Fetal Interests vs. Maternal Rights: Is The State Going Too Far?

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FETAL INTERESTS VS. MATERNAL RIGHTS: IS THE STATE GOING TOO FAR?

INTRODUCTION

Medical evidence has proven that many factors may influence a fetus' development while it is in its mother's womb.\(^1\) The growing ability to diagnose and treat the fetus has engendered a fetal right to begin life with a sound mind and body.\(^2\) Judicial recognition of fetal rights has resulted in attempts to compel women to consent to medical treatment that their doctors deem to be essential for their fetus' well being.\(^3\) Women who are reluctant to follow medical advice have been detained in hospitals until the birth of their fetuses.\(^4\) Courts have also punished women's prenatal conduct through civil\(^5\) and criminal liability.\(^6\)

Part One of this Comment traces the historical development and examines the current status of fetal rights. Part Two discusses the implications that the courts' recognition of fetal rights has spawned upon women's lives. This Comment concludes that forcing women to undergo medical treatment to benefit their fetuses both ignores legal precedent and violates the woman's right to privacy and bodily integrity. The use of civil and criminal sanctions to punish women for prenatal conduct greatly affects all women while accomplishing nothing in furtherance of state goals.

PART ONE: RECOGNITION OF FETAL RIGHTS

Property Law

Fetal rights were initially recognized in property law.\(^7\) A fetus that was in existence at the time of a testator's death and that was subsequently born alive

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\(^1\) Drinking alcohol, smoking cigarettes, ingesting drugs, engaging in sexual intercourse or failing to discontinue strenuous employment are a few activities that may adversely affect fetal development. R. Stevenson, *The Fetus and Newly Born Infant: Influences of the Prenatal Environment* 96-109 (1973).


\(^4\) See cases and accompanying text cited infra note 26.

\(^5\) See case and accompanying text cited infra note 137.

\(^6\) See cases and accompanying text cited infra notes 138 & 165. This comment is limited to a discussion of a pregnant woman's refusal to follow her physician's medical advice. For a complete discussion of problems associated with drug use during pregnancy see Moss, *Substance Abuse During Pregnancy* 13 Harv. Woman's L.J. 278 (1990) (discussing criminal prosecutions of pregnant women who use drugs).

was entitled to inherit property equally with its living siblings. The common law permitted courts to appoint guardians to protect the property interests of the unborn child.

Criminal Law

Our criminal law has also protected the unborn. The common law recognized that a fetus may be the victim of murder if it is born alive and then dies from injuries inflicted upon its mother prior to its birth. Many states have enacted murder statutes that impose criminal sanctions against third parties for killing a fetus. Other states have amended their homicide statutes so as to punish the destruction of a fetus. These statutes usually require that the fetus had been viable and that the perpetrator had intended to kill either the fetus or its mother.

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8 Comment, Medical Technology And The Law, 103 HARV. L. REV. 1519, 1559 (1990). See also E. Wypyski, THE LAW OF INHERITANCE IN ALL FIFTY STATES 53 (3rd ed. 1976) (discussing fetal rights in the field of property law); Uniform Probate Code § 2-108 (1969) "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." Id. The purpose of recognizing fetal interests in property law is to ensure that children are not inadvertently omitted from their parent's will. Id.

9 Comment, supra note 8, at 1559.

10 See e.g., Clarke v. State, 117 Ala. 1, 23 So. 671 (1898) (man charged with second degree murder in the death of his child, who was born alive and subsequently died as a result of a beating inflicted upon its mother while in utero); Abrams v. Foshee, 3 Iowa 274 (1856) (recognizing that if a newborn should die from injuries received while in the womb, the person who inflicted those injuries, with the intent to cause a miscarriage, shall be charged with murder); Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923) (defendant's murder conviction was reversed where the state failed to prove that the infant was born alive); State v. Anderson, 135 N.J. Super. 423, 343 A.2d 505 (1975) (defendant charged with two counts of murder in the deaths of his twin infants, who died from injuries they received while in utero), rev'd on other grounds, 173 N.J. Super. 75, 413 A. 2d 611 (1980).


Third Party Tort Liability

A fetus' right to pursue a tort claim against a third party has also become well-settled in the United States. Historically, all courts had denied recovery because a fetus was deemed to be merely part of its mother; it lacked separate existence or personality.\(^{14}\) Therefore, no independent duty was owed to the fetus.\(^{15}\) "In 1946, ... a federal district court reversed the longstanding tradition of denying third party tort recovery to fetuses."\(^{16}\) To date, most jurisdictions recognize third party tort actions for prenatal injuries.\(^{17}\) Other jurisdictions have gone further, allowing wrongful death actions to be brought when a third party's actions cause a fetus' stillbirth.\(^{18}\) Some courts have even allowed children to sue

\(^{14}\) See Dietrich v. Northampton, 138 Mass. 14, 17 (1884). In Dietrich, a pregnant woman fell on a defective highway when she was approximately five months pregnant. Id. at 14. The woman's fall resulted in her fetus' premature birth. Id. at 14-15. Although there was testimony that the infant survived birth, the court denied recovery for damages in a suit brought by the administrator of the child's estate. Id. at 15. Dietrich was subsequently overruled by Torigan v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967).

\(^{15}\) ["Dietrich"] was the first American or English case to rule on the [issue] of tort liability for prenatal injuries...[I]t set the tone of judicial opinion for the next sixty years." Annotation, Liability For Prenatal Injuries, 40 A.L.R.3d 122, 126 (1971 & Supp. 1991).

\(^{16}\) Comment, supra note 8, at 1559. See Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). In Bonbrest an infant alleged that a doctor's negligence resulted in injury to the infant prior to his birth. Id. at 139. Bonbrest held that a viable fetus who is injured by a third party's negligence may recover damages for its injuries. Id. at 142.


for prenatal injuries where the defendant’s negligence occurred prior to the child’s conception.19

PART TWO: CONSEQUENCES OF CREATING A LEGAL DUTY

It is the firmly held belief of some that a woman should subordinate her right to control her life when she decides to become pregnant or does become pregnant: anything which might possibly harm the developing fetus should be prohibited and all things which might positively affect the developing fetus should be mandated under the penalty of law be it criminal or civil.20


19 See e.g., Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (allowing child’s action for injuries which resulted from physician’s negligent treatment of the plaintiff’s mother eight years prior to conception); See also Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), cert. denied, 379 U.S. 945 (1964); Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978); Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973). This increased potential for third party liability encouraged the implementation of fetal protection policies which ban women from the performance of certain jobs. See e.g., U.A.W. v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (U.S. Supreme Court invalidated a fetal protection policy that banned women ages sixteen through seventy from jobs which exposed them to lead); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984) (court upheld fetal protection policy which barred pregnant women from working in areas of radiation), reh’g denied, 732 F.2d 944 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) (court upheld fetal protection policy that banned women from jobs which exposed them to harmful toxins), vacated, 767 F.2d 915 (4th Cir. 1984).

20 Stallman, 125 Ill. 2d at 278, 331 N.E.2d at 359.
Courts which have recognized fetal rights have articulated "a legal right to begin life with a sound mind and body." The recognition of this right necessitates the recognition of a mother's legal duty to create the best possible prenatal environment. While most would agree that the expectant mother has a moral duty to provide the best possible care for her developing fetus, the transformation of that moral duty into a legal duty creates many consequences.

Forced Medical Treatment

Courts have forced women to submit to blood transfusions and caesarean sections to benefit their fetuses. Women who are reluctant to follow medical advice have been detained in hospitals until the birth of their fetuses. Results such as these violate the woman's right to privacy and bodily integrity and place the woman's prenatal activities under public scrutiny.

1. Infringement Upon Right To Privacy And Bodily Integrity

The United States Supreme Court has traditionally recognized a right to privacy in procreational matters. "Closely associated with the right to privacy


22 Stallman, 125 Ill. 2d at 275-76, 531 N.E.2d at 359.


25 But see Taft v. Taft, 388 Mass. 331, 446 N.E.2d 395 (1983) (court refused to order a woman, in her sixteenth week of pregnancy, to undergo a "purse string operation" for the purpose of avoiding a miscarriage).

26 See Court-Ordered Interventions, supra note 3, at 1195. A "16-year-old pregnant girl in Wisconsin was held in secure detention for the sake of her fetus because she tended "to be on the run" and to "lack motivation or ability to seek prenatal care." Id. The survey also indicated that a Nigerian woman was cuffed to the four corners of the bed while a caesarean section was performed against her wishes. Id. See also In re Steven S. 126 Cal App. 3d 23, 178 Cal. Rptr. 525 (1981) (woman detained in a psychiatric hospital until birth of her child).

are the rights of bodily integrity and personal security from unwarranted governmental intrusions.28 The right to bodily integrity is protected by the Fourth29 and Fourteenth Amendments30 to the United States Constitution. In the 1970's courts began to extend these concepts to an individual's decision to decline medical treatment.31 The right to protect one's own body from the invasion of others is, perhaps, an individual's most significant privacy right.32

In *Winston v. Lee,*33 the United States Supreme Court refused to force a robbery suspect to undergo the surgical removal of a bullet from his chest.34 The court held that the proposed surgery would violate the respondent's right to be secure in his person.35 Surgery without the patient's consent, performed under a general anesthetic involves "virtually total divestment" of the patient's "ordinary control over surgical probing beneath his skin."36 Similarly, in *Washington v. Harper,*37 the United States Supreme Court held that the "forcible injection of medication into a non consenting person's body represents a substantial interference with that person's liberty."38

"Most courts have based [the] right to refuse [medical] treatment ... on the common law right to informed consent39... and a constitutional privacy right."40 The right to refuse medical treatment is recognized even if refusal of the treatment causes the patient's death.41 Yet, an individual's right to refuse life-

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Myers supra note 7, at 57-58.


Winston, 470 U.S. at 758.


Id. at 767.

Id.

Id. at 765.


Id. at 229.

The Informed Consent Doctrine requires that the physician advise a patient of the risks involved in undergoing a certain medical procedure as well as the risks of refusing such treatment. 2 J. Lee & B. Lindahl, Modern Tort Law Liability And Litigation, § 25.29-25.30 (Rev. Ed. 1977-1989). After receiving that information the patient has the right to determine whether or not the surgery will be performed. Id.


Cruzan, 110 S. Ct. at 2851.
State courts usually invoke their interest in the protection of dependant third parties and/or the preservation of life when they regulate the pregnant woman’s medical decisions. States may override the pregnant woman’s refusal of medical treatment if her decision will result in the abandonment of her minor children.

If the pregnant woman has no minor children, some courts have considered the fetus to be the "innocent third party." Those courts have relied upon the

42 Id.
43 Id. at 2847-48. The state’s interests in preventing suicide and safeguarding the integrity of the medical profession are irrelevant in cases which involve a pregnant woman’s refusal of medical treatment. A.C., 573 A.2d at 1246. The state’s interest in the prevention of suicide does not apply because pregnant women who refuse medical treatment lack the intent to cause their own death. Id. at 1246 n.12. Most of the pregnant women who refuse treatment do so for religious reasons. Other women fear the harmful effects of the compelled treatment. Still others feel the treatment is simply unnecessary and wish to utilize other alternatives.

44 See e.g., A.C., 573 A.2d at 1240 (performance of the caesarean section was actually calculated to hasten the mother’s death); Jefferson, 247 Ga. at 86, 274 S.E.2d at 459 (caesarean ordered although the woman had 50% chance of surviving vaginal delivery); Madyun, No. 189-86 (D.C. Super. Ct. July 26, 1986) (caesarean ordered although the operation compromised the mother’s health in order to save the fetus).

45 A.C., 573 A.2d at 1245-46. The United States Supreme Court has not determined the circumstances, if any, under which a pregnant woman may refuse medical treatment.

46 See e.g., Jamaica Hosp., 128 Misc. 2d at 1008, 491 N.Y.S.2d at 900. In Jamaica, a New York trial court ordered a pregnant patient to undergo a blood transfusion. Id. Preserving the life of the fetus was the court’s primary reason for ordering the blood transfusion. Id. at 1007, 491 N.Y.S.2d at 899. However, the court’s decision was also motivated by the mother’s need to care for her other minor children. Id. 1008, 491 N.Y.S.2d at 900; Crouse-Irving Mem. Hosp. Inc. v. Paddock, 127 Misc. 2d 101, 485 N.Y.S.2d 443 (Sup. Ct. 1985) (a New York trial court ordered blood transfusions for an R.H. negative mother of newly-born infant to stabilize the mother’s condition following the caesarean delivery of her fetus); But see Mercy Hosp. v. Jackson, 62 Md. App. 409, 489 A.2d 1130 (1985), vacated, 306 Md. 556, 510 A.2d 562 (1986). In Mercy Hosp, a Maryland Court of Appeals affirmed a lower court decision which allowed a pregnant patient to undergo a caesarean section while refusing blood transfusions for herself. Id. at 418, 489 A.2d at 1134. The court reached its decision after finding that the woman’s refusal to undergo blood transfusions following the birth of her fetus would not harm the fetus. Id. The caesarean was performed without the need for transfusions. Id. at 412, 489 A.2d at 1131. Both Mrs. Jackson and her fetus survived the surgery. Id.

47 The state’s interest in protecting innocent third parties is least discriminatory as it applies equally to a nonpregnant female’s and male’s refusal of medical treatment in a life threatening situation.
state's interest in preserving "life" to override a pregnant woman's medical treatment choices. Relevant abortion law exposes this reasoning as faulty.

In <i>Roe v. Wade</i>, the United States Supreme Court held that the "right of privacy...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court held that a fetus is "potential life" and is not recognized as a "person" in the legal sense. <i>Roe</i> held that a state's interest in preserving "potential life" becomes compelling in the third trimester of pregnancy. States may proscribe third trimester abortions entirely except where necessary to preserve the health or life of the mother. Although the United States Supreme Court later held that a state may have a compelling interest in a woman's fetus prior to its viability, the Court has yet to hand down a decision which requires a woman to jeopardize her own health in order to protect her fetus. In fact, in <i>Thornburg v. American College of Obstetricians</i> the Court expressly refused to reach such a conclusion. In <i>Thornburg</i> the Court found a portion of Pennsylvania's Abortion Act, which required that any person performing a post viability abortion, use the technique "which would provide the best opportunity for the unborn child to be aborted alive unless that... technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available

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48 See <i>Jefferson</i>, 247 Ga. at 87, 274 S.E.2d at 458. The Georgia Supreme Court ordered a woman, in her thirty-ninth week of pregnancy, to undergo a caesarean section. <i>Id.</i> at 86-87, 274 S.E.2d at 458. The court "[found] that as a matter of [law], that the [unborn] child is a human being [who is] fully capable of sustaining life independent of the mother." <i>Id.</i> at 88, 274 S.E.2d at 459. See also <i>Raleigh</i>, 42 N.J. at 422, 201 A.2d at 537 (ordering blood transfusions for a woman in her thirty-second week of pregnancy to preserve the life of the unborn child); <i>Jamaica Hosp.</i>, 128 Misc. 2d at 1007, 491 N.Y.S.2d at 899 (ordering blood transfusions for woman in eighteenth week of pregnancy, finding that the state's interest in a not-yet-viable fetus outweighed the patient's interests).

49 <i>Roe v. Wade</i>, 410 U.S. 113 (1973). In <i>Roe</i>, a pregnant woman challenged a Texas statute which criminalized abortion, except where necessary to save the life of the mother. <i>Id.</i> at 120. The U.S. Supreme Court divided pregnancy into three trimesters holding that a woman could choose to have an abortion during her first and second trimesters for any reason. <i>Id.</i> at 164. During the third trimester of pregnancy however, the states could proscribe abortion entirely except in cases where it was necessary to save the life of the mother. <i>Id.</i> at 164-65.

50 <i>Id.</i> at 153.

51 <i>Id.</i> at 158.

52 <i>Id.</i> at 164-65. <i>Roe</i> found that a fetus is considered viable at approximately twenty-four to twenty-eight weeks. <i>Id.</i> at 160.

53 <i>Id.</i> at 164-65.

54 See <i>Webster v. Reproductive Health Services, Inc.</i>, 492 U.S. 490, 519-20 (1989) (<i>Webster</i>, upheld a Missouri statute which requires physicians to perform pre-abortion viability tests upon pregnant women whose fetuses may be twenty or more weeks old). <i>Roe</i> had previously found that viability occurs at twenty-four weeks and would not allow the state to interfere with the woman's individual decision prior to that time. <i>Roe</i>, 410 U.S. at 164-65.

55 <i>Roe</i>, 410 U.S. at 165.

The Court held that the act was unconstitutional because it required a "trade off" between the woman's health and the fetus' survival. The maternal mortality rate in caesarean deliveries is significantly higher than that for vaginal deliveries. J. Wilson, E. Carrington & W. Ledger, Obstetrics and Gynecology, 330-31 (7th ed. 1983); See also 5B C. Frankel, J. Zimmerly & R. Patterson, Lawyers' Medical Cyclopedia, § 37.21, 89 (3rd ed. 1986). The American Red Cross estimates that A.I.D.S. continues to be transmitted to approximately fifty to five hundred blood transfusion recipients per year. The problem continues because the test which the American Red Cross utilizes to test blood for A.I.D.S. is unable to detect the disease in newly infected blood. Unfortunately, a more precise test has not been developed. Telephone interview with Jeffery McCullough M.D., American Red Cross Blood Services Division, Washington D.C. (February 10, 1991). See supra notes 59 and 60. "Court orders force women to assume medical risks and forfeit their legal autonomy in a manner not required of men and non-pregnant women." Annas, supra note 27, at 227. Despite this fact, it is doubtful that these orders violate the equal protection clause. Id. Under current equal protection analysis, the state's intent to discriminate is lacking. Id. The purpose of these decisions is to protect the fetus, not to discriminate against pregnant women. Id.

In re Jamaica Hospital, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (1985).

Id. at 1006, 491 N.Y.S.2d at 900.

Id. at 1007, 491 N.Y.S.2d at 899. The patient in Jamaica was a Jehovah’s Witness. Id. Members of the Jehovah’s Witness faith are prohibited from receiving blood transfusions. Id.

Id. at 1007, 491 N.Y.S.2d at 900.
to the fetus as "a human being to whom the court stood in parens patriae."68 The court acknowledged the woman's right to obtain an abortion at that stage in her pregnancy.69 Yet, the acknowledgment of that right did not affect the court's decision.

In Jefferson v. Griffin Spalding County Hospital Auth.,70 the Georgia Supreme Court ordered a pregnant woman, who suffered from placenta previa,71 to undergo a caesarean section.72 The court held that the intrusion into the woman's life was outweighed by the state's duty to protect an unborn human being from a premature death.73 Similarly, in In re Madyun Fetus,74 the court ordered a nonconsenting female to submit to a caesarean section.75 The court held that the fetus was at much greater risk of dying from infection than its mother was of dying from a caesarean.76

In In re A.C.,77 perhaps the most disturbing case within this area of the law, a court ordered the performance of a caesarean section upon a terminally ill woman. The procedure was calculated to hasten the woman's death, yet to increase the fetus' chances for survival.78 The patient was in her twenty-sixth week of pregnancy.79 Surgery was ordered over the objections of the patient, her husband and her family.80 The fetus died within two hours of the

68 Id.
69 Id.
71 Placenta previa is a condition in which a woman's placenta is implanted over the opening of her cervix. 5B C. FRANKEL, J. ZIMMERLY & R. PATTERSON, LAWYERS' MEDICAL CYCLOPEDIA, § 37.15b, 70-71 (3rd Ed. 1986). This condition is potentially lethal for both the mother and the fetus. Id. In Jefferson, physicians testified that it was virtually impossible for Mrs. Jefferson's placenta previa to correct itself prior to delivery. Jefferson, 247 Ga. at 86, 274 S.E.2d at 458.
72 Jefferson, 247 Ga. at 86, 274 S.E.2d at 458.
73 Id. at 87, 274 S.E.2d at 458.
75 Id.
76 Id.
78 A.C., 533 A.2d at 613-14.
79 Id. at 612.
80 A.C., 573 A.2d at 1239-40.
The patient's death followed within two days. The caesarean section was listed as a contributing cause of the young woman's death.

In re A.C. held that "a state may infringe upon [a] mother's right to bodily integrity to protect the health or life of her fetus if to do so will not significantly affect the health of the mother and if the child has a significant chance of being born alive." The court reasoned that "although in some cases the surgery will result in the mother's death, A.C. had at best two days of sedated life left and any complications from the caesarean would not significantly affect A.C.'s condition...The child, on the other hand, [might survive] delivery, despite the possibility that it would be born handicapped." This reasoning directly conflicts with the United States Supreme Court's holding in Roe v. Wade, which forbade the sacrificing of a mother's life for the benefit of her fetus.

In subsequently vacating this order, the court held that in "virtually all cases", the pregnant woman must choose the desired medical treatment on behalf of herself and her fetus. If the patient is incompetent, or otherwise unable to give informed consent to a proposed course of medical treatment, then her decision must be ascertained through substituted judgment. On its face, this decision seems to respect a woman's individual rights. However, the D.C. Court did not clearly define the phrase, "in virtually all situations". Situations in which the pregnant patient would lose her freedom of choice remain unclear.

In re A.C. is particularly troublesome because the court followed its own subjective judgment, thereby refusing to respect the family’s privacy. The facts of In re A.C. parallel those in In re Klein. Klein involved a husband who sought to secure an abortion for his comatose wife. Doctors wanted to treat

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81 Id. at 1238. The child's death certificate described the cause of death as "extreme immaturity." C. Gorney supra note 70.
82 A.C., 573 A.2d at 1238.
84 A.C., 533 A.2d at 617 (emphasis added).
85 Id. (emphasis added).
86 A.C., 573 A.2d at 1252.
87 Id. Substituted judgment allows the court to determine what an incompetent individual's decision would have been under the circumstances. Cruzan, 110 S. Ct. at 2847, citing, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 737-38, 370 N.E.2d 417, 424 (1977). Cruzan held that valid exercises of substituted judgment on behalf of an incompetent patient may require clear and convincing evidence of the patient's wishes. Cruzan, 110 S. Ct. at 2854.
88 See A.C., 573 A.2d at 1252.
90 Id. at 146, 538 N.Y.S.2d at 275 (Klein was approximately seventeen weeks pregnant at the time the abortion was sought).
the woman more aggressively, but could not do so until she received an abortion. Mr. Klein was forced to fight pro-life advocates through three levels of the court system to secure his wife’s abortion. In allowing the abortion to be performed, the New York Court of Appeals stated that the pro-life advocates were "absolute strangers to the Klein family...[who had] no place in the midst of [the Klein] family tragedy."  

A.C. and Klein signify that a fetus’ health interests should never supersede those of the mother’s. In forced medical treatment cases, strangers are permitted to interfere in private family decisions.

2. Right To Abort Versus Duty To Ensure Health

It is inconsistent to find that a woman has both the right to abort her fetus and a "legal duty" to ensure that it is born healthy. Fetal advocates argue that if a woman chooses to become pregnant and subsequently waives her right to an abortion, she has an enhanced duty to ensure that her fetus enters the world as a healthy child. This reasoning ignores the differences among women’s circumstances. Not every woman who becomes pregnant chooses to do so. Some pregnancies result from rape, incest or failed birth control. Even in situations where the expectant mother makes a conscious choice to become pregnant she cannot be expected to bring her child into the world at all costs. One cannot be made aware of all the possible complications which may arise. Furthermore, a woman cannot be said to have waived her right to an abortion if her pregnancy is within the permissible time frame where that alternative is still an option.

3. No Right To Withhold Medical Treatment From A Child

Fetal rights advocates contend that courts may override pregnant women's "unwise" medical decisions because parents may not withhold medical treatment from their children. In Prince v. Massachusetts, the Court stated, "Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they

91 Id.
92 Id.
93 Id. at 148-49, 538 N.Y.S.2d at 276.
94 See e.g., Robertson, Procreative Liberty And The Control Of Conception, Pregnancy And Childbirth, 69 VA. L. REV. 405, 456 (1983) (suggesting that the right to abort the fetus may not include the lesser right of injuring it); King, The Juridical Status of the Fetus: A Proposal For Legal Protection of the Unborn, 77 Mich. L. Rev. 1647 (1979).
95 Comment, supra note 8, at 1644.
96 See e.g., Robertson, supra note 94, at 444; Myers, supra note 7, at 21.
have reached the age of full and legal discretion when they can make that choice for themselves. 98

Some jurisdictions have extended this doctrine to cover unborn children. 99 It has been argued that the pregnant woman who refuses treatment for herself also refuses treatment for her unborn child. 100 The two situations are not synonymous. 101 A court order which forbids a mother to prevent a living child's medical treatment does not affect the mother's bodily integrity. 102 Much more analogous to a pregnant woman's situation is a person's refusal to donate needed body organs. 103 It has been held that a person may not be forced to donate necessary body organs, even if that person is the only compatible donor.

In McFall v. Shimp, 104 a Pennsylvania District Court refused to compel a relative of a person who suffered from a rare bone marrow disease to submit to a bone marrow transplant, even though the disease victim would die without the transplant. 105 The court cited "the common law rule which provides that one human being is not obligated to aid, assist, or rescue another." 106 The court insisted that this rule must be upheld even when it is morally "harsh or revolting." 107 The court concluded, "[F]or our law to compel the defendant to submit to an intrusion of his body would change every concept and principal upon which our society is founded....To do so would defeat the sanctity of the individual and would impose a rule which would know no limit and one could not imagine where the line would be drawn." 108

More recently in Curran v. Bosze, 109 a mother refused to allow her three and one-half year old twins to undergo a bone marrow harvesting procedure for the

98 Id. at 170.
100 Robertson, supra note 94, at 444.
101 A.C., 533 A.2d at 616.
102 Id. at 617 (emphasis added).
103 Court-Ordered Interventions, supra note 3, at 1194.
105 Id. at 90-91. See also In re George, 630 S.W.2d 614 (Mo. Ct. App. 1982) (court refused to order alleged biological father of leukemia patient to undergo bone marrow harvesting procedure for patient's benefit).
106 McFall, 10 Pa. D. & C. 3d at 91.
107 Id.
108 Id.
benefit of their half brother. The father of all three of the children requested the twins' cooperation after all other possible donors were found to be incompatible. The Illinois Supreme Court refused to order the twins to submit to the testing. The court held that ordering the twins to undergo the bone marrow harvesting procedure would not be in the twins best interests. The court concluded that although the boy's situation is tragic, it would not be proper under existing law to order such treatment.

Recognizing this concept, a Washington state judge refused to order a caesarean section against a pregnant woman's wishes. The judge stated "I would not have the right to require a woman to donate an organ to one of her other children, if that child were dying...I cannot require her to undergo [a] major medical procedure for [her fetus]."

Ordering a pregnant woman to undergo a surgical procedure for the benefit of her fetus is more unjust than requiring a living person to undergo a surgical procedure for the benefit of another. "A legal duty to guarantee the mental and physical health of another has never been recognized in the law." Since courts often order pregnant women to submit to medical treatment, a fetus, in effect, possesses more rights than does a living individual.

4. Physicians' Attitudes & Medical Uncertainty

Physicians' attitudes toward expectant mothers and the uncertainty of medicine further complicate this issue. Medical professionals recognize the fetus as their "second patient" and often wish to protect the fetus from the potentially harmful consequences of its mother's choices. They, therefore, seek to save two people: the mother and the fetus. Physicians also contend that they fear
legal action if they fail to provide medical treatment to the pregnant woman.\(^{121}\) For these reasons, physicians often disregard the mother's interests and seek court orders to compel refused treatment which they believe to be essential.\(^{122}\)

While the medical profession may be well-intentioned, physicians cannot be permitted to ignore a pregnant woman's legal rights.\(^{123}\) The risks which accompany medical treatment and the imprecise nature of science should compel the courts to refuse to order pregnant women to undergo unwanted medical procedures.\(^{124}\)

A New England Journal of Medicine survey found that doctors inaccurately predicted harm to the fetus in six cases in which court-ordered caesarean sections were sought.\(^{125}\) In several instances women left the hospital system when confronted with the threat of forced medical treatment.\(^{126}\) Some of the women involved in those circumstances delivered safely elsewhere, despite their doctor's warnings that the health of both the mother and the fetus were in danger.\(^{127}\)

Courts often justify their errors as unfortunate byproducts of medical uncertainty while disregarding the ramifications their decisions have upon women.\(^{128}\) Not only may court regulation of pregnant women's lives endanger the health and safety of women it may also jeopardize doctor-patient relationships.\(^{129}\) Hospitals' public images may be adversely affected.\(^{130}\)

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\(^{121}\) *Court-Ordered Interventions, supra* note 3, at 1195. Physicians argue that they are in a double bind in these situations. *Id.* They face possible lawsuits from a child injured by a physician's decision not to override the mother's choice as well as for performing a medical procedure without the mother's consent. *Id.* Obtaining a court order may be in the physician's best interests. *Id. But see Court-Ordered Interventions, supra* note 3, at 1196 (indicating that "none of the [surveyed] doctors knew of a case in which a doctor had been sued for failure to seek a court order." However, two of the surveyed doctors were aware of cases in California and Michigan where women sued their doctor following the performance of a court-ordered medical procedure). See also "Family Wins Settlement Over Forced Caesarean" Los Angeles Times (November 29, 1990) (following the decision in *A.C.*, the surviving family members sued the hospital and physicians for performing a caesarean on A.C. against her wishes. The family was successful in their suit and won an undisclosed amount in damages).

\(^{122}\) *Court-Ordered Interventions, supra* note 3, at 1193.

