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PRENATAL V. PARENTAL RIGHTS: WHAT A DIFFERENCE AN "A" MAKES

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On July 13, 1989, Jennifer Johnson was convicted of a felony drug charge by a Florida court which found her guilty of having delivered drugs to a minor—via the umbilical cord.[1] Jennifer Johnson was using drugs at the time of her arrest; she was also pregnant.[2] The court

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1. Florida v. Johnson, No. E89-890-CFA (Seminole County Cir. Ct., 18th Judicial Dist., decided August 25, 1989). Ms. Johnson was charged with delivering an illegal substance, as defined by section 893.03(2)(a)(4) of the Florida Statutes, to a person under the age of eighteen years, contrary to section 893.13(1)(c)(1) of the Florida Statutes, via the umbilical cord. *Id.* *See generally* Sherman, *Keeping Babies Free of Drugs*, Nat'l L.J., Oct. 16, 1989, at 1, col. 4 (detailing facts of Johnson case and other cases involving fetal rights).

2. *See* Sherman, *Keeping Babies Free of Drugs*, Nat'l L.J., Oct. 16, 1989, at 28, col. 2 (Johnson convicted of drug use while pregnant).

found that a child who is born but whose umbilical cord has not been severed is a person within the intent of the statute.[3] The court also found that Ms. Johnson: (a) chose to use cocaine, (b) chose to become pregnant, and (c) chose to allow those pregnancies to come to term.[4] For a crime usually reserved for penalizing drug dealers, Ms. Johnson was sentenced to one year of drug rehabilitation and fourteen years probation.[5]

Similarly, in Texas, at least one woman who allegedly used drugs during pregnancy was charged with prenatal child abuse and neglect.[6] Arrests of pregnant women found to be using drugs[7] continue despite a recent survey of 78 drug treatment programs in New York City that revealed drug-addicted pregnant women presented for drug treatment were refused service by 54 percent of the programs, while 67 percent of programs denied treatment to women on Medicaid.[8] The denial rate increased to 87 percent for pregnant women on Medicaid who were specifically addicted to crack.[9]

The decision in *Florida v. Johnson* flies in the spirit of a previous Supreme Court ruling where addiction was declared to be a medical, not criminal, matter.[10] This thought was reiterated in a later Supreme Court decision that stated: "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and

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3. *See* Record at 366, Florida v. Johnson, No. E89-890-CFA (Seminole County Cir. Ct., 18th Judicial Dist., decided Aug. 25, 1989)(court found child is person after birth but before umbilical cord severed).

4. *See id.* at 366-67 (defendant chose to use cocaine, become pregnant and bring pregnancy to term).

5. *See* Sherman, *Keeping Babies Free of Drugs*, Nat'l L.J., Oct. 16, 1989, at 28, col. 2 (rehabilitation and fourteen years probation mandated for Johnson).

6. Texas v. Rodden, No. 0373625R (Criminal Dist. Ct. of Tarrant County, 1st Criminal District, dismissed July 14, 1989). In this case, the mother was arrested for child abuse after giving birth to a baby apparently addicted to narcotics. *Id.* The indictment alleged the mother had caused serious bodily injury, as well as serious mental and physical deficiencies, by her actions during the child's gestation period. *Id.*

7. *See* Gallagher, *Fetus As Patient*, in REPRODUCTIVE LAWS FOR THE 1990'S 185, 204 (S. Cohen & N. Taub ed. 1989)(detailing facts of *Stewart* case, which involved California woman who used drugs while pregnant); *see also* Sherman, *Keeping Babies Free of Drugs*, Nat'l L.J., Oct. 16, 1989, at 1, col. 4 (at least ten cases in 1989 of women arrested for drug use in pregnancy). *See generally* Bonavoglia, *The Ordeal of Pamela Rae Stewart,* Ms., July/Aug. 1987, at 92, 93-203 (in-depth study of Stewart case). For a discussion of the *Stewart* case, see *infra* pp. 312-13.

8. Chavkin, *Help, Don't Jail, Addicted Mothers*, N.Y. Times, July 18, 1989, at 21, col. 2.

9. *Id.*

10. *See* Linder v. United States, 268 U.S. 5, 18 (1925)(addicts diseased and require medical treatment).

sick people to be punished for being sick."[11]

I. INTRODUCTION

In the wake of the tremendous social and political intensity surrounding the abortion issue, a legal interest in recognizing "fetal rights" is emerging in media reports and ethical journals.[12] Traditional tort and criminal case law that addressed fetal injury treated women and their unborn as having common interests while also seeking to provide remedies for injuries caused by some other third party or entity.[13] A newer phenomenon is now emerging and seeks to blindly apply these principles as "fetal rights" to be pitted against women without adequately addressing or balancing their respective rights and interests.[14]

Advancing technology and an increased capacity by the medical profession to identify prenatal conditions, treat prenatal disorders, and prevent certain birth defects[15] have presented the courts with human-life issues far more complex than previously encountered. Such conflicts surrounding in-vitro fertilization or viability at 26 weeks gestational age were not a reality until recently and were, therefore, not addressed by the courts. Increasingly, governmental re-

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11. Robinson v. California, 370 U.S. 660, 678 (1962)(Douglas, J., concurring)(statute criminalizing addict status violates eighth amendment), *reh'g denied*, 371 U.S. 905.

12. *E.g.*, Gallagher, *supra* note 7, at 185-88; Comment, *Court-Ordered Cesarean Sections: A Judicial Standard For Resolving the Conflict Between Fetal and Maternal Rights*, 3 J. LEGAL MED. 211, 213 (1989); Note, *Developing Maternal Liability Standards for Prenatal Injury*, 61 ST. JOHN'S L. REV. 592, 593 (1987).

13. Gallagher, *supra* note 7, at 185-88. The United States Supreme Court in *Roe v. Wade* stated, "[T]he law has been reluctant to endorse any theory that life, as we recognize it, begins before birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth." 410 U.S. 113, 161 (1973).

14. *See In re* A.C., 533 A.2d 611, 612-13 (D.C. 1987)(hospital permitted to perform cesarean on critically ill woman, who subsequently died, as did the baby), *vacated*, 539 A.2d 203 (D.C. 1988); *see also* Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457, 458-60 (Ga. 1981)(woman who did not seek prenatal care ordered to submit to cesarean section).

