

# Non-Consensual Care and the Pregnant Woman: An Ethical Concern

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## **Non-Consensual Care and the Pregnant Woman: An Ethical Concern**

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### **Abstract**

Non-consensual care, or care done to a pregnant woman that includes treatments, hospitalization or even surgery without her consent, raises legal and ethical concerns. When do maternal claims not outweigh third party demands on behalf of the fetus? The American Nurses Association's (ANA) Code of Ethics for Nurses was developed to guide nurses in responsible, quality care consistent with the ethics inherent in the profession.

### **Non-Consensual Care and the Pregnant Woman: An Ethical Concern**

Non-consensual care, or care done to a pregnant woman that includes treatments, hospitalization or even surgery without her consent, raises legal and ethical concerns. Incarceration of a pregnant woman that occurs to "protect" a fetus likewise raises serious questions. When does the state's compelling interest in the fetus override maternal claims? Perhaps there is a more important question: When do maternal claims *not* outweigh third party demands on behalf of the fetus? Are these women harmed when forced to have treatments or care against their will? Does the nurse assigned to care for these patients take part in these interventions or is the nurse a patient advocate and, thus, refuses to participate?

The American Nurses Association's (ANA) Code of Ethics for Nurses was developed as a guide for "carrying out nursing responsibilities in a manner consistent with quality nursing care and the ethical obligations of the profession." (American Nurses Association [ANA], 2012). This code has as its first provision the right to self-determination, stating that

Respect for human dignity requires the recognition of specific patient rights, particularly the right...to determine what will be done to their own person...including the choice of no treatment.... Each nurse has an obligation to be knowledgeable about the moral and legal rights of all patients to self-determination. (ANA, 2001, p.4)

To that end, several cases will be reviewed with a discussion about the ethical and legal issues that arise in these situations.

Although non-consensual care occurrences are not often publicized, the following cases drew media attention. On August 31, 2000, at the Juvenile Court of Attleboro, Massachusetts, Judge Kenneth P. Nasif ordered pregnant 32-year old Rebecca Corneau into custody after she refused to submit to a court-ordered medical examination and evaluation of her pregnancy (*In re*

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*Unborn Child Corneau*, 2000). Rebecca Corneau was a woman who belonged to a religious group called “The Body” that claimed that God was the only healer and regarded medical intervention as blasphemy. This pregnancy came to the attention of protective services in Massachusetts when a former family member was concerned that the baby from Corneau's previous pregnancy seemed missing and she was pregnant again (*In re Unborn Child Corneau*, 2000). This case is one of the small, but alarming groups of women who are forced by the courts to have unwanted medical treatment and/or imprisonment because of their pregnancy. Both of these happened to Rebecca.

In another case (2003), Middlesex County Superior Court Judge Philip Paley sentenced a pregnant woman, Simone Ikerd, to a prison term solely to protect the health of her fetus (*New Jersey v. Ikerd*, 2004). A New Jersey appeals court in 2004 ruled that Paley may have violated her constitutional rights (Illinois Federation for Right to Life [IFRL], 2004). Ikerd was before the judge because of violating her probation on a welfare fraud case. However, a three-judge appeals court panel ruled that Judge Paley sentenced Ikerd to prison "because she was pregnant and addicted, and for no other reason." (IFRL, 2004, p. 1). In 2009, the Circuit Court of Leon County, Florida ordered Samantha Burton – a mother of two suffering from pregnancy complications – to be indefinitely confined to Tallahassee Memorial Hospital. Her obstetrician sought a court order for Samantha to remain in the hospital and to undergo "any and all medical treatments, including Cesarean Section delivery deemed necessary to save her 25 week fetus." (Belkin, 2010). In opposition to these judges' rulings, Diana Kasdan, an attorney with the American Civil Liberties Union (ACLU), argued that “women do not give up their right to determine the course of their own medical care when they become pregnant.” (American Civil Liberties Union [ACLU], 2009, p. 1). Little is written about whether these women are harmed

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when this occurs, and there does not seem to be any literature on the role of the nurse in these situations.

The issues in these cases are complex. Constitutional issues raised include the Fourth Amendment questions about illegal searches and seizures, the Fourteenth Amendment's concern for due process, along with issues of self-determination, bodily integrity and other related matters. Gwen Tovey (2010-2011), a professor at the University of Glamorgan in the United Kingdom, writes in her lecture notes that it is necessary to categorize those for whom the administration of non-consensual treatment (treatment given without consent) might be allowed, but that it is easy to eliminate one category of persons: "those of sound mind, for whom administration of non-consensual treatment is *absolutely prohibited*" (p. 1). She goes on to write that conscious adults of sound mind have an unqualified right of self-determination, based on the United States' (U.S.) case *Schloendorff v. The Society of the New York Hospital* (1914). In this case, the plaintiff, Mary Schloendorff, was admitted to New York Hospital and consented to being examined under ether to determine if a diagnosed fibroid tumor was malignant, but did not give consent for the tumor to be removed. When the tumor was examined, it was found to be malignant. The physician then disregarded the patient's wishes and removed the tumor. The Court found that the removal of the tumor without consent constituted medical battery. April Cherry (2004) argues that fundamental harm is done to a woman, and she is relegated to being a second-class citizen in the United States when she is subordinated to her reproductive capacity and state-sanctioned mothering roles. Such treatment, Cherry states, "derogates and disrespects women's claim to full citizenship" (p. 725).

Court ordered civil commitment, either in a hospital or a jail, is often accompanied by treatments and procedures which may be seen as illegal searches and assault. Rebecca Corneau

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was detained in police custody. Burton was ordered held in a hospital indefinitely, and Ikerd apparently was jailed by the judge in order to "save" the baby. This raises questions about qualifiers for preventive detention and the state's convincing interest in protecting the public. The compelling state interest in a fetus begins with viability that is when the fetus is able to live outside the womb. Concerns for the fetus in cases as those discussed here seem to trump any rights the mother has to decide what will happen to her body, her pregnancy and/or her growing fetus.

Further, the court cases discussed here indicate a tendency toward court paternalism. Until the Corneau decision, commitment of a pregnant woman was limited to someone who abused substances (*Whitner v. State*, 1996) or was mentally ill (*In re Steven S*, 1981). A significant question results from Judge Nasif's decision in the Corneau case: Was a precedent being set where the Court has the authority to control a woman's body when she is pregnant on the chance that the fetus might be in jeopardy at some future time? The concern here is about a slippery slope, wherein pregnant women's activities could be curtailed by court orders and prison time. Court decisions authorizing legal action against pregnant women for inadvertent fetal jeopardy suggest that states seem to think they have a license to take control of a woman's body during pregnancy to protect the health and welfare of the fetus (Boatright, 2001). Wendy Murphy, referring to the Corneau case, argues that no state interest could justify the total denial of a pregnant woman's liberty (*Barbara F. v. Bristol Division of the Juvenile Court Department*, 2000). According to Morris (2002), the same state interests that could be used to force Rebecca Corneau into custody could also be used against any woman who decides to carry a pregnancy past viability for any action, or omission, that the courts consider compelling or necessary for the state.

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Morris wrote that the Corneau case could be an indication that today's courts are willing to be paternalistic in decision-making regarding the rights of the fetus, regardless of the parent's wishes and beliefs. In the story of Samantha Burton, the state of Florida asked the court to order her confined indefinitely, against her will, to Tallahassee Memorial Hospital and to submit to any and all medical treatments, including cesarean section, that the unborn child's attending physician deemed necessary to safeguard the health and life of Corneau's unborn child (ACLU, 2010). In U.S. law, a fetus is not a person, or a child, until it is born. Note that the fetus is referred to as a "child" in the Burton case, implying rights that do not yet exist.

Burton wanted to go to a different hospital to get a second opinion, but the court denied that request, stating that that this was not in the "child's" best interest. In addition, the court approved the state's complete control over Burton's liberty and medical care during pregnancy on what the ACLU, who filed an Amicus brief in support of Burton, called the erroneous legal premise that the ultimate welfare of the fetus was sufficient to override her constitutional rights to liberty, privacy, and autonomy (*Samantha Burton v. State of Florida*, 2009).

This idea that a pregnant woman can have her body invaded and appropriated at the discretion of the state is an idea that goes against the constitutional concepts of privacy, liberty, and being secure in your person from unreasonable searches and seizures (Arch, 1996). Rebecca Corneau was placed into custody with no clear duration of the confinement. So, too, for Burton. In 2001 (a year after the Corneau decision), the U.S. Supreme Court in *Ferguson v. City of Charleston* (2001) reaffirmed that the Fourth Amendment provides all Americans with protection from unreasonable searches and seizures (Paltrow, 2000) even when they are pregnant. When pregnant women have non-consensual treatment, their bodies are "seized," as are

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the materials taken from their bodies as laboratory specimens, when their bodies were "searched" during examinations. As nurses, do we question participating in this?

Inasmuch as there was no indication that the women discussed here intended to harm their fetuses, and since competent adult citizens of the United States are not to be imprisoned on the chance that they might do something to harm their fetus at some future time, the claims by the courts are not strong enough to have these pregnant women taken into custody – in a hospital or in a jail. Below are some of the issues that indicate harms done to competent pregnant women who are compelled to have medical treatment and care or who lose their liberty because of their pregnancy. Although not an inclusive list, it benefits us to be aware of the potential injuries that can occur to women who receive unwanted care.

### **Illegal search and seizure**

Medical professionals can be civilly and criminally liable for wrongful violation of bodily integrity (Svoboda, Van Howe & Dwyer, 2000), as well as be subject to professional disciplinary action and is considered a *tort*. A tort (Tort, n.d.) is a negligent or intentional civil wrong including assault, battery and/or imprisonment. In the hospital setting, treatments and procedures done to a patient without informed consent are considered battery (Keeton, Dobbs, Keeton & Owen, 1984). In *Ferguson*, where some patients were unknowingly tested for drugs when they delivered their child, the Supreme Court expressly stated that laboratory tests done without the knowledge and consent of the patient are not legal and are against the Fourth Amendment. Not knowing that the tests were being done, they were unable to give informed consent. However, in these situations the pregnant woman is subjected to laboratory tests and physical examinations to determine personal and private information about her body and her pregnancy without her permission and against her competent statement that she does not want these to happen.



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Permission from a judge may remove liability to the hospital and healthcare workers who do these procedures, but the question asked is if it takes priority over the stronger guarantees provided in the U.S. Bill of Rights, or excuses the ethical questions that include respect for persons and self-determination?

### **Bodily integrity/Autonomy**

In *Union Pacific Railway v. Botsford* (1891), the U.S. Supreme Court held that the court has no right to order a surgical examination without the person's permission or consent. At least since 1891, courts have increasingly emphasized the strong interest each person has in being free from non-consensual invasion of his or her body (*Ferguson v. City of Charleston*, 2001), a corporeal property. Further, in *Union Pacific*, the Supreme Court stated that 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 person, free from all restraint or interference of others, unless by clear and unquestionable authority of law (Svoboda, Van Howe & Dwyer, 2000). Based on the precedence of these Supreme Court rulings, the medical interventions performed on Rebecca Corneau and Samantha Burton were not legal since there was no maternal consent.

### **Self-determination and due process**

The autonomous individual acts freely in accordance with a self-chosen plan, analogous to the way an independent government manages its territories and sets its policies (Beauchamp & Childress, 2009). Included in this theory is the requirement of the liberty to make decisions without controlling influences, and from this comes the notion that prohibits actions to one's person without express consent. In addition to bodily integrity and protection from illegal searches and seizures is the right to accept or refuse medical treatment. This constitutionally based liberty (*Cruzon v. Director, Missouri Department of Health*, 1996) guarantees the

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protection of an individual's deeply personal decision to reject medical treatment. Ideas of liberty are inextricably entwined with thoughts about physical freedom and self-determination, and the court has often deemed state incursions into the body against the interests that are protected by the Due Process Clause (*Union Pacific Railway v. Botsford*, 1891). Further, Wunsch points out how the Supreme Judicial Court in Massachusetts recognizes constitutional and common law bias for the right of a competent individual to refuse medical treatment (*Norwood Hospital v. Munoz*, 1991). This is true, "however unwise [her] sense of values may be in the eyes of the medical profession." (*Shine v. Vega*, 1999). Wunsch then went on to reference *In re Baby Boy Doe* (1994) that in the context of non-consensual medical treatment of pregnant women, a woman has the right to refuse invasive medical treatment based on her rights to privacy, bodily integrity, and religious liberty and that these are not lessened when she is pregnant.

The Equal Protection/Due Process clause of the Fourteenth Amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the law (Burgess, 1998). That is, what goes for one citizen goes for every citizen, in this case, whether one is pregnant or not. Referring to *In re Fetus Brown* (1997), the appellate court ruled that a competent pregnant woman had the right to refuse medical treatment despite possible harm to herself and her fetus. The appellate court's decision was based on the principle that the law would not treat a fetus as a being which is entirely separate from its mother and that a fetus cannot have rights that supersede those of its mother (S. Wunsch, personal communication, December 27, 2000).

### Privacy

A constitutional right recognized in the U.S. is personal privacy (*Eisenstadt v. Baird*, 1972), a right that limits the government's ability to interfere with personal decisions, including

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procreation and family matters (*Norwood Hospital v. Munoz*, 1991). According to analysts such as Heddy Bower, Massachusetts wrongfully forced Corneau into confinement because individuals have a fundamental right to make decisions concerning their pregnancy in private. This goes, too, for Ikerd and Burton. To infringe on this right requires that the government show a compelling reason for doing so (Bower, 2001).

### **Civil Commitment**

Rebecca Corneau was detained in police custody at a jail for pregnant women until she either allowed medical care for herself and her fetus or until she delivered. Samantha Burton was held in the hospital indefinitely to protect her preterm fetus. Neither Corneau nor Burton was charged or convicted of a crime, so at best, they were held in detention in a civil commitment. Judge Paley is quoted as saying, "You know, put [Ikerd] in jail. Not because I want to punish her, but because we want to save the baby." (IFRL, 2004, p. 1) The important question here is how high is the bar that justifies detention without being charged in any crime? The preventive detention doctrine, upheld by the U.S. Supreme Court in *U.S. v. Salerno* (1987), allows for a defendant to be held prior to trial and without bail if the court fears that the defendant is a danger to an individual or the public at large. The Supreme Court decided that preventive detention could be used only if the state could prove, with clear and convincing evidence, that it had a compelling regulatory interest in protecting the public that outweighs an individual's liberty rights. However, this doctrine required that the person confined be a criminal defendant (Bower, 2001).

As a case in point, Massachusetts' civil commitment statutes mandate that a person be incompetent before he or she can be placed in state custody. None of the women discussed in this paper were declared incompetent. Yet, Corneau, Ikerd and Burton were placed into custody.

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Since Corneau and Burton were not criminals charged with any crime and Ikerd was not imprisoned for the crime for which she was charged, nor were they diagnosed as being mentally ill, and since a fetus is not a person in law per the Fourteenth Amendment to the U.S. Constitution, it is argued that the courts did not have the authority to place these women into custody.

### **Compelling state interest**

Since *Roe v. Wade* (1973), the compelling interest of the state begins at viability. Because of viability (referring to when a fetus would be able to live outside the womb, at best a vague term, especially when considering the continuing advances in newborn intensive care technologies), the state's interest in the unborn fetus usually prevents a woman from having an abortion once viability has been reached. This determination tells what can no longer happen once the fetus reaches viability. It does not tell what must be done once the fetus is able to live outside the womb, with or without medical assistance.

Technological developments seem to occur rapidly, and the court relies on the medical profession when making decisions related to reproduction. Advances in prenatal diagnoses have led to seeing the fetus as the "second patient" (Chervenak & McCullough, 1985). Although the ability to physically intervene and cure specific diseases or defects is very limited, medical technology continues to make advances, and the potential for the ability to treat more and more fetal problems will almost surely increase. Thus, the mindset that sees the fetus as a second patient has become more entrenched in the public's mind. Nevertheless, any treatments to the fetus are possible only by invasive procedures to - and through - the pregnant woman's body and these procedures can even put the woman's life in jeopardy. According to Annas (1987), at this

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time such procedures *cannot* (emphasis Annas') be performed without the woman's informed consent and that she is under no obligation to give that consent.

### Conclusion

Americans today have a sense that it is necessary to rescue those who are in harm's way. Many rally for the underdog, and attentively hope for a good outcome when a child falls in the well (Kennedy, 1987). When a pregnant woman appears to jeopardize the health or welfare of her unborn fetus, the courts (and/or other third parties) see the fetus as a vulnerable innocent at risk and in need of rescue (Beauchamp & Childress, 2009). Related to this, the pregnant woman is often viewed with hostility. Because every case is not brought to the attention by the media, it is unknown how often this actually happens in the United States. However, some hospitals have policies or procedures in place for getting a court order whenever a patient resists a treatment option that the staff or attending physician deems necessary for the health and wellbeing of the fetus (See Table 1). It is the physician that initiates a court order for treatment. The actions by physicians to request court ordered non-consensual care questions their role as advocates for their patients (Vaiani, 2007).

Chavkin (1992) suggests that there is a social theme that positions a pregnant woman as antagonistic to the fetus if she deviates from medically, socially, or legally sanctioned behavior. She maintains that certain policies convey a vision of an errant pregnant woman whose antagonism to the fetus must be constrained by outside intervention. However, the Illinois Supreme Court in *Re Baby Boy Doe* (1994) found no case in the U.S. Supreme Court that mandated a balancing test between the rights of the viable fetus and the rights of the mother to choose a medical procedure.