\(^{123}\) "Doctors have a very deep obligation to convince [the pregnant woman] differently if they believe she is wrong but that obligation does not extend to forcibly overriding her ultimate decision" C. Gorney, *supra*, note 70 (quoting Lynn Paltrow of the American Civil Liberties Union).

\(^{124}\) *Court Ordered Interventions, supra* note 3, at 1195.

\(^{125}\) *Id.*

\(^{126}\) *Id.* at 1193. See also C. Gorney *supra* note 70 (indicating that the patient in *Jefferson* left the hospital and delivered her child without complications).

\(^{127}\) *Court-Ordered Interventions, supra* note 3, at 1195.

\(^{128}\) *Id.*

\(^{129}\) *Id.*

\(^{130}\) *Id.* at 1196.
Women may begin giving birth to their babies outside the hospital system.\textsuperscript{131} "Because neither doctors nor patients can make entirely informed and accurate risk-benefit calculations and because the mother will ultimately be...most affected by...her choices, she must...make the initial decision."\textsuperscript{132} When the mother makes an unwise decision, it is an isolated error and one from which she will most likely learn.\textsuperscript{133} When the courts make unwise decisions, those decisions become legal precedent and, consequently, affect many people.\textsuperscript{134} Furthermore, "[a]cceptance of forced caesarean sections, hospital detentions and intrauterine transfusions may trigger demands for court ordered prenatal screening, fetal surgery, and restrictions on the diet, work, athletic activity, and sexual activity of pregnant women."\textsuperscript{135} Threats to a woman's privacy in these forms should not be considered unimaginable. Once courts have allowed major surgery to be performed against a woman's will, these more subtle restrictions will most likely be viewed as "less invasive and burdensome."\textsuperscript{136}

\textbf{Civil and Criminal Liability}

Some states have imposed civil\textsuperscript{137} and criminal\textsuperscript{138} sanctions upon women whose prenatal activities endanger their fetuses regardless of whether or not those activities were intentional. Decisions such as these impose sanctions upon women for actions that may be beyond their control and therefore punish women for simply possessing childbearing capacity.

\textsuperscript{131} Id.

\textsuperscript{132} Comment, \textit{supra} note 8, at 1583.

\textsuperscript{133} C. Gorney, \textit{supra} note 70.

\textsuperscript{134} Rhoden, \textit{The Judge In The Delivery Room: The Emergence of Court-Ordered Cesarean} 74 CAL. L. REV. 1951, 1953 (1986). "It is far better that some tragic private wrongs transpire than that state-imposed coercion of pregnant women become part of our legal landscape." \textit{Id}.

\textsuperscript{135} \textit{Court-Ordered Interventions, supra} note 3, at 1195. This concept is particularly frightening. "In light of present knowledge, forcing a woman in the 1960's to ingest widely-accepted medication, such as thalidomide, would now seem unfair." Comment \textit{supra} note 8, at 1583. Moreover each person's individual circumstances may pose more personal risks. For example, one woman refused a caesarean section due to concerns that her obesity would heighten her risks of developing complications. Bowes & Seldestad \textit{Fetal Versus Maternal Rights Medical and Legal Perspectives} 58 Obstetrics and Gynecology 209, 211 (1981). The court disregarded her concerns and ordered her to undergo the operation. \textit{Id}.

\textsuperscript{136} \textit{Court-Ordered Interventions, supra} note 3, at 1195. At least one commentator disagrees stating that "mere trivial interventions...may require more massive privacy invasion than one-time surgery." Annas, \textit{supra} note 27, at 228.

\textsuperscript{137} See e.g., Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1980); \textit{See also} Grodin discussed infra notes 139-44 and accompanying text.

\textsuperscript{138} See e.g., People v. Pamela Rae Stewart, No. M508197 (San Diego Mun. Ct. 1987) (woman arrested and imprisoned for failing to follow her doctor's medical advice following newborn's death).
1. Civil Liability

If a mother's moral duty to her fetus is transformed into a legal duty a child injured in utero would be permitted to sue its mother for damages. In *Grodin v. Grodin*, the Michigan Court of Appeals sustained a minor son's action against his mother for damages which resulted from his mother's use of tetracycline during pregnancy. Grodin ingested the drug after physicians advised her that she was not pregnant. After another physician examined Grodin and advised her that she was seven or eight months pregnant, Grodin refrained from using the drug. The court reversed summary judgment in favor of the mother and remanded the case to the trial level to assess the "reasonableness" of the mother's conduct during her pregnancy. In doing so, the court held that the child's mother's liability for negligent conduct resembled a third person's liability. Therefore, if the mother's prenatal conduct was found to be "unreasonable," a fetus injured by that conduct would be permitted to recover damages for its injuries.

