

September 2005

The Material-Fetal Conflict: The Right of a Woman to Refuse a Cesarean Section versus the State's Interest in Saving the Life of the Fetus

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Recommended Citation

Daniel R. Levy Esq., *The Material-Fetal Conflict: The Right of a Woman to Refuse a Cesarean Section versus the State's Interest in Saving the Life of the Fetus*, 108 W. Va. L. Rev. (2005).
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THE MATERNAL–FETAL CONFLICT: THE RIGHT OF A WOMAN TO REFUSE A CESAREAN SECTION VERSUS THE STATE’S INTEREST IN SAVING THE LIFE OF THE FETUS

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I. INTRODUCTION

The maternal-fetal relationship presents unique issues for consideration in both the healthcare field as well as in the legal arena. This relationship is unique and creates complex issues because the fetus is completely dependent on the pregnant woman.¹ Therapeutic access to the fetus can only be achieved through the pregnant woman, and it is possible for the pregnant woman to experience negative effects from the treatment intended to benefit the fetus.² Therefore, some women may refuse medical treatment intended to benefit the fetus because that same treatment may be harmful to the pregnant woman.³ This paper will focus on whether a woman may refuse such treatment, more specifically, whether a woman can refuse to undergo a Cesarean section when the dangers of vaginal birth significantly outweigh the dangers of undergoing the Cesarean section.

There are several legal justifications under which it can be argued that a woman may refuse to undergo a Cesarean section. First, there is an argument that a woman has a right to refuse a Cesarean section under the right to privacy and the right for a woman to choose to have an abortion.⁴ A second argument that a woman has a right to refuse a Cesarean section derives from the almost absolute right for an individual to refuse medical treatment.⁵ An additional argument for the right to refuse a Cesarean section is based on the right to not be forced to rescue another.⁶

The refusal of a Cesarean section presents a unique question in both the medical and legal arenas. In the medical field, the obstetrician owes a duty to both the mother and the fetus, even though the best course of treatment for each patient may be in direct conflict.⁷ Legally, a viable fetus is completely dependent on the mother, so it may limit the mother's constitutional rights, such as the right to reproductive privacy and the right to refuse medical treatment. Even though there are several arguments in support of a woman's right to refuse a Cesarean section, a state should be able to require a woman to undergo a Cesar-

¹ AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE ON ETHICS, ETHICS IN OBSTETRICS AND GYNECOLOGY 34 (2d ed. 2004) [hereinafter ETHICS IN OBSTETRICS].

² *Id.*

³ See Kirk Johnson, *Harm to Fetuses Becomes Issue in Utah and Elsewhere*, N.Y. TIMES, Mar. 27, 2004, at A9. Prosecutors in Utah originally charged Melissa Ann Rowland with murder after she refused to undergo a Cesarean section despite her doctor's urging and one of the fetuses died as a result. The prosecutors charged that Ms. Rowland's refusal of the surgery showed "depraved indifference" to her twins' survival. *Id.*

⁴ See *infra* Part III.A.-C.

⁵ See *infra* Part IV.A.

⁶ See *infra* Part IV.B.

⁷ See ETHICS IN OBSTETRICS, *supra* note 1, at 34.

ean section due to the special relationship formed between the mother and the fetus by the time of viability.

II. BACKGROUND

“[A] Cesarean [section] is necessary whenever labor is unsafe for either [the] mother or [the] fetus, when labor cannot be induced, when dystocia⁸ or fetal problems present significant risks with vaginal delivery, [or] when an emergency mandates immediate delivery.”⁹ “The majority of [C]esareans are performed for fetal indications [and] a few solely for maternal reasons”¹⁰ Forty percent of Cesarean sections are performed due to fetal distress, breech or other emergency conditions.¹¹

Cesareans can lead to a variety of postpartum complications, including wound infection, hemorrhage, severe complications from anesthesia, and even death.¹² The pregnancy related mortality rate among women with Cesarean delivery with a live birth outcome is about 35.9 deaths per 100,000 while the mortality rate among women with vaginal delivery with a live birth outcome is about 9.2 per 100,000.¹³ Previous Cesarean sections can lead to major risks in subsequent pregnancies since there may be a higher chance of *placenta previa* or *placenta accreta*,¹⁴ both of which can cause severe bleeding.¹⁵

“When deciding whether or not vaginal delivery is prudent, the attending physician must balance the effects the route of delivery might have not only on the pregnant woman, but also on her fetus.”¹⁶ This balancing does not only

⁸ Dystocia includes any “[m]echanical problems of the uterus, fetus, or birth canal or ineffective uterine contractions that result in unsuccessful progress of labor and vaginal delivery” JAMES R. SCOTT ET AL., *DANFORTH’S OBSTETRICS & GYNECOLOGY* 450 (9th ed. 2003).

⁹ *Id.* at 449.

¹⁰ *Id.* at 450.

¹¹ *Id.*

¹² *Id.*

¹³ Margaret A. Harper & Robert P. Byington, *Pregnancy-Related Death and Health Care Services*, 102 *OBSTETRICS & GYNECOLOGY* 273, 275 (2003). While the mortality rate is higher for Cesarean births, it must be remembered that the C-section is generally indicated only when there is maternal or fetal complications, whereas vaginal births are typically performed when there are no such complications; therefore, the patients having the Cesarean are more susceptible to death even prior to the C-section. *See id.*

¹⁴ *Placenta previa* is defined as the condition in pregnancy where the “placenta has grown abnormally low in the uterus, partly or completely covering the cervix.” AMERICAN MEDICAL ASSOCIATION COMPLETE MEDICAL ENCYCLOPEDIA 990 (1st ed. 2003). “*Placenta accreta* occurs when the placenta attaches too deep in the uterine wall but does not penetrate the uterine muscle.” Pregnancy Complications: Placenta Accreta, <http://www.americanpregnancy.org/pregnancycomplications/placentaaccreta.html> (last visited Oct. 6, 2005) (emphasis added).

¹⁵ *See Should I Have a Cesarean Section*, 49 *MIDWIFERY & WOMEN’S HEALTH* 167-68 (2004).

¹⁶ JEFFREY P. PHELAN & STEVEN L. CLARK, *Preface to CESAREAN DELIVERY* (1988).

include the birth itself, but also includes any negative consequences that may occur subsequent to the birth.¹⁷ “Once the balancing is complete, [C]esarean delivery may be indicated for the patient, her fetus, or both.”¹⁸ Further complications arise from the threat of medical malpractice litigation, which may explain the radical rise in Cesarean births over the past few decades.¹⁹ The additional risks placed on the mother when undergoing a Cesarean section may cause more women to refuse the procedure, even if the Cesarean is indicated for the fetus.²⁰

III. BASIS FOR REFUSING A CESAREAN SECTION UNDER THE RIGHT TO REPRODUCTIVE PRIVACY

A. Roe v. Wade

One argument for the right to refuse a Cesarean section is that the right of refusal is protected by the right to reproductive privacy. The Supreme Court has consistently held that there is a fundamental right to reproductive privacy in the United States.²¹ In *Roe v. Wade*,²² the Supreme Court held that a woman has a constitutional right to an abortion under the right to privacy.²³ However, the Court held that although the right to privacy is broad enough to cover a woman’s right to terminate her pregnancy, the right is not absolute.²⁴ In the first trimester, the woman’s right to an abortion is absolute, so there can be no restrictions on the privacy right.²⁵ The Court reasoned that there is no viability of the fetus in the first trimester and that abortion may actually be safer than childbirth, so the privacy interest far outweighs the state’s interests.²⁶ In the second trimester, a state has a compelling interest in protecting the health of the mother and can regulate such things as licensing of clinics, but the doctor and mother are free to determine whether to end the pregnancy.²⁷ In the third trimester, the

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See ETHICS IN OBSTETRICS, *supra* note 1, at 34.

²¹ See *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 438-39 (1983) (invalidating a statute requiring an abortion after the first trimester to be performed in a hospital because the result was an unnecessary economic burden on a woman’s right to an abortion); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that a woman’s qualified right to terminate her pregnancy is within the right to privacy); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (including within the right to privacy the right to use contraceptives).

²² 410 U.S. 113 (1973).

²³ *Id.* at 154.

²⁴ *Id.*

²⁵ *Id.* at 164.

²⁶ *Id.*

²⁷ *Id.* at 163.

fetus is deemed viable and can live outside the womb, so the state has a compelling interest in protecting life and can prohibit abortion.²⁸

B. Planned Parenthood of Southeastern Pennsylvania v. Casey

After several attempts to overturn the ruling in *Roe*, the Court reconsidered the abortion issue by granting certiorari in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁹ In *Casey*, the Supreