

The Midwifery Stalemate and Childbirth Choice: Recognizing Mothers-to-Be as the Best Late Pregnancy Decisionmakers

AMY F. COHEN*

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* J.D. Candidate, 2005, Indiana University School of Law—Bloomington; M.A., 2002, Ludwig-Maximilians-Universität Munich; B.A., 1992, Columbia College of Columbia University. I thank especially my three midwives, Jennifer, Ina, and Maria, for their able and loving assistance, my husband Walter, and my children Dorothea, Aaron, Josephine, who shared those births with me. Many thanks also to Professors Susan Williams, Dawn Johnsen, Daniel Conkle, and Patrick Baude for their valuable suggestions and advice—of course, the positions taken and all errors remain my own.

INTRODUCTION

Many believe that midwife-assisted home-births¹ are as safe as hospital births for low-risk women, yet blanket government restrictions still prevent women from choosing this option in fifteen states.² Since the 1970s, legal commentators have urged the case for the safety of midwifery³ and a woman's constitutional right to choose

1. In this Note, "midwife" will be used to refer to direct-entry midwives (also known as "lay midwives" or "certified professional midwives") and not to certified nurse midwives ("CNMs"). Direct-entry midwives practice primarily in non-hospital environments and provide woman-oriented, low-intervention prenatal, delivery, and postpartum care for low-risk births. CNMs are nurses with additional midwifery training who usually practice under the supervision of obstetricians and generally assist births in hospital or clinic environments. See Midwives Alliance of North America: Definitions, at <http://mana.org/definitions.html> (last visited Sept. 17, 2004). While obstetricians nearly always recommend a hospital setting for birth and routinely use technology,

[t]he Midwives Model of Care is based on the fact that pregnancy and birth are normal life events . . . [and] includes: monitoring the physical, psychological and social well-being of the mother throughout the childbearing cycle; providing the mother with individualized education, counseling and prenatal care, continuous hands-on assistance during labor and delivery and postpartum support; minimizing technological interventions; and identifying and referring women who require obstetrical attention. The application of this model has been proven to reduce the incidence of birth injury, trauma and cesarean section.

North American Registry of Midwives, *How to Become a Certified Professional Midwife (CPM) 2*, available at <http://www.narm.org/pdf/htbmar04.pdf> (revised Oct. 2003).

2. Illinois, Indiana, Iowa, Kentucky, Maryland, Montana, North Carolina, South Dakota, Wyoming, and the District of Columbia (illegal either by statute, judicial interpretation, or state practice); Alabama, Georgia, Hawaii, New York, and Rhode Island (legal by statute but unavailable because states do not license direct entry midwives); and Virginia (not legally regulated and effectively prohibited, but licensure legislation being lobbied for, see Virginia Friends of Midwives, *VFOM Continues to Support Pro-Midwifery Legislation in 2004-2005*, at <http://www.vfom.org/legislation.html> (last updated Sept. 17, 2004)). See generally Citizens for Midwifery, *Legal Status of Direct-Entry Midwives: State-by-State Analysis*, at <http://www.cfmidwifery.org> (last visited Oct. 31, 2004); Midwives Alliance of North America, *Direct-Entry Midwifery State-by-State Legal Status*, at <http://www.mana.org/statechart.html> (last visited Sept. 17, 2004). The legal status of direct-entry midwives practicing in several other states is unclear or disputed, for instance, Pennsylvania and Wisconsin. See Citizens for Midwifery, *Legal Status of Direct-Entry Midwives: State-by-State Analysis*, at <http://www.cfmidwifery.org> (last visited Oct. 31, 2004). In Utah, comprehensive midwifery care is illegal, but some services are allowed. See Midwives Alliance of North America, *Report from June 2004 MANA News*, at <http://www.mana.org/region05.html> (last updated July 23, 2004).

3. E.g., Susan Cocoran, Note, *To Become a Midwife: Reducing Legal Barriers to Entry Into the Midwifery Profession*, 80 WASH. U. L.Q. 649 (2002). The infant mortality rate of the United States is one of the worst of developed nations and not because we lack a national health system. See Danielle Rifkin, Note, *Midwifery: An International Perspective—The Need for Universal Legal Recognition*, 4 IND. J. GLOBAL LEG. STUD. 509, 510 (1997) (arguing that infant mortality statistics from the USA and Canada, two nations that do not utilize midwifery care, are

among birthing options⁴ nearly twenty times. All midwifery advocates point to the significant public health and economic benefits that would result from greater access to midwife care: better outcomes for many mothers and babies at a much lower cost than obstetrical care.⁵ As our nation's health crisis worsens, the policy arguments in favor of midwifery only gain in urgency: more and more women are without health insurance, and many birthing service providers must raise fees or close their doors due to astronomical malpractice insurance rates.⁶ Although several states have created licensing programs for direct-entry midwives,⁷ midwifery legislation faces entrenched

comparably out of line with their economic power, despite the fact that Canada has a public health system).

4. One of the first constitutional arguments was made by Jennifer J. Tachera. Jennifer J. Tachera, A "Birth Right": *Home Births, Midwives, and the Right to Privacy*, 12 PAC. L.J. 97, 106 (1980) (arguing for a fundamental right to choose home birth because the childbirth decision is an expression of family relationships as well as medical decisions). For the best early constitutional analysis, see Barbara A. McCormick, Note, *Childbearing and Nurse-Midwives: A Woman's Right to Choose*, 58 N.Y.U. L. REV. 661, 692 (1983) (finding a fundamental right to make childbearing decisions based on personal autonomy, family autonomy, and bodily integrity). See also Dawn E. Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569, 607-08 (1992) [hereinafter Johnsen, *Shared Interests*] (arguing outside of the midwifery context that restrictions and interventions targeting pregnant women should be viewed as equal protection violations); Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 614 (1986) [hereinafter Johnsen, *Fetal Rights*]. But see John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 437 (1983) (arguing that once a woman has exercised her procreational liberty by deciding not to abort, her liberty to act in ways that would adversely affect the fetus is limited only by her right to bodily integrity).

5. Midwives generally charge fees that are about one-half of the amount an obstetrician would charge. The midwife's fee, however, often includes complete prenatal care and postpartum checkups. Additionally, midwives have traditionally served rural or economically weak communities. See Rondi E. Anderson & David A. Anderson, *The Cost-Effectiveness of Home Birth*, 44 J. NURSE MIDWIFERY 30 (1999) (finding the cost of the average, uncomplicated vaginal home birth to be 68% less than a comparable hospital birth); Rifkin, *supra* note 3, at 533 (opining in 1997 that \$8.5 billion in health care costs might be saved yearly were midwives to deliver three out of four babies, as they do in Western Europe).

6. It was reported that in Texas, 152 of the state's 254 counties have no obstetrician. Ralph Blumenthal, *Yells Replace Yawns in a Texas Ballot Ritual*, N.Y. TIMES, Sept. 13, 2003, at A11. Unfortunately, midwives carrying malpractice insurance are affected by this trend, too. *Morning Edition: Birthing Centers Close Despite Popularity* (NPR radio broadcast, Nov. 13, 2003), available at <http://www.npr.org/features/feature.php?wfid=1504365> (last visited Jan. 23, 2004). See also Rifkin, *supra* note 3, at 532 (finding it unfortunate that high malpractice rates prevent many midwives from practicing because "only six percent had ever been named in a malpractice suit, while sixty percent of obstetricians had been sued").

7. Licensing programs for direct-entry midwives have been instituted in Alaska, Arkansas, Arizona, California, Colorado, Delaware, Florida, Louisiana, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Oregon, South Carolina, Rhode Island, Tennessee, Texas, Vermont, and Washington. Midwives Alliance of North America, *Direct-Entry Midwifery State-by-State Legal Status*, at <http://www.mana.org/statechart.html> (last updated May 26, 2004). For a definition of "direct-entry midwife," see *supra* note 1.

resistance in other states.⁸ In fact, the home-birth rate overall has declined in recent years, instead of rising, as many midwifery advocates had expected.⁹

While many legislatures have recognized the right to choose among safe childbirth alternatives,¹⁰ no court has yet recognized that the constitutional right to privacy encompasses childbirth choice.¹¹ This produces the result in most jurisdictions that a

8. For example, in Indiana and Missouri, licensing legislation stalled at the committee level in the state senate for years. Matt Kitzi, Note, *Can Missouri Catch up? Why Missouri Laws Work Unconstitutional Discrimination Against Lay Midwives and What Can Be Done to Stop It*, 67 UMKC L. REV. 427, 434–35 (1998) (describing how midwifery bills were repeatedly blocked in the state senate despite passing in the lower house and good media coverage). See Julie Harmon, *Statutory Regulation of Midwives: A Study of California Law*, 8 WM. & MARY J. WOMEN & L. 115, 131–32 (2001) (discussing midwife prosecutions in Virginia, one of the most conservative states on midwifery issues).

9. The American midwifery movement began in the sixties, and the first wave of commentary is from the late seventies and early eighties. While home-birth rates were on the rise in the early eighties, see Harry M. Caldwell, *Bowland v. Municipal Court Revisited: A Defense Perspective on Unlicensed Midwife Practice in California*, 15 PAC. L.J. 19, 30 (1983) (expressing confidence in the prediction that the trend to out-of-hospital births would continue), the nineties saw a rise in certified nurse midwife care but a decline in midwife-assisted home births. 4–22 MICHAEL G. MACDONALD, HEALTH CARE LAW § 22.05 (2003) (citing a 7% decline in the use of non-nurse midwives from 1989 to 1997).

10. See, e.g., CAL. BUS. & PROF. CODE § 4(b) (West 2000) (“Every woman has a right to choose her birth setting from the full range of safe options available in her community.”); MONT. CODE ANN. § 37-27-102 (2003) (“The legislature finds and declares that . . . Montanans may exercise their right to give birth where and with whom they choose.”); N.H. REV. STAT. ANN. § 326-D:1 (1982) (“It is the intent of the general court to preserve the rights of women to deliver children at home.”); Katherine S. Yagerman, Comment, *Legitimacy for the Florida Midwife: The Midwifery Practice Act*, 37 U. MIAMI L. REV. 123, 140–43 (1982) (discussing FLA. STAT. ch. 467.002 (2003) (“The Legislature recognizes the need for a person to have the freedom to choose the manner, cost, and setting for giving hirth.”)).

11. See generally Noralyn O. Harlow, Annotation, *Midwifery: State Regulation*, 59 A.L.R. FED. 4th 929, §§ 3–6 (2003) (cataloging due process, vagueness, right of privacy, and equal protection claims). It should be noted that the legislation/litigation choice divides midwifery advocates, several believing that the courts are an inappropriate forum for achieving wider access to midwife care. See Cocoran, *supra* note 3, at 670–73; Suzanne Hope Suarez, *Midwifery is Not the Practice of Medicine*, 5 YALE J.L. & FEMINISM, 315, 360–61 (1993); Charles Wolfson, *Midwives and Home Birth: Social, Medical, and Legal Perspectives*, 37 HASTINGS L.J. 909, 938–39 (1986). These commentators feel either that the rights implicated do not rise to the level of constitutionally protected rights or that such public health matters are better handled by the legislatures. *But see* RAYMOND G. DEVRIES, MAKING MIDWIVES LEGAL: CHILDBIRTH, MEDICINE, AND THE LAW xvi (2d ed. 1996) (arguing that regulation has the effect of destroying the aspects of midwife care that distinguish it from the medical establishment). Still others believe strongly in the merits of privacy and equal protection arguments and feel that blanket restrictions on rights must be pierced if they are not lifted voluntarily. See Janet Gallagher, *Prenatal Invasions & Interventions: What’s Wrong With Fetal Rights*, 10 HARV. WOMEN’S L.J. 9, 13 (1987); Tachera, *supra* note 4, at 108; Kathleen M. Whitby, *Choice in Childbirth: Parents, Lay Midwives, and Statutory Regulation*, 30 ST. LOUIS U. L.J. 985, 1026–28 (1986); Joleen Susan Pettee, Note, *Midwifery: Do Parents Have A Constitutional Right to Choose the Site, Process, and Attendant for the Birth of Their Baby?*, 24 J.C.L. 377 (1998);

woman has the unfettered right to abort a fetus in the first trimester, the right to make most medical decisions for a child moments after birth, and the right to refuse medical treatment for herself in any other situation, but that she does not have the right to choose among safe childbirth alternatives for herself and her child. Thus, the law on midwifery is currently at odds with the law on abortion, child health decisionmaking, and much privacy doctrine. The project of this Note is to harmonize these areas of law, without jeopardizing *Roe v. Wade*.¹² Late pregnancy is a unique condition where the rights of the mother-to-be and the developing child are intertwined.¹³ This Note concludes that given the strong privacy interests of a mother-to-be, including her parental rights as to the developing child, she, and not the state, is the most appropriate childbirth decisionmaker.

Michael A. Pike, Note, *Restriction of Parental Rights to Home Births via State Regulation of Traditional Midwifery*, 36 J. FAM. L. 609, 625 (1997).

Although constitutional arguments have not been successful, several courts have legalized midwifery through statutory interpretation. If midwifery is held not to constitute the practice of medicine, it may be practiced with impunity, assuming that no other statutes stand in the way. *E.g.*, *Legett v. Tenn. Bd. of Nursing*, 612 S.W.2d 476 (Tenn. App. 1980). *But see* *State v. Smith*, 459 N.E.2d 401 (Ind. App. 1984) (holding that midwifery services do constitute the practice of medicine or nurse midwifery and are unlawful without a license). Additionally, statutory provisions have been found to be void for vagueness because they do not clearly indicate which acts constitute the practice of midwifery. *See, e.g.*, *People v. Jihan*, 537 N.E.2d 751, 756 (Ill. 1989) (holding the previous version of the midwifery act unconstitutional as applied, but not reaching the revised version); *cf.* *Peckmann v. Thompson*, 745 F. Supp. 1388, 1394 (C.D. Ill. 1990) (holding the new statute vague on its face because it failed to indicate the current legality of the practice of midwifery when the vague references to “midwife” and “midwifery” were removed).

Even if the courts remain unwilling to address midwifery issues, some legislatures have been receptive to rights-based arguments, exercising their prerogative to interpret state and federal constitutions independently of the courts. For instance, California explicitly overruled the influential *Bowland* decision, holding that there was no constitutional right to choose a midwife because, following the trimester scheme in *Roe*, the state’s interest in the welfare of the fetus reached its pinnacle at birth. *Bowland v. Mun. Ct.*, 556 P.2d 1081, 1089 (Cal. 1977). California was followed by Kansas, *see* *State Bd. of Nursing v. Ruebke*, 913 P.2d 142, 162 (Kan. 1996), and Maryland, *see* *Hunter v. State*, 676 A.2d 968, 969 (Md. App. 1996). In 2000, the California legislature amended the Midwifery Act, finding that “[e]very woman has a right to choose her birth setting from the full range of safe options available in her community.” CAL. BUS. & PROF. CODE § 2508 (West 2000); *see* *Kathlyn Marie Happe, Review of Selected 2000 California Legislation: Health and Welfare Chapter 303: Is California Edging Toward a “Consultive” Relationship Between Midwives and Physicians*, 32 MCGEORGE L. REV. 713, 726 (2001); *Harmon, supra* note 8, at 129–30; *see also* *Caldwell, supra* note 9 (discussing the illogic of the *Bowland* decision as well as demonstrating that it had already been undermined by subsequent California decisions).

12. 410 U.S. 113 (1973).

13. Throughout, I shall use the term “mother-to-be” for a pregnant woman and “developing child” to denote a late-term fetus. These terms are intended to reflect my attempt to take the unique situation of late-term pregnancy into account when balancing rights. Because the relationship between the two individuals in late-term pregnancy is fundamentally unlike their relationship during the first trimester of pregnancy and also distinct from the situation after birth, the terminology should signal that in-between state. I thank Professor Dawn Johnson for her insight into the polemic and descriptive significance of choosing these terms. *See infra* text accompanying note 59–60.

In Part I, I identify four reasons why the case for a privacy right encompassing childbirth choice has failed, which then suggest how the case can be bolstered. First, midwifery advocates must explain the political, philosophical, religious, and feminist dimensions of alternative understandings of birth; second, they must question the habitual deference to the judgment of doctors with regard to value-laden and personal health decisions; third, they must emphasize why midwifery is not about abortion; and fourth, they must both differentiate late pregnancy from early pregnancy and compare the parental relationship between the mother-to-be and developing child in late pregnancy with the parental relationship after birth.

Part II applies the numerous strands of privacy doctrine to the childbirth choice issue and demonstrates how midwifery is an issue that could unite advocates from left, right, and center, in contrast with the divisive abortion debate. Finally, Part III shows how midwifery law can and should be harmonized with the legal doctrines of abortion, forced caesarean, bodily integrity, and child health decisionmaking. First, late pregnancy should be recognized as a distinct phase during which a mother-to-be actively parents a developing child and during which both their interests and rights are uniquely intertwined. Second, given the woman's strong privacy interests in choosing the manner of childbirth as well as her status as mother-to-be of the developing child, she, and not the state, should be recognized as the most appropriate and competent health decisionmaker for both.

I. UNDERSTANDING WHY MIDWIFERY REFORM FAILED IS TO UNDERSTAND HOW IT CAN SUCCEED

One standard explanation for the stalemate on midwifery reform is that the powerful medical lobby seeks to preserve its economic share of the birthing business by preventing midwifery regulation and utilizing its traditional influence over courts.¹⁴ While this has been convincingly argued,¹⁵ there are other, more complex issues that underscore the midwifery debate and have consistently undermined efforts to achieve greater childbirth freedom.

In the first two Subparts, I demonstrate how midwifery advocates must effectively confront two misconceptions regarding their own attitudes toward birth. If personal preferences and safety concerns were the extent of the justification for home birth, there would not be a privacy right at stake, and rational basis review would likely come

14. See, e.g., McCormick, *supra* note 4, at 664–65; Kitzi, *supra* note 8, at 427; David M. Smolin, Essay, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975, 1016–17, 1021 (1992) (“[O]ne common thread linking the judiciary’s embrace of abortion rights and rejection of childbirth rights is the acceptance of American Medical Association (AMA) positions. . . . The contrast between the judiciary’s treatment of abortion and midwifery illustrates that empowerment of the elitist medical profession is a common thread in the modern judiciary’s privacy jurisprudence.”); see also Rifkin, *supra* note 3, at 513. Rifkin describes what amounts to a conflict of interest when obstetricians advise legislatures on health-policy decisions. See *id.* at 524. For a more nuanced appraisal of how doctors and judges each use the rhetoric of the other in a process of self-legitimation, see Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 567 (1993).

15. See *supra* note 14.

out in favor of the state.¹⁶ Rather, at the heart of the right to privacy are acts and choices that define the self.¹⁷ Therefore, advocates must communicate to courts the deeply held feminist, political, religious, and philosophical beliefs that support their alternative understandings of birth. Safety evidence is more complicated because midwifery advocates can argue both that midwifery is safer (an argument that does not support a privacy right, but would carry persuasive force nonetheless), and at the same time that it is they, not doctors, who should choose among medical treatment options. Here I place the struggle for childbirth choice in the context of the movements supporting the right to die, the rights of intersex people to remain untreated, and the rights of the disabled. All of these movements question the value judgments inherent in medical analyses and seek to reclaim the right to make fundamental health choices from doctors.

In the third Subpart, I note how the proximity of midwifery to the abortion issue has had an enormous effect on the way courts have handled, or rather avoided, the midwifery issue. To achieve midwifery reform, advocates must overcome the unwillingness of courts to face irreconcilable conflicts between the rights of the woman and the unborn in late pregnancy. This, as I argue in the final Subpart, can be done if late pregnancy is distinguished from early pregnancy, which it clearly can be when viewed not from the “outside” but from an “inside” perspective. I conclude that a centrist resolution to late pregnancy issues could help diffuse the abortion controversy without endangering the right to choose. This Part analyzes why the right to choose among safe childbirth alternatives has not yet been recognized and shows why it merits this status in order to lay the groundwork for the more doctrinal privacy arguments surveyed in Part II.

A. Birth as Self-Definition

Home-birth mothers believe that the choice about where and how to give birth is not a trivial decision that merely reflects personal, aesthetic preferences, such as dim lighting or background music.¹⁸ This Subpart will show how views about birth may express deeply held beliefs about nature and religion, and are often the product of parental, political, religious, and feminist choices. This Subpart is not an attempt to describe all of the alternative understandings of birth, a task that would exceed the scope of this Note. Instead, it seeks to relativize the medical model of birth by juxtaposing it with one alternative model of childbirth. The very incompatibility of

16. One could argue, however, that it is irrational for a state to outlaw midwifery where a significant number of counties are without obstetrical care or prenatal services. Given the Court's recent preference for overturning legislation on rational basis review as opposed to recognizing new fundamental rights (as in *Romer* and *Lawrence*), the rational basis review argument might be stronger than it appears at first blush. Such an argument was persuasive with the Arkansas legislature, which passed a bill legalizing midwifery in counties where 32.5% of the population lived below the poverty level (six of seventy-five counties). Arthur English & John Carroll, *Midwifery in Arkansas: The Delivery of a Bill*, 12 S. EXPOSURE 90 (1984).

17. See Smolin, *supra* note 14, at 980–984 (identifying the existentialist belief that “human beings create and define themselves through their choices and acts” as the basis of the privacy right as understood by Justice Blackmun).

18. See *infra* note 29.

these views about birth demonstrates the significance of childbirth choices to the individual and the existence of a privacy right to childbirth choice. Indeed, birth might be considered the paradigmatic "sweet mystery" moment, thus meriting childbirth decisionmaking substantive due process protection.¹⁹

One description of an alternative world-view espoused by some midwifery advocates could be described as follows:

[T]he first precept of the alternative approach to childbirth is the notion that pain is not pathological, not something to be feared, and the conviction that women have the strength to endure it. In short, this approach rejects stereotypes of women as either weak and vulnerable or as dangerously irresponsible or hysterically out of control and instead affirms their strength and determination in the face of adversity.

[This] alternative approach to childbirth is revolutionary. It challenges fundamental beliefs and firmly entrenched distributions of power, raising questions about what constitutes male and female, science and superstition, order and chaos. Thus, efforts to employ this alternative approach can be seen as acts of resistance to the dominant order, acts informed by an alternative set of understandings of the world that medicine purports to know.²⁰

DeVries makes similar observations about the broad scope of the midwifery debate when he reflects on the reasons why midwifery reform has come so slowly:

In retrospect, it is clear that the kind of change we were seeking two decades ago was at least as radical as the changes demanded by the civil rights and antiwar movements. We were asking for a new view of our bodies, of our relation to technology, of our sense of 'home,' of gender, of family. We were asking not just for social change but for cultural change.²¹

Seen in this context, adherence to this alternative birth scenario comes close to a religious belief. Reading through *Spiritual Midwifery*, one of the midwifery "bibles" written by Ina Gaskin, a greatly revered midwife from The Farm community, it becomes clear that the practice of delivering babies can be an integral part, indeed an expression, of religious practice.²² In fact, a good analogy for the relation between the medical and alternative theories of birth would be the contrasting evolutionary and creationist views of the Earth's history. There is such a deep division between the medical and natural models of birth that neither can "convince" the other. The two models operate on different assumptions, and adherents to both the scientific and

19. See *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."); see also *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (citing *Casey*).

20. Ehrenreich, *supra* note 14, at 547, 549.

21. DEVRIES, *supra* note 11, at xvi.

22. See INA MAY GASKIN, *SPIRITUAL MIDWIFERY* (3d ed. 1990).

religious views define themselves according to those assumptions.²³ Just as the state may not impose religious viewpoints on citizens, the law should recognize multiple viewpoints in the birth context:

[T]his view of the reality of what happens in childbirth is as socially constructed as the view it means to supplant. But the mere presence of a coherent alternative to modern medicine casts doubt upon the convictions that drive society and the courts into accepting and enforcing one view of reproduction.²⁴

Birth is also a major personal milestone in the life of the woman. For many if not most women, giving birth is an extremely challenging and life-altering experience. It is an event that will take place only a few times in her life,²⁵ and it marks an important moment in her transition from a single person, to a pregnant, dual person, and then to being a mother. Ina May Gaskin, one of the mothers of the midwifery movement, eloquently describes the role of the midwife in supporting a mother through this liminal event:

Many seeds for later actions and relationships are planted in the birth room. Marriages may be made or broken here, mothers form lasting ideas about their strengths or weaknesses, about their mate's strengths and frailties and lasting impressions about the 'personality' of the newborn are created. The woman who is gently mothered by a midwife or nursed through her labor learns by absorption some of the most important skills she will need as a parent. When she is showered with sweetness and love, she is more likely to have a fund of generosity on which she can later draw when her patience is tested.²⁶

Reading through Ina Gaskin's collection of birth narratives, the reader clearly understands that for these women, giving birth is one of the most amazing and transformative experiences of their lives.

No matter which alternative birth view a mother subscribes to, all would consider giving birth to be a highly significant event. Currently, substantive due process guarantees individuals the right to non-reproductive sex (by ensuring access to contraception)²⁷ and the right to homosexual sex (by striking down anti-sodomy laws).²⁸ Although some might believe that the cumulative effect of being able to choose consensual, non-reproductive sex is of even greater significance for the individual, it must be noted that these sexual encounters, viewed individually, may be fungible, and will seldom have the significance of a single birth event.

23. The weak point of the analogy is that both medical and alternative birth camps are deeply concerned with safety. See Ehrenreich, *supra* note 14, at 530, for an interesting discussion of how "privileged women's role as good mothers includes the stricture that they be obedient to physicians."

24. Ehrenreich, *supra* note 14, at 546. For a good summary in chart form of the medical and midwifery viewpoints, see *id.* at 548.

25. See *infra* Subpart II.G (discussing *Lawrence v. Texas*).

26. GASKIN, *supra* note 22, at 8.

27. *Eisenstadt v. Baird*, 405 U.S. 438, 451 (1972).

28. *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

B. Safety and the Growing Consensus: Doctors Please Don't Choose for Me

As explained above, many people are unaware of the personal, political, and religious significance of giving birth. However, there is another common misperception that similarly trivializes the motivations of home-birth mothers, namely that they put the aesthetic experience of birth over the safety of their children. Professor John Robertson, for instance, expresses what is surely the majority view in America that “[a] woman’s interest in an aesthetically pleasing or emotionally satisfying birth should not be satisfied at the expense of the child’s safety.”²⁹ In fact, as will be shown below, most home-birth mothers believe that their alternative understandings of birth have the added advantage of being safer for both mother and child.

In the following paragraphs I describe safety concerns regarding hospital births that have been reported by midwifery advocates time and again in the literature,³⁰ but I repeat them here for several reasons. First, the safety data about midwifery and home births are still widely unknown. Second, these data form the basis of the bodily integrity arguments made later. Third, the outrage many alternative birth adherents feel at this unnecessary and disrespectful violence toward women partly explains their strength of conviction. And finally, after the data, I will discuss whether these data might not demonstrate something else entirely, namely, that since medical knowledge is not absolute and incorporates important value judgments, perhaps those value judgments should be the protected right of the individual as well.

But first, the data. Many mothers birth at home because they do not want to fall victim to our nation’s unnecessarily high caesarean section rate. This major surgery is performed on nearly 26.1% of American women,³¹ while the Dutch, for instance, who have a much lower infant and maternal mortality rate, perform it on less than 8% of their mothers.³² Home-birth mothers (who, it must be noted, have been prescreened by

29. Professor Nancy Ehrenreich reads this statement as belittling a woman’s concerns regarding childbirth options. See Ehrenreich, *supra* note 14, at 525–26. While Robertson does argue for more childbirth choice, he does not do so because of his confidence in mothers as the most informed and appropriate decisionmakers. Instead, as Ehrenreich notes, his stance is deeply suspicious of women as decisionmakers. *Id.* at 526–27. His mistrust is more directly expressed when he discusses outsider women who refuse doctor orders: “some may refuse because of religious beliefs, eccentric preferences, idiosyncratic weightings of the values at issue, fear of surgery, or desire not to have the child.” Robertson, *supra* note 4, at 455 n.162 (citations omitted).

30. The primary purpose of this Note is not to restate the safety and economic arguments that should be influencing our legislators and have been convincingly made by others. See, e.g., *supra* notes 3, 5.

31. According to the *National Vital Statistics Report*, the caesarean rate for the year 2002 was 26.1%. Joyce A. Martin et al., *Births: Final Data for 2002*, in 52/10 NATIONAL VITAL STATISTICS REPORTS 1 (December 17, 2003), available at http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_10.pdf (last visited Mar. 16, 2005). However, elsewhere the peak rate for caesarean sections has been reported to be 35.5%. L.J. Kosaks & J.D. Weeks, 29 *OBSTETRICS AND GYNECOLOGY* 157, 157 (2002) (comparing data on obstetric interventions from 1980–1990 with 1990–2000).

32. Rifkin, *supra* note 3, at 518–19. For newer, more complete information on caesarean section rates and infant mortality rates, see Diana Korte, *Infant Mortality, Caesarean, and VBAC Rates*, *THE MAGAZINE OF NATURAL FAMILY PLANNING*, at

midwives for risk factors) only require caesarean sections in 4–5% of cases.³³ The maternal mortality rate of caesarean sections has been estimated to be between two and six times higher than the rate for vaginal deliveries, and Smolin estimates that there are between fifty and two hundred maternal deaths yearly due to unnecessary caesarean sections.³⁴ Furthermore, caesareans have recently been linked to a nearly doubled risk of stillbirth after thirty-four weeks in a subsequent pregnancy.³⁵

Another reason women seek midwives is that many doctors still perform episiotomies routinely, while midwives almost never do.³⁶ In 1983, it was reported that over 90% of new mothers received one.³⁷ Recently, the overall rate dropped to 37.7% in 2000 from an average of 64% in 1980,³⁸ though individual doctors still use the procedure routinely. Nearly all midwives, on the other hand, avoid episiotomies whenever possible and instead employ techniques that protect the perineum (stretching and supporting the tissue to promote elasticity and prevent natural tearing, avoiding the lithotomy position, etc.). These techniques result in much lower levels of birth injuries (both episiotomies and tearing). The World Health Organization has recommended against routine use of episiotomies. Indeed, infections from episiotomies account for 20% of maternal deaths,³⁹ and approximately 10% of women with episiotomies report

<http://www.mothering.com/11-0-0/html/11-4-0/11-4-infantmortality89.shtml> (last visited Oct. 6, 2004); see also International Cesarean Awareness Network, *International Cesarean and VBAC Rates*, at <http://www.ican-online.org/resources/statistics3.htm> (last updated Mar. 5, 2003).

33. See Carol Sakala, *Midwifery Care and Out-of-Hospital Birth Settings: How do They Reduce Unnecessary Cesarean Section Births?*, 37 SOC. SCI. MED. 1233, 1245 (1993) (citing a 4.4% rate in a study of data from freestanding birthing centers in the United States and a comparable rate from Dutch midwife-assisted births). Dutch studies of home-birth outcomes also show a much lower perinatal mortality rate (1.5% versus 18.9% for obstetrician-attended hospital births). Marjorie Tew, *Safest Birth Attendants: Recent Dutch Evidence*, 7 MIDWIFERY 55 tbl. 2 (1991).

34. Smolin, *supra* note 14, at 1007 n.169 (comparing this figure with the approximately seventy maternal deaths due to legal and illegal abortions performed in the year prior to *Roe*).

35. The Lancet published a study conducted at Cambridge University in November 2003. LANCET, *Caesarean Delivery Could Increase Risk of Future Stillbirth* (Nov. 2003), available at <http://www.scienceblog.com/community/older/2003/F/20033611.html> (postulating additionally that the high infant mortality rate in some developed countries may be linked to the high caesarean section rates in those countries). These findings will very likely lead to a rethinking of obstetrical protocols.

36. An episiotomy is when an obstetrician cuts the vaginal opening to enlarge it and speed delivery. Episiotomies were thought to be better for the mother than a tear of the vaginal opening. However, 40% of episiotomies tear further, sometimes as far as the anus, resulting in serious injury, while only 5% of midwife-attended mothers tear at all. Rifkin, *supra* note 3, at 518. While episiotomies are more convenient than natural tears for the doctor to sew, they do not heal as easily for the mother.

Hospitals in Germany report episiotomy rates, allowing pregnant women to compare rates and make informed choices. Episiotomy data for individual institutions or doctors is much harder to come by in the United States.

37. S.B. Thacker & H.D. Banta, *Benefits and Risk of Episiotomy: An Interpretative Review of the English Language Literature, 1860–1980*, 38 OBSTETRICAL AND GYNECOLOGICAL SURVEY, 322, 322–38 (1983).

38. L.J. Kozak & J.D. Weeks, *U.S. Trends in Obstetric Procedures 1990–2000*, 29 OBSTETRICS & GYNECOLOGY, 157 (2002).

39. *Id.*

fecal incontinence.⁴⁰ Pain for months afterward and inability to enjoy sexual relations for months or years following the procedure are additional side-effects that have been less thoroughly studied.

Finally, mothers also seek to avoid injuries and distress to their infants. The "snowball effect" of interventions often causes fetal distress.⁴¹ Hospitals may insist on taking the baby away for routine "care" shortly after birth.⁴² Breastfeeding is also usually more difficult to establish after a caesarean delivery, and hospital nurses are often not able to give good breastfeeding advice. Because breastfeeding is "one of the most important contributors to infant health" that "improves maternal health, and contributes economic benefits to the family, healthcare system, and workplace,"⁴³ the snowball effect of birth interventions can have far-reaching consequences.

40. Approximately 10% of women who received episiotomies reported some degree of fecal incontinence three months after delivery. L.B. Signorello et al., *Midline Episiotomy and Anal Incontinence: Retrospective Cohort Study*, 320 BRITISH MEDICAL JOURNAL 86, 87-90 (2000). Avoiding damage to the anal sphincter is the major reason that many doctors now avoid routine episiotomies.

41. A typical snowball of procedures would be the following: doctors may insist that labor be induced, induction may cause contractions that are too weak, pitocin may be administered to strengthen contractions, extremely strong contractions are painful and may cause fetal distress, an epidural anaesthetic may be administered for pain, the epidural may inhibit a woman's ability to push, the doctor may need to pull the fetus out of the birth canal using a vacuum extractor, the woman will need a major episiotomy to insert the vacuum extractor, and the vacuum extractor will cause the infant to have a disturbing, bruise-like injury to the head. See Ehrenreich, *supra* note 14, at 544.

42. Laura Derrick writes:

I believe that what routinely happens to women (and their babies) birthing in hospitals with OBs borders on abuse Treatment of newborns might surprise a few people, too. It did me. My first child was born 3 1/2 years ago in Cedars Sinai Hospital in Los Angeles. My husband insisted on accompanying his newborn son to the nursery while he was bathed and checked over. First they pumped out his stomach—the colostrum from his first nursing experience went down the drain (and no, there was no meconium staining, this was just routine procedure). Next they stuck a tube up his butt, then injected him with vit K and stuck his heel and squeezed a while for his PKU test. All this time he was uncovered, flailing about on a tabletop and screaming. Finally, it was time for his first bath. The nurse held him under running water, all the while scrubbing his skin with a stiffbrush [sic]. He cried so hard that he stopped breathing three times, for which he was briskly slapped on the feet and buttocks and yelled at to take a breath. When my husband was near tears and finally protested, the nurse said, 'I do this 20 to 30 times a day. It really doesn't hurt them.' What do YOU think? What would most new mothers think if they could see this?

Laura Derrick, *Is Hospital Birth Better*, MIDWIFERY TODAY, at <http://www.efn.org/~djz/birth/add695/newbornhos.html> (May 31, 1995) (reporting events that appear to have occurred in 1991).

43. United States Surgeon General, *HHS Blueprint for Action on Breastfeeding*, at <http://www.4woman.gov/Breastfeeding/bluprntbk2.pdf> (Oct. 25, 2000).

Safety evidence played an undeniable role in swaying the *Roe* Court (i.e. that fewer women would die from illegal abortions if they were legalized and regulated).⁴⁴ It could be highly effective in the midwifery context too.⁴⁵ Similarly, although safety concerns are distinct from the deeply held convictions that midwifery advocates hold regarding birth, most midwifery advocates are convinced that home birth is better and safer for most mothers and babies. However, even though midwifery advocates can and do meet doctors on their own terms with safety data, many midwifery advocates do not believe that Western medicine is a scientific absolute or that it is the proper yardstick for measuring the acceptable risk or net benefit of a particular procedure. Rather, they note the existence of alternative approaches to healing, alternative beliefs about what level of risk and safety is good, and alternative ways of assessing the net benefit of any intervention.

Midwifery should be seen within the broader context of the debate on medical decisionmaking, where the tide has begun to turn on our nation's long, unquestioning deference to doctors. The language of the *Roe* decision does sound "more like a doctors' rights opinion than a women's rights opinion," but it is not.⁴⁶ Our country's healthcare spending is unsustainable over the long term, many procedures are of questionable utility, and medical benefits are unevenly and unfairly distributed among our citizens. But further, many groups are discovering that many of the decisions we have ceded to doctors must be reclaimed because they directly affect personal dignity and definitions of self.⁴⁷ Advocates for the disabled are insisting that much of the assistance they require should not be considered medical care.⁴⁸ Advocates for intersexed people are arguing that sex reassignment operations performed on babies are unethical and impose on the prerogative of those individuals to define themselves as

44. See Caldwell, *supra* note 9, at 23 (critiquing *Bowland* for failing to consider medical evidence whereas the *Roe* Court took judicial notice of safety evidence).

45. See *supra* text accompanying notes 31–43.

46. Smolin, *supra* note 14, at 1016 (citing Andrea Asaro, *The Judicial Portrayal of the Physician in Abortion and Sterilization Decisions*, 6 HARV. WOMEN'S L.J. 51, 53–55 (1983)); see Ehrenreich, *supra* note 14, at 567–68 ("even the foundational reproductive rights case really only gives the woman the right to have a doctor decide for her") (citing *Roe v. Wade*, 410 U.S. 113, 163 (1973) ("[T]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.")).

47. "It is not by bappenstance that we turn to cases involving sexual intimacy or the right to die with dignity when confronted by the pregnancy and birthing conflicts. In all of these contexts, government intrusion and medical hegemony affect not only the individual's body, but the deepest core of her personal, spiritual identity." Gallagher, *supra* note 11, at 57.

48. Samuel R. Bagenstos, *The Americans With Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1013 (2003) (describing how the independent living movement drew to the fore common interests among diverse groups that all "sought 'independence' from the control of professionals, welfare bureaucracies, and charity"); see also Marc A. Rodwin, *Patient Accountability and Quality of Care: Lessons from Medical Consumerism and the Patients' Rights, Women's Health and Disability Rights Movements*, 20 AM. J.L. & MED. 147, 157–66 (1994) (demonstrating how both the disability rights movement and the women's health movement have provided impetus to the push for greater patients' rights).

normal.⁴⁹ Advocates for the elderly are attempting to demedicalize and reclaim death as an important personal event—the midwifery movement seeks to do the same for birth.⁵⁰

The bigger concern in all these contexts is not *which* choice is correct, but that given the fact that medical science has so often been wrong and that these choices are of such personal importance and value-laden, it is the *individual who should choose*, not the doctor. I argue here that the privacy right encompasses the right to choose among safe childbirth alternatives, but I am sure that one day we will be arguing instead that this right is but one aspect of a more broadly defined right to privacy that reserves to the individual all health decisionmaking that involves value judgments and affects personal dignity or autonomy.

C. Why Midwifery Is, and Is Not, About Abortion

Perhaps the most significant hurdle midwifery advocates face is the proximity of midwifery to the politically charged abortion debate. *Roe* decided the abortion issue by declining to recognize the unborn as a “person” under the Constitution but recognized the state’s compelling interest in the “potential life.”⁵¹ The result is that today, the abortion struggle in our society is now waged almost exclusively with reference to this legalistic question of when the baby becomes an individual. For example, during the recent debate on the Unborn Victims of Violence Act,⁵² liberal opponents of the bill argued that it was part of a strategy to undermine *Roe* because it used the term “unborn child” to denote a “fetus.”

Liberals correctly note that according to the *Roe* doctrine, moving back the point at which a fetus becomes an individual would not only put the right to choose an abortion into question, but could also cast serious doubt on the resolution of other pregnancy issues such as the imposition of liability on pregnant women for neglecting their health during pregnancy, harming fetuses through the use of drugs, etc.⁵³ For once the “fetus” becomes an “individual,” courts are faced with the impossible task of deciding whose rights will have to be infringed upon.⁵⁴ Many commentators fear that any balancing test

49. See, e.g., Susan F. Appleton, *Transgender Tales: Jeffrey Eugenides’s Middlesex and Other Stories of Popular Culture, Sex, and Law*, 80 IND. L.J. 391, 401 (2005) (citing “misguided medics,” who counsel parents of intersexed children to sex reassignment surgery, may recommend drug therapy for ADHD, may seek forced caesarean section, etc.).

50. See generally Ehrenreich, *supra* note 14, at 515–24 (arguing that doctors act on and perpetuate the image of outsider women as irresponsible and dangerous when they order forced caesarean sections, and hence that outsider women can only reclaim their identity by throwing off the coercion of doctors).

51. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

52. Unborn Victims of Violence Act of 2004, 18 U.S.C.A. § 1841 (West Supp. 2004) (designating as a separate offense the “death of, or bodily injury . . . to, a child, who is in utero at the time . . . injury or death occurred to the unborn child’s mother”).

53. Johnsen, *Fetal Rights*, *supra* note 4; Johnsen, *Shared Interests*, *supra* note 4.

54. This Note consciously refers to the pregnant woman as a “mother-to-be” and to the fetus or baby as the “developing child.” This terminology is intended to denote the special characteristics of late pregnancy as well as to avoid the debate regarding whether a fetus is an individual.

for maternal and fetal rights would threaten a woman's right to an abortion under *Roe*.⁵⁵

Indeed, perhaps in light of these pitfalls, the U.S. Supreme Court will likely remain extremely reluctant to take post-viability pregnancy cases. Lower courts too are extremely hesitant to tread into the uncharted waters of late-pregnancy. Recently, a Florida court described the potential scope of a case regarding the appointment of a guardian ad litem for the fetus of a retarded woman who had been raped:

If a fetus has rights, than all fetuses have rights. And, if a fetus is a person, than all fetuses are people, not just those residing in the womb of an incompetent mother. If we recognize a fetus as a person, we must accept that the unborn would have the rights guaranteed persons under the Constitutions of the United States and the State of Florida. While it is inviting to view this case as narrowly as Wixtrom suggests, it would be dangerous to do so when the potential for state intrusion into the lives of women is so significant.⁵⁶

However, there are several important reasons why midwifery *should not* be about abortion. First, midwifery is an issue both right and left can agree upon. Second, while it remains true today, as when *Roe* was decided, that there is no societal consensus about when life begins,⁵⁷ this is much less true of late pregnancy. Fewer liberal politicians are willing to take the position today that no recognition of the fetus is tenable. In fact, the tide may have turned already, as evidenced by the recent passage of the Unborn Victims of Violence Act.⁵⁸ Part of the *Roe* controversy, perhaps a large part, is that the law here has strayed too far from reality when it dictates that the unborn in the third trimester is not a "baby."

I believe that the rights of a mother-to-be and developing child can be defined differently in late pregnancy than they are in early pregnancy or after birth. After birth, both mother and child enjoy full constitutional rights, although parents exercise considerable control over their children. In the first trimester, however, things are much different, because *Roe* says that the fetus is not yet a "person" under the

55. E.g., Gallagher, *supra* note 11, at 11–14; Johnsen, *Shared Interests*, *supra* note 4, at 570; see also Robin P. Morris, Note, *The Corneau Case, Furthering Trends of Fetal Rights and Religious Freedom*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 89, 98–99 (2002) (analyzing the Corneau petition, where a pregnant cult member was placed in custody to insure that the mother received medical assistance at birth).

56. Wixtrom v. Dep't of Children and Families (*In re Guardianship of J.D.S.*), 864 So. 2d 534, 541 (Fla. Dist. Ct. App. 2004) (Orfinger, J., concurring and concurring specially) (holding that Florida guardianship law does not address the appointment of a guardian ad litem for the unborn fetus of a mentally retarded woman raped in a group home).

57. "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe*, 410 U.S. at 159.

58. 18 U.S.C.A. § 1841 (West Supp. 2004). During the debate, liberal opponents of the bill argued that it was prompted by a desire to undermine *Roe*, while President Bush asserted that "[p]regnant women who have been harmed by violence, and their families, know that there are two victims—the mother and the unborn child—and both victims should be protected by federal law." Carl Hulse, *Senate Outlaws Injury to Fetus During a Crime*, N.Y. TIMES, March 26, 2004, at A1.

Constitution.⁵⁹ Why should late pregnancy not also be unique, bearing some of the traits of the phases before and after? If we could compromise in late pregnancy, ceding the unborn some measure of rights by calling it a “developing child,” while at the same time recognizing the decisionmaking authority of the “mother-to-be” as a parent, I believe we could not only achieve better outcomes but bring the law closer to reality. This is where it must be in order to be accepted.

In the next Subpart, I will attempt to show that a principled distinction may be drawn between the *Roe* framework for early pregnancy and the resolution of most late pregnancy issues. First, when applied to most late pregnancy conflicts, *Roe* does not reach the right result because the “outside” perspective of pregnancy is neither appropriate nor accurate for late pregnancy. Instead, late pregnancy should be viewed from the “inside,” a perspective I explain in the next Subpart. The “outside” perspective is inappropriate both because it privileges a third-party decisionmaker over the mother-to-be, an “insider,” and because it employs the methodology of conflicting individual rights instead of viewing the interests of mother-to-be and developing child as linked and connected. Additionally, the nature of most late pregnancy conflicts is different in magnitude from the *Roe* issue: late pregnancy conflicts purportedly involve exposure of the developing child to some measure of risk, whereas abortion, the primary early pregnancy issue, terminates the life of the fetus.⁶⁰

D. Pregnancy as Parenting

When a pregnant woman and the child are viewed from an “outside” perspective of someone thinking in the mode of individual rights, they may appear as nesting Russian dolls, two individuals who happen to be occupying the same space at the same time. Viewed from this outside vantage point, the rights of the woman and the baby will be seen to conflict when the woman considers abortion, neglects prenatal care, incurs a pregnancy-related health risk, etc. The “outside” decisionmaker, however, has no special knowledge with which to resolve a conflict and may be far removed from the woman’s concerns (of a different sex, religion, socioeconomic status, or race).⁶¹ Furthermore, no other situation will give the decisionmaker adequate guidance⁶² because “[t]he relationship between mother and her unborn child is unique among other types of biological, emotional, and legal relationships.”⁶³

59. *Roe*, 410 U.S. at 157.

60. Caldwell, *supra* note 9, at 23 (critiquing *Bowland*).

61. *Cf.* Ehrenreich, *supra* note 14.

62. The most analogous situation described in the literature is that of conjoined twins, yet there are important differences too. See Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1113–14 (1999) (arguing that while conjoined twins each derive a benefit from the other, “[p]regnancy is a benefit to a fetus but a harm to a woman if she does not consent to it.”). In my view, however, McDonagh’s analysis does not capture the mutuality of the pregnancy relationship between mother and fetus. With twins, there is also no parental rights aspect and no disparity in maturity and decisionmaking ability as there is between mother and child. See also Morris, *supra* note 55, at 98–99 (noting that similar religious convictions often motivate parents objecting to both forced caesarean sections and operations to separate twins).

63. 4-22 Michael G. MacDonald, Health Care Law § 22.05(2)(a) (2003).

A legal discourse based on individual rights and autonomy artificially unravels the bonds between the mother-to-be and developing child,⁶⁴ viewing them as separate individuals and imposing an artificial antagonism upon their protected parent-child relationship and linked medical concerns.⁶⁵ As one commentator noted, “[w]hatever political value the notion of rights may have, the paradigm of conflicting rights seems singularly inappropriate to describe pregnancy, a condition of continuous connection and dependence.”⁶⁶

The “outside” view of pregnancy may also correspond with what I would call a “male” view of pregnancy, while the “inside” perspective usually corresponds to a female, or feminist, view. The effect of a “male” view is that it privileges and emphasizes the acts of conception and birth but deemphasizes the “passive” phase of pregnancy. For Professor John Robertson, for instance, conception is important because it is the exercise of the “right of procreative freedom,” whether by the usual means, through surrogate parents, in vitro fertilization, or other means. And birth is important because it marks when parenting begins, the other aspect of Robertson’s idea of procreative freedom. During pregnancy, however, Robertson argues that because a pregnant woman has already chosen and exercised her freedom to procreate, she must bear the pregnancy passively: “Once she decides to forgo abortion and the state chooses to protect the fetus, the woman loses the liberty to act in ways that would adversely affect the fetus.”⁶⁷

From a pregnant woman’s “inside” perspective, however, the benchmarks that are potentially important milestones for the baby’s “individuality” (conception, viability, or birth) are less determinative or important. Instead, motherhood is a continuum that can begin as early as conception,⁶⁸ but usually begins later, after she learns of the

64. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 428–29 (2000) (“Property theory severs the body from the person who owns it, whereas privacy theory maintains the two as indivisible and inextricably intertwined. . . . [B]odily privacy is generally inalienable and unassailable—it can neither be contracted away to private parties nor confiscated by the government.”) (footnotes omitted).

65. Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARVARD L. REV. 1325, 1341 (1990) (making an exception, however, for drug addiction, because “addictive behavior does not reflect the woman’s overt consideration of potential consequences for the fetus”); see Johnsen, *Fetal Rights*, *supra* note 4, at 599; Johnsen, *Shared Interests*, *supra* note 4, at 569 (arguing that policies targeting pregnant women are ineffective in improving outcomes and should not withstand equal protection review).

66. *Rethinking (M)otherhood*, *supra* note 65, at 1337 (arguing that the regulation of pregnancy by means of drug and child abuse prosecutions deflected attention from needed prenatal care and drug treatment programs).

67. Robertson, *supra* note 4, at 437.

68. One woman writes:

When I got pregnant with our third child I knew pretty exactly the day I conceived. . . . [S]omewhere in the center of me I felt like a flash of energy just spark. It felt like my heart opening. Then it turned into a warm glowy feeling that spread up and down my body. It felt delicious, like falling in love. I lay there and thought, “What is this?” After a while I found myself thinking. “Wow, this feels just like being pregnant.”

Edine, *Jenny Rose*, in *SPIRITUAL MIDWIFERY*, *supra* note 22, at 98.

pregnancy and decides to carry the child to term.⁶⁹ During pregnancy, the developing baby is the woman's constant companion, especially after quickening. They share the same blood, the same food, and the same experiences. Birth is a special moment in their relationship because the mother is able to see her baby for the first time in person and may discover its sex, if she has not already.⁷⁰ However, birth marks a new phase in their relationship, not the beginning of that relationship.

What Robertson misses is that because the woman already parents the child in her womb, her pregnancy and birth health decisions should be respected as parenting decisions as well. The mother-to-be makes all of the nutritional decisions for the developing child and most medical decisions (for instance, whether to obtain prenatal care, whether to take vitamins, etc.). Robertson's model evinces a deep suspicion of the (sole) parenting contribution made by the mother during pregnancy. Yet, by his own token, "[t]o deny someone who is capable of parenting the opportunity to rear a child is to deny him an experience that may be central to his personal identity and his concept of a meaningful life."⁷¹

When proper weight is given to the unique nature of pregnancy and the complex risk assessments involved in making pregnancy and birth health decisions, mothers (who have the "inside" perspective on their pregnancies) and not the state (with its "outside" perspective) should be regarded as the most appropriate and well-informed decisionmakers. Women are best informed as to their own religious beliefs, personal situations, risk-averseness,⁷² and pregnancies.⁷³ And it appears that even compared with doctors, women are the best authority on what is best for the child in light of the nascent parent-child relationship. In one study the data showed that in six of fifteen court-ordered caesarean sections, doctors' predictions for imminent harm to the fetus were inaccurate.⁷⁴ Though there is no representative study, some mothers faced with

69. I believe that the recent news story about Boris Becker's surprise third child caught the public's imagination precisely because it turned this typically male notion of active conception and passive wait on its head. Becker learned after the fact that Anna Ermakova, a Russian model, had impregnated herself by injecting sperm into her womb. The story went that Ermakova saved the sperm without his knowledge after giving Becker oral sex at a London restaurant. Becker experienced a passive, indistinct beginning of fatherhood but then, upon discovering the truth, was immediately confronted with a real, undeniable baby. See "Boris Becker blames Russian Mafia for Steal His Sperm After Closet Tryst", ON-LINE PRAVDA (Jan. 20, 2001), at <http://english.pravda.ru/sport/2001/01/20/2107.html> (last visited Jan. 23, 2004) (reporting that Becker's lawyers were investigating whether the Russian model and alleged mother of his illegitimate child, Anna Ermakova, had become pregnant by injecting herself with Becker's sperm following oral sex).

70. I believe that the wide use of ultrasound technology in prenatal exams has also had a profound effect on the way women experience their pregnancies. See *infra* note 152.

71. Robertson, *supra* note 4, at 410.

72. See Gallagher, *supra* note 11, at 13-14; Johnsen, *Shared Interest*, *supra* note 4, at 571.

73. See Johnsen, *Shared Interests*, *supra* note 4, at 598 (citing the AMA's position that given the uncertainty of obstetrical assessments, it would be inappropriate for any party other than the woman to make medical decisions).

74. See Veronica E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1195 (1987).

court orders disobey, flee the hospital, and deliver normally.⁷⁵ As soon as the baby is born, the mother's medical decisions for the child will be given broad deference, as long as the life of the child is not threatened.⁷⁶ Questioning her judgement at the moment of birth, when she is better informed than anyone as to the well-being of the child, simply does not make sense.⁷⁷

Also, recognizing a woman's right to parent an unborn child and to make her own health decisions, as well as those of the unborn child, places authority and responsibility on the shoulders of the pregnant woman. When a court orders a forced caesarean section against the will of a mother, it objectifies her, violates her rights, and disempowers her. When a legislature places blanket restrictions on a woman's ability to birth as she chooses, it does the same things, though in a less obvious manner. The evidence has shown that courts are often wrong when they order caesarean sections, and studies also show that midwives often provide safer, gentler births for mothers and babies. Under either rule, whether the state decides or the mother decides, mistakes will be made. However, as a matter of public policy, empowering a pregnant woman as a mother, rather than disempowering her, objectifying her, and violating her

75. Dr. Helene Cole notes that "[c]onsiderable uncertainty can surround medical evaluations of the risks and benefits of obstetrical interventions," and recommends against physicians overriding a pregnant woman's evaluation of an acceptable level of risk as it "undermines the very concept of informed consent." Helene M. Cole, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2665 (1990). Furthermore, proceedings in court-ordered caesareans are usually procedurally inadequate. Often they are initiated shortly before birth or during labor, the mothers rarely testify directly, and misinformation is common. Gallagher, *supra* note 11, at 48–54. These medical and legal shortcomings are both illustrated by a recent case. Doctors in Philadelphia asked a judge to order a caesarean section for Amber Marlowe because her baby was expected to be thirteen pounds and they believed it was in imminent danger of death if the mother delivered vaginally. The doctors told the judge that the mother objected to a caesarean for religious reasons. However, the mother, told reporters that she did not want a caesarean because a friend had died from one and because she had delivered six other children, all of them vaginally, and some bigger. The judge ordered a caesarean section and appointed a guardian ad litem for the baby. The parents, however, did not return to that hospital but delivered the baby vaginally and without complications at another hospital. *Hospital Faces Suit Over a Pregnancy*, PHILADELPHIA INQUIRER (Jan. 19, 2004). Debacles like these should raise a red flag for any type of contested pregnancy health issue.

76. Courts generally require parents to consult doctors when their children's lives are threatened; however, they are split as to whether medical treatment must be sought for non-life-threatening conditions. See generally Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers*, 16 U. PUGET SOUND L. REV. 599, 639–51 (1993).

77. Similarly, parental decisionmaking was recently privileged over judicial decisionmaking in a little noted Supreme Court decision, *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (plurality opinion). The plurality in *Troxel* held a Washington visitation law unconstitutional because it substituted the court's judgment for the parents' judgment as to whether granting visitation rights to third parties was in the child's best interests.

constitutional rights, can only have positive effects for the developing child and might be the best long-term protection of his or her rights.⁷⁸

II. THE PRIVACY ARGUMENTS FOR MIDWIFERY (FROM LEFT, RIGHT, AND CENTER)

Midwifery is a feminist issue, a rich person's issue, a right to life issue, a religious issue, a survivalist issue, and a poor people's issue. It cuts across all classes of people. It's everybody's issue.⁷⁹

Midwifery supporters are a broad and diverse group. Historically, nearly all births in America were attended by midwives until the late 1800s. Geographically, midwives deliver about 70% of babies in the European Union and are important birth attendants in nearly every other country.⁸⁰ Politically, midwifery advocates come from the left as well as from the right.⁸¹ Many are members of formal religious groups, and many are not. While advocates from the left tend to rely more on personal autonomy arguments, advocates from the right may argue parental authority, family autonomy, religious freedom, and sanctity of the home.⁸² All, however, believe that women should have the freedom to make most childbirth decisions.

Numerous midwifery advocates have made privacy rights arguments, but no article to date has reviewed and gathered all of the different aspects of the privacy right in one place. Seen in their entirety, they reflect the diverse backgrounds of midwifery supporters, who use different but related reasons to justify the same thing. I believe that liberals should not balk at some of the more conservative arguments, and vice versa, because of the positive externalities that would result from legalizing midwifery. If the Court recognized that the right to privacy encompasses the right to choose any safe method of childbirth, on whatever rationale, not only will more women begin to exercise more freedom, but fewer resources will be expended on unnecessary procedures, and many mothers and babies will experience healthier outcomes. Furthermore, agreement by left and right on an inclusive issue such as midwifery

78. See Johnsen, *Shared Interests*, *supra* note 4, at 613 ("Policymakers who truly wish to foster healthy childbearing must understand that government, women, and their future children all have shared interests in taking the steps necessary to promote healthy births.").

79. Arthur English & John Carroll, *Midwifery in Arkansas. The Delivery of a Bill*, 12 SOUTHERN EXPOSURE 90, 93 (1984)(quoting Carolyn Vogler, midwife and midwifery advocate in Arkansas).

80. Rifkin, *supra* note 3, at 511-12, 533.

81. *E.g.*, Robertson, *supra* note 4, at 452-54; Smolin, *supra* note 14, at 1009-13.

82. Some also argue a form of conservative feminism. Smolin, *supra* note 14, at 1005 ("Contemporary anti-abortion women and men therefore usually do not use the term 'feminist' to describe their beliefs; nonetheless, they generally believe that their own anti-abortion position is more consistent with the equal worth and dignity of women than is the position of the National Organization for Women."). Smolin, for example, notes that attempting to achieve gender equality (defined as equal sexual freedom) through abortion rights exacts a heavy toll on women. Not only is the goal (being like men) intrinsically anti-woman, ignoring the unique experiential aspects of pregnancy and motherhood, but its pursuit causes many women to abort, although they themselves consider abortion to be a killing. *Id.* at 1001-05.

would help resolve the divisiveness of the abortion debate, which has consumed so much energy that could have been used to address other social problems.⁸³

A. Personal Autonomy

Personal autonomy goes to the heart of what many Justices feel is at the root of the privacy right. It is perhaps the most abstract or philosophical strand of privacy doctrine, as it is less about the right to do a particular thing as about the right to be let alone. For instance, in *Eisenstadt*, the Court stated, "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁸⁴ In *Lawrence*, it was not so much that the homosexual couple had a right to have sex as that the sodomy statute, in prohibiting a particular sexual act, reached too far—"touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."⁸⁵

Personal autonomy arguments can be made in favor of midwifery as well. For instance, Wolfson argues that childbirth decisions present "social, economic, and political, rather than merely medical, issues."⁸⁶ McCormick reasons, "A woman's right to make procreative choices is protected because the decisions are intensely personal, and denial of the right would impose psychological, physical, social, and financial burdens upon the woman."⁸⁷ One conservative midwifery advocate notes that it is inconsistent to allow abortion choice, with its heavy consequences for the fetus, while limiting childbirth choice, with its lesser risks for a fetus, when both trigger the autonomy rights of the mother.⁸⁸ To prevail, however, midwifery advocates must clearly explain the feminist, political, religious, and philosophical dimensions of their alternative birth understandings. They must counteract the common misperception that childbirth choice is merely an aesthetic preference or a medical judgment call. Only when a fundamental right is at stake, such as privacy, will statutes be given strict scrutiny rather than rational basis review.

B. Bodily Integrity

Bodily integrity is the mainstay of any pregnancy-related privacy argument, including those made by midwifery advocates.⁸⁹ As with all fundamental rights, the state must show a compelling governmental interest to justify a regulation challenged

83. Indeed, with the passage of the Unborn Victims of Violence Act, Pub. L. 108-212, 118 Stat. 568 (2004), and the new partial-birth abortion ban last year, Pub. L. 108-105, 117 Stat. 1201 (2003), arguing in favor of a partial recognition of fetal rights may be a moot point.

84. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original).

85. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

86. Wolfson, *supra* note 11, at 941-42.

87. McCormick, *supra* note 4, at 686.

88. Smolin, *supra* note 14, at 980-85 (criticizing the Supreme Court for protecting abortion autonomy more assiduously than birthing autonomy).

89. *E.g.*, McCormick, *supra* note 4, at 691 ("A woman's interest in controlling her body during childbirth involves not only direct physical control of her body but also exercise of that bodily control as an expression of her identity.").

on the ground that it infringed upon bodily integrity. In *Winston v. Lee*, for instance, the Court found that surgical removal of a bullet for evidentiary purposes would be a "virtual total divestment of respondent's ordinary control over surgical probing beneath his skin."⁹⁰ In *Rochin v. California*, the Court found a privacy right violation where a man's stomach was pumped in order to retrieve evidence.⁹¹ However, in *Schmerber*, testing for blood alcohol level was held not to violate bodily integrity.⁹²

Clearly, piercing the woman's body to reach the unborn is a much greater bodily invasion than removal of a bullet or stomach pumping. Caesarean sections are major surgical procedures that are far more risky for the mother than vaginal delivery. The mother can also argue on behalf of her infant that the attachment of a fetal blood scalp monitor, the application of the vacuum extractor, or any other invasive procedure exceeds this standard. Midwifery advocates should argue that requiring hospital birth, doctor attendance, or imposing a higher risk of episiotomy or caesarean section (i.e. forbidding home birth) is also more like requiring surgery than requiring an alcohol blood test.

Seen theoretically, McCormick notes, there are two aspects of the privacy interest in controlling one's body: "one is freedom from *interference* with one's body . . . [t]he other is freedom to *act* with one's body, i.e., the right to exercise autonomous control."⁹³ Both of these aspects are implicated by currently routine obstetrical interventions.⁹⁴ Subpart I.B of this Note discussed how midwifery advocates object to unnecessary caesarean sections and episiotomies. The mother's freedom to act is implicated by mandatory use of fetal monitoring (which requires that the mother be attached to a machine and remain stationary during labor), prohibitions on eating or drinking during labor, and rules or expectations regarding the positions she may assume during the pushing stage.⁹⁵

Of course, the problem with protecting the woman's bodily integrity in pregnancy cases is that sometimes her right is seen to conflict with that of the fetus. When a baby's health lies in the balance, a mother's religious objections to treatment, or complicated risk assessment are often honored, but some object to this.⁹⁶ Many times a woman's decisionmaking is considered frivolous, or may not be respected because it reflects a different cultural background.⁹⁷ In such cases, Prof. Robertson argues for

90. 470 U.S. 753, 764-65 (1985).

91. 342 U.S. 165, 166, 174 (1965).

92. *Schmerber v. California*, 384 U.S. 757 (1985).

93. McCormick, *supra* note 4, at 692 (emphasis in original).

94. *Id.*

95. It is common to require or expect the woman to take the so-called lithotomy position (on her back, often with her feet in stirrups) because this is the most convenient position for the obstetrician. It has been shown, however, that 95% of women would not assume this position unless directed to do so. Rifkin, *supra* note 3, at 517 (citing NANCY W. COHEN & LOIS J. ESTNER, *SILENT KNIFE* 158 (1983)). The lithotomy position also increases the probability of cord compression. Additionally, an upright position enlarges the pelvic opening, allowing for easier passage of the baby and fewer forceps or vacuum deliveries. *Id.*

96. Cf. Marilyn L. Miller, Note, *Fetal Neglect and State Intervention: Preventing Another Attleboro Cult Baby Death*, 8 CARDOZO WOMEN'S L.J. 71, 74 (2001).

97. Ehrenreich, *supra* note 14, at 521-22 (noting that doctors associate bad decisionmaking with outsider women, and consequently attempt to upset the judgments of outsider women more often). The recent case of Melissa Ann Rowland is a good example. She

balancing the mother's rights against those of the child as the New Jersey Supreme Court did when it required a pregnant Jehovah's Witness to submit to a blood transfusion in order to save her own life and that of the unborn child.⁹⁸ Similar balancing is presumably undertaken when lower courts order forced caesarean sections.

Midwifery advocates should object to any such balancing *by the state*. The common law is quite clear that when the bodily integrity of one individual is pitted against the needs of another individual, there is no duty to sacrifice oneself, even if the harm were minimal and the benefit to the other great.⁹⁹ Opponents of forced caesareans argue that this no-duty rule should hold true, even where the supposed danger is to a fetus, and that strict scrutiny should be applied to government actions infringing on a mother's bodily integrity.¹⁰⁰ As Professor Janet Gallagher notes, "[t]he alternative adopts a brutally coercive stance toward pregnant women, viewing them as vessels or means to an end which may be denied the bodily integrity and self-determination specific to human dignity."¹⁰¹

If there must be balancing in late pregnancy situations, this Note argues emphatically in Part III that it should be done by the woman, and not by the state. Pregnancy, as discussed above,¹⁰² is a condition in which the bodies of the baby and mother are intimately connected, forming in essence one body together. Drugs must pass through her bloodstream to reach the baby, amniotic fluid can only be influenced by piercing the mother's body, fetal surgery requires surgery on the mother, and birth, by whatever means, requires her participation. As will be discussed below, since her rights are affected in every case, a competent mother-to-be is in the best position to speak both for herself and the child; she, and not the state, is the best and most appropriate late pregnancy decisionmaker.

C. Right to Refuse Medical Treatment

Closely related to bodily integrity is the limited right to refuse medical treatment.¹⁰³ Generally speaking, individuals have the right to make their own healthcare decisions unless third parties' lives are threatened, or the patient is found to be incompetent.¹⁰⁴

was charged with murder after one of her twins was delivered stillborn. Associated Press, *Murder Charged in Stillbirth* (Mar. 14, 2004), at <http://washingtontimes.com/national/20040314-121449-3356r.htm>. Media reports emphasized Rowland's alleged statement that she refused a caesarean because she did not want the scar. However, another quote in the article demonstrates the fact that she may not have been receiving the best medical advice: "[Rowland said that] doctors wanted to cut her 'from breast bone to pubic bone.'" *Id.*

98. Robertson, *supra* note 4, at 445–46 (citing Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964)).

99. Johnsen, *Shared Interests*, *supra* note 4, at 583; Rao, *supra* note 64, at 397 (citing McFall v. Shimp, 10 Pa. D. & C.3d 90 (1978)).

100. *E.g.*, Johnsen, *Shared Interest*, *supra* note 4, at 583–84.

101. Gallagher, *supra* note 11, at 57–58 (footnotes omitted); see also Rao, *supra* note 64, at 410–14 (deploring the state's appropriation of pregnant women as fetal incubators).

102. See *supra* Subpart I.D.

103. See *In re A.C.*, 573 A.2d 1235, 1244–45 (D.C. 1990) (finding unconstitutional a court-ordered caesarean section performed on an objecting cancer patient who died, along with her baby, as a result; listing state, circuit, and federal district court cases).

The issue arises in pregnancy situations when doctors are faced with a woman who, for whatever reasons, does not accept their medical recommendations. Doctors sometimes seek the appointment of guardians ad litem for the unborn children and sometimes seek court-ordered medical procedures.¹⁰⁵ Because of the nature of the proceedings, there is often no direct testimony from the woman, few appeals, and few written opinions.¹⁰⁶ Midwifery advocates have asserted that women have the right to refuse medical birth assistance.¹⁰⁷

D. Parental Authority

Parental authority is the third important prong of the privacy argument, and midwifery advocates often emphasize the right of parents to make decisions regarding the upbringing of their children and family life.¹⁰⁸ Some of the earliest privacy cases were parental authority cases. In *Meyer v. Nebraska*, parents protested a law prohibiting the teaching of foreign languages.¹⁰⁹ *Pierce v. Society of Sisters* struck down a law requiring attendance at public rather than private schools.¹¹⁰ *Wisconsin v. Yoder* again privileged parental judgments in the context of education, where the family religion required private school attendance.¹¹¹ In *Yoder*, Amish parents sought an exemption to state compulsory school attendance laws on the ground that it interfered with their ability to raise their children in the Amish faith, free of the influence of mainstream culture.¹¹² The Court granted the parents the autonomy to decide whether to give their children alternative, community-based vocational education instead of public education, despite the Court acknowledging a possible risk that if the children left the Amish community later, they might be disadvantaged by their lack of education. But, only Justice Douglas's dissent considered this risk

104. Nobel, *supra* note 76, at 612–19 (giving a good general overview and an application to the pregnancy contexts of court-ordered blood transfusions and caesarean sections).

105. See *supra* notes 5, 97, 101.

106. Gallagher, *supra* note 11, at 48–54 (discussing, among other things, the procedural due process implications of caesarean hearings while a woman is in labor); Johnsen, *Shared Interest*, *supra* note 4, at 595–97. For a very recent case displaying egregious violations of procedural due process, see *supra* note 56.

107. E.g., Tachera, *supra* note 4, at 106–07.

108. E.g., Johnsen, *Shared Interests*, *supra* note 4, at 592 (arguing in the context of pregnancy decisionmaking in the face of adversarial government policies, but accepting a governmental role in steering pregnant women toward safer births); McCormick, *supra* note 4, at 686–91 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Santosky v. Kramer*, 455 U.S. 745, 766–67 (1982)) (emphasizing the importance of the family as an institution and the special protections granted the parent-child relationship); Tachera, *supra* note 4, at 105–06.

109. 262 U.S. 390, 399 (1923) (holding that the liberty guaranteed by the Fourteenth Amendment encompassed the right “to marry, establish a home and bring up children”).

110. 268 U.S. 510, 534 (1925) (upholding the “liberty of parents and guardians to direct the upbringing and education of children”).

111. 406 U.S. 205, 234–35 (1972) (upholding the right of Amish parents to guide the religious upbringing of their children, even when it required keeping them home from school).

112. *Id.*

sufficiently important.¹¹³ Smolin argues that parents should be given the same latitude in birth decisionmaking as they are in educational decisionmaking: “[t]he issue of whether education is a matter of family or professional responsibility parallels the issue of whether birth is a matter of family or medical responsibility.”¹¹⁴

Moreover, parental authority is not limited to education and religion. In a recent case, *Troxel v. Granville*,¹¹⁵ the Court struck down a law that gave local courts the authority to grant visitation rights to third parties, holding that parents must be given deference as the primary balancers of their children’s best interests, not the state.¹¹⁶ The plurality reasoned that “[t]he liberty interest in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”¹¹⁷ Further, “there is a presumption that fit parents act in the best interests of their children,”¹¹⁸ and “the court must accord at least some special weight to the parent’s own determination.”¹¹⁹

Best interest calculations are notoriously complex, but no less so in birth decisionmaking than in visitation decisions or educational decisions. Just as *Troxel* deferred to the parents’ balancing of their children’s best interests, so too should parents be accorded leeway to choose the circumstances of their children’s births. Childbirth decisions involve not only family attitudes toward health and religion. Childbirth is also the very moment at which the family becomes a family, and the parents’ wishes regarding this event should be given broad deference.

E. Free Exercise and Hybrid Claims

Yoder involved free exercise rights as well, because the Amish parents were motivated by a desire to instruct their children effectively in the practice of their faith. *Employment Division v. Smith*¹²⁰ reinterpreted *Yoder* as a so-called hybrid-rights case—that is, one that combines a free exercise with a privacy right. This line of reasoning, or this way of interpreting past precedent, is attractive in the midwifery context because, as this Part attempts to show, so many strands of privacy doctrine are implicated in childbirth decisionmaking. If the logic of *Smith* (that two strands are stronger than one) holds, it would seem that childbirth choice would clearly be protected. However, *Smith* is probably better understood as reaching only those privacy cases where a free exercise claim can be made as well, instead of “double” privacy cases.

Parents who can make free exercise arguments in the context of midwifery should do so, as it seems that in combination, a weaker privacy interest would suffice to

113. *Id.* at 245–46 (Douglas, J., dissenting).

114. Smolin, *supra* note 14, at 1022. See also Gallagher, *supra* note 11, at 30 (citing *Bowen v. Am. Hosp. Assoc.*, 476 U.S. 610, 628 (1986) for the proposition that parents are entitled to a strong presumption that they are acting in their child’s best interests and arguing that fetal rights cases should be decided by the same standard).

115. 530 U.S. 57, 63–64 (2000) (plurality opinion).

116. *Id.* 63–64.

117. *Id.* at 65.

118. *Id.* at 68.

119. *Id.* at 70.

120. 494 U.S. 872, 881 (1990) (majority opinion).

override non-compelling government purposes.¹²¹ However, while centrist arguments will help dissipate the abortion controversy, showcasing religious objectors to medical treatment may ultimately hinder, rather than advance, the case of childbirth choice. The more reasonable home-birth advocates appear, the more likelihood they have of achieving real reform and respect for women's choices.¹²²

F. Privacy of the Home

The last privacy strand implicated by midwifery is the privacy of the home. The home is the locus of personal privacy, where citizens have the expectation of being let alone. *Lawrence* protected consensual sexual activity in the home.¹²³ The Fourth Amendment confers special protection to the home from government intrusion.¹²⁴ Historically, the home was the woman's realm, and most births occurred at home. Certainly, a law requiring a woman to leave home to give birth would have seemed the utmost affront to the wives of the founding fathers.¹²⁵ Indeed, even when the

121. Duncan describes the test as follows:

First, what governmental purposes are being served by the restrictive law at issue? Second, does the law exempt or otherwise leave unrestricted secular conduct that endangers those governmental purposes in a similar or greater degree than the prohibited or restricted conduct of the party seeking the protection of the Free Exercise Clause? In other words, a law burdening religious conduct is underinclusive, with respect to any particular government interest, if the law fails to pursue that interest uniformly against other conduct that causes similar damage to that government interest.

Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 858, 868 (2001) (advising that until we hear otherwise it would be "malpractice not to plead hybrid claims in free exercise litigation"). A law prohibiting everyone who is not a doctor or nurse midwife from delivering babies might not be generally applicable if it made exceptions for emergency personnel to deliver babies. *See, e.g.*, IND. CODE § 25-22.5-1-2(a)(2) (2004) (excepting a "person who renders service in case of emergency where no fee or other consideration is contemplated"); IND. CODE § 25-22.5-1-2(a)(3) (2004) (excepting paramedics, EMTs, and others). For good guidance on the ways courts treat hybrids, see William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998).

122. For examples of commentators opposed to religion-based refusal of medical treatment *see, e.g.*, Janna C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American Healthcare System*, 29 AM. J.L. & MED. 269 (2003) (advocating the protection of children threatened by religious minorities who fear or shun medical science); Miller, *supra* note 102, at 74 (arguing that "in situations like Corneau's the state's interest in protecting the life of the fetus takes precedence over any rights, including religious rights, the mother may have and that the fetus has a right to be protected by the state as soon as the fetus is viable or when a woman can no longer obtain a legal abortion"); Rita Swan, *On Statutes Depriving a Class of Children of Rights to Medical Care: Can this Discrimination be Litigated?*, 2 QUINNIPIAC HEALTH L.J. 73 (1998) (discussing the harm of religious exemption statutes).

123. *Lawrence v. Texas*, 539 U.S. 558 (2003).

124. *E.g.*, *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

125. I thank Professor Patrick Baude for this insight.

Fourteenth Amendment was enacted, "midwifery was universally legal and almost completely unregulated."¹²⁶

Birth is one of the most private, intimate moments in a family's life. The home is the most private, intimate sphere. It seems unreasonable both for the government to reach into the home with regulation and for it to forbid activities in the home that do not harm others.¹²⁷ When there is no special risk to the developing child, the right to privacy protects both the parental decisionmaking as well as the locus of the home.¹²⁸

G. Recent Developments: *Lawrence v. Texas Applied to Midwifery*

Despite the plethora of possible privacy arguments described in Subpart A, significant hurdles remain when applying current substantive due process doctrine to the midwifery issue. The primary hurdle is, or was, the Court's increasing reluctance to recognize "new" fundamental rights. The Court's recent decision in *Lawrence* did show unexpected movement on the substantive due process front,¹²⁹ but it is unclear whether *Lawrence* will actually help or hurt the midwifery cause.

On the positive side, *Lawrence* reemphasized the "sweet mystery" language of *Casey*, which appears on its face to be highly applicable to the moment of birth:

'These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.' Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.¹³⁰

A mother choosing a home birth usually does so because she wishes to be in charge of her birth—autonomous, experiencing the moment actively and freely—because she views birth as an extremely important moment in her personal development as well as one of the most important experiences she will share with her child.¹³¹ However, as Justice Scalia notes in his dissent, it is unclear whether the *Casey* language or the substantive due process talk in *Lawrence* are anything more than dicta because the majority also finds the Texas sodomy law unconstitutional on the grounds that it fails

126. Smolin, *supra* note 14, at 1019; see also Robertson, *supra* note 4, at 452–53.

127. In *Lawrence*, the protected sexual activity also occurred in the home. The *Lawrence* majority, however, did make an exception to the government's duty to stay out of private relationships—where there could be "injury to a person or abuse of an institution the law protects." *Lawrence*, 539 U.S. at 567. Thus, home births might have to be limited to situations where the infant was not at risk. Midwifery regulation, where it exists, and general standards of good practice preclude home births in high-risk situations anyway.

128. Cf. Smolin, *supra* note 14.

129. *Lawrence* could have been decided more narrowly, as Justice O'Connor would have done, on equal protection grounds. This holding would not have required overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986).

130. *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

131. See *supra* Subpart I.A. and note 4.

rational basis review.¹³² If so, the *Casey* language, which Justice Scalia asserts to have been merely dictum in that case as well, may not play a rule in future substantive due process analysis.¹³³

We must also take careful note of the fact that the Court uses the wording “[p]ersons in a homosexual relationship” instead of referring to the protected nature of the relationship itself. This is significant because it may indicate that the Court was primarily moved to protect what Radhika Rao calls “personal privacy” instead of “relational privacy.”¹³⁴ Personal privacy serves pure individual autonomy interests, while relational privacy encompasses the “‘right to include’ some individuals by joining with them in close personal relationships.”¹³⁵ Probably the Court was motivated by a desire to avoid casting what Rao refers to as a “mantle of immunity”¹³⁶ over homosexual relationships. Indeed, the majority opinion explicitly denies that it does, although Justice Scalia opines that *Lawrence* essentially removes all hurdles to gay marriage.¹³⁷ Because the birth situation involves only one individual who is capable of autonomous choice (the woman), childbirth choice must depend on both personal and relational privacy. The rule I advocate for in Part III recognizes that because the mother-to-be already parents the developing child and because of her own significant liberty stake in childbirth decisions, she should be authorized to choose midwifery for herself as well as for the child.¹³⁸

One aspect of *Lawrence* that bodes well for the midwifery issue is the fact that the majority in *Lawrence* takes the historical test for fundamental rights very seriously.¹³⁹ The opinion goes into considerable detail describing the historical treatment of sodomy and analyzing how *Bowers* had been undermined because it was not based on historically accurate facts. Of course, if Scalia is right, and the majority does not, in fact, hold homosexual sex to be a fundamental right at all, then this historical analysis was not determinative. Nevertheless, it is clear that a historical analysis may hold great sway in establishing the case for a “new” fundamental right to a moderate or conservative court. Midwifery’s historical pedigree is, of course, as old as humankind itself. Certainly, in 1789, home birth was the norm, and to require a woman to leave the sanctity, privacy, and comfort of her home to give birth would have been unthinkable.¹⁴⁰

132. *Lawrence*, 539 U.S. at 586. See *supra* note 16 for an argument that outlawing midwifery should fail rational basis review under certain circumstances.

133. *Id.*

134. Rao, *supra* note 64, at 388–89.

135. *Id.* at 389.

136. *Id.*

137. The majority opinion stated “[*Lawrence*] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” *Lawrence*, 539 U.S. at 578. Justice Scalia, dissenting, wrote that “what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution?’” *Id.* at 605 (quoting the majority opinion).

138. See *supra* Subpart II.F.

139. *Lawrence*, 539 U.S. at 567–73 (conducting an extensive reevaluation of the historical evidence relied upon in *Bowers*).

140. See Smolin, *supra* note 14, at 1018–19 for a good analysis; see also *supra* text accompanying notes 124–26.

Similarly, the midwifery context compares favorably with the homosexual sex context because an individual birth event may be more meaning-laden for the individual than an isolated sexual encounter. On the other hand, *Lawrence* could, and perhaps should, be read to safeguard not the individual sex acts prohibited by the statute, but the right to express oneself through sexual orientation. If this is so, it is arguable that even highly significant, non-fungible events such as births are arguably not as protected if they affect the individual less fundamentally.

Finally, the *Lawrence* Court also seems to open the door to a comparative law analysis that could be utilized in the midwifery context. The majority opinion cites to a ruling by the European Court of Human Rights in building the argument that *Bowers* was wrongly decided from the start.¹⁴¹ Midwifery is the dominant model of birth in the European Union, and a directive requires all EU countries to recognize midwifery degrees (as opposed to nurse midwifery).¹⁴² The World Health Organization has also taken a strong position in support of the midwifery model of birth.¹⁴³

In sum, *Lawrence* is encouraging for midwifery advocates if for no other reason than that it demonstrated that there is currently a majority on the Court that is not dead-set against expanding the realm of substantive due process. Further, the Court relied on historical analysis as well as a comparative law approach, two arguments that can be made effectively for midwifery. More broadly, the Court seems to have reached a result that is compatible with the changing social norms and did not hesitate to overrule *Bowers*, a decision only seventeen years old. Given the fact that a majority of Americans may wish to recognize limited fetal rights in some form, midwifery might persuade the Court similarly.¹⁴⁴

III. HARMONIZING MIDWIFERY LAW WITH CURRENT LAW ON ABORTION, FORCED CAESAREAN SECTIONS, AND CHILD HEALTH DECISIONMAKING

The uniform, negative treatment of midwifery privacy claims in the courts is not in conformity with *Roe*,¹⁴⁵ *In re A.C.* (the most famous forced-caesarean case),¹⁴⁶ the bodily integrity cases,¹⁴⁷ or the child health decision cases.¹⁴⁸ This distinction is wrong because there is no logical reason (such as disproportionate risk) to treat the birth

141. *Lawrence*, 539 U.S. at 573. Since *Lawrence*, the Court has opened the door to comparative analysis a little wider. In overturning juvenile death penalty laws, the Court found "confirmation" for its Eighth Amendment holding in the unanimous jurisprudence of other states. *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005).

142. Rifkin, *supra* note 3, at 525–26 (citing the European Economic Community Midwives Directive, Council Directive 80/155, art. 4, 1980 O.J. (L 33), requiring that direct-entry midwives' credentials be recognized in all member countries).

143. *Id.* at 524. The World Health Organization website provides extensive resources aimed at both doctors and midwives. At <http://www.who.int/topics/labour/en/> (last visited Apr. 2, 2005).

144. See *supra* text accompanying note 58–59.

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

146. 573 A.2d 1235 (D.C. 1990) (holding that a court-ordered caesarean section on a terminally-ill cancer patient who objected to and died as a result of the operation (along with the baby) was unconstitutional).

147. See *supra* Subpart II.B.

148. See *supra* notes 76–77 and accompanying text.

moment as different from any other health decision.¹⁴⁹ These cases could all be harmonized by differentiating early pregnancy (when the woman and the fetus have no relationship) from late pregnancy (when the mother-to-be parents the developing child). As a woman and a parent, she should be entitled to exercise health decisionmaking for herself and the child, except perhaps where there is a showing of a clear danger to the life of the developing child or incompetence on her part.

When this limited recognition of fetal rights is properly allocated to late, rather than early pregnancy, and a mother-to-be's parental rights are found to commence at the same time, the oppressive consequences commentators have predicted become much more unlikely.¹⁵⁰ Additionally, this concession would help diffuse two conservative arguments. First, granting birthing choices to mothers who choose to bear their children instead of aborting refutes the conservative critique that courts currently grant broad rights to the minority (who abort) while largely ignoring the significant rights of the majority of women (who choose to birth).¹⁵¹ Second, acknowledging viable, third-trimester fetuses to be "babies" (or, in my terminology, "developing children") more closely approximates the way most Americans view them.¹⁵²

149. The moment after birth, a parent may make decisions for the child that fall short of threats to the child's life. Up until the moment before birth, the mother retains significant latitude to abort the child if her life or health is threatened. Most birth decisions involve complex risk calculations that are made even more opaque by the fact that the health of two individuals is at stake instead of just one. However, the same interests in bodily integrity, autonomy, and parental rights are at stake, and the increased complexity of birthing health decisions only lends more weight to the proposition that the individual should decide, not the state.

150. See Gallagher, *supra* note 11 at 42–43 (predicting prenatal negligence claims and noting that "[v]irtually all fetal rights proponents ultimately reject any 'bright line' limitation of maternal duties and liability to the period after viability"); Johnsen, *Shared Interests*, *supra* note 4 at 585–86 (discussing the possibility of prosecuting pregnant women for drug use or parental neglect, limiting work opportunities to non-risky jobs, etc.); Robertson, *supra* note 4 (advocating the same); see also *Wixtrom v. Dep't of Children & Families (In re Guardianship of J.D.S.)*, 864 So. 2d 534 (Fla. Dist. Ct. App. 2004). Judge Orfinger, in his concurring opinion, warned against opening the door to fetal rights because it "would be dangerous to do so when the potential for state intrusion into the lives of women is so significant." *Id.* at 540–41 (Orfinger, J., concurring).

151. Smolin, *supra* note 14, at 1012 ("The judicial abandonment of a constitutional role in midwifery and women's control over childbirth, contemporaneous with its constitutional activism in abortion, constitutes an arbitrary constitutional favoritism, as Justice Scalia described it, for the unconventional. Autonomy theory should equally protect both the conventional choice to give birth and the unconventional choice to abort.").

152. See *supra* text accompanying notes 57–59. Regardless of how fetuses were viewed in the past, the advent of modern technology has given us a window into the fetus's development. Mothers who see their babies squirming on the ultrasound screen or feel them kicking do not doubt that a fetus is, in the ordinary sense of the word, a baby. When legal doctrine strays so far from experience, the legitimacy of the courts is undermined. This has happened in the abortion context. See Robin Power Morris, Note, *The Corneau Case, Furthering Trends of Fetal Rights and Religious Freedom*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 89, 99–100 (2002) (arguing that technology has fostered identification with the fetus, which has, in turn, led to some placing the fetus's rights on a par or above those of the

More importantly, however, taking the decisionmaking about how to birth back from the doctors and putting it in the hands of women will have a profound, if subtle, long-term effect on the dignity, autonomy, and self-respect of the women of this country. Midwifery is an important, core feminist issue, even if the violence of current obstetrical practices is usually non-lethal and generally goes unquestioned.¹⁵³ Abortion rights currently dominate the feminist movement,¹⁵⁴ but this absolute commitment to that one issue has come at a cost.

mother); *see also* Smolin, *supra* note 14, at 1026–27 (noting that the Court’s legitimacy has also been undermined because of the way the abortion issue has affected the nomination process).

153. *See* Ehrenreich, *supra* note 14, at 553 (contrasting and connecting the outright violence of forced caesarean sections against outsider women with the hegemonic oppression of privileged women through obstetrical practices).

154. Neither the website of the National Abortion and Reproductive Rights Action League, at <http://nara.org/> (last visited Oct. 15, 2004), nor the website of the National Women’s Law Center (“NWLC”), at www.nwlc.org (last visited Oct. 15, 2004), contained any references to midwifery or birthing choices (NWLC’s website did contain references to the availability of prenatal care). The National Organization of Women adopted a resolution in support of midwifery at its 1999 conference, but the website yields only one result for the topic in the years after that, and midwifery is not listed under the “Key Issues” section of the site. National Organization for Women, Key Issues, at www.now.org/issues/ (last visited Oct. 15, 2004). The 1999 N.O.W. resolution succinctly states the case for broader childbirth options:

EXPANSION OF REPRODUCTIVE FREEDOM TO INCLUDE THE MIDWIFERY MODEL OF CARE

WHEREAS, the National Organization for Women (NOW) has long supported reproductive freedom as a priority issue; and

WHEREAS, NOW believes that women should have complete authority over their reproductive lives; and

WHEREAS, reproductive freedom not only includes the ability to decide whether or when to bear children, but also the right to devise a birth plan with a medical provider of their choice in either a hospital or an alternative setting such as a freestanding birth center or private residence; and

WHEREAS, women have historically given birth with midwives; and

WHEREAS, the practice of midwifery has many benefits including lower costs, lower rates of premature births, higher rates of breastfeeding; and greater satisfaction with the birthing experience; and has been endorsed by the World Health Organization; and

WHEREAS, midwifery has a lower incidence of medical interventions during the birthing process, including the routine use of episiotomies and Caesarian sections; and

WHEREAS, women’s access to midwifery and traditional birthing practices many times is limited by restrictive laws and non-coverage by private insurance companies and state-subsidized funding;

THEREFORE BE IT RESOLVED, that NOW’s policy statements, brochures, and fact sheets concerning reproductive freedom include references to birthing choices, safe childbearing practices, midwifery; and

BE IT FINALLY RESOLVED, that NOW work in cooperation with state and national midwifery organizations to increase women’s access to midwifery and community awareness of childbirth, pregnancy, and early parenting choices.

CONCLUSION

Feminists and humanists are rightly angered by egregious examples of violence toward women such as forced caesarean and genital mutilation. Similarly, the right to choose an abortion will always be a vital aspect of reproductive freedom. Yet, when states outlaw midwifery and thus impose the medical model of birth on all childbearing women and their children, there are also costs to bodily integrity and to individual autonomy that, while perhaps less extreme, affect a large proportion of childbearing women.¹⁵⁵

This Note analyzed the factors that have blocked midwifery reform both in the legislative arena as well as in the courts. First, the medical lobby has a vested interest in defining birth as a medical event.¹⁵⁶ Second, midwifery advocates have not communicated clearly the political, feminist, philosophical, and religious facets of their beliefs about the meaning of birth and their conviction that doctors should not make value-laden decisions that affect dignity and self-definition. Finally, we should abandon the “outsider” perspective of pregnancy as passive down-time, as a cake in the oven. Instead, pregnancy must be viewed from the “insider” perspective, as active parenting time during which the interests of mother and child are interconnected.

While the *Roe* framework is appropriate for early pregnancy, in late pregnancy the individual rights of mother-to-be and developing child cannot, and should not, be artificially disengaged from each other and balanced by the state, because the state is not in the best position to accurately balance and assess the interests involved. Instead, absent a showing of incompetence, a mother-to-be should be authorized to make joint health decisions for herself and the developing child, as she would be moments after birth. Her decisionmaking for the developing child should be reviewable under the same standard as it would be after the child is born, subject, of course, to the maternal health-exception of *Casey*. Adopting this rule would harmonize midwifery doctrine with child health decisionmaking law, abortion doctrine, and the cases against forced caesareans.

Women have the right to give birth in accordance with their deeply held convictions about nature, women, parenting, and life. However, childbirth rights can only be recognized if the Court finally addresses the controversial legal issues raised by late pregnancy. Given the fact that midwifery supporters come from both left and right, it is a reproductive issue that is not programmed to divide us along pro-choice and pro-life lines. Instead, integrating midwifery decisions into a cohesive reproductive and parenting doctrine may help us move beyond the deep divisions and extreme positions wrought by *Roe*. Recognizing childbirth choice will bring important public health and economic benefits. But most importantly, by exercising childbirth choice, women will work long-term societal change, defining themselves, and in turn shaping society’s view of them as the most competent and appropriate pregnancy decisionmakers.

National Organization for Women, *1999 National NOW Conference Resolutions*, available at <http://www.now.org/nnt/fall-99/resolutions.html> (last visited Oct. 15, 2004).

155. The same harms occur when women are denied the option of giving birth vaginally after a previous caesarean section (“VBAC”), a distressing current trend. See Denise Grady, *Trying to Avoid 2nd Caesarean, Many Find the Choice Isn’t Theirs*, N.Y. TIMES, Nov. 29, 2004, at A1 (reporting that the VBAC rate has dropped dramatically from 28.3 in 1996 to 10.6 in 2003).

156. See *supra* note 14.

In Defense of *Maroni*: Why Parents Should Be Allowed to Proceed Pro Se in IDEA Cases

M. BRENDHAN FLYNN

Should the ability to pay for the services of an attorney determine which students have a better chance of receiving appropriate services and placement because they can afford an attorney to represent them at the various stages of administrative appeal and litigation? I think we would all agree that the answer to that question is a resounding “no.”¹

INTRODUCTION

In March of 1991, fifteen-year-old Steven Wenger suffered severe head trauma as a result of an auto accident.² Following his release from the hospital a year later, Steven needed special education services from his local school district.³ The Individuals with Disabilities Education Act (IDEA)⁴ required the school district to provide Steven with these services. Under the IDEA, states receiving federal special education funding must provide a “free appropriate public education” to all children—no matter the extent of the child’s disabilities—and must observe certain procedures laid down in the statute in order to receive federal funds.⁵ Because Steven lived in a state that was subject to the IDEA, his family’s attempts to obtain appropriate special education services for their child provide a concrete example of how the IDEA works.⁶

As it had every year since Steven first started receiving special education services, a committee at the Canastota School District met in July 1994 to prepare Steven’s Individualized Education Program (“IEP”), which is the document that specifies the special education services a child will receive.⁷ Steven’s father was dissatisfied with his child’s IEP,⁸ so he requested that a local education agency review its

1. 132 Cong. Rec. 17610 (1986) (remarks of Rep. Jeffords).

2. *Wenger v. Canastota Cent. Sch. Dist.*, 961 F. Supp. 416, 418 (N.D.N.Y. 1997).

3. *Id.*

4. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

5. The IDEA so strongly asserts that education be made available to all children that it even requires that services be provided for children expelled from school. *Id.* § 615; STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW 3 (Steve McEllistrem et al. eds., 2002).

6. While litigation is not particularly frequent, the IDEA process often ends in the parents of children with disabilities and the school district developing an adversarial relationship. Stephen A. Rosenbaum, *Aligning or Maligning: Getting Inside a New IDEA, Getting Behind No Child Left Behind, And Getting Outside It All*, 15 HASTINGS WOMEN’S L.J. 1, 15 (2004). Since parents want schools to provide as many educational services as possible to their child and schools want to “shortchange students” due to budgetary constraints, the reason parent/school relations so often descend into hostility is apparent. *Id.* at 2 n.9.

7. Individuals with Disabilities Education Improvement Act of 2004 § 614(d).

8. *Wenger*, 961 F. Supp. at 418.

appropriateness at an impartial due process hearing.⁹ The school, wishing to avoid a due process hearing, scheduled another IEP meeting in September of 1994 to reevaluate Steven's IEP.¹⁰ The second IEP still did not satisfy Steven's father, who again requested a due process hearing. Unable to afford an attorney,¹¹ Steven's father represented his son without the aid of an attorney, as the IDEA expressly permits parents to do.¹² At the due process hearing, the local education agency decided that Steven's IEP was appropriate.

The IDEA allows a state to decide whether to provide one or two levels of administrative review of IEPs. Steven lived in a state that maintained two levels of administrative review.¹³ Steven's father appealed to the state education agency, where he lost as well.¹⁴ Having exhausted his administrative remedies, Steven's father filed suit in federal court.¹⁵ From 1995, when the case was filed, until 1997, when the court issued an opinion, Steven's father represented his child pro se in a federal district court.¹⁶ Steven's father lost his claim at the district court level; however, the Second Circuit vacated the district court's ruling against Steven by holding that Steven's father should not have been allowed to represent his son pro se.¹⁷ The court of appeals reasoned that it was protecting children with disabilities by preventing parents from compromising their children's rights under the IDEA by providing impassioned but incompetent counsel.¹⁸

In 2003, the First Circuit decided *Maroni v. Pemi-Baker Regional School District* and reached the opposite conclusion; parents do have a right to proceed pro se in IDEA cases.¹⁹ The court noted that given the scarcity of lawyers who handle special education cases and the expense of hiring them, the Second Circuit, and other circuits that have ruled in a similar manner,²⁰ might be preventing children from utilizing their only available advocate—their parents.²¹ According to *Maroni*, denying parents the right to proceed pro se in IDEA cases contravenes the language of the IDEA, which allows “[a]ny party aggrieved” by a final administrative review ruling to appeal to either state or federal court, and the structure of the IDEA, which is designed to encourage parental advocacy.²² Because federal law and that of most states prevents

9. The IDEA grants parents the right to administrative review of school decisions. Individuals with Disabilities Education Improvement Act § 614(d)(4).

10. *Wenger*, 961 F. Supp. at 418.

11. *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124 (2d Cir. 1998).

12. *Id.*

13. In states that have two levels of due process, the first hearing is administered by what the IDEA refers to as a local education agency and the appellate hearing is administered by the state education agency. Individuals with Disabilities Education Improvement Act § 615(f)(1)(A).

14. *Wenger*, 961 F. Supp. at 418–19.

15. *Id.* at 419.

16. *Id.*

17. *Wenger*, 146 F.3d at 125.

18. *Id.*

19. *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 258 (1st Cir. 2003).

20. *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997).

21. *Maroni*, 346 F.3d at 258.

22. *Id.* at 250–53.

nonlawyers from representing another person's rights in courts, the question of whether parents should be allowed to proceed pro se in IDEA cases hinges on whether the Act grants parents their own cause of action, because the U.S. Code expressly permits individuals to proceed pro se when litigating their own claims.²³

This Note will argue that parents have a cause of action under the IDEA and, thus, should be allowed to proceed pro se. I will undertake this task by analyzing *Collinsgru v. Palmyra Board of Education*, the seminal case that argues that parents should not be allowed to proceed pro se,²⁴ and the *Maroni* decision which held that the IDEA allows pro se representation.²⁵ The circuit courts' reasoning will serve as a touchstone to examine the IDEA's language, legislative history, and policy. Part I of this Note will provide an overview of the IDEA and of some of the problems that families of children with disabilities have in utilizing its protections. Part II of this Note will argue that the First Circuit's decision in *Maroni*, which allows parents to proceed pro se, represents the correct interpretation of the IDEA under the plain language of the act. Part III of this Note will argue that, because the legislative history of the IDEA shows that Congress created the statute in part to protect parents against having to pay for their children's special education costs, parents have a right under the IDEA that can be aggrieved by insufficient IEPs for their children. Part IV of this Note will argue that, since lawyers who handle IDEA cases are scarce and expensive, disallowing pro se representation goes against the IDEA's purpose, which is to ensure that all children, regardless of their parents' fiscal resources, receive an appropriate education. This Note concludes that, for the above-given reasons, parents should be able to proceed pro se in IDEA cases.

I. AN OVERVIEW OF THE IDEA'S GOALS AND EFFECTIVENESS

Section A of this Part details the history of the IDEA. It will show that the IDEA came into existence because America's schools warehoused disabled children and that Congress amended the Act several times to increase parental involvement. Section B describes how the IDEA works to ensure that children with disabilities receive appropriate education services and how disputes between parents and school districts are resolved. Section C uncovers shortcomings of the act in ensuring fair educational treatment of all children, especially children of parents with limited means.

A. *The IDEA's History*

Over the course of its history, our country has done little to educate children with special needs. In 1975, an observer of a school for children with special needs saw

23. 28 U.S.C. § 1654 (2000).

24. *Collinsgru*, 161 F.3d 225, 231. The other circuits that ruled that parents may not proceed pro se did not even bother to engage in extended statutory analysis. See *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147 (7th Cir. 2001); *Wenger*, 146 F.3d 123; *Devine*, 121 F.3d 576. The Second Circuit also found that the IDEA grants parents only procedural rights. *Wenger*, 125 F.3d at 124. And the Seventh and Eleventh Circuits bar any parental cause of action. *Navin*, 270 F.3d at 1149; *Devine*, 121 F.3d at 576. So before the First Circuit decided *Maroni* in 2003, no court had found that the IDEA's text granted a parental cause of action.

25. *Maroni*, 346 F.3d at 358.

"rows and rows of children and adults strapped to their chairs in a dimly lit room, a cacophony of moans and screams. Four or five attendants stood watch over what seemed to be about a hundred 'students.'"²⁶ After court cases made clear that public schools either excluded or warehoused children with disabilities, Congress passed the Education for All Handicapped Children Act ("EACHA") in 1975,²⁷ which later became the Individuals with Disabilities Education Act ("IDEA").²⁸

The IDEA has been amended numerous times. In 1986, Congress added an attorney's fee provision out of concern about the lack of lawyers taking IDEA cases.²⁹ In 1990, Congress added a transition clause that was aimed at youth with disabilities about to enter the work force.³⁰ In 1997, Congress then added provisions that were meant to increase parental involvement and advocacy.³¹ And in 2004, Congress reauthorized the IDEA and amended it so that the act would be more outcome-based and create less paperwork for teachers, but these latest amendments do not change the statutory language that covers civil actions.³²

B. The IDEA's Structure

Under the IDEA, the federal government provides special education funding to those states that have both a "zero reject" policy³³ when it comes to education and follow certain procedures when deciding on a student's eligibility for special education services.³⁴ To ensure that a state is complying with the IDEA, the statute requires that every year a participating state provide the federal government with its plan to provide special education services for students with disabilities.³⁵ Also, in addition to mere accessibility to special education services, the IDEA imposes a substantive pedagogical standard on participating states that demands that each child receive a "free appropriate public education."³⁶

26. Therese Craparo, Note, *Remembering the "Individuals" of the Individuals with Disabilities Education Act*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 467, 472 (2003) (quoting John Merrow, *What's So Special About Special Education?*, EDUC. WEEK, May 8, 1996, at 48).

27. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

28. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

29. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986).

30. Education of the Handicapped Act Amendments of 1990, Pub. L. 101-476, 104 Stat. 1103 (1990).

31. See NATIONAL COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS 34 (2000).

32. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

33. A "zero reject policy" consists of making education accessible to all children regardless of the severity of their disabilities. H. RUTHERFORD TURNBULL III, FREE APPROPRIATE PUBLIC EDUCATION 37-40 (1990).

34. Individuals with Disabilities Education Improvement Act, § 615(a).

35. *Id.* § 612(a).

36. *Id.* § 612(a)(1)(A).

In enacting the IDEA, Congress created a procedure demanding schools to involve parents in making educational choices for their children.³⁷ To ensure active parent participation, the IDEA mandates that a school notify parents of their procedural rights under the statute.³⁸ The Department of Education states that there are ten steps in the IDEA process, assuming that there is no dispute between the school and the child's parents:

- (1) a child is identified as possibly needing special education and related services;
- (2) the child is evaluated;
- (3) eligibility is decided;
- (4) the child is found eligible for services;
- (5) an Individualized Education Program (IEP) meeting is scheduled;
- (6) an IEP meeting is held, and the IEP is written;
- (7) services are provided;
- (8) progress is measured and reported to parents;
- (9) the IEP is reviewed by the IEP team a minimum of once a year; and
- (10) the child is reevaluated at least every three years.³⁹

A school or parent can request an evaluation⁴⁰ and a parent must give consent to the evaluation unless a hearing officer rules otherwise.⁴¹ If a parent disagrees with the evaluation, she has the right to obtain an independent evaluation.⁴² In deciding upon eligibility, there are ten enumerated disability categories that invoke the IDEA and a second catch-all class of protected students, those with a specific learning disability.⁴³ Once a child is deemed to need special education, the school assembles a team that includes teachers and parents to create the IEP—the description of what special educational services will be provided to the child for the academic year.⁴⁴ With parental consent, a student can have an IEP lasting for three years under the 2004 amendments to the IDEA, which created a pilot program that allows fifteen states to create multiyear IEPs.⁴⁵ A parent who disagrees with the final outcome of an evaluation, an IEP, or the implementation of an IEP has the right to ask for a due process hearing to resolve the dispute,⁴⁶ or to ask for non-binding mediation first.⁴⁷

To succeed at the due process hearing, a parent must show either that a school failed to meet the IDEA's substantive standards for an IEP or that the school failed to follow all of the IDEA's procedural safeguards. Substantially, an IEP must provide a "free appropriate public education,"⁴⁸ and the Act presumes that an appropriate education

37. See MILTON BUDOFF & ALAN ORENSTEIN, *DUE PROCESS IN SPECIAL EDUCATION* 54 (1988).

38. Individuals with Disabilities Education Improvement Act, § 615(c).

39. Tana Lin, *Recovering Attorney's Fees Under the Individuals with Disabilities Education Act*, 180 ED. LAW. REP. 1, 3 (2003) (citing U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. AND REHABILITATIVE SERVICES, *A GUIDE TO THE INDIVIDUALIZED EDUC. PROGRAM* (2000)).

40. Individuals with Disabilities Education Improvement Act, § 614(a)(1)(B).

41. *Id.* § 614(a)(1)(D)(i)(I).

42. Independent Educational Evaluation, 34 C.F.R. § 300.502(a)(1) (2002).

43. Individuals with Disabilities Education Improvement Act, § 602(3)(A)(i).

44. *Id.* § 614(d)(1)(A)(i).

45. *Id.* § 614(d)(5).

46. *Id.* § 615(e).

47. *Id.* § 615(f).

48. *Id.* § 602(9).

for children with disabilities is in the same classroom as everyone else.⁴⁹ The statute directs schools to provide an education that will give each child with a disability meaningful opportunities for employment after school.⁵⁰ The Supreme Court, however, undermined this relatively high standard by holding that under the IDEA a school must only provide some minimal educational benefit.⁵¹

At a due process hearing the IDEA grants parents the right to choose between representing their child, obtaining an attorney, or using a nonlawyer representative.⁵² The official selected to conduct the due process hearing must be impartial.⁵³ The parents—as parties—have a right to present evidence, compel witnesses, and confront witnesses through cross-examination.⁵⁴ Parents also have a right to a written record of the hearing and a written opinion justifying the ruling.⁵⁵ If the ruling is adverse, parents, as parties, can appeal to the state appeal board if the state has an appellate review agency.⁵⁶ The statute also provides that once all administrative hearings have been exhausted, “any party aggrieved” by the ruling or the findings of the decision can appeal to either a state or federal court.⁵⁷

Courts subject due process hearings to a limited standard and scope of review. The IDEA states that a court “shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.”⁵⁸ The First Circuit places emphasis on the word “additional” in the text and interprets the provision to mean that a court must use the administrative record unless the new evidence supplements the record.⁵⁹ The Sixth Circuit, however, allows any type of new evidence to be presented to the court.⁶⁰ Nevertheless, all circuits agree that “a court should [give] ‘due weight’ to the results of the administrative proceedings and not to ‘substitute [its] own notions of sound educational policy for those of the school authorities, whose decision it is reviewing.’”⁶¹ Depending on the circuit, a court may or may not be able to look at the record anew, but it must be deferential to the

49. *Id.* § 612(a)(5)(A).

50. *Id.* § 600(d)(1)(A).

51. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982); Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561 (2003). While the Supreme Court was arguably simply worried about courts not getting involved in pedagogical disputes, in the years following *Rowley* lower courts have specifically held that a school need not provide the best possible education or one created to maximize the student's potential. ALLAN G. OSBORNE, JR., LEGAL ISSUES IN SPECIAL EDUCATION 99 (1996).

52. Individuals with Disabilities Education Act, § 615(h)(1).

53. *Id.* § 615(f). State and federal law require that hearing officers be independent from public education agencies. STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW, *supra* note 4, at 141.

54. Individuals with Disabilities Education Improvement Act, § 615(h)(2).

55. *Id.* § 615(3)–(4).

56. *Id.* § 615(g).

57. *Id.* § 615(h)(2)(A).

58. *Id.* § 615(h)(2)(C).

59. *Town of Burlington v. Dept. of Educ. for Commonwealth of Mass.*, 736 F.2d 773, 790 (1st Cir. 1984).

60. *Metro. Gov't of Nashville v. Cook*, 915 F.2d 232, 234 (6th Cir. 1990).

61. *Heather S. v. Wisconsin*, 125 F.3d 1045, 1052–53 (7th Cir. 1997) (alteration in original).

educational judgment of the hearing officers who are experts in the field.⁶² Additionally, this deference to the hearing officer recognizes the traditional role of the state to control education.⁶³

C. The IDEA's Effectiveness

The IDEA's importance as a statute can be seen by the fact that in the 2001–2002 school year about six and half million children, or 13% of students nationwide, received special education services and, thus, were eligible for the IDEA's protections.⁶⁴ But while the IDEA's purpose of ensuring that all six and one half million children protected by the statute receive an appropriate education is noble, its ability to effect those results has been mediocre. While schools and parents are supposed to work together cooperatively to forge an IEP for a child with a disability, that goal often goes unrealized. A study done by the National Counsel on Disability reported that schools have a poor track record in fulfilling their duty to create IEPs that meet the needs of children with disabilities.⁶⁵ Also, because parental requests for due process hearings are concentrated in certain geographic areas, there is a concern that certain schools are not attempting to work cooperatively with parents to create appropriate IEPs, which means that parents might be getting their first real input about their child's IEP at the due process hearing.⁶⁶ This failure of individual schools to create sufficient IEPs is unsurprising because many state education agencies fail to sufficiently monitor schools to ensure compliance with the IDEA.⁶⁷

State and school noncompliance forces many parents to invoke the IDEA's formal grievance process and ask for either a due process hearing or mediation.⁶⁸ But even in the due process hearing, a child's right to an appropriate IEP is not always adequately protected. Authorities in the educational field depict these hearings as being especially unfair to children whose parents are of poor or moderate means.⁶⁹ Children of modest means are disadvantaged when their parents cannot afford to remove their child from the school being litigated against pending the outcome of the hearing, when their parents cannot afford lawyers, and when arguing their claim because their parents tend to be less familiar with administrative hearings.⁷⁰

The importance of having a vigorous system of judicial review is apparent since states are lax in enforcing school compliance with the IDEA,⁷¹ some schools

62. *Id.* at 1053.

63. *Id.*

64. U.S. GENERAL ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBER OF FORMAL DISPUTES ARE LOW AND STATES ARE USING OTHER STRATEGIES TO RESOLVE DISPUTES 5 (2003), available at www.gao.gov/new.items/d03897.pdf.

65. NATIONAL COUNCIL ON DISABILITY, *supra* note 31, at 18.

66. *Id.* at 22.

67. *Id.*

68. *Id.* But to those worried about frivolous litigation by parents it should be noted that the number of due process hearings actually had decreased in the five years prior to 2001–2002 school year as parents used mediation more often. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 63, at 3, 12.

69. BUDOFF & ORENSTEIN, *supra* note 36, at 91–94.

70. *Id.*

71. See *supra* note 67.

traditionally override parents' concerns about their child's IEP,⁷² and because due process hearings are skewed against poor children.⁷³ Congress itself saw the need for the full panoply of due process rights that comes with getting one's day in court, which is why it granted a civil right of action under the IDEA.⁷⁴ However, unless parents are "parties aggrieved" with their own IDEA cause of action, only the few parents who can afford representation have full access to the protections of the Act.⁷⁵

II. PARENTS ARE "PARTIES AGGRIEVED" UNDER THE IDEA

When courts interpret a statute, they should endeavor to hew closely to the plain meaning of the language.⁷⁶ This seemingly simple mandate is quite often difficult for courts to enact. This mandate is especially hard for a court deciding whether the IDEA grants a parental cause of action because the court must look to scattered passages throughout the IDEA instead of interpreting a particular line or section of the statute.⁷⁷

This Part of the Note will examine and compare the *Collinsgru* and *Maroni* courts' understandings of the text of the IDEA. The Note will examine the First Circuit's *Maroni* opinion because it is the only court that has ruled that the IDEA authorizes parents to proceed pro se, while the *Collinsgru* decision is chosen as an exemplary case of those circuits that do not allow parental pro se representation because the Third Circuit's opinion is careful, well crafted, and thorough. This Note will argue that the IDEA's extensive language proclaiming parents as their child's primary advocates and acknowledging parents' stake in the outcome of the IEP review process clearly mandates that parents are "parties aggrieved" entitled judicial review by the statute.

A. The *Collinsgru* Court on the IDEA's Text

In *Collinsgru*, the Third Circuit held that the IDEA grants parents procedural rights, like the right to be involved in the IEP team, but it does not grant parents substantive rights.⁷⁸ The parents in the case, Martha and Robert Collinsgru, proceeded pro se on behalf of their son. After a hearing in which the district court ruled that the Collinsgrus could not represent their son, the parents sued in federal court. All parties stipulated that the Collinsgrus could not find an attorney to represent them and did not qualify for a court-appointed attorney in forma pauperis.⁷⁹ The Collinsgrus asserted two alternative legal arguments as to why they should be allowed to proceed pro se. First, they argued that the IDEA creates an exception to the common-law doctrine that parents cannot represent their child's claim in federal court.⁸⁰ Second, they argued that

72. NATIONAL COUNCIL ON DISABILITY, *supra* note 31, at 22.

73. BUDOFF & ORENSTEIN, *supra* note 36, at 91-94.

74. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615(i) 118 Stat. 2647, 2723 (2004).

75. See *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 257-58 (1st Cir. 2003).

76. See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

77. *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 233 (3rd Cir. 1998).

78. *Id.*

79. *Id.* at 228.

80. *Id.* at 231-32.

the IDEA gives parents an independent cause of action, in which case they could claim the right to proceed pro se in federal court. The Third Circuit rejected both claims.⁸¹

1. The *Collinsgru* Court Holds that the IDEA Does Not Authorize Parents to Represent Their Child's Claim

The Third Circuit first addressed the issue of whether the IDEA authorizes parents to represent their child's claim in court. Looking to precedent to guide its decision, the *Collinsgru* court examined *Osei-Afriyie v. Medical College of Pennsylvania*—a previous case dealing with parental advocacy. In *Osei-Afriyie*, the Third Circuit vacated a verdict where a father had pursued his child's tort claim pro se by reasoning that the child could pursue the claim when he reached majority.⁸² The *Osei-Afriyie* court gave two policy reasons for its decision: (1) pro se representation places a burden on the court system,⁸³ and (2) the child is more likely to receive adequate representation from an attorney because of the professional's skill and because the profession is regulated.⁸⁴ These policy reasons justified adherence to the common-law rule that a nonlawyer may not prosecute another person's claims.⁸⁵ In *Collinsgru*, because of these policy reasons, and because Congress legislates "against a background of common-law principles," the Third Circuit held that unless there was strong evidence to the contrary, Congress did not intend parents to proceed pro se under the IDEA.⁸⁶

The Third Circuit rejected the argument that the IDEA, as a remedial statute, should be construed liberally to allow parents to represent their child's claims because this common-law canon of statutory interpretation only applies to the remedies a statute gives.⁸⁷ The Third Circuit instead employed another tool of statutory interpretation to show that the IDEA does not overturn the common law rule prohibiting nonlawyer representation. The court invoked "[t]he canon of *expressio unius est exclusio alterius* [which] means that explicit mention of one thing in a statute implies congressional intent to exclude similar things that were not specifically mentioned."⁸⁸ In the IDEA,

81. *Id.* at 232.

82. *Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 883 (3rd Cir. 1991).

83. *Id.*

84. *Id.*

85. *Collinsgru*, 161 F.3d at 230. Here, it should be highlighted that the logical weakness of giving a school a weapon with which to dismiss IDEA claims in the name of protecting the interests of a child with disabilities has been made apparent in the case law. In a recent case, a school district tried to get an appellate court to vacate a verdict in favor of a child because the parents were allowed to proceed pro se. The Second Circuit, which rejected pro se representation in *Wenger*, and still does, declined to overturn the verdict favoring the child without reversing *Wenger*. *Murphy v. Arlington Sch. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002). So, in the Second Circuit, precedent seems hold that a parent cannot proceed pro se, but if the district court mistakenly does not dismiss the parent's case for proceeding pro se and the parent wins, then that is fine. This holding creates the incentive on the part of parents to sneak one past judges; it also creates an incentive on the part of judges to not remember to dismiss a pro se IDEA action if a plaintiff seems sympathetic or to remember if the plaintiff is less endearing.

86. *Collinsgru*, 161 F.3d at 231.

87. *Id.*

88. *Id.* at 232.

Congress explicitly states that parents can advocate for their child's claim in due process hearings, but failed to do the same in the section regarding judicial review;⁸⁹ so Congress must have only authorized parents to represent their child's claims in due process hearings.