In *Stallman v. Youngquist*, the Illinois Supreme Court criticized *Grodin* for failing to recognize the profound implications that parental liability for prenatal injury would impose upon all women. In *Stallman*, the plaintiff sought to recover against her mother for injuries which she sustained in an auto accident when she was in her fifth month of gestation. The court refused to recognize a cause of action by or on behalf of the child and, consequently, granted summary judgment for the mother. The *Stallman* court stated, that, "holding a third person liable for prenatal injuries furthers the interests of both the mother and the subsequently born child and does not interfere with the defendant's right to control his or her own life." The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant. No other defendant must go through biological

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140 *Id.* at 398, 301 N.W.2d at 870.
141 *Id.* at 398, 301 N.W.2d at 869.
142 *Id.*
143 *Id.* at 401, 301 N.W.2d at 871. See also *Mayberry v. Pryor*, 134 Mich. App. 826, 832-33, 352 N.W.2d 322, 324-25 (1984) (criticizing *Grodin* as incorrect and holding that the "reasonableness" of one's parental conduct is a question of law).
144 *Grodin*, 102 Mich. App. at 400, 301 N.W.2d at 870.
146 *Id.* at 274, 531 N.E.2d at 358.
147 *Id.* at 268, 531 N.E.2d at 355.
148 *Id.* at 280, 531 N.E.2d at 361.
149 *Id.* at 278, 531 N.E.2d at 360.
changes of the most profound type possibly at the risk of her own life, in order to bring an adversary into the world."  

The court concluded, "[I]t is the mother's every waking and sleeping moment which for better or worse shapes the prenatal environment which forms the world for the developing fetus...[t]hat this is so is not a pregnant woman's fault it is a fact of life."

The Grodin and Stallman decisions also reflect Michigan’s and Illinois’ views on parental tort immunity. The state of Michigan has abolished its parental immunity doctrine and, therefore, allows minors to sue their parents. Grodin has been interpreted to extend that right to fetuses. In contrast, Illinois has not abolished its parental immunity doctrine. Stallman expressly refused to comment on the doctrine’s status.

2. Criminal Liability

At least one state has employed the criminal law to punish a woman for her allegedly unreasonable conduct during pregnancy. Pamela Stewart was arrested and imprisoned after she failed to follow "doctor's orders." Stewart was informed that she had placenta previa, as a result she was advised to avoid drugs, to stay off her feet, to avoid sexual intercourse, and to seek immediate medical attention if she began to hemorrhage. Stewart ignored this advice. Her son was born with massive brain damage, and died six weeks

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151 Id.
152 Id. at 279, 531 N.E.2d at 360. The Stallman court stated: "The error that a fetus cannot be harmed in a legally cognizable way has been corrected...the law will not now make an error of a different sort, one with enormous implications for all women...." Id. at 276-77, 531 N.E.2d at 359.
153 See Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972). In Plumley, the personal representatives of the estate of four deceased children brought an action against the estate of their deceased mother for the mother's negligence which resulted in their deaths. Id. at 3, 199 N.W.2d at 170-71. The administrator of the mother's estate argued that the representatives of the childrens' estates were barred from recovery by the parental immunity doctrine. Id. The Michigan Supreme Court held that "a child may maintain a lawsuit against his parent for injuries suffered as a result of alleged ordinary negligence of the parent, except where the alleged negligent act involves an exercise of reasonable parental authority over the child or where the alleged negligent act involves an exercise of reasonable discretion with respect to provisions of food [and] clothing...." Id. at 4, 199 N.W.2d at 172-73.
154 Stallman, 125 Ill. 2d at 274, 531 N.E.2d at 358.
155 Stallman, 125 Ill. 2d at 274, 531 N.E.2d at 358.
158 Stallman, 125 Ill. 2d at 269, 531 N.E.2d at 355.
159 Stallman, 125 Ill. 2d at 269, 531 N.E.2d at 355.
161 Comment, The Pamela Rae Stewart Case and Fetal Harm: Prosecution Or Prevention? 11 HARV. WOMEN'S L.J. 227, 229 (1988) (Stewart became the first woman in the United States to be charged with criminal liability for prenatal conduct).
161 Id. at 228.
162 Id. at 228.
162 Id. at 228.
163 Id. at 228-29.
later. Stewart was charged with violating California’s child abuse statute which provides:

> If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars..., or by imprisonment [for up to one year]... A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned...

The trial judge dismissed the charges against Stewart after he determined that this statute did not apply to Stewart’s prenatal conduct. Since the Stewart case, criminal prosecutions for the mistreatment of fetuses has dramatically risen.

CONCLUSION

The state’s interest in favoring healthy newborns should not compel a pregnant woman to forfeit her legal rights to privacy and bodily integrity. Forced medical treatment violates those rights and affords a fetus with greater rights than those of a living person.

"The circumstances in which each individual woman brings forth life are as varied as the circumstances of each woman’s life." While the birth of healthy babies is an important goal, involuntary medical treatment and after-the-fact civil or criminal liability for individual mothers will not effectuate that goal.
Rather, "before-the-fact" education of all women and families about prenatal development will most effectively further the state's objectives.168

With the erosion of Roe,169 women may lose the right to control their reproductive lives. Decisions that continue to place fetal interests above maternal rights ensure that women will also be forced to subject themselves to state regulation during their pregnancies. State regulation of pregnancy will continue to force pregnant women to jeopardize their health and in some instances their lives in order to ensure their fetuses' survival.

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