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Cecilia McGraw

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Less State Intervention and Greater State Assistance Equals Greater Maternal Rights and Less Prenatal Abuse

*by Cecilia McGraw**

Introduction

Should the state intervene in the life of a pregnant woman and intrude upon her constitutional rights in order to prevent prenatal abuse? This Article will argue, in a three part analysis, that the state can better protect the unborn from harm through assistance to the mother and support of the unique relationship between the mother and her unborn.

First, the Article will focus on the extent to which states now intervene in the life of a pregnant woman when she refuses medical treatment deemed necessary to the fetus. Current state intervention may take the form of a court ordered cesarean section when the mother objects to medical care considered to be of benefit to the unborn. Further, Part I will examine the move towards imposing, over the objections of the mother, more invasive and experimental medical interventions. These potential interventions may be made possible by either the broad interpretation of existing child abuse and neglect statutes, or the adoption of a current legislative proposal. Finally, the first section will conclude that state intervention in the area of invasive medical care for the fetus must be limited, since interventions not only violate a woman's constitutional rights, but also may involve grave risks to the mother with questionable benefits to the fetus.

* Member, Class of 1989, Hastings College of the Law.

The second part of this analysis will examine how states now deal with maternal drug abuse, both in terms of the detention of women during their pregnancies and the removal of their children after birth. Part II will propose that less invasive alternatives are available to enable states to deal with the problem of maternal drug abuse, such as education about the effects of substance abuse on the unborn and drug rehabilitation programs.

Part II will also discuss the current lean towards the prosecution of women who abuse drugs and fail to follow their doctors' orders. It will consider the effect of a recent legislative proposal designed to empower the state to prosecute a woman for any prenatal conduct that causes harm to her fetus. This section will argue that a state goes too far when it files criminal charges against a woman for any behavior which causes harm to the fetus, since such a policy is overbroad and violates a woman's constitutional rights to privacy, parental autonomy, bodily integrity, and freedom from bodily restraint. This prosecution would not be the constitutionally mandated "least intrusive means" of protecting the unborn, would not protect the unborn, and might even harm the unborn.

The third and final part of this analysis will argue that limited state intervention and greater state assistance will protect the interests of both the mother and the unborn child. Since the needs of the unborn cannot be met unless the needs of its mother are met, states should assist mothers by providing them with prenatal care, counseling, and drug education and rehabilitation. State intervention in the form of prosecution, detention, and removal does not meet the needs of the mother, may harm the fetus, and violates a woman's constitutional rights. Medical decisions made by pregnant women must be respected. Since the relationship of the mother and her unborn is a unique one, it must be supported rather than interfered with by the state.

I

State Intervention - Medical Treatment

A. Current Status

1. *Parens Patriae* Power

The states have argued that their authority to protect the unborn derives from the doctrine of *parens patriae*.¹ *Parens patriae* has been defined as the inherent power and authority of a state legislature to protect children or individuals who are not able to make decisions in their own best interests.² Pursuant to this authority, state legislatures have drafted child abuse and neglect statutes. Typically, the statutes require the parents of a minor child to furnish necessary clothing, food, shelter, and medical attendance. These statutes either explicitly provide for the unborn, or they may be construed to include the unborn.³

Thus, when a mother refuses to consent to medical care that is essential to prevent serious fetal injury or death, state authorities may seek to intervene on the basis that refusal constitutes child neglect or abuse. For example, courts have used child abuse statutes to compel women to submit to cesarean sections which were thought to be in the interest of the fetus.⁴

In *Jefferson v. Griffin Spalding County Hospital Authority*, a pregnant woman was advised by her doctor to deliver her baby by cesarean section, since her unborn child had only a 50% chance of surviving a vaginal delivery.⁵ The woman objected to the cesarean

1. *McIntosh v. Dill*, 86 Okla. 1, 12, 205 P. 917, 925 (1922); *In re Weberlist*, 360 N.Y.S.2d 783, 786 (N.Y. Sup. Ct. 1974).

2. *Id.*

3. CAL. PENAL CODE § 270 (West Supp. 1987); *Hoener v. Bertinato*, 67 N.J. Super. 517, 521, 171 A.2d 140, 144 (1961) (statutory provisions apply to the unborn child); *In re Ruiz*, 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (Ct. Com. Pl. 1986).

4. See *In re Baby Jeffries*, No. 14004 (Jackson County P. Ct. May 24, 1982); *In re A.C.*, No. 87-609 (D.C. Ct. Appeals, Nov. 10, 1987).

5. *Jefferson v. Griffin Spalding County Hosp. Auth.*, 247 Ga. 86, 87, 274 S.E.2d 457, 458 (Ga. Sup. Ct. 1981).

section.⁶ The Supreme Court of Georgia found that the unborn child had been denied the proper parental care and subsistence necessary for its life and health when its mother refused to deliver by cesarean section.⁷ The court determined that the unborn child was entitled to the protection of the Juvenile Court Code of Georgia, and that, therefore, the court could intervene to protect the fetus and compel the cesarean section over the mother's objections.⁸

2. *Critique*

These intrusive and involuntary procedures performed for the benefit of the fetus directly violate the mother's constitutional rights to privacy, bodily integrity, freedom from bodily restraint, and parental autonomy.

In *Roe v. Wade*, the United States Supreme Court recognized that the right to privacy may be found either in the fourteenth amendment's concept of personal liberty, or in the ninth amendment's reservation of rights to the people.⁹ The broad outline of the Court's holding is as follows:

1. The right to privacy is broad enough to include a woman's decision to terminate her pregnancy without interference prior to the end of the first trimester.¹⁰

2. Fundamental constitutional rights such as the right to privacy may be limited by a compelling state interest when limitations are narrowly drawn, and the state's interest outweighs the mother's constitutional rights.¹¹

3. The state has a compelling interest in protecting the unborn once it reaches the point of viability.¹² This is the point at which

6 *Id.*

7 *Id.* at 459.

8 *Id.*

9 *Roe v. Wade*, 410 U.S. 113, 153 (1973).

10 *Id.* at 154, 164.

11 *Id.* at 155, 164.

12 *Id.* at 163.

the fetus is capable of life independent of its mother.¹³

4. The state may limit a woman's privacy and prohibit abortion at the point of viability, except when it is necessary to preserve the life or health of the mother.¹⁴

Thus, the Court held that, even when the fetus has become viable, the state's compelling interest in potential life does not outweigh the mother's interest in her own life and health.

In addition, the right of privacy protects intimate family decisions concerning procreation and child bearing against government intrusion.¹⁵ Apparently, then, a pregnant woman has a constitutional right to privacy in decisions affecting her pregnancy. It follows that a pregnant woman's right of privacy includes her right to decide whether or not to accept medical treatment. Since the state does not have a compelling interest until the unborn reaches the point of viability, the state cannot order medical procedures against a pregnant woman's will prior to this point. Therefore, the right of privacy includes the right to refuse a cesarean section delivery when the woman's own life and health could be jeopardized by the medical procedure.

A cesarean section delivery involves major surgery. The procedure requires a woman to submit to general anesthesia while an incision is made into her abdominal and uterine walls.¹⁶ As with any major surgery, it involves a painful recovery, as well as a risk of infection, bleeding, and death.¹⁷ Thus, even when a state has a compelling interest in providing this arguably safer method of delivery for the benefit of a viable fetus, this interest does not outweigh the mother's constitutional rights when the cesarean section delivery could threaten her own health and life.

The fourteenth amendment protects an individual's rights to be free from the nonconsensual invasion of bodily integrity and unwarranted bodily restraint.¹⁸ The right to bodily integrity includes

13 *Id.*

14 *Id.* at 164.

15 *Whalen v. Roe*, 429 U.S. 589, 600 (1977).

16 PRITCHARD, MACDONALD, GANT, WILLIAMS *OBSTETRICS* 867 (17th ed. 1985).

17 *Id.* at 868-69.

18 *Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 739, 370 N.E.2d 417, 424

the right to possession and control of one's own person.¹⁹ It is the right to be free from all restraint and interference.²⁰ The fundamental right to bodily integrity and freedom from bodily restraint includes a woman's right to refuse to be detained within the hospital environment and to refuse medical treatment.²¹ Like the right of privacy, these rights outweigh a state's compelling interest in the performance of a cesarean section delivery when restraint and invasion of a pregnant woman's bodily integrity might risk her own life and health.

Finally, a mother has a constitutional right to parental autonomy under the due process clause of the fourteenth amendment.²² It confers upon the mother the right to the care and custody of her children, to "direct the upbringing" of her children under her control.²³ A state cannot unreasonably interfere with this right.²⁴

Since a mother cannot direct the upbringing of her child without making important decisions concerning his or her welfare, the state cannot unreasonably interfere with a mother's decisions concerning the welfare of her unborn child. Therefore, if a mother feels that a cesarean section is not warranted or necessary to the delivery of her child, the state may not compel such a delivery. It would be unreasonable to force a pregnant woman against her will to undergo major surgery which could risk her health or life.

In sum, for the purpose of protecting the fetus, a state cannot force a pregnant woman to submit to a cesarean section when the treatment in question puts the health or life of the woman at risk. A state that compels this intervention notwithstanding the woman's rights to privacy, parental autonomy, bodily integrity, and freedom from bodily restraint, violates the woman's constitutional rights

(1977); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 195 (1984); see generally Nelson, Buggy and Weil, *Forced Medical Treatment of Pregnant Women: Compelling Each to Live as Seems Good to the Rest*, 37 HASTINGS L. J. 703 (1986).

19 *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891).

20 *Id.*

21 *Rennie v. Klein*, 462 F.Supp. 1131 (D.N.J. 1978).

22 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

23 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

24 *Id.* at 535.

guaranteed by the fourteenth amendment.

B. Possible Future State Intervention in the Area of Medical Treatment

1. *Broad Interpretation of Child Abuse and Neglect Statutes*

Some states have compelled women against their wills to submit to cesarean section deliveries on the theory that because the fetus is viable, the state's interest in potential life outweighs the mother's constitutional rights.²⁵ A question that follows is whether states also have the power to compel a mother to submit to newly developed diagnostic tests and surgical interventions designed specifically to treat the fetus in utero. Pediatric surgeons are now capable of removing a fetus from its mother's uterus by cesarean section, performing surgery on the fetus in order to correct some defect, and then replacing the fetus in its mother's uterus until its birth.

Surgical treatment of the fetus may include, but is not limited to, the correction of hernias, blocked bladders, neural tube defects, and fluid build-up in the brain.²⁶ Extrauterine fetal surgery, like a cesarean section, requires the mother to submit to general anaesthesia and major surgery.²⁷ Given the intrusive nature of a cesarean section, it may well serve as a precedent for compelling fetal surgery when it is in the interest of the fetus to do so.²⁸ By broadly interpreting child abuse and neglect statutes, it is possible that the courts could enforce the implementation of prenatal medicine and fetal surgery over the objections of the mother.

²⁵ *Supra* notes 4-8.

²⁶ Schiavoni, *Individual Reproductive Rights v. State Interests*, WISC. BAR. BULL., Sept. 1986, at 18, col. 3.

²⁷ Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 446 (1983).

²⁸ See Schiavoni, *supra* note 26 at 20, col. 1.

2. *Legislative Proposal Made by Fetal Rights Advocates*

Proponents of fetal rights contend that once a woman decides to carry a child to term, she assumes a moral responsibility and must defer her rights to those of the developing fetus.²⁹ In furtherance of this conviction, Robert Masterson, a California attorney and fetal rights advocate, drafted legislation which would enable the state to detain a pregnant woman in a medically controlled environment for various reasons. The woman could be detained if she disagreed with her doctor regarding a diet plan, used inappropriate drugs, or otherwise failed to protect her unborn against potential injury. According to Masterson's proposal, a mother's failure to protect her unborn against potential injury might include her refusal to submit to newly developed diagnostic and surgical interventions, designed specifically to aid the unborn, such as extrauterine fetal surgery.³⁰

The state would implement this plan by declaring the fetus an unborn child without proper parental care and, accordingly, a ward of the juvenile court. The state could assert its authority any time the mother refused medical care or disagreed with her doctor's treatment plan if the doctor believed this care or treatment was necessary to the health of the fetus.³¹ Since the fetus cannot be physically separated from its mother, an order declaring the fetus a ward of the juvenile court would detain the mother as well.

John Myers, another fetal rights advocate and professor at McGeorge School of Law in Sacramento, California, argues that, in certain circumstances, a pregnant woman should be required, even against her will, to submit to surgery on her fetus' behalf.³² For example, surgeons can now operate on fetuses suffering from hydrocephalus, a condition of excessive fluid in the brain which can cause severe brain damage.³³ Myers observed that the forced intervention, while regrettable, was necessary because a "child has

²⁹ Begley, Wingert, Huck, Quade, *The Troubling Question of 'Fetal Rights', Should Denying Care to the Unborn Be a Crime?*, NEWSWEEK, Dec. 8, 1986, at 87, col. 2.

³⁰ Takas, *Women and Law*, VOGUE, May 1987, at 148, cols. 1-2.

³¹ *Id.*

³² *Id.* at col. 2.

³³ *Id.*

a right to be born with a sound mind and body."³⁴

3. Critique

Fetal surgery can be risky to both the mother and her unborn. With any major surgery, such as a cesarean section delivery or extrauterine fetal surgery, there is a possibility that the mother might not survive the surgical procedure or general anaesthesia. The safety and efficacy of many surgical interventions on behalf of the fetus have not been established.³⁵ For example, one hydrocephalic's head was punctured six times between the twenty-fifth and thirty-second weeks of pregnancy to withdraw fluid.³⁶ Despite this treatment, the baby was born with severe brain damage and other disabilities.³⁷ Indeed, fetal surgery is not always successful and the outcome is often unpredictable. Mary Bedard, neonatologist at the Children's Hospital of Michigan, feels it would be inappropriate under any circumstances to compel a woman to undergo fetal surgery since it is highly experimental.³⁸

Throughout medical history are cases where treatments once considered "cure-alls" were later found to cause more problems than those they originally sought to cure. For instance, in the 1950s doctors prescribed diethylstilbestrol (DES) to many women for the purpose of preventing miscarriages.³⁹ The daughters born to these women are more likely than those not affected by DES to suffer from cervical cancer.⁴⁰ Thalidomide, also administered to pregnant women in the past in order to prevent miscarriage, caused devastating seal-limb deformities in the children born to these women.⁴¹ To the same effect, attorney Janet Gallagher conducted

34 *Id.*

35 Hubard, *The Fetus as Patient*, Ms., Oct. 1982, at 32.

36 *Id.*

37 *Id.*

38 Takas, *supra* note 30, col. 2.

39 Sandroff, *Invasion of the Body Snatchers*, VOGUE, Oct. 1988, at 331, col. 2.

40 *Id.*

41 REEDER, MASTROIANNI, MARTIN AND FITZPATRICK, *MATERNITY NURSING* 611 (13th ed. 1976).

a study finding that "in six out of eleven cases of requests for court-ordered cesarean section deliveries, the women went on to successful vaginal births."⁴² A physician's opinion may be valuable but it is not unerring.

Indeed, even the American College of Obstetrics and Gynecology (ACOG) advises against court-ordered medical procedures implemented to treat the fetus.⁴³ ACOG encourages physicians to seek the mother's consent, through education and counseling, to medical procedures believed to be beneficial to the fetus, when the mother objects to such regimens.⁴⁴ ACOG concluded that "resort to the court is almost never justified."⁴⁵

Not only is resort to the courts unjustified, but it also should be unsuccessful. A state that compels a pregnant woman to undergo fetal surgery violates her constitutional rights to privacy, bodily integrity, freedom from bodily restraint and parental autonomy, unless the state first proves it has a compelling interest which outweighs the mother's constitutional rights.⁴⁶ While the state may have a compelling interest in fetal surgery to preserve the life and health of a viable fetus, this interest does not outweigh the mother's constitutional rights when the surgery might risk her own life and health. In addition, since fetal surgery may present risks to the life and health of the unborn as well as to the life and health of the mother, the state's interest may be less compelling than if the surgery were safe.

The broad interpretation of child abuse and neglect statutes or the adoption of Masterson's legislative proposal might give states the power to compel, over a pregnant woman's objections, surgical interventions designed to treat the fetus in utero. Given the grave risks that major surgery may pose to mother and child, the questionable benefits as well as success rates of fetal surgery, and the susceptibility of medical technology and judgment to human

42 Sandroff, *supra* note 39, col. 1.

43 Gianeli, *ACOG Issues Guidelines on Maternal, Fetal Rights*, 30 AM. MED. NEWS, Aug. 28, 1987, at 7, cols. 1-3.

44 *Id.* at col. 3.

45 *Id.*

46 *Supra* note 11.

error, major surgery should be held out as a choice to women and not be made compulsory. Whose life is it anyway? And whose baby?

II

State Intervention - Drug Abuse

A. Current Status

1. Drug Abuse Problem

The use of drugs by a pregnant woman can produce crippling and often fatal fetal defects. The vulnerability of the unborn to drugs has been demonstrated repeatedly. Prescription drugs, such as sedatives and tranquilizers, as well as heroin and morphine, all may lead to physical and mental defects in the child.⁴⁷ Excessive alcohol intake during pregnancy may result in physical growth retardation, particularly of the heart and skeletal systems of the fetus, in addition to mental retardation.⁴⁸

Growing numbers of women are using crack, the cheap and readily available purified form of cocaine. In 1988, about 20% of all babies born at Highland General Hospital in Oakland, California, were harmed by the effects of crack.⁴⁹ Even one "hit" of crack can cause irreparable harm to a fetus.⁵⁰ At birth, the babies are irritable, have tremors, and are lethargic.⁵¹ They may experience periods of uncontrollable crying and unresponsiveness.⁵² Head and brain size may be impaired; they may suffer from strokes and seizures, and their kidneys, genitals, intestines, and spinal cords may be malformed.⁵³

47 SANDBERG, *SYNOPSIS OF OBSTETRICS* 124 (10th ed. 1978).

48 *Id.* at 118.

49 Langone, *Crack Comes to the Nursery*, *TIME*, Sept. 19, 1988, at 85, col. 1.

50 *Id.* at col. 3.

51 *Id.*

52 *Id.*

53 *Id.* at col. 2.

The use of cocaine in the United States is increasing.⁵⁴ Because many cocaine users are young women of reproductive age, it is inevitable that some women who use cocaine will become pregnant. In a study conducted of 36 U.S. hospitals, Dr. Ira Chasnoff of Chicago's Northwestern Memorial Hospital reported that at least 11% of 155,000 pregnant women surveyed had exposed their unborn babies to illegal drugs, cocaine being by far the most common drug used.⁵⁵

2. *Civil Intervention*

a. Detention of Pregnant Women and Removal of their Infants

In response to these frightening statistics, courts have used child abuse and neglect statutes to detain pregnant women who abuse drugs or engage in activities that might harm their unborn. By designating the fetus as "a child in need of protective services" because of the mother's drug abuse, courts have seized custody of the fetus, thereby detaining the mother.⁵⁶ For example, a Wisconsin court ordered that a pregnant sixteen year-old woman and habitual runaway be placed in secure detention until the birth of her fetus. The court found that her toxemic condition could cause premature labor, presenting a danger to the fetus.⁵⁷

Once a woman gives birth, instead of detaining her, states may seek to take the infant from her. *In re Baby X* held that the newborn's symptoms of narcotics withdrawal established sufficient evidence of its mother's prenatal neglect to justify the court's taking temporary custody of the baby.⁵⁸ The court concluded that prenatal conduct causing postpartum injury could constitute child abuse within the meaning of the probate code. This determination would be

54 *Id.* at col. 1.

55 *Id.*

56 See Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, & Equal Protection*, 95 YALE L. J. 599, 605 (1986).

57 Unreported case, Wankesha County Circuit Ct., Aug. 9, 1985.

58 *In re Baby X*, 9 Mich.App. 111, 116, 293 N.W.2d 736, 739 (1980).

considered in deciding whether the mother should be permanently deprived of the custody of her child.⁵⁹ *In re Ruiz* likewise determined that an infant born to a mother addicted to heroin was abused by the mother within the meaning of the child abuse statute.⁶⁰ The court held that the unborn child was entitled to legal protection under the statute which would permit the state to take custody of the child.⁶¹

b. Critique

The detention and monitoring of pregnant women who abuse drugs, as well as the removal of babies born to these women, directly infringe upon a woman's constitutional rights to be free from bodily restraint, the right to bodily integrity, the right to privacy in decisions affecting her pregnancy, and the right to parental autonomy, which includes a mother's right to the care and custody of her child. Accordingly, a state must prove it is using the least intrusive means available to protect the interests of the unborn.⁶²

Many women who use drugs during their pregnancies do not appreciate the harm that drug intake may have on their unborn. Some pregnant women naively believe that the placenta forms a barrier between themselves and their unborn, protecting their unborn from exposure to the drugs they take.⁶³ Since many women are ignorant of the effects of drug use on their unborn, education rather than detention would be a less intrusive means of protecting the unborn. Rehabilitating women addicted to drugs also would be less intrusive than taking custody of their newborn infants. In sum, states do not have the right to detain pregnant women and remove their children when less invasive means of protecting the unborn are available, such as drug rehabilitation and education.

59 *Id.*

60 *In re Ruiz*, 27 Ohio Misc. 2d 31, 35, 500 N.E.2d 935, 939 (1986).

61 *Id.*

62 *Supra* note 11.

63 See Hillard, "Recreational" Drugs: Cocaine, PARENTS, Jan. 1988, at 134, col. 1.

In addition, a state must prove it has a compelling interest before it can detain a pregnant woman against her will.⁶⁴ A state has a compelling interest in the fetus only after it has reached the point of viability.⁶⁵ Therefore, it would be unconstitutional to order a woman detained prior to the viability of the fetus. Since maternal drug abuse causes the greatest amount of damage to the unborn during the first trimester of pregnancy,⁶⁶ before a fetus has become viable, the unborn is left unprotected from early drug abuse by state measures directed at detention. Drug education and rehabilitation of women of child bearing years would offer greater protection to the unborn than would the detention of their mothers.

The removal of an infant born to a drug addicted mother is the ultimate infringement of parental autonomy. Yet, the right to parental autonomy is not unlimited.⁶⁷ When a mother fails to meet her basic duty to provide for her child, or when she abuses or neglects it, states may take action to protect the child.⁶⁸ Dr. Steve Kandall, chief of neonatology at Beth Israel Hospital in New York, argues that women who are addicted to drugs are not ideal mothers for the purpose of bonding and interacting with babies.⁶⁹ Indeed, these women may have difficulty taking care of themselves. If the state fails to remove the infants, social workers claim that drug-addicted women are likely to neglect or abuse their children.⁷⁰ While removal of the newborn may be necessary in some cases, it should be ordered only temporarily to assist the mother in regaining control of her life, so she can adequately care for her child.

64 *Supra* note 11.

65 *Supra* note 12.

66 BARNES, *MEDICAL DISORDERS IN OBSTETRIC PRACTICE* 484 (4th ed. 1974).

67 *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

68 *See id.* at 166-67.

69 *In re Baby X*, note 58, at 116, 293 N.W.2d at 739.