15. Robertson, *The Right to Procreate and In Utero Fetal Therapy*, 3 J. LEGAL MED. 333, 342-43 (1982) [hereinafter Robertson, *Right to Procreate*] (medical science now able to detect, prevent and treat neonatal defects); *see also* Powledge, *From Experimental Procedure to Accepted Practice*, HASTINGS CENTER REP., Feb. 1976, at 6, 7 (amniocentesis now an accepted test); Waltz & Thigpen, *Genetic Screening and Counseling: The Legal and Ethical Issues*, 68 NW. U.L. REV. 696, 736-41 (1973)(genetic screening and amniocentesis have moral, medical malpractice consequences). *See generally* Wertz, *What Birth Has Done for Doctors: A Historical View*, 8 WOMEN & HEALTH 7 (1983)(obstetric practice led to development of medical technology and transformed medical profession).

straints have been placed on pregnant women pertaining to their physical activities, diets, and lifestyles.[16] A more intrusive form of privacy invasion has subsequently emerged whereby court-ordered cesarean sections of pregnant women are being increasingly sought by the courts when the fetus is judged to be medically at risk.[17]

The medical community understandably is searching for legal guidance so that it may deal with the complex clinical problems encountered when the patient and the fetus she is carrying are perceived to have opposing interests.[18] There seems to be no consensus within the medical community today as to how physicians should react when fetal interests and maternal rights conflict.[19]

Statutory changes in our laws also have chipped away at the rights of pregnant women. A clear example of this is a 1984 Illinois law that excludes pregnant women from the protection of "living will" statutes.[20] Women also are losing ground in the workplace. It is estimated that 100,000 jobs have been closed to women due to a claim of "reproductive hazards."[21] Twenty million more jobs may be closed to women of child-bearing age because of such "fetal protection" poli-

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16. *See* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 443-50 (1983) [hereinafter Robertson, *Procreative Liberty & Control of Pregnancy*] (detailing cases in which courts have held women liable for prenatal actions).

17. *See A.C.*, 533 A. 2d at 612-13 (hospital permitted to perform cesarean on terminally ill woman who was 26 weeks pregnant); *see also Jefferson*, 274 S.E.2d at 458-60 (cesarean ordered for woman who never sought prenatal care).

18. *See* Koch, *Disagreement Over Treating Gravida Against Her Wishes*, 20 OB. GYN. NEWS 1, 20 (May 1985)(physicians disagree about performing cesareans against women's wills).

19. *Id.* The American College of Obstetrics and Gynecology, in response to increasing concern over court-ordered medical interventions during pregnancy and delivery, recently told physicians that "resort to court order was almost never justified." Gustaitis, *Court-Ordered Cesareans Could Lead to Doctors' Liability*, L.A. Daily J., Oct. 19, 1987, at 4, col. 1. Also instructive is the preface to Williams Textbook of Obstetrics, which remarks: "Quality of life for the mother and her infant is our most important concern. Happily, we live and work in an era in which the fetus is established as our second patient with many rights and privileges comparable to those previously achieved only after birth." J. PRITCHARD, P. MACDONALD & N. GANT, WILLIAMS OBSTETRICS xi (1985).

20. ILL. ANN. STAT. ch. 110 1/2, para. 703(c) (Smith-Hurd 1984)(pregnant woman's living will ineffective if physician believes fetus could develop to point of viability if mother's death delayed).

21. Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 MICH. L. REV. 1379, 1462 (1983). Toxic chemicals in the workplace may endanger the fetus during gestation. *Id.* at 1461.

cies.[22] Despite a growing awareness of the existence of similar job-related reproductive hazards to men, there has not been corresponding interest to limit their exposure to job-related hazards nor punish them for risky reproductive behavior.[23]

The fundamental rights of women guaranteed by our constitution have thus been challenged to the core. This article will first identify and analyze the presently established legal interest of the state as to the potentiality of life. Secondly, the constitutional rights of the pregnant woman will be presented and discussed. This article will propose that the government's interest in protecting potential life, while legitimate, is not great enough to override the long-established fundamental right of women to privacy and self-determination. In support of the proposal, this article will identify less drastic policy measures that achieve the state's objective of promoting healthful life for the living as well as the unborn.

II. STATE'S INTEREST IN POTENTIAL LIFE

A. *The Evolution of Fetal Rights*

Early common law denied any recovery for injuries to a fetus by reasoning there could be no duty owed to a person not in existence at the time of the negligent action.[24] It was not until 1946 when the courts acknowledged a common law right to recover damages for in-

22. Beeker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1220 (1986).

23. *See* Comment, *Birth Defects Caused by Parental Exposure to Workplace Hazards*, 12 U. MICH. J. L. REF. 237, 237 (1979)(employers respond to hazards in workplace by excluding women, but not men). Women also may be subject to health hazards due to exposure to common habits, such as cigarette smoking. *See* Choney, *Smoking: A Marital Minefield*, San Diego Union, Feb. 1, 1987, at D-1, col. 2 (non-smoker's risk of lung cancer increased by living with cigarette smokers and passively inhaling fumes). A Danish study also reveals that men who smoke during their nonsmoking wives' pregnancies put the fetus at risk of being born at a low birth weight. Choney, *The (Contradictory) Facts on Secondhand Smoke*, San Diego Union, Feb. 1, 1987, at D-1.

24. *See* Drobner v. Peters, 133 N.E. 567, 568 (N.Y. 1921)(child in womb had no separate existence at time of negligent act); *see also* Allaire v. St. Luke's Hosp., 56 N.E. 638, 640 (Ill. 1900)(unborn infant may not bring suit for injuries); Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884)(child born prematurely because of miscarriage caused by negligence by defendant not person and could not recover). *See generally* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 367 (5th ed. 1984) [hereinafter PROSSER & KEETON] (discusses infliction of harm on infant through mother's body).

jury to a viable fetus.[25] Recovery for damages was later extended to cover a non-viable fetus injured *in utero*.[26]

While the courts have been slow to extend tort liability as against third persons for prenatal injury to fetuses, there remains a strong reluctance on the part of the Supreme Court to accord the fetus rights apart from those of its mother.[27] This reluctance, however, has been eroding. Recently, a court of appeals held that liability for negligently caused injuries to a fetus was not limited to third parties, and that the mother could be sued for causing permanent discoloration of her child's teeth caused by a drug she had taken during her pregnancy.[28] Prenatal injury actions have thus appeared, allowing recovery for a child who incurred damages *in utero* from injuries caused by a third party's negligent conduct.[29] However, the courts are divided on wrongful death actions for stillborn fetuses.[30]

The courts have enhanced the fetus' status by affording it increased rights in recent years. A leading fetal rights advocate has theorized that the fetus' status is a sort of "contingent legal personhood,"[31] and it is the "intent to go to term rather than the stage of fetal development that is determinative."[32] This model, if adopted, would have the effect of subjecting the mother to retroactive criminal as well as civil

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25. Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946).

26. Sylvia v. Gobeille, 220 A.2d 222, 224 (R.I. 1966).

27. *See* Roe v. Wade, 410 U.S. 113, 156-59 (1973)(fetus not person and thus not accorded citizenship rights).

28. Grodin v. Grodin, 301 N.W.2d 869, 871 (Mich. Ct. App. 1981). In *Grodin*, the mother continued taking tetracycline until she was almost eight months pregnant, which caused her son to later have brown and discolored teeth. *Id.* at 869.

29. *See* Sylvia v. Gobeille, 220 A.2d 222, 223 (R.I. 1966)(court allows negligence action for prenatal injuries); *see also* Sinkler v. Kneale, 164 A.2d 93, 96 (Penn. 1960)(court allows suit for prenatal injuries sustained by infant); Smith v. Brennan, 147 A.2d 497, 504-05 (N.J. 1960)(suit for prenatal injuries incurred when mother in auto accident allowed by court). *See generally* PROSSER & KEETON, *supra* note 24, at § 55 (detailing infant's ability to sue for prenatally inflicted injuries).

30. *See* Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639, 642-44 nn.25-27 (1980)(courts conflict over whether stillborn fetus entitled to wrongful death recovery). *See generally* PROSSER & KEETON, *supra* note 24, at § 55 (reporting courts' disagreement over right of recovery for stillborn fetuses). By 1980, twenty-four states allowed stillborn fetuses to recover for wrongful death, thirteen states disallowed recovery and an equal number had not considered the issue. Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639, 644-45 nn.25-27 (1980).

31. *See* Robertson, *Procreative Liberty and Control of Pregnancy*, *supra* note 16, at 437-38 (once woman allows fetus to remain *in utero* she has legal obligations toward it).

32. Robertson & Shulman, *Pregnancy and Prenatal Harm to Offspring: The Case of Mothers with PKU*, HASTINGS CENTER REP., Aug./Sept. 1987, at 23-24.

liability for damaging acts or omissions before the child's birth.[33] The great weakness in this concept is that it presupposes that the pregnant woman "decided" to carry her fetus to term.

The idea that women "decide" whether or not to undergo an abortion or carry the fetus to term deserves consideration. There currently exists in the United States a recognized lack of available or accessible medical services for woman requiring obstetrical care, especially for drug-addicted pregnant women.[34] This is especially true in the rural areas in our country.[35] Whether the reasons for such lack of services are the inordinately high incidence of medical malpractice suits against obstetricians or the burdensome rate of insurance premiums family practitioners must pay to perform such services, physicians are opting out of obstetrical care, leaving more women without access to prenatal care and education. Health care unaffordability is a reality in light of the 37 million uninsured in this country, 26 percent of whom are women and children.[36] It follows, then, that some women are getting pregnant and others are carrying to term, not by a conscious choice process, but rather as a consequence of circumstances.

Concerns over discrimination emerge whenever courts begin to single out a pregnant woman's actions solely because it is easier to establish causation. In the majority of cases, however, causation will always be difficult, if not impossible, to establish because of the number of uncontrolled variables.[37] Since it is easier to make a case against the pregnant woman, it is foreseeable that women will unjustly bear the greater number of prenatal injury suits rather than other third parties who are liable for negligence.

A recent study bears witness to these concerns regarding discrimination. After the state of Florida in 1987 required doctors to report women who abused drugs during their pregnancies to health authori-

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33. Robertson, *Right to Procreate, supra* note 15, at 350 n.82.

34. Chavkin, *Help, Don't Jail, Addicted mothers*, N.Y. Times, July 18, 1989, at 21, col. 2.

35. *Id.*

36. *See Forgotten Patients*, NEWSWEEK, Aug. 22, 1988, at 52-53 (government reports that 37 million Americans are without health insurance and 26 percent are women and children).

37. Comment, *A New Crime, Fetal Neglect: State Intervention to Protect the Unborn — Protection at What Cost?*, 24 CAL. W.L. REV. 161, 172 (1988)(numerous prenatal decisions that must be made by pregnant woman cloud ability to prove that woman intentionally or recklessly harmed fetus).

ties,[38] the National Association for Perinatal Addiction Research and Education (NAPARE) examined how physicians complied with the law during a six-month period.[39] The study revealed that, while black women were slightly less likely than white women to abuse drugs or alcohol while pregnant, doctors reported almost twice as many black women as white to the state health department for drug abuse.[40] In commenting on the study, Ira Chasnoff, NAPARE president, stated that drug abuse is "one of the most frequently missed diagnoses" by doctors who treat pregnant women.[41] Chasnoff also observed that doctors are less likely to suspect white, middle-class women of abusing drugs and, therefore, are failing to detect the signs of abuse among members of this group.[42] The NAPARE study graphically supports the conclusion that much can and should be done in terms of educating our physicians, as well as the patients they serve. Consequently, we must make the policy choice of supporting education, rather than resort to the coercive measures some espouse. Viable alternatives to curtailing prenatal abuse do exist.

B. *Fetal Injury: The Causes*

Fetal harm or injury may occur in a variety of ways, some of which the pregnant woman may not have knowledge of or direct control over. Iatrogenic, or "physician caused," factors have been dealt with extensively in tort law in the context of "negligence" or "third party injury" cases.[43] Environmental hazards are another source of prena-

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38. *See* FLA. STAT. ANN. § 415.503 (West Supp. 1989)(statute redefines injury to child as including newborn's dependency on controlled substances). Florida allows the appointment of a "guardian advocate" on behalf of drug-dependent newborns. *Id.* § 415.503(4). Numerous statutes were enacted that outline the procedures for appointing guardian advocates, their powers, duties and how they may be reviewed and removed *Id.* § 415.5082-.5089.

39. *Study Finds Race Bias in Diagnosis of Drug Abuse by Pregnant Women*, Austin American-Statesman, Sept. 28, 1989, at E7, col. 1.

40. *Id.*

41. *Id.* at col. 2-3.

42. *Id.* at col. 2.

43. *See, e.g.*, Bergstressen v. Mitchell, 577 F.2d 22, 26 (8th Cir. 1978)(physician liable for inflicting prenatal injuries while operating on pregnant woman); Renslow v. Mennonite Hosp., 367 N.Ed.2d 1250, 1256 (Ill. 1977)(child could sue for prenatal injuries suffered as a result of negligent blood transfusion on mother); Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975)(physician liable when baby born impaired because of failure to warn mother of risks of contracting rubella). *See generally* STEADMAN'S MEDICAL DICTIONARY 688 (W.H.L. Dornette 5th ed. 1982)(defining iatrogenic as event caused by physician).

tal injury.[44] A more recent type of injury, that being caused parentally, has emerged with, arguably, the more direct harm being a function of the actions or conditions of the pregnant woman.[45] The manner in which the courts deal with those persons or factors that have the capability to harm a fetus has differed without regard to the severity of the injury to the fetus.

1. Iatrogenic Factors

Malpractice suits brought against physicians generally involve allegations that the treating physician has deviated from the "standard of care."[46] Negligence is present when a physician's actions deviate from that which the reasonable, prudent physician would have done under like or similar circumstances.[47] When a physician is found liable for negligent malpractice and a fetus is injured as a result, the courts consider this action by the physician to be "unintentional" despite a recognized breach of duty.[48] The courts even hold defendants liable when injured victims, in seeking treatment, are subjected to medical malpractice because such malpractice has been recognized as "foreseeable."[49] In short, the physician who has committed malprac-

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44. *See* Rothstein, *supra* note 21, at 1461-62 (toxic chemicals in the workplace pose risk to developing fetus).

45. *See* Sherman, *Keeping Babies Free of Drugs*, Nat'l L.J., Oct. 16, 1989, at 1, col. 4 (pregnant women increasingly prosecuted for drug use).

46. Pinckley v. Gallegos, 740 S.W.2d 529, 531 (Tex. App.—San Antonio 1987, writ ref'd); *see also* Wheeler v. Aldama-Luebbert, 707 S.W.2d 213, 217 (Tex. App.—Houston [1st Dist.] 1986, no writ)(statement of standard of care).

47. *E.g.*, Williams v. Bennett, 610 S.W.2d 144, 146 (Tex. 1980)(for patient to have malpractice action must show doctor violated standard of care); Wilson v. Scott, 412 S.W.2d 299, 303 (Tex. 1967)(doctor commits malpractice by failing to conform to accepted standard of medical care); Baker v. Story, 621 S.W.2d 639, 642 (Tex. Civ. App.—San Antonio 1987, writ ref'd)(to prove negligence by doctor plaintiff had to show standard of care).

48. *Cf. Baker*, 621 S.W.2d at 642-43 (specialist who court held should have known difference between ureter and nerve chain found negligent for severing ureter instead of nerve).

49. *E.g.*, Kansas City S. Ry. v. Justis, 232 F.2d 267, 271 (5th Cir. 1956); *see also* Orkin Exterminating v. Davis, 620 S.W.2d 734, 737 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.)(original tortfeasor liable for subsequent injury due to improper medical treatment); Atherton v. Devine, 602 P.2d 634, 636 (Okla. 1979)(original tortfeasor liable for reasonably foreseeable subsequent injuries including negligent medical treatment). In *Justis*, the court followed the Restatement of Torts when it stated: "[I]f the negligent actor is liable for another's injury, he is also liable for any additional bodily harm resulting from acts done by third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or negligent manner." *Justis*, 232 F.2d at 272; *see also* RESTATEMENT (SECOND) OF TORTS § 457 (1965)(holding tortfeasor liable for negligence of third parties).

tice commits a civil action rather than a criminal action, irrespective of the severity of the damage to the fetus.

2. Parental Prenatal Injury

The Texas Family Code provides that there is a parental duty to support the child, including providing the child with clothing, food, shelter, medical care, and education.[50] The Code does not include the "unborn" as coming within this protection for medical care, nor does it call for "optimal" medical care be provided. However, even if providing medical care of the unborn were to be included under the duties of the mother, obligating a person to regard the health of the fetus above one's own health would impose a level of self-sacrifice that is required neither at common law nor by statute.[51]

As in the case of negligence by a physician, many prenatal complications are unintenional due to unavoidable mechanisms of delivery rather than any negligent conduct by the woman. At the time of delivery, the majority of women elect to put themselves at increased risk by undergoing an emergency cesarean section in an attempt to protect the life of their unborn.[52] In the rare instance where the pregnant woman has refused to consent for such surgery, however, she is treated as having violated an unwritten societal "standard of care" that threatens penalties severe enough so as to override her fundamental right to bodily integrity, self determination and privacy.[53]

The cases permitting forced surgical intervention to protect the potential life of the unborn at the increased risk to the pregnant woman appear to be wrongly heading toward much more oppressive penalties against women, who may be unaware of the effects their actions may have on their unborn, than those imposed upon knowledgeable but negligent physicians. Criminalizing the pregnant woman's actions for negligence presupposes an intent to harm her fetus. In reality, many

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50. TEX. FAM. CODE ANN. § 12.04(3) (Vernon 1989).

51. *See* McFall v. Shimp, 127 PITTS. LEGAL J. 14, 15 (Allegheny County July 26, 1978)(law does not compel person to donate bone marrow to terminally ill patient against will). A recent survey of the "Samaritan" laws concluded, "The basic and well established common law principle is that one individual is not required to volunteer aid to another." Regan, *infra* note 108, at 1608.

52. *See* Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. MED. J. 1192, 1192-93 (1987)(in eighteen states over five-year period, only thirty-six attempts by doctors to get court order to override maternal refusal of proposed cesarean section).

53. *Id.* at 1194-95.

women receive little or no prenatal care for reasons often beyond their control,[54] nor do they receive education regarding the health of their unborn.[55] Until we can provide adequate education and prenatal care to pregnant women, subjecting them to criminal penalties serves no useful state purpose. Jail sentencing as a means of deterring drug use has not been effective in the general population; there is no reason to think it will somehow become a "preventative" boon with respect to prenatal neglect when applied to pregnant women.

3. Environmental Factors

Environmental hazards have been identified as having adverse effects on fetuses as well as on others.[56] Not only is there a growing concern about the "reproductive hazards" contained in the workplace,[57] there is also a growing recognition of environmental fetal hazards in the home.[58] The effects of maternal passive smoking on the fetus are an excellent example of such hazards.[59] Given the many environmental dangers to the fetus now being identified, it is foreseeable that tort liability increasingly will be attached to fetal injuries stemming from environmental causes. One commentator suggests that since numerous fetal health variables are beyond the control of the pregnant woman, she should not exclusively bear the burden of criminal liability for prenatal injuries.[60]

Legislatures need to carefully consider the direction they will take in terms of allocating resources. We can spend endless numbers of dollars trying to police the activities of women, even prenatally, without any preventative health care gains that truly benefit the unborn. Environmental hazards can and should be minimized without being punitive toward women. Our industries still have a long way to go in

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54. Comment, *A New Crime, Fetal Neglect: State Intervention to Protect the Unborn—Protection at What Cost?* 24 CAL. W. L. REV. 161, 180 n.171 (1988).

55. *Id.*

56. *See* Choney, *The (Contradictory) Facts on Secondhand Smoke, supra* note 23, at D-1, col. 2 (cigarette smoke may cause pregnant woman to deliver low birth-weight baby); *see also* Rothstein, *supra* note 21, at 1461 (toxic chemicals may endanger fetus as well as mother).

57. *See* Beeker, *supra* note 22 (up to twenty million jobs may be closed to women due to concern over reproductive hazards).

58. *See Radon: The Problem No One Wants To Face,* CONSUMER REP., Oct. 1989, at 623 (government estimates eight million homes in United States exposed to unsafe levels of radon).

59. *See* Choney, *The (Contradictory) Facts On Secondhand Smoke, supra* note 23.

60. *See* Comment, *A New Crime, Fetal Neglect: State Intervention to Protect the Unborn—Protection at What Cost?*, 24 CAL. W. L. REV. 161, 180 n.179 (1988).

protecting individuals from identified harm. The current method of selectively precluding women from jobs where reproductive hazards may, in fact, continue to exist as to men, discriminates against women while undermining the state's purpose of promoting healthful life.

C. *Criminal Law*

Prenatal injuries that resulted in the death of a child after a live birth have been successfully prosecuted as a homicide against third parties ever since the sixteenth century.[61] Recently, the California courts have indicated a willingness to expand this doctrine by criminalizing the actions of a pregnant woman for prenatal neglect under a California's criminal child support statute.[62]

In the case of Pamela Rae Stewart Monson, the defendant-mother suffered from a condition known as placenta previa.[63] She was warned by her physicians that she should refrain from sexual activity and seek immediate medical attention should she begin to hemorrhage.[64] Ms. Monson gave birth to a full-term, brain-damaged baby who died shortly thereafter.[65] Ms. Monson was charged with criminal neglect under the California Penal Code for failure to provide her child with medical treatment.[66]

The California statute required parents to support their children financially and referred to a "child conceived but not yet born [as] . . . an existing person."[67] The intent of the California Legislature was to enforce the obligation of support against the parent for "every child, legitimate or illegitimate, born or unborn . . . ."[68] The statute was not legislatively designed for the purpose of holding a woman criminally

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61. Robertson, *Reconciling Offspring and Maternal Interests During Pregnancy*, in REPRODUCTIVE LAWS FOR THE 1990'S 259, 262 (S. Cohen & N. Taub ed. 1989).

62. *See* Bonavoglia, *The Ordeal of Pamela Rae Stewart*, Ms., July/Aug. 1987, at 92, 93.

63. *Id.* at 95. Placenta previa describes a condition where the placenta covers the cervix. *Id.* Any cervical change can result in the placenta separating from the cervix, thus causing severe hemorrhaging, thus threatening the lives of the mother and the fetus. *Id.*

64. *Id.* The defendant is alleged to have taken drugs immediately prior to her cesarean section and to have had sexual intercourse with the father of the fetus. Additionally, she failed to seek medical attention immediately, as instructed, when she began to hemorrhage. *Id.*; *see also* Comment, *A New Crime, Fetal Neglect: State Intervention to Protect the Unborn — Protection at What Cost?*, 24 CAL. W.L. REV. 168-69 n.65 (1988)(quoting criminal complaint and newspaper story about incident).

65. *See* Bonavoglia, *The Ordeal of Pamela Rae Stewart*, Ms., July/Aug. 1987, at 92, 95.

66. *See* CAL. PENAL CODE § 270 (Deering Supp. 1987).

67. *Id.* § 270 (Deering 1985).

68. People v. Sorenson, 437 P.2d 495, 498 (Cal. 1968)(lawful parent under support stat-

liable for injury to the fetus and was lacking in "fair notice of the practices to be avoided."[69]

The case against Ms. Monson was dismissed but raises the issue of whether existing legislation might in the future be used to create offenses unintended by the legislature. Equally disturbing is the idea that the woman may be held to a higher standard of care than the father of the fetus, particularly when the actions alleged to constitute negligence were knowingly undertaken by both parties.[70]

The state's interest in the protection of prenatal life should flow from well-prepared thought and from debate encompassing all the myriad ramifications such a law would necessarily have on society. This can best be achieved through the legislative process and should not occur in response to any one group's fervor to exact an end at any price.

D. *Misinterpretation of* Roe *and* Webster

Fetal rights advocates have argued that the "viability line" established in *Roe v. Wade*[71] constitutes a "waiver" of the woman's rights as against those of her fetus. These advocates state that once the woman "decides to forego abortion and the state chooses to protect the fetus, the woman loses the liberty to act in ways that would adversely affect the fetus."[72]

This argument cannot stand on the holding in *Roe*. *Roe* permits abortions for women in their last trimester when a threat to their own life or health exists. This is so even though a previous decision to carry to term was made.[73] The right of the woman to preserve her

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ute included donor of sperm for artificial insemination when donor and mother married at time of birth).

69. *In re* Clarke, 309 P.2d 142, 146 (Cal. Ct. App. 1957).

70. It was alleged that Ms. Monson and the father of the fetus engaged in sexual intercourse against the advice of their physicians. Yet, there were no charges brought against the father for any such action. Comment, *A New Crime, Fetal Neglect: State Intervention to Protect the Unborn — Protection at What Cost?* 24 CAL. W.L. REV. 168-69 n.65 (1988); *see also* Bonavoglia, *The Ordeal of Pamela Rae Stewart*, MS., July/Aug. 1987 at 92, 201 (father not held criminally liable for having sex with Ms. Monson against doctors' advice).

71. 410 U.S. 113 (1973).

72. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 437 (1983).

73. *See Roe*, 410 U.S. at 162-64 (physician may decide with patient that abortion is necessary for well-being of mother at any time up to point where state's interest in protecting potential human life accrues).

own life or health was never found to be "waived," but, rather, was expressly reserved by the *Roe* court when it prevented any state action that would bar abortions after viability where the mother's health or life were at stake.[74]

The Supreme Court in *Webster v. Reproductive Health Services of Missouri*[75] recently held, inter alia, that the requirement for physicians to conduct viability tests before aborting fetuses of more than twenty weeks gestational age was constitutional.[76] *Webster*, although narrowing *Roe* by abolishing the trimester framework and by finding that the state's interest in regulating abortion does not only become compelling at viability, does not change the finding by the *Roe* Court that the woman's health and life outweigh the state's interest in protecting potential life. It is imperative to remember that *Webster* did not overrule the finding in *Roe* that permits states to proscribe abortions after viability if, and only if, the abortion is not necessary for the woman's life or health.[77]

E. *Misinterpretation of Compelling State Interest*

In *Roe*, the Court decided that the state's interest in protecting potential human life arises at the point of viability. The *Webster* Court recognized a compelling state interest in protecting potential human life, but did away with the rigid trimester framework, declaring: "[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability."[78]

Justice Stevens in his *Webster* dissent raises an important argument that, while there were times in history when military and economic interest would have been served by an increase in the population, there is no societal interest today in the state increasing its population as a reason for fostering potential life.[79] Quite the contrary, he continues, the national policy, as reflected in a recent Supreme Court case, is to prevent the potential life that is produced by "pregnancy

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74. *Id.* at 163-64.

75. Webster v. Reproductive Health Servs. of Missouri, __, U.S. __, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989).

76. *Id.* at __, 109 S. Ct. at 3057, 106 L. Ed. 2d at 433.

77. *Webster*, at __, 109 S. Ct. at 3055-56, 106 L. Ed. 2d at 435-36; *see also* Roe v. Wade, 410 U.S. 113, 164-65 (1973)(interest in maternal life sufficiently compelling to enable abortion of fetus).

78. *Webster*, at __, 109 S. Ct. at 3057, 106 L. Ed. 2d at 436.

79. *Id.* at __, 109 S. Ct. at 3084, 106 L. Ed. 2d at 469-70 (Stevens, J., dissenting).

and childbirth among unmarried adolescents."[80]

Given the economic and social situation in the United States today, and the often negative impact unplanned pregnancies have on this situation, it would appear that the state's most compelling interest would be to encourage individual responsibility in reproductive matters. This encouragement would include the recognition of individual choice, which would not be subordinated to the interests of a nonperson. Therefore, the question of when a "person" comes into legal existence is relevant to the determination of when the state's interests in one person's individuality outweigh the state's interests in potential individuality.