2. The *Collinsgru* Court Holds Parents Do Not Have a Cause of Action Under the IDEA

Having concluded that parents could not represent their child's claims, the Third Circuit examined whether the IDEA granted parents their own cause of action. The IDEA states that "any parties aggrieved" by the administrative ruling can "bring a civil action in federal court."⁹⁰ The Third Circuit conceded that the IDEA "clearly grants parents specific procedural rights, which they may enforce in administrative proceedings, as well as in federal court."⁹¹ In the Third Circuit, parents are "parties aggrieved" for IDEA procedural claims, when, for example, a school district does not give a parent notice of her rights under the IDEA.⁹² Therefore, the main issue in the *Collinsgru* court's opinion is whether parents count as "aggrieved parties" on substantive IDEA claims or if only the child denied services counts. The Third Circuit analogized that whether parents have a cause of action under the IDEA is similar to a plaintiff claiming that a statute creates a private cause of action when there is no explicit language in the statute to that effect.⁹³ When creating a new cause of action not explicitly mentioned in the text of the statute, courts require strong and clear evidence.⁹⁴

The Third Circuit rejected the statutory sections that the *Collinsgrus* relied upon to support their claim that the IDEA creates joint rights in parents and children. First, the court reported that the *Collinsgrus* relied on an old version of § 1415 of the IDEA, which provided attorneys' fees to "parents or guardian of a handicapped child or youth who is the prevailing party."⁹⁵ The court rejected this passage as evidence that the IDEA currently creates parental rights by noting that in 1997 the statute was changed "to the parents of a child with a disability who is a prevailing party."⁹⁶ This new language indicates for the Third Circuit that the child is the prevailing party and, therefore, the aggrieved party who can bring suit. Next, the court rejected the attorneys' fee section of the IDEA as evidence that parents are parties who can be aggrieved by a due process hearing outcome. The text of the attorneys' fee section of the IDEA "allows for the award of attorney's fees 'to the parent or guardian who is the prevailing party if he was substantially justified in rejecting [any] settlement offer.'"⁹⁷ While the grammatical structure of this passage indicates that the parents are the prevailing party, for the Third Circuit this passage could simply be referring to the

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 234 (quoting 20 U.S.C. § 1415(e)(4)(B) (1988)).

96. *Id.* (quoting 20 U.S.C. § 1415(i)(3)(B) (1997)).

97. *Id.* (quoting 20 U.S.C. § 1415(i)(3)(E) (1997)).

procedural cases where the court acknowledges that parents have standing to pursue judicial review.⁹⁸

For the Third Circuit, the IDEA's language is ambiguous about whether parents are "parties aggrieved."⁹⁹ Even the passages in *Collinsgru* brought to the fore can be read as granting or addressing only parents' procedural rights. So the clear evidence the Third Circuit required to find a parental cause of action under the IDEA is not present.

B. The First Circuit Found That the Plain Language of the IDEA Creates a Parental Cause of Action

As in *Collinsgru*, the parents in the *Maroni* case argued that the IDEA authorizes them to represent their child's claim and that parents have their own cause of action under the Act. Because the First Circuit held that parents had their own cause of action, it did not have to address the representation argument.¹⁰⁰ Nevertheless, in dicta the First Circuit suggested that the IDEA does overrule the common-law rule that parents cannot represent their children's claims.¹⁰¹

1. The First Circuit Held that Parents Are "Parties Aggrieved"

The First Circuit began its analysis of whether the IDEA grants a parental cause of action by noting that the IDEA grants any "party aggrieved by the findings and decision" made in a due process hearing(s) a "right to bring a civil action."¹⁰² The court reasoned that parents are parties to the due process hearings because the IDEA allows them to transfer the ability to ask for a due process hearing to their child once the child reaches majority.¹⁰³ Having decided that parents are parties to due process hearings, the court reasoned that the plain language of the IDEA permits parents to sue if they are aggrieved by the outcome of the hearing.¹⁰⁴ The First Circuit further justified its holding by noting that the courts have determined that parents are "parties aggrieved" under an identically worded section that permits parents to appeal an adverse decision of the local education agency to the state education agency.¹⁰⁵ Because the same term should be given the same meaning within one statute, the court felt that it was further justified in holding that parents should be "parties aggrieved" for the purposes of judicial review.¹⁰⁶ To do otherwise would unnecessarily muddy the meaning of terms in the Act.

The argument against parental pro se representation that the First Circuit found most persuasive is that Congress' inclusion of a fee-shifting provision suggests that Congress wants to bar pro se representation of IDEA claims.¹⁰⁷ But the *Maroni* court thought that this use of Congress' inclusion of a fee-shifting provision in the IDEA

98. *Id.*

99. *Id.* at 235.

100. *See Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 249 (1st Cir. 2003).

101. *Id.*

102. *Id.* at 251 (quoting 20 U.S.C. § 1415(i)(2)(A) (2000)).

103. *Id.*

104. *Id.*

105. *Id.* at 251–52.

106. *Id.* at 252.

107. *Id.*

"would lead to perverse results."¹⁰⁸ While Congress wanted to encourage attorney representation in IDEA cases, this was done to remove an obstacle to special education advocacy. The First Circuit stated that it would be paradoxical for Congress, after removing one bar to IDEA suits, to raise another.¹⁰⁹ The court also noted that in other civil rights statutes a fee-shifting provision has not been read to ban pro se representation.¹¹⁰

The First Circuit directly rejected the Third Circuit's view that courts should permit parents to proceed pro se to enforce procedural violations of the IDEA but deny parents the right to proceed pro se to enforce substantive claims. The *Maroni* court argued that such a division would cause needless litigation to resolve whether a claim was substantive or procedural because it is not always clear to which category a claim belongs.¹¹¹ Therefore, as a means to reduce complexity and costs in IDEA litigation, courts should not unnecessarily attempt to distinguish between procedural and substantive claims.

To conclude its disagreement with the *Collinsgru* decision, the First Circuit faulted that decision for erroneously applying statutory rules of construction. Statutory rules of construction, such as *expressio unius est exclusio alterius*, should be invoked only when they make sense in light of the context of the whole statute.¹¹² According to the First Circuit, the doctrine of *expressio unius est exclusio alterius* was not applicable to the civil cause of action section of the IDEA because Congress "needed to include several categories of plaintiffs and so used a collective term."¹¹³ The First Circuit also concluded that the *Collinsgru* opinion relied on another false principle of statutory interpretation when deciding that parents lack a cause of action. The *Collinsgru* court wrongly treated a parental cause of action like a request for an implied right of action.¹¹⁴ Such reasoning misunderstood the claim that a parental cause of action existed because the question posed was whether parents were "parties aggrieved" included amongst those granted an explicit cause of action. The question of whether parents are "parties aggrieved" under the IDEA requires that courts engage only in normal statutory interpretation with no extra burdens placed on the plaintiffs.¹¹⁵

2. The Structure of the IDEA Calls for a Parental Cause of Action

To supplement its language-centered statutory analysis, the First Circuit also concluded that the procedural structure created by the IDEA supports a parental right to sue. The IDEA requires parental involvement in the "centerpiece of the statute: the

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* But here it should be noted that this litigation worry might be exaggerated as most district courts that have used *Collinsgru* or *Wenger* as precedent do so to exclude all pro se claims. Such courts do so by simply citing to *Collinsgru* and *Wenger* as rejecting parent representation without noting the cases' caveat about procedural claims. See e.g., *Hammer v. U.S. Dep't of Educ.*, 85 F. Supp. 2d 191 (E.D.N.Y. 2000).

112. *Maroni*, 346 F.3d at 252.

113. *Id.* (stating the collective term being "any parties aggrieved").

114. *Id.* at 255.

115. *Id.*

individualized education program."¹¹⁶ To force parental involvement, the IDEA names parents as part of the IEP team, demands revision of IEPs to address parental concerns, and requires that parents be involved in any decision regarding the educational placement of their child.¹¹⁷ The IDEA also requires schools to obtain parental consent for education evaluations and to ensure that parents have access to any information that will be used to make educational decisions about the child.¹¹⁸

The IDEA's procedural processes were created so that the parent becomes its child's advocate. Until a parent asks for a due process review of the IEP, attorney participation is actually discouraged.¹¹⁹ The statute allows parents to proceed pro se in due process hearings and authorizes the funding of training centers that will improve parents' advocacy skills.¹²⁰ According to the First Circuit, it would be odd for Congress to encourage parents to be their children's advocates "at every other stage" of the IDEA process but not in federal courts.¹²¹

C. Expanding Upon the First Circuit's Statutory Analysis

1. The IDEA Can Be Read to Authorize Parents to Represent Their Child's Claims

While the First Circuit concluded that *Collinsgru* incorrectly invoked the *expressio* doctrine, it fails to explain the full irony of the Third Circuit's use of that doctrine. The Supreme Court has made it clear that canons of statutory interpretation "ha[ve] no application in the absence of statutory ambiguity."¹²² The Supreme Court states that "[a]ny other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution."¹²³ The First Circuit demonstrated the plain language of the IDEA allows any "party aggrieved" to appeal a due process hearing to a federal court and that the IDEA's language makes it clear that parents are parties in a due process hearing. So, the only ambiguity present in the IDEA's text as to whether parents are "parties aggrieved" exists because the *Collinsgru* court invoked the *expressio* doctrine. That means the Third Circuit ignored the Supreme Court's mandate to not usurp Congress' legislative powers by only using statutory rules of construction when there is ambiguity.

Also, in IDEA cases, unlike in common law tort cases like *Osei-Afriyie*, Congress created a cause of action in the context of a statute that indicates throughout that parents should be trusted as their child's advocate. Therefore, unlike a common-law claim where Congress has not spoken, in IDEA cases there is evidence for legislative intent for parental representation.¹²⁴ Additionally, one can distinguish parental

116. *Id.* at 256.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 257.

122. *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 134–35 (2002) (citing *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001)).

123. *Id.* at 135.

124. Brief for Appellants at 19, *Collinsgru v. Palmyra Sch. Dist.*, 161 F.3d 225 (3rd Cir. 1998) (No. 96-5807).

representation in IDEA cases from tort cases like *Osei-Afriyie*. Unlike in a tort case, where monetary compensation is being sought, in an IDEA case a child's remedy—a good education—will be lost if she has to wait until majority to pursue it.¹²⁵ It would seem strange if Congress gave a cause of action to children, but only allowed children of poor and moderate means to pursue it after their remedy had been lost. Finally, *Osei-Afriyie* is inapplicable if parents are, alternatively, and as the *Maroni* court accepted, pursuing their own case.¹²⁶

2. Parents Have Their Own Cause of Action Under the IDEA

In 1997, Congress clarified the importance of parental advocacy by adding statutory provisions assuring parental involvement.¹²⁷ It was in the 1997 amendments that Congress made it clear that parents—not children—had a right to a due process hearing by adding a provision that transfers a parent's right to a due process hearing to their child upon majority.¹²⁸ Congress also added a provision that expressly allowed for parental reimbursement of private school tuition, which shows that Congress was interested in the fiscal harm done to parents by IDEA non-compliance.¹²⁹

As the First Circuit noted in *Maroni*, the text of the IDEA grants parents the right to be participants in the due process hearing. When the IDEA outlines what participants in the due process hearing, like parents, can do, the statute refers to them as parties.¹³⁰ Parents are parties when cross-examining witnesses, bringing experts, and pleading their child's case.¹³¹ Because the text of the IDEA describes parents as parties in all their numerous activities in the due process hearing, it seems contrary to the plain meaning of the statute for a court to not describe them as parties for the sake of determining who can appeal the outcome of the hearing to a federal court.¹³²

Arguing that parents have substantive rights under the IDEA is not equivalent to arguing that parents have a right to be taught in schools. Instead, it is an argument that the procedural rights given to parents are inextricably intertwined with their child's substantive right to a "free appropriate public education."¹³³ As the *Maroni* opinion observed¹³⁴ and the 2004 amendments to the IDEA dictate,¹³⁵ courts can only find a due process hearing faulty for procedural reasons if the procedural faults negatively impact a child's access to appropriate educational services. Thus, parents would have to advocate that their child's substantive right to appropriate educational services was

125. *Id.*

126. As previously noted, a person has a statutory right to pursue their own cause of action pro se in federal court. 28 U.S.C. § 1654 (2000).

127. NATIONAL COUNCIL ON DISABILITY, *supra* note 30, at 34–35.

128. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615(m) I 18 Stat. 2647, 2716 (2004).

129. *Id.* § 612(a)(10)(B)(i).

130. *Id.* § 615(h).

131. *Id.* § 615(h).

132. Brief of Amicus Curiae Disabilities Rights Center, Inc. and The National Association of Protection and Advocacy Systems at 3–4, *Maroni v. Pemi-Baker Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003)(Nos. 03-1407, 03-1700).

133. *Maroni*, 346 F.3d at 247.

134. *Id.* at 255.

135. Individuals with Disabilities Education Improvement Act, § 615(g)(3)(E)(ii).

denied even if the parent were only entitled to bring procedural cases pro se. Such a result, where parents have to successfully argue that their child is not receiving an appropriate IEP but could not themselves seek remedy for that harm, would seem counter-intuitive.

Despite what the Third Circuit claims, there is no clear divide between a parent's procedural rights and a child's substantive right to a "free appropriate public education;" for when a parent makes a procedural mistake in a due process hearing, like not giving the school notice of the parent's reasons for wanting the hearing, the child's substantive rights suffer.¹³⁶ In other words, parents must successfully use the procedural rights that the IDEA grants them to have their child's substantive rights vindicated. Congress must have accepted that parents' poor exercise of their procedural rights, rights which are the heart of the IDEA, might negatively impact their child's substantive rights. Still, Congress trusted parents to be their children's best advocates and risked such impairment. The Third Circuit cites to *Board of Education v. Rowley* to assert a distinction in the IDEA between procedural and substantive rights,¹³⁷ but *Rowley* actually helps further the argument that IDEA's procedural rights define what the statute considers a "free appropriate public education." In *Rowley*, the Supreme Court stated that a "free appropriate public education" is a hazy substantive right; yet the IDEA's procedural rights are quite clear. Therefore, the Supreme Court concluded that Congress must have trusted the IDEA's procedures to determine what an appropriate education is for a given child.¹³⁸

III. EACHA AND THE IDEA WERE ENACTED AS A RESPONSE TO PARENTS' COMPULSORY EDUCATION OBLIGATIONS AND COSTS

Section A of this Part explains the *Collinsgru* court's reading of the legislative record, which it turned to because the court found the statutory language of the IDEA to be ambiguous. Section B gives the truncated legislative history analysis of the *Maroni* court, which is brief because the court found no reason to examine the legislative history as in its view the language of the Act clearly gave parents their own cause of action. Section C provides a reading of the legislative history that gives force to the argument that Congress intended the IDEA to protect the rights of parents as well as children with disabilities. This indicates that parents can be "parties aggrieved" under the Act.

A. *The Collinsgru Court Argues that the Legislative Record is Ambiguous*

Because the language of the IDEA is unclear in the *Collinsgru* court's estimate, it felt free to turn to the legislative history; however, the court found that the legislative history was also ambiguous.¹³⁹ The Third Circuit concedes that a Senate Report filed when Congress amended the IDEA in 1985 states, "[a]lthough the law has worked very well in most cases, Congress knew that there would be instances where *parents would*

136. *Maroni*, 346 F.3d at 256.

137. *Collinsgru v. Palmyra Sch. Dist.*, 161 F.3d 225, 234-235 (3rd Cir. 1998) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982)).

138. *Rowley*, 458 U.S. 190.

139. *Collinsgru*, 161 F.3d at 235.

be denied the free appropriate public education to which their child was legally entitled."¹⁴⁰ The court also acknowledges that a "Senate Report stated that 'parents of [learning disabled] children have the right to expect that individually designed instruction to meet their children's specific needs is available.'"¹⁴¹ But as a counter to these passages that suggest the IDEA is meant to protect parental rights, the Third Circuit produced a piece of legislative history noting that it is a state's duty to "develop procedures for appointing the parent or another individual to represent the interests of the child."¹⁴² The *Collinsgru* court also produced a Senate Report stating that EACHA created "an enforceable right to free appropriate public children for all handicapped children."¹⁴³ For the court, these passages suggested that parents in the IDEA process merely represent the interests of their children. The *Collinsgru* court reasoned that the conflict in these passages demonstrates that determining whether the IDEA grants parents a cause of action from the legislative history is impossible because all these passages are simply "snippets plucked from broad discussions" randomly chosen to prove a point.¹⁴⁴

B. Because the Plain Language of the IDEA Supports a Parental Cause of Action, the First Circuit in Maroni Does Not Engage with the Legislative History

The First Circuit only looked briefly at the legislative history because it felt that the plain language of the statute created a parental cause of action. The First Circuit looked at the legislative history only to confirm that its reading of the IDEA did not contradict some clearly displayed congressional intent that only lawyers should be permitted to bring substantive IDEA claims in federal court.¹⁴⁵ Instead, the First Circuit found Congress demonstrating support for parental involvement throughout the entire IDEA enforcement process. The court uncovered a Senate Report that stated EACHA was intended "to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child."¹⁴⁶ Having found only support for its holding allowing pro se representation, the *Maroni* court concluded its cursory legislative history analysis.

C. The Legislative History Shows that the IDEA is Meant to Protect Parents' Rights and that Congress Wants Parents to Be Strong Advocates for Their Children

Because *Maroni* concluded that the plain text of IDEA allowed parents to proceed pro se, the court only briefly touched on the Act's legislative history. Had the First Circuit fully explored the legislative history of the IDEA, it would have found a great

140. *Id.* (quoting 131 CONG. REC. S1979 (daily ed. Feb. 6, 1985) (statement of Sen. Weicker)) (emphasis in original).

141. *Id.* (quoting S. REP. NO. 94-168, at 10 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1434) (alteration in original).

142. *Id.* (quoting S. REP. NO. 105-17, at 22 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 100).

143. *Id.* (quoting 131 CONG. REC. S1979 (1985)).

144. *Id.*

145. *Maroni*, 346 F.3d at 257.

146. *Id.* (quoting *Collinsgru*, 161 F.3d at 237-38 (Roth, J., dissenting) (citing S. REP. NO. 94-168, at 11-12 (1975), reprinted in 1995 U.S.C.C.A.N. 1425, 1435-36)).

deal of evidence that supports the claim that parents are “parties aggrieved” and can bring a civil action. In fact, Congress justified the EACHA by stating that because parents had a legal duty to educate children, it would be unfair to make them pay for their child’s special education.¹⁴⁷ Historically, EACHA was a direct response to two court rulings in the early seventies that held that parents of children with disabilities have a right for their child to receive educational services for free.¹⁴⁸ Courts made these rulings because many public schools excluded children from attendance. While EACHA no longer exists, when Congress changed the name of the statute to the IDEA in 1990, it expressly stated that all the rights and court interpretations of EACHA survive in the new statute.¹⁴⁹ Thus, the EACHA’s focus on providing the parents of children with disabilities access to special education for their child at no cost carries on in the IDEA.

In addition to the nature of the court decisions that prompted Congress to pass EACHA, there is also direct evidence in the legislative record showing that special education bills from the beginning were concerned with the harm done to families as well as with the harm done to children when schools discriminate against student with disabilities. Even the Third Circuit in *Collinsgru* admitted that in enacting EACHA, Congress stated that “parents of [handicapped] children have the right to expect that individually designed instruction to meet their children’s specific needs is available” and that such education should be provided at “no cost to the parents of a handicapped child.”¹⁵⁰ In addition, the legislative history notes that while public schools can place children with disabilities in private educational institutions, “[i]t should be emphasized, however, that in no case should such charges result in cost to the parents or guardian, or the denial or diminution of services to the child.”¹⁵¹ This passage clearly demonstrates that Congress wanted to protect both the fiscal concerns of parents and the educational concerns of children in passing the IDEA.

When the *Collinsgru* court argued that such history is “snippets from board discussions,” the court ignored that the congressional sentiment regarding protecting parents was incorporated into the IDEA’s text. The 1997 parental reimbursement provision, which gave parents the right to a refund if their child needed to go to a private school, is a clear example of this sentiment.¹⁵² And Congress strengthened this

147. See S. REP. NO. 94-168 at 6, 8, 10-11, 41 (1975), reprinted in 1975 U.S.C.C.A.N. at 1430, 1432, 1434-35, 1464.

148. See *Mills v. Bd. Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972). The due process and procedural frame work of the IDEA originated in *Mills* and *PARC*. KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 402 (4th ed. 1998); Jean M. Bond, *Making Up for Lost Time: The Third Circuit’s Use of Remedies for Violations of the Individuals with Disabilities Education Act*, 46 VILL. L. REV. 777, 780 (2001).

149. Stefan R. Hanson, Buckhannon, *Special Education Disputes, and Attorney’s Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 528-29 (2003).

150. *Collinsgru*, 161 F.3d at 235 (quoting S. REP. NO. 94-168 at 10, 32 (1975), reprinted in 1975 U.S.C.C.A.N. at 1434, 1456).

151. S. REP. 94-168 at 32 (1975), reprinted in 1975 U.S.C.C.A.N. at 1456 (alteration from original).

152. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 612(a)(10)(B)(i), 118 Stat. 2647, 2680 (2004).

commitment to parental choice and reimbursement in the 2004 amendments.¹⁵³ Also, the IDEA's text promulgates that EACHA is being continued as the IDEA because EACHA was successful "in ensuring children with disabilities and the families of such children access to a free appropriate public education"¹⁵⁴ Here, the IDEA's text mirrors the legislative history and clearly indicates that the statute exists both to protect the families of children with disabilities and to ensure that children with disabilities receive an appropriate education. Finally, the statutory definition of the IDEA's substantive goal, "free appropriate public education," is defined as special education that has been "provided at public expense, under public supervision and direction and without charge"¹⁵⁵ Given the court cases that drove the creation of EACHA, the part of IDEA's substantive goal which consists of providing free education is clearly a legislative response that compulsory primary and secondary education should never cost parents of children with disabilities more than other parents. When a school denies a child a "free appropriate public education" under the IDEA, the school injures not only the child but the parents' right to have their child educated for free.

Supporting the claim that parents should be able to proceed pro se, members of Congress working on the EACHA endorsed the principle that "parents or legal guardians have available to them the full range of remedies to protect and defend their rights to a free, appropriate education."¹⁵⁶ Even if the IDEA were meant primarily to protect children with disabilities, Congress could have utilized the broad "parties aggrieved" language when granting standing to bring suit in court so that parents would have the full range of means, including pro se representation, available to protect their children's rights.¹⁵⁷ Because Congress meant the IDEA to address parental fiscal concerns, and because Congress meant to give parents the greatest possible access to remedies to gain special education for their children, it is contrary to the legislative intent to not allow parental representation.

IV. THE IDEA'S POLICY GOAL OF ENSURING THAT ALL CHILDREN RECEIVE SPECIAL EDUCATION DEMANDS THAT COURTS ALLOW PARENTAL REPRESENTATION

Section A of this Part explains the *Collinsgru* court's analysis of the policy goals of the IDEA. The *Collinsgru* court believed that the IDEA exists solely to protect children with disabilities and that to protect these children requires preventing their parents from giving passionate but poor legal representation. Section B explains the *Maroni* court's policy analysis of the IDEA. The *Maroni* court asserted that given the prohibitively expensive costs involved in hiring a lawyer to handle special education

153. *Id.* § 612(a)(10)(B)(i).

154. *Id.* § 601(c)(3).

155. *Id.* § 602(9).

156. 131 CONG. REC. S10396-01, (daily ed. July 30, 1985) (statement of Sen. Kennedy, T.) (discussing the Handicapped Children's Protection Act). Another member of Congress stated that "[t]he bill clarifies the intent of Congress that handicapped children and their parents have available to them the full range of remedies necessary to protect and defend both their right to be free from discrimination and their right to a free appropriate public education." 132 CONG. REC. H4841-01 (daily ed. July 24, 1986) (statement of Rep. Williams)

157. See Brief of Amici Curiae The National Association of Protection and Advocacy Systems & The Disabilities Rights Center, Inc. at 17, *Maroni v. Pemi-Baker Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003).

cases and the scarcity of these lawyers, the only way to protect the education rights of children with disabilities is to allow parents to proceed pro se. Section C argues that courts have a self-interest in limiting pro se representation due to the perceived burdens it places on the judicial system and that all members of the legal profession, including judges, have an economic self-interest in limiting any form of lay advocacy.

A. The Collinsgru Court on Parental Representation and the Policy Goals of the IDEA

Even the *Collinsgru* opinion admitted the “hard practical reality that parents are often the only available advocate for a child’s right to an appropriate education.”¹⁵⁸ But the opinion rejected any argument that the IDEA’s policy of parental advocacy makes parents parties to IDEA proceedings that could bring their own claim pro se in federal court.¹⁵⁹ For the *Collinsgru* court, the policy goal of the IDEA is for parents to be their child’s advocate, and that goal is separable from parents having their own cause of action. To support its conclusion that parents are mere facilitators of their children’s rights, the Third Circuit pointed to the provision of the IDEA stating that if a child has no parent, an appointed surrogate can fill the parental advocacy role.¹⁶⁰ Implicit in this is that the legally appointed surrogate would certainly not have the right to be free from the extra educational costs associated with raising a child with disabilities because the surrogate never had a duty to pay such costs. In other words, a parent’s role in the IDEA is purely procedural and, thus, a parent does not have any substantive rights protected by the statute. In the Third Circuit’s view, preventing a parent from proceeding pro se on substantive IDEA claims would not undercut the Act’s policy because the statute never envisioned that parents themselves would be anything more than advocates who advance the enforcement process.

B. The Maroni Court Concludes that the IDEA’s Policy Goals Require Pro Se Representation

In the *Maroni* opinion, the First Circuit concluded that proscribing pro se representation undercuts the IDEA’s substantive goal of providing special education to all children that qualify for services. To support its claim, the First Circuit gave three reasons why a parent of moderate means might not be able to find an attorney in an IDEA case: 1) such cases are so fact intensive that finding an attorney with the time to take the case pro bono is difficult; 2) there is no constitutional right to an attorney in civil cases; 3) as the attorney fee shifting provision only takes effect if the parent wins, it is only a partial incentive.¹⁶¹ The First Circuit also noted that New Hampshire’s Protection and Advocacy (“PA”) unit, which is the primary legal group handling IDEA cases at no charge in the state, could handle only 35 out of 390 requests for legal aid in IDEA cases.¹⁶² And many PA attorneys refuse to take an IDEA case unless they also

158. *Collinsgru*, 126 F.3d at 236.

159. *Id.*

160. *Id.*

161. *Maroni*, 346 F.3d at 257–58.

162. *Id.* at 257 n.9.

represented the parents at the due process hearing.¹⁶³ There is also a shortage of private attorneys who handle IDEA cases, for example: Michigan has eight, Wisconsin has fewer than ten, and Arizona has one.¹⁶⁴ So, even having money and the existence of the IDEA's fee shifting provision are not enough to secure representation.

Additionally, the First Circuit found that interpreting the IDEA so as to deny parents from proceeding pro se would create a problem that Congress most likely would not have intended. The IDEA allows parents to proceed pro se in state or federal court. And some states allow parents to represent their child.¹⁶⁵ So parents could file in state court, a school district could then ask for the case to be removed to federal court, and then when the parents could not find an attorney the case would be remanded back to state court.¹⁶⁶ This logjam would be a waste of judicial time and effort.

To conclude its reasoning for parental representation the *Maroni* court contended that pro se representation allows for a child's claim to at least be heard,¹⁶⁷ even though parents can lack the traits the legal system values: objectivity and rationality.¹⁶⁸ Also, while pro se representation places a burden on the courts because poor advocacy makes courts' adjudication harder, such difficulty can be handled in the same manner as other pro se claims.¹⁶⁹ For the First Circuit, these problems are hurdles the legal system can overcome so that more people can get a hearing for their IDEA claims.

C. The IDEA, Access to the Courts, and the Judicial System's Dislike for Pro Se Representation

1. Parental Representation and Access to Justice for Children of Poor and Moderate Means

While the *Collinsgru* opinion does not explicitly state as much, other courts have read its policy concerns against parents representing their child's IDEA claims as being the same concerns that also girded the court's decision to hold that the IDEA does not create a parental cause of action.¹⁷⁰ These concerns, that the child will not receive competent counsel and that the court system will be overly burdened by poor advocacy, are either false, self-interested, or both. Courts have a strong dislike for pro

163. *Id.*

164. *Id.*

165. For example, New Hampshire allows a person of good character to appear before its courts representing another person. See N.H. REV. STAT. ANN. § 311:1 (Supp. 2004). Since the state also has a statute banning the unauthorized practice of law, courts have interpreted this to mean a person could handle the occasional case, for instance for a family member. *State v. Settle*, 523 A.2d 124 (N.H. 1987). Another example would be Arizona, which lacks a statute banning the unauthorized practice of law. George C. Leef, *Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes*, REGULATION: THE CATO REV. OF BUS. & GOV'T, Winter 1997, available at <http://www.cato.org/pubs/regulation/reg20n1c.html>.

166. *Maroni*, 346 F.3d at 258.

167. *Id.*

168. *Id.*

169. *Id.*

170. See, e.g., *Michael M. ex rel. M.D. & M.A. v. Plymouth Sch. Dist.*, No. Civ. 01-469-M, 2003 WL 1191396, at *1 (D.N.H. Mar. 10, 2003).

se advocates.¹⁷¹ In recent years, due to a flood of pro se representation, courts increasingly make it more difficult for self advocates to have their day in court.¹⁷² This Note argues that courts' worry about parents providing incompetent advocacy for their children with disabilities makes little sense if no alternative representation to parental advocacy exists. The fear of an overly burdened court system due to self-representation is not a completely valid fear because cases involving pro se litigants are often shorter; and even to the extent it is valid, if courts let its fear be a driving policy in statutory interpretation, this would make access to justice class-based.

On a practical level, preventing parents from proceeding pro se in federal court would do little to protect children's rights because the IDEA grants parents an explicit right to proceed pro se in due process hearings. Courts do not review the due process hearings *de novo*. In some circuits, the court must use the evidentiary record produced by the hearing, and parties can only add supplementary facts.¹⁷³ And every court gives deference to the hearing officer's education opinion.¹⁷⁴ So if a parent either does not introduce enough evidence or introduce the right evidence in the due process hearing, the outcome of the trial is almost predetermined. Thus, because parents can proceed pro se at the due process hearing, having a lawyer at the court level can do little to cure parental mistakes.¹⁷⁵ This fact explains why New Hampshire's PA lawyers will not take a case unless they already represented the parent in the due process hearing. Such stacked odds also would make the fee shifting provision less useful in attracting private attorneys, as a lawyer is unlikely to take an IDEA case that she has a small chance of winning.

On a more global level, people of low or moderate means often do not have access to the judicial system.¹⁷⁶ Attorney fees are so extravagant that most of the populace cannot afford an attorney's hourly rates. The ABA has described this as one of the major ethical quandaries facing the legal profession in this generation.¹⁷⁷ For economic reasons, lawyers have a vested interest in retaining a professional monopoly over the

171. See Deborah L. Neveils, *Florida's Vexatious Litigant Law: An End to the Pro Se Litigant's Courtroom Capers*, 25 NOVA L. REV. 343, 347 (2000) (noting that judges get frustrated at the incompetence of pro se litigants).

172. See generally Candice K. Lee, Note, *Access Denied: Limitations on Pro Se Litigants' Access to the Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261 (2003).

173. See *supra* text accompanying notes 58–59.

174. See *supra* text accompanying note 61.

175. Empirical data shows that parents are much less likely than a school to be represented by an attorney at a due process hearing. One study puts the number of parents represented by an attorney at the due process hearing at 44%. Kay H. Seven & Perry A. Zirkel, In the Matter of Arons: *Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 GEO. J. ON POVERTY L. & POL'Y 193, 215 n.187 (2002).

176. AMERICAN BAR ASSOCIATION, CIVIL JUSTICE: AN AGENDA FOR THE 1990S: REPORT OF THE AMERICAN BAR ASSOCIATION NATIONAL CONFERENCE ON ACCESS TO JUSTICE IN THE 1990S 11 (1991); David Fagelson, *Rights and Duties: The Ethical Obligation to Serve the Poor*, 17 LAW & INEQ. 171(1999).

177. HERBERT M. KRITZER, "FIRST THING WE DO LET'S REPLACE ALL THE LAWYERS": A COMPARISON OF LAWYERS AND NONLAWYERS AS ADVOCATES 1 (1995); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

ability to advocate in court.¹⁷⁸ Some authorities argue that lawyers' selfish economic desires partially explain unauthorized practice of law statutes, which ban lay advocacy.¹⁷⁹

Over the years, bar associations have been good at enforcing lawyers' professional monopoly via the courts, which in most states get to decide who appears before them.¹⁸⁰ Interest group analysis of such lobbying makes clear that lawyers' lobbying is more effective on the judiciary than that of legal consumers because the judges themselves are part of the legal profession.¹⁸¹ Judges more naturally empathize with lawyers' complaints about the damage done by the unauthorized practice of law than with consumer complaints about being denied a chance to use the legal system.¹⁸² Also, lawyers have greater access to judges than legal consumers do because judges belong to many of the same professional organizations as lawyers.¹⁸³ Greater access to judges gives lawyers a greater chance to sway the judiciary; some authorities argue that judges and the bar should not even have the ability to decide who can practice law in their courts due to these concerns.¹⁸⁴

This jaundiced view of judicial reluctance to allow lay advocates might explain the faulty reasoning of the *Collinsgru* court, which partly justified its rejection of parental representation out of a stated concern that children should receive the best advocacy possible. Empirical studies show that there simply are not enough lawyers that specialize in education to represent every child with an IDEA claim.¹⁸⁵ The shortage of legal representation means that even parents who can afford to pay a private attorney are facing inflated prices and, perhaps, an utter inability to secure representation. Empirical studies also show that even the presence of a fee shifting provision in a civil rights statute is not enough incentive to garner adequate access to the legal system for people of poor or moderate means.¹⁸⁶ Fee shifting provisions are not enough incentive to get lawyers to take civil rights cases because civil rights claims have low success rates and are time and work intensive.¹⁸⁷ Attorneys, despite their image as ambulance chasers, are actually quite risk adverse when deciding to accept cases that only pay when their client wins.¹⁸⁸ All of these factors are proof that when courts bar pro se representation in IDEA cases they are not normally protecting a child against a cheap

178. AMERICAN BAR ASSOCIATION COMMISSION ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 16-17 (1995) [hereinafter ABA COMMISSION REPORT].

179. Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1814-15 (2001).

180. *Id.* at 1806.

181. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 *GA. L. REV.* 1167, 1188-201 (2003).

182. *See id.*

183. *Id.* at 1201-10.

184. *Id.* at 1246; Rhode, *supra* note 175, at 99.

185. ABA COMMISSION REPORT, *supra* note 176, at 81.

186. *Id.* at 78 n.252.

187. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of Attorney Fees Statute and the Government As Defendant*, 73 *CORNELL L. REV.* 719 (1988).

188. HERBERT M. KRITZER & J. MITCHELL PICKERILL, *CONTINGENT FEE LAWYERS AS GATEKEEPERS IN THE AMERICAN CIVIL JUSTICE SYSTEM* (1996).

or foolish parent, but instead, as even the Third Circuit partially acknowledges, are taking away the child's only advocate.

2. Pro Se Representation and the Exaggerated Burden to the Court System

Courts like good legal representation, such as the kind that lawyers hopefully provide, because it makes their job easier.¹⁸⁹ But the argument that courts are overly burdened by pro se representation is exaggerated and self-interested. First, federal courts have a duty to allow pro se representation.¹⁹⁰ Whether or not parents are representing their own cause of action under the IDEA should be determined independent of its impact on the court's docket, regardless of that impact being for the better or worse. Second, studies have shown that while pro se litigants need more help navigating the legal system, they are less likely to extend litigation via procedural maneuvering, because they have no ability to do so.¹⁹¹ This means that the negative impact of pro se representation on court dockets is not as great as members of the judiciary claim. In fact, an ABA study claims that members of the judiciary have a dislike for pro se litigants that extends far beyond the actual negative impact that pro se claimants have on the efficiency of the court system.¹⁹²

Because legal representation is not a right in civil cases in this country, courts have a duty to be creative in ensuring that access to justice does not become purely a matter of wealth.¹⁹³ In IDEA cases, one way to address lack of access to the legal system¹⁹⁴ is using *in forma pauperis*¹⁹⁵ procedures to grant parents court-appointed attorneys. But reliance on *in forma pauperis* to cure the problem of unrepresented IDEA claimants is problematic. First, in civil matters the decision to appoint an attorney is at the discretion of the court.¹⁹⁶ Additionally, as the *Collinsgru* decision illustrates, many parents who do not qualify fiscally for *in forma pauperis* or for free legal services, such as those participating in the New Hampshire PA program, still cannot afford to retain an attorney.¹⁹⁷ Therefore, even if courts appointed attorneys more frequently, the working poor and middle class would still not have an opportunity for judicial review of their children's IDEA due process hearings. Given that the IDEA was enacted to ensure that all children with disabilities have access to special education, it seems doubtful that Congress intended to create a system whereby the working poor and middle class are excluded. When judges deny pro se representation in IDEA cases,

189. See STEVEN R. COX & MARK DWYER, REPORT ON SELF-HELP LAW: ITS MANY PERSPECTIVES 54 (1987).

190. 28 U.S.C. § 1654 (2000).

191. Many pro se litigants turn in poorly done legal forms and need to ask for assistance often. See COX & DWYER, *supra* note 187, at 50–51.

192. See *id.* at 50.

193. Deborah M. Weissman, *Law As Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 826–28 (2002).

194. See, e.g., *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998).

195. 28 U.S.C. § 1915(e) (2000).

196. *Caruth v. Pickney*, 683 F.2d 1044, 1048 (7th Cir. 1982).

197. ABA COMMISSION REPORT, *supra* note 176, at 79 n.255 (noting that each year the amount of people who cannot afford lawyers but are not eligible for free legal services increases, and estimating that the number is around 100 million).

judges are not just hindering access to the legal system; they are acting contrary to the IDEA's policy, which courts are supposed to be upholding.

CONCLUSION

Courts that interpret the IDEA so as to prohibit parents from proceeding pro se ignore the plain meaning of the statute's text. Because parents are parties when acting in a due process hearing, they do not suddenly cease to become parties when determining whether they can ask for judicial review as "aggrieved parties" under any plain reading of the IDEA. Rulings that deny a parental cause of action, like *Collinsgru*, also ignore the IDEA's legislative history, as Congress enacted EACHA in response to court cases that held that parents cannot be forced to pay for their child's special education.

Finally, because the IDEA is geared toward creating access to special education for all classes, and because parents of poor and moderate means have trouble retaining lawyers, it is contrary to the policy of the IDEA not to allow parents to proceed pro se. That courts' distaste for parental representation might not originate from a concern that children have competent advocacy but rather from self-interested desires—like those that partially explain unauthorized practice of law statutes—bolsters the case for pro se representation. Because the judiciary's distaste could easily stem from economic self-interest of the legal profession and from the judiciary's concern that pro se claimants make their job harder, courts' arguments that denying parental representation benefits the child should not be given much weight. Given the text of the IDEA, the history of the IDEA, and the IDEA's policy, the First Circuit, in *Maroni*, was right to break from all the wrongly decided cases that took place before its ruling and hold that parents can represent their child in federal court.