70 *Id.*

3. *Criminal Intervention*

a. Case Study

The state of California has recently shown its willingness to prosecute women who abuse drugs and fail to follow their doctors' orders. In 1986, criminal charges were filed in California against Pamela Stewart Monson for failing to take proper medical precautions during her pregnancy.⁷¹ The statute under which Pamela was charged provides that a minor child's parent who willfully omits to furnish necessary clothing, food, shelter, medical attendance, or other remedial care for his or her child shall be guilty of a misdemeanor punishable by a fine not exceeding \$2,000, or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment.⁷²

Prosecutors charged that on the day Pamela delivered, she took amphetamines, used marijuana, and against her doctor's orders had sexual intercourse with her husband.⁷³ Pamela suffered from placenta previa, a condition under which the baby's descent through the birth canal tears the placenta from the uterine wall, causing hemorrhaging and depriving the baby, sometimes fatally, of oxygen.⁷⁴ Her doctor warned her to seek medical care as soon as she started bleeding, but Pamela failed to call the paramedics until twelve hours after the bleeding began.⁷⁵ On November 23, 1985, her son was born brain dead and amphetamines were found in his system; he died January 1, 1986.⁷⁶ The statute under which Pamela was charged provided that a child conceived but not yet born is an existing person.⁷⁷ However, charges were eventually dismissed because the judge determined the law which was alleged to have

71 *People v. Pamela Rae Stewart Monson*, No.M-508197 (Calif., filed May 13, 1986).

72 CAL. PENAL CODE § 270 (West Supp. 1987).

73 Sandroff, *supra* note 39.

74 *Id.*

75 *Id.*

76 Rust, *Women Charged with Prenatal Neglect*, 29 AM. MED. NEWS, October 24, 1986, at 1, col. 2.

77 *Supra* note 72.

been violated was intended to enforce the parental obligation of support.⁷⁸

b. Critique

While the details of the *Monson* case are particularly shocking, imposing criminal punishment on women for failing to take proper care of themselves or to follow doctors' orders during pregnancy will not protect or benefit the unborn. The prosecution of women for negligent behavior during their pregnancies will not necessarily deter this conduct.⁷⁹ When a woman is negligent in regard to her own body, it cannot be presumed that she knows the potential effects of her acts on the fetus. A woman who is unaware of the risk she is creating cannot be deterred from creating it by the threat of punishment.⁸⁰ Many women who are casual users of prescription, as well as recreational, drugs may not believe that they have drug problems or that their use of drugs may have any effect on their unborn babies.

In addition, many have argued that the threat of criminal punishment could actually injure the fetus by frightening pregnant women away from seeking prenatal care.⁸¹ This would be regrettable, since it is the women who abuse drugs and negligently care for themselves that are most in need of prenatal care. What is more, prosecution of the mother after the birth of the child does not help the child.

B. Possible Future State Intervention in the Area of Drug Abuse

1. Legislative Proposal

In response to the *Monson* decision, Senator Ed Royce introduced a bill, SB1070, into the California State legislature to

⁷⁸ Gianeli, *supra* note 43 at col. 4.

⁷⁹ W.R. LAFAYE AND A.W. SCOTT, CRIMINAL LAW 211 (1972).

⁸⁰ *Id.*

⁸¹ Zimmerman, *When Mother's Rights, Unborn Child's Collide, Whose Wins?*, San Diego Union, November 16, 1986, at C-1, col. 2.

give prosecutors the authority to prosecute women who harmed their unborn.⁸² Although this proposed legislation died in the Senate Judiciary Committee in January of 1988, Senator Royce reintroduced the exact legislation as Senate Bill 1630.⁸³ If SB1630 passes, a woman could be found guilty of either a misdemeanor or a felony if she willfully failed to follow her doctor's advice or engaged in other activities that caused harm to her unborn. Activities during pregnancy such as riding in an automobile, flying, residing at high altitudes or engaging in sexual intercourse could be grounds for criminal punishment, since these activities have been shown to cause fetal harm.⁸⁴ Poor nutrition, smoking, or drinking coffee or alcohol have also been shown to cause disorders in, and even death of, the fetus.⁸⁵ The concept of what constitutes prenatal abuse is gradually being expanded, so that in some cases even a planned birth at home has been described as an instance of prenatal abuse.⁸⁶

2. Critique

If such a bill were passed, the state could prosecute women for *any* behavior having adverse effect on the fetus. "Given the fetus's complete physical dependence on and interrelatedness with the body of the woman, virtually every act of the pregnant woman has some effect on the fetus," says attorney and ethicist Dawn Johnsen.⁸⁷ The state would have to police what pregnant women eat and drink as well as the types of activities in which they engage.⁸⁸

Furthermore, SB1630 is unconstitutionally overbroad since it does not provide adequate notice to a woman of ordinary

82 Carson, *Bill Offered Based On Pamela Rae Stewart Baby Case*, San Diego Union, March 7, 1987, at A-3, col. 1.

83 Telephone conversation with Senator Royce's secretary on March 31, 1989.

84 Note, *supra* note 56.

85 *Id.*

86 Gallagher, *The Fetus and the Law - Whose Life Is It Anyway?*, Ms., September, 1984, at 134.

87 See Note, *supra* note 56, at 605-6.

88 *Id.* at 619-20.

intelligence that her contemplated conduct is prohibited.⁸⁹ It holds a woman criminally liable for activity which she could not reasonably understand to be unlawful.⁹⁰ If a government interest can be achieved by less restrictive means, the regulation is unconstitutionally overbroad.⁹¹ Prosecution for maternal misbehavior is one of the most restrictive means of protecting potential life. It is also unlikely to succeed in protecting the fetus from harm.

If SB1630 were passed, a mother's refusal to submit to fetal surgery could be the basis for criminal prosecution if her refusal resulted in harm to her fetus. In addition to newly developed diagnostic techniques and surgical interventions employed specifically to aid the fetus, the future holds promise for correcting inheritable fetal defects by gene therapy.⁹² Possibly, then, a woman who refuses to submit to gene therapy in the future could be subject to criminal sanctions, if her child were born with a genetic defect.

While a state may impose restrictions on a woman's constitutional rights only after the fetus has reached the point of viability, this point is being pushed back further and further by medical technology. Today, a fetus born in the 25th gestational week has a 50% chance of survival.⁹³ This means that a state has the right to restrict a woman's freedoms, and under SB1630, to impose criminal sanctions at earlier and earlier points in time. Furthermore, if abortion is criminalized, the state may have the right to intervene and control a pregnant woman's behavior from the moment of conception.

Even more startling is the fact that a woman could be subject to a standard of conduct for her entire lifetime *prior* to the conception of her child. Negligent acts before conception that result in a liveborn infant with injuries are actionable.⁹⁴ For example, Meade-Johnson Laboratories was successfully sued for manufacturing birth

89 See *Papachristou v. Jacksonville*, 405 U.S. 156 (1972).

90 See *id.*

91 *People v. Pointer*, 151 Cal. App. 3d 1128, 1138-40, 199 Cal. Rptr. 357, 364-65 (1984).

92 Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 80 (1984).

93 McLoughlin, *America's New Civil War*, U.S. NEWS & WORLD REP., October 3, 1988 at 28, col. 1.

94 See Shaw, *supra* note 92, at 91.

control pills which, when taken before conception, caused damage to the chromosomes of the mother's ova, inducing Down's Syndrome in twins born to the mother.⁹⁵ Therefore, it is possible that a woman could be subject to civil or criminal liability if she engaged in negligent acts before conception and damaged her eggs which, when later fertilized, resulted in injury to her liveborn infant.

Since criminalizing maternal behavior would destroy a woman's right to make important personal decisions regarding her body and her liberty, the regulation would have to serve a compelling state interest and achieve its objectives by the least intrusive means.⁹⁶ While a state has a compelling interest in the fetus at the point of viability, the greatest damage to the unborn caused by the maternal intake of drugs is during the first trimester of pregnancy, before the point of viability.⁹⁷ Therefore, prosecuting a woman for drug use or other maternal conduct causing injury to the unborn before the point of viability would be unconstitutional.

Prosecution for maternal misbehavior is one of the most intrusive means of protecting potential life, since it involves possible imprisonment. Drug education, rehabilitation, counseling, and prenatal care are less intrusive alternatives available to protect the unborn. Furthermore, the fear of prosecution could cause many women to forego prenatal care, which would endanger the unborn rather than protect them.

95 *Jorgensen v. Meade-Johnson Laboratories*, 483 F.2d 237 (10th Cir. 1973).

96 *Supra* note 11.

97 *BARNES*, *supra* note 66.

III Proposals

A. The Problem with Regarding Maternal and Fetal Interests as Being in Conflict

1. Medical Treatment

At one time, the medical community considered the fetus to be a part of and inseparable from its mother. Now, due to medical developments, health professionals have come to regard the fetus as a separate patient which is treatable independent of its mother.⁹⁸ Indeed, the law has responded by acknowledging that the fetus not only has separate rights, but also has rights which conflict with those of its mother. Regrettably, the courts may detain a pregnant woman, compel her to submit to major surgery, and prosecute her on behalf of her unborn.

State regulation of a pregnant woman's behavior "in the name of fetal rights . . . reflects a view of the fetus as an entity separate from the pregnant woman, with interests that are hostile to her interests."⁹⁹ Because the relationship of a mother and her unborn has come to be treated as one of conflict, states have seen fit to intervene more extensively into the life of the mother in order to protect the interests of the fetus.

Ironically, state intervention may not only affect a woman's constitutional rights, but it may in fact harm the fetus. ACOG has criticized state intervention which would compel a mother against her objections to submit to treatment regimens in order to protect the fetus. ACOG found that coercion could result in "undesirable societal consequences" and could threaten the doctor-patient relationship,¹⁰⁰ which could take an even greater toll on the health of the unborn.

98 PRITCHARD, *supra* note 16 at vii.

99 Note, *supra* note 56, at 613.

100 Gianeli, *supra*, note 43.

State intrusion upon a mother's parental autonomy can actually harm her unborn by impairing important emotional bonds between a mother and her child. A mother who experiences a loss of autonomy following the birth of a child may feel frustration, which may have an unconscious impact on her relationship with her child.¹⁰¹ If the mother plans to raise the child herself, a healthy relationship is important.¹⁰²

Court-ordered medical interventions or state regulation of a pregnant woman's behavior clearly impairs a woman's parental autonomy. This state intervention into the parent-child relationship risks the destruction of fragile emotional bonds necessary to the health of the child.

2. *Drug Abuse*

State officials may believe that detaining women who abuse drugs is the only alternative in some cases. However, considering the grave consequences to the fetus and the inability of the mother to abstain, detention is no panacea. Civil commitment of pregnant women may actually harm the fetus. The detention of a pregnant woman may cause her adverse psychological effects which in turn are likely to affect the fetus, because a mother and her fetus are linked physiologically.¹⁰³ Psychological studies show that "a mother can pass on to her fetus her sense of helplessness or shock. Additionally, a mother's emotional distress can cause pregnancy disorders, premature delivery, or still birth."¹⁰⁴

Yet, the interests of the mother and her unborn, rather than being distinct and conflicting, are intimately bound. Mother and fetus are tied together both physiologically and emotionally. Thus, the needs of the unborn cannot be met unless the needs of the mother are met.

101 Note, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1051, 1065 (1981).

102 *See id.*

103 *Id.*

104 *Id.*

B. Expanding State Assistance

Women who abuse drugs or negligently care for themselves during their pregnancies need help, not prosecution. States can best protect the interests of the fetus by offering the mother assistance rather than intervention, and choices rather than coercion.

Because social service spending has been cut, increasing numbers of women suffer from inadequate nutrition, shelter, and medical coverage during their pregnancies.¹⁰⁵ In addition, while state prenatal care programs do exist, many are not equipped to handle the number of women requiring their services.¹⁰⁶

Inadequate nutrition and poor health may cause prenatal harm.¹⁰⁷ Certainly, states could better protect the interests of the unborn by providing adequate social services and prenatal care to needy women, rather than by imposing criminal liability on the women who are incapable of adequately caring for themselves. A state cannot fairly prosecute women who cause harm to their unborn because they are too poor to afford adequate nutrition, shelter, and prenatal care.

The fetus can be better protected from prenatal abuse if states insist upon the labeling and publication of products and drugs proven harmful to the fetus. Recently, local establishments that sell alcohol have been required to post warnings, cautioning pregnant women that alcohol can cause birth defects.¹⁰⁸ This is a start.

Many women are not even aware of the harm that some drugs may have on their unborn. Therefore, educating pregnant women as to substances and activities that may be harmful to their unborn children is crucial. States should establish widespread drug education programs aimed at women of child-bearing age, pregnant women, high school students, recreational drug users, and high risk groups.

105 Takas, *supra* note 30, col. 3.

106 Moore, Origel, Key, Resnik, *The Perinatal and Economic Impact of Prenatal Care in a Low Socioeconomic Population*, 154 AM. J. OBSTET. GYNECOL. 29 (1986).

107 REEDER, *supra* note 41, at 56.

108 CAL. HEALTH & SAFETY CODE § 25249.6 (1986).

Rather than detaining pregnant women who abuse drugs and removing their children from them, states should expand their drug rehabilitation centers in order to assist women to overcome their drug dependencies, preferably before conception. Non-threatening counseling could be provided by former drug users who, as a result of their drug use, have borne defective children. Even more effective might be supervised visits to hospitals that care for drug-afflicted infants. Nothing could be more sobering and have more of an impact on a pregnant woman who abuses drugs than the inconsolable crying of a malformed baby.

Conclusion

States should provide drug education, prenatal care, and drug treatment programs; not detention, removal, and prosecution. While the drug problem is very real and the devastating effects on the unborn are heartbreaking, state intervention cannot protect the interests of the unborn to the degree that state assistance can. Policies aimed at criminalizing any behavior of a pregnant woman that causes harm to the unborn are overbroad and violate a woman's constitutional rights to privacy, parental autonomy, bodily integrity, and freedom from bodily restraint.

The relationship of the mother and her unborn is a unique one. Actions taken against one will affect the other. Coerced medical interventions not only violate a woman's constitutional rights, but they also may risk her life, and may be of limited benefit to her unborn. Since it is the woman who bears the consequences, it is she who should make the decision. Therefore, states should support the relationship of the mother and her unborn; where they can assist, they should not intervene.