In *Webster*, the Supreme Court refused to address the constitutionality of the Missouri statute's preamble, which set forth the premise that life begins at conception.[81] The Court found that the preamble on its face did not regulate abortions or any other aspect of medical practice.[82] However, this aspect of the preamble already has been challenged in a lawsuit filed in federal court in Jefferson City, Missouri, on behalf of Lovetta Farrar's unborn child.[83] The suit contends that the state is illegally imprisoning a female inmate's fetus and cites the Missouri statute's preamble in support.[84] The fetus has been imprisoned, the lawsuit claims, in the correction center where the mother is an inmate without having been charged with a crime, allowed an attorney, convicted or sentenced.[85] Further, the suit asserts that the fetus is being denied an adequate diet, medical care, and the "opportunity to develop into a healthy live born" child.[86] This case illustrates the far-reaching effects of any decisions the Supreme Court or state legislatures reach on this complex issue.

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80. Bowen v. Kendrick, __ U.S. __, __, 108 S. Ct. 2562, 2566, 101 L. Ed. 2d 749, 758 (1988); *see also Webster*, __ U.S. at __, 109 S. Ct. at 3084, 106 L. Ed. 2d at 469 (Stevens, J., dissenting).

81. *See Webster*, __ U.S. at __, 109 S. Ct. at 3049-50, 106 L. Ed. 2d at 426-28 (Court addressed preamble in MO. REV. STAT. § 1.205.1(1), (2) (Vernon 1986)).

82. *Id.* at __, 109 S. Ct. at 3049, 106 L. Ed. 2d at 427.

83. *Fetus Jailed Illegally, Suit Argues*, Austin American-Statesman, Aug. 4, 1989 at A4, col.1.

84. *Id.*

85. *Id.*

86. *Id.*

III. THE RIGHTS OF WOMEN

A. *Self-determination and Individual Rights*

Confronted now with conflicts over a patient's right to refuse medical treatment, courts generally are resorting to a balancing test that weighs the rights of the pregnant woman to privacy and bodily integrity against the state's claim of interest in protecting potential life and the impact that refusing to do so might have on third parties.[87] The results, although somewhat varied, reveal an increase in "judicial solicitude for the individual rights of self-determination and bodily integrity . . . in recent years."[88] "The regard for human dignity and self-determination" and the recognition of the "inviolability of [the] person" have been firmly established in the treatment refusal cases.[89]

Recent decisions involving court-ordered cesarean sections often present judges with only the barest of facts on which to base their decisions.[90] The medical invasion being forced upon a pregnant woman virtually denies her the same right to bodily integrity that has been upheld for the mentally incompetent or the unconscious.[91] Understandably, while the threat to the fetus may create an urgency not present in other cases of treatment refusal, the courts nonetheless have allowed for such medical intervention where time was not of the essence and where the pregnant woman could have been and was not

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87. *See* Brophy v. New England Sinai Hosp., 497 N.E.2d 626, 635 (Mass. 1986)(balancing test considers state's interest in preserving life against individual's interest in self-determination); *In re* Conroy, 486 A.2d 1209, 1225 (N.J. 1985)(right to self-determination ordinarily prevails in balancing test with state's interest in preservation of life). *See generally* Gallagher, *Prenatal Invasions and Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 19 (1987) [hereinafter Gallagher, *Prenatal Invasions*] (balancing test employed in treatment refusal cases).

88. *Conroy*, 486 A.2d at 1223-24; *see also In re* Hier, 464 N.E.2d 959, 965 (Mass. App. Ct. 1984)(individual's opposition to medical treatment considered unless incompetent).

89. Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977)(quoting Pratt v. Davis, 118 Ill. App. 161, 166 (1905), *aff'd*, 79 N.E.2d 562 (1906)); *see also In re* Quinlan, 355 A.2d. 647, 664 (N.J.)(incompetent in persistent vegetative state should have been allowed to die natural death), *cert. denied*, 429 U.S. 922 (1976). The preamble of the Missouri statute states in relevant part: "The life of each human being begins at conception." MO. REV. STAT. § 1.205.1(1) (Vernon 1986). Conception is defined as the "fertilization of the ovum of a female by the sperm of a male," and the fertilized egg is considered an "unborn child." MO. REV. STAT. § 188.015(3),(5) (Vernon 1986).

90. *See* cases cited *supra* note 14.

91. *See Saikewicz*, 370 N.E.2d at 427 (incompetent patient allowed to refuse life-prolonging treatment to preserve human dignity); *see also Quinlan*, 355 A.2d at 671-72 (guardian may order attending physician to disconnect life support systems from incompetent daughter in vegetative state).

offered the opportunity for a second medical opinion.[92]

The cesarean section and other medical invasion cases against pregnant women do not meet the requirements of procedural due process nor do they withstand the right to bodily integrity and self-determination.[93] Judges have had to rely solely on the statistical guesses of physicians whose own judgment is suspect given the inordinate number of cesarean sections performed today in the United States and the medical uncertainty that is involved.[94] Furthermore, there is no consensus within the ranks of the medical community with respect to physicians resorting to court intervention in order to enforce medical intervention.[95]

The right to be free from bodily invasion is constitutionally protected by the fourth amendment's guarantee for people to be secure in their persons.[96] As the Supreme Court held in 1891, "No right is held more sacred, or is more carefully guarded by the common law than the right of every individual to the possession and control of his own

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92. Gallagher, *Prenatal Invasions, supra* note 87, at 9 (Nigerian woman expecting triplets given cesarean section against her will)(citing an unpublished manuscript on file at the HARV. WOMEN'S L.J.). In Chicago in 1984 a cesarean was violently forced on a Nigerian woman expecting triplets and over the irate protestations of her and her husband. After seven security guards removed the husband from the hospital, and the mother's arms and legs were tied to the bed's four corners, the triplets were taken by cesarean section. Preparations and plans for the non-emergency cesarean (which the hospital considered "necessary" for multiple birth cases), were kept from the parents because they were known to steadfastly oppose the procedure. *Id.* These preparations included the hospital's successful efforts to obtain a court order authorizing the cesarean. *Id.*

93. Gallagher, *Prenatal Invasions, supra* note 87, at 20.

94. *See* Gallagher, *Prenatal Invasions, supra* note 87, at 10-11 (doctors responsible for determining risk factors in court-ordered cesarean sections). In one case a pregnant woman refused to undergo a cesarean section deemed necessary by her doctor. She was diagnosed as having a condition whereby the placenta was blocking the birth canal. The courts ordered the surgical procedure but shortly before delivery, her condition corrected itself and the delivery proceeded normally. Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457, 458 (Ga. 1981).

95. *See* Koch, *Disagreement Over Treating Gravida Against Her Wishes*, 20 Ob. Gyn. News 1, 20 (May 1985)(physicians disagree regarding performance of cesarean when mother objects); *see also* Gustaitis, *Court-Ordered Cesareans Could Lead to Doctors' Liability*, L.A. Daily J., Oct. 19, 1987, at 4, col. 4 (doctors disagree about forcing women to have cesareans when fetus believed to be at risk).

96. *See* U.S. CONST. amend. IV. The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[97]

In order for the state's interest to prevail and privacy interests to be overcome when a forced surgical procedure is at issue, the procedure must be reasonable[98] and the state's interest compelling.[99] Judges, therefore, at a minimum should require physicians to meet standards of proof that establish both the necessity of the procedure and the unavailability of less drastic means. Even with these safeguards, the danger still exists that overriding a woman's right to choose her own medical care would place her in a protected class that necessarily would assume her incompetency and thus deny her fundamental right to self-determination.

B. *Privacy*

"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."[100] Coupled with the right to privacy is the common law right to bodily integrity. Both enable a person to decide whether to accept medical treatment or refuse.[101] Governmental intrusion can take place in this sphere only upon a showing of a compelling state interest where less drastic measures do not exist.[102]

In 1978, the courts dealt with the issue of whether a competent individual could be forced to undergo a bone marrow transplant determined by doctors to be his cousin's only chance to continue to

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97. *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891); *see also* Comment, *Court-Ordered Cesarean Sections: A Judicial Standard for Resolving the Conflict Between Fetal Interests and Maternal Rights*, 10 J. LEGAL MED. 211, 225 (1989).

98. *See* Winston v. Lee, 470 U.S. 753, 760 (1985)(court-ordered surgical procedure must be reasonable to override privacy concerns).

99. *Cf.* Roe v. Wade, 410 U.S. 113, 155 (1973)(compelling state interest may limit right to abortion).

100. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

101. *See In re* Conroy, 486 A.2d 1209, 1222 (N.J. 1985)(personal integrity for adults means no medical procedure performed without consent); *see also In re* Farrell, 514 A.2d 1342, 1344 (N.J. Super. Ct. Ch. Div. 1986)(competent adults may determine their medical treatment).

102. *See* Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977)(compelling state interest must be balanced against burden that medical treatment would impose on individual).

live.[103] The cousin was diagnosed as having aplastic anemia, a condition usually fatal absent a successful bone marrow transplant. David Shimp, the proposed bone marrow donor, refused to donate the needed bone marrow that might have significantly increased his cousin's chances of survival. The court refused to order the transplant reasoning, "[T]he common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save that human being or to rescue . . . . For our law to compel the Defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded."[104] The court further declared, "[T]o [compel the defendant to submit to an intrusion of his body] would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn."[105]

Fetal rights advocates have maintained that the state's interest in protecting potential life at viability as established in *Roe*, and reiterated in *Webster*, may be enough to override even the protectable interests of the pregnant woman.[106] However, this result misreads the organ transplant cases[107] and creates an affirmative duty to rescue the unborn.[108]

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103. McFall v. Shimp, 127 PITTS. LEGAL J. 14, 15 (Allegheny County July 26, 1978).

104. *Id.* at 14, 15.

105. *Id.*

106. *See* King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1683 (1979)(when fetus viable, should balance its interests equally against the mother's); *see also* Webster v. Reproductive Health Servs. of Missouri, __ U.S. __, 109 S. Ct. 3040, 3057, 106 L. Ed. 2d 410, 436-37 (1989)(viability tests valid prerequisite to performance of abortion because they further state's interest in protecting human life); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973)(mother's interest predominates over that of viable fetus when mother's life or health endangered).

107. *See* McFall v. Shimp, 127 PITTS. LEGAL J. 14, 15 (Allegheny County, July 26, 1978)(compulsory bone marrow transplant from brother barred); *see also In re* Guardianship of Pescinski, 226 N.W.2d 180, 181 (Wis. 1975)(court lacks power to authorize kidney transplant from mental patient to younger sister); *In re* Richardson, 284 So. 2d 185, 187 (La. Ct. App. 1973)(organ transplant from incompetent donor denied), *cert. denied*, 284 So. 2d 338 (La. 1973). *But see* Strunk v. Strunk, 445 S.W.2d 145, 146 (Ky. Ct. App. 1969)(doctrine of substituted judgment used to determine incompetent would have donated kidney to brother had he been competent).

108. "The basic and well established common law principle is that one individual is not required to volunteer aid to another." Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1570 (1979). Commentator Donald H. Regan notes that parents do have a duty to rescue their children, but that the pregnant woman does not necessarily have a corresponding duty toward her fetus, particularly if her pregnancy was not voluntary. *Id.* at 1593-98.

C. *Fourteenth Amendment Rights*

The courts have long recognized that one aspect of the "liberty" protected by the fourteenth amendment's due process clause is "a right of personal privacy, or a guarantee of certain areas or zones of privacy."[109] As the Supreme Court pointed out in *Roe*, "The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights."[110] *Roe* also maintains that "liberty" is not a "series of isolated points pricked out in terms" of other specific grants in the Constitution, but rather is "a continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement."[111]

Any discussion of assigning certain rights to fetuses, then, must ultimately involve an examination of the restraint these rights place on women's liberty. This restraint takes many forms; a particularly vivid form is seen in cases involving forced cesarean cases, as previously discussed. Under those facts, there is no doubt that the woman's personal zones are invaded for the benefit of the fetus. In most cases not only is the pregnant woman's liberty jeopardized, but her health and life as well.[112]

Obviously, the fourteenth amendment allows the abridgement of liberty if the state demonstrates that the individual deprived of such liberty has been afforded due process of law and that a compelling state interest exists.[113] While *Roe* and *Webster* recognize a state interest in the potentiality of life sufficient to justify certain restrictions on

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109. Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977)(citing *Roe*, 410 U.S. at 152).

110. *Roe*, 410 U.S. at 168 (Stewart, J., concurring).

111. *Id.* at 169 (citing Poe v. Ullman, 367 U.S. 497, 583 (1961)).

112. "[The] risk of death from cesarean deliveries is about four times greater than that in vaginal deliveries." Comment, *Court-Ordered Cesarean Sections: A Judicial Standard For Resolving the Conflict Between Fetal Interests and Maternal Rights*, 10 J. LEGAL MED. 211, 214 (1989). At least one commentator estimates that this rate is even higher. "The maternal mortality rate is three to thirty times that associated with vaginal delivery." Gallagher, *Prenatal Invasions, supra* note 87, at 50 (citing Gilfix, *Electronic Fetal Monitoring Physician Liability and Informed Consent*, 10 AM. J.L. & MED. 31, 34 (1984)).

113. *See* Roe v. Wade, 410 U.S. 113, 155 (1973)(woman's right to abortion limited by

the mother's liberty, the mother's health and safety are reserved as liberties which outweigh this compelling state interest.[114] A cesarean operation involves the mother's health and safety. Because the Supreme Court has not yet recognized a compelling state interest sufficient to outweigh these concerns, to force such an operation would be a deprivation of due process.

Forced cesareans represent a breach of due process in the "procedural" sense as well. Threat of civil and criminal liability for babies born with birth defects has prompted doctors to perform cesareans at alarming rates, often unnecessarily.[115] Often these operations are done with the mother's "consent." By the natural urgency of the childbirth situation, the mother's time to make a decision between cesarean or vaginal delivery is often limited. In cases of "consented to" cesarean sections, the mother's decision often is based largely upon her physician's recommendation. This is the backdrop for a potentially exploitive and coercive situation[116] as more physicians begin to pursue other avenues to obtain consent or, worse, to operate without consent because the situation seems to be an emergency not requiring such formalities.

When the state intervenes to force delivery by cesarean, a disinterested third party (i.e., the court) must also make a hasty decision given the urgency of the situation. The court's decision is final in the practical sense; appeal after the delivery serves little purpose and is seldom pursued.[117] In short, the characteristics of the situation make procedural due process nearly impossible and deprive the woman of her right to liberty (i.e., invades her zones of personal privacy, jeopardizes her health and safety). Given the fourteenth amendment's prohibition of deprivation of life, liberty and property without due

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compelling state interest); *see also* Zablocki v. Redhail, 434 U.S. 374, 388 (1978)(fundamental right can be overidden only by compelling state interest).

114. *See Roe*, 410 U.S. at 163-64 (endangerment of mother's life or health enables abortion because mother's interest predominates over state's interest in fetus' life); *see also* Webster v. Reproductive Health Servs. of Missouri, __ U.S. __, 109 S. Ct. 3040, 3058, 106 L. Ed. 2d 410, 437-38 (1989)(right to abortion a liberty interest under due process clause, but subject to governmental regulation).

115. *See* Gallagher, *Prenatal Invasions*, *supra* note 87, at 51-52 (doctors performing increased number of cesareans due to concern about malpractice liability).

116. Gallagher, *Prenatal Invasions*, *supra* note 87.

117. Gallagher, *Prenatal Invasions*, *supra* note 87, at 49 (citing United States v. George, 239 F. Supp. 752 (D. Conn. 1965)).

process of law,[118] the woman's right to liberty and life may not be deprived by the state in the form of forcing her to undergo a cesarean operation.

IV. PROPOSAL

"The mutual obligations of the parent-child relation derive their strength and vitality from such forces as natural instinct, love and morality, and not from the essentially negative compulsions of the law's directives and sanctions. Courts and Legislatures have recognized this, and consequently have intruded only minimally upon the family relation."[119] Instead of forcing pregnant women to undergo a medical procedure that denies her the right to privacy, bodily integrity and equal protection, the state should focus on improving prenatal education and access to care.[120] Legal coercion "might drive these women away from the prenatal care that they and their fetuses especially need,"[121] and thus work against the asserted state interest in promoting healthy children. Moreover, a reliance on medical coercion does nothing to correct the poor doctor/patient interactions responsible for most treatment refusals.[122]

It also is unworkable to expand child abuse reporting laws to include fetuses. The detection problems present in post-natal child abuse reporting are only magnified in the context of fetal child abuse. For example, "substance abuse in pregnancy is one of the most commonly missed of all obstetrical and neonatal diagnoses . . . [with] as many as 375,000 infants [being] affected each year."[123] Even in the unlikely event that detection problems could be improved, fetal abuse reporting laws, if they were to follow the course child abuse reporting

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118. U.S. CONST. amend. XIV.

119. Holodook v. Spencer, 324 N.E.2d 338, 346 (N.Y. 1974).

120. Comment, *Court-Ordered Cesarean Sections: A Judicial Standard for the Conflict Between Fetal Interests and Maternal Rights*, 10 J. LEGAL MED. 211, 243 (1989)(quoting Nelson & Milliken, *Compelled Medical Treatment of Pregnant Women — Life, Liberty, and Law in Conflict*, 259 J.A.M.A. 1060, 1066 (1988)); *see also* Note, *Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus — Is This a Mother's Crime?*, 53 BROOKLYN L. REV. 807, 840 (1987).

121. Nelson & Milliken, *Compelled Medical Treatment of Pregnant Women — Life, Libery, and Law in Conflict*, 259 J.A.M.A. 1060, 1065 (1988).

122. Gallagher, *Prenatal Invasions, supra* note 87, at 53 n.224.

123. *A First: National Hospital Incidence Survey*, in National Association for Perinatal Addition Research and Education, *The Dangers of Cocaine Use in Pregnancy* Fact Sheet (Sept. 1989).

has taken, would do little to actually diminish the abuse. Although the law incorporates a complex procedure by which various state agents ferret out the perpetrator of the abuse, existing child abuse laws are not effective in dealing with the abuser.[124] The abuser's violent behavior is rooted in emotional disabilities, but, as one commentator has observed, "[T]he law has not yet developed an approach which responds adequately to this behavior. The criminal law does not sufficiently sanction child abuse. The civil law does not sufficiently supervise a process of treatment which might lead to rehabilitation of the family unit."[125] A better way of approaching the problem of pre- as well as post-natal abuse is to address the root of the behavior through counselling and other educational methods.

V. CONCLUSION

Technological advances alone cannot dictate how society should deal with its interest to protect and promote newborn life. Enforcement of such far-reaching policy actions as espoused by fetal rights advocates is as impracticable as it is ineffectual. Nothing is gained when a free society does with force what it cannot do with education. Improved access and availability of health care for pregnant women has been a recognized, but unpursued, policy by Congress for more than a decade. And, it is a goal which would yield far better results for newborns than any coercive actions against the mothers who would ultimately care for them. To legislate otherwise is to move women further away from the very care society desires for their newborns. Governmental resources are limited. We must not divert endless numbers of dollars to create a slippery slope of policy enforcement action against the seemingly rare, if at all existent, cases of intentional fetal neglect. The larger problem facing women and the unborn exists in the glaring form of environmental dangers, ignorance, lack of access and availability of health care services, and the absence of any comprehensive government policy to combat the losing war against drug abuse in this country.

The medical community's trend toward practicing defensive medicine only compounds the problem a pregnant woman faces when deciding whether to submit to surgical procedures to "protect" the

124. Senungetuk, *An Improved Legal Approach to Child Abuse: Early and Sustained Judician Intervention*, 72 WOMEN LAW. J. 1, 1 (1986).

125. *Id.*

life of her unborn. The term "informed consent" provides pregnant women neither when courts are ready to override a woman's right to bodily integrity based upon information suggestive of "doctor" — not "fetal" — distress. Consent must not be diminished to the point where it is a mere request to be overruled by a faceless judge. The one half of our society which bears the children must demand that we not fail in our efforts to educate against prenatal neglect, that we not jail in our efforts to legislate against prenatal neglect.