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These and similar cases bring up issues that are emotionally charged. The visceral response to a potential baby-to-be in America today is often a reaction to the ideology of motherhood, an ideology that expects the pregnant woman to act selflessly to protect her fetus. When the case involves the pregnant woman and her fetus, the court is faced with competing interests. They are not equal, as the fetus is not a constitutional person, but the fetus does have limited recognized interests. Nevertheless, the rights of the competent adult are clear whether one is, or is not, pregnant. To broadly paraphrase Dr. Martin Luther King, Jr. (1963), restricting any freedom diminishes every freedom. It makes all freedoms vulnerable to reinterpretation at the whim of a particular court. The *Stallman v. Youngquist* (1987) court argued that a woman has a right to refuse invasive medical treatment, and that this is derived from her rights to privacy, bodily integrity and religious liberty. The *Stallman* court goes on to say that these are not diminished during pregnancy (*Stallman v. Youngquist*, 1988). Federal constitutional principles prohibit balancing fetal rights against maternal health (*Thornburgh*, 1986).

As nurses, participation in care without the patient's consent can lead to internal conflict. The legal and ethical concerns raised in this article are significant information for nurses to recognize. The ANA (2001) code of ethics insists that the nurse's primary commitment is to the patient; that the nurse promotes, advocates for and strives to protect the health, safety and rights of the patient; and that threats to integrity may include an expectation that the nurse will act in a way that is inconsistent with the values of ethics of the profession. When a particular activity is morally objectionable, per the nurse's code of ethics, the nurse may refuse to participate.

It seems that the rights afforded to the fetus have grown substantially over the past decade. Comparatively, the trend to disregard the wants and needs of the mother and family has also increased significantly (Minkoff & Paltrow, 2006). The nurse who is responsible for the care

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of a woman with court ordered treatments, hospitalization or even detention on behalf of the fetus may question her or his role here. The Code of Nursing Ethics, not to mention the U.S. Constitution and Case Law, in nearly every instance comes down unmistakably on behalf of the pregnant woman. Yet, when assigned the care of such a woman, the nurse does not stand on solid ground. Rather, he or she is in a gray area- required to fulfill the assignment, but with the obligation to promote the best interests of the patient. What if the best interests of the patient, and supporting patient advocacy, means not participating in a court ordered procedure the patient has refused? With nursing as an inherently moral activity (Vaiani, 2007) and emphasizing patient advocacy, a discussion on the role of nursing in the non-consensual care of pregnant women is essential.

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TABLE 1

## Sample Hospital Policy (U.S.A.)

DEPARTMENT: NURSING

SUBJECT: Court Order for Authorization of Treatment of Fetus at Risk

POLICY: A court authorization for treatment will be requested to protect a fetus in those instances where the pregnant woman refuses treatment.

PROCEDURE:

1. The physician will:
  - a. explain all the information to the pregnant woman that is relevant to a meaningful decision to accept or refuse the treatment;
  - b. advise the pregnant woman of the potential consequences to her and to the fetus if treatment is refused;
  - c. document discussion of steps a & b in the patient's medical record with exact date and time of the discussion.
2. The patient will be asked to sign a "Refusal to Permit Medical Treatment."
3. The RN will witness the patient's signature. If the patient refuses to sign, the notation "Patient Refuses to Sign" will be written at the place for the patient's signature.
4. The treating physicians and nurses will document in the medical record the substance of the conversation, the mother's refusal to allow treatment, and reasons given by her, if any, and their attempts to have the mother sign the form. If the mother refuses, that should also be noted.
5. The attending physician will obtain a second opinion concerning the treatment and need for immediate action.
6. The facts concerning the second opinion will be documented in the patient's chart, including the name of the consulting physician, date and time of the consulting physician, date and time of examination and reasons for the need for the treatment and immediate action.
7. The treating physician or Nursing Supervisor will:
  - a. notify the President of the hospital or his designee;
  - b. complete a notification report.
8. The treating physician or Nursing Supervisor will call the LA County Courthouse liaison and request authorization for treatment from a Dependency Court Judge. The court liaison will help facilitate the process.
9. The attending physician will document in the patient's chart: date, time, name of the liaison, and the name of person authorized to consent to the treatment.

## NON-CONSENSUAL CARE

10. As soon as possible, the hospital will obtain from the court a written memo of any court order which was issued verbally.

## References:

May be done by: RN

M.D. order required? Yes

Reviewed: February 1991, ..., May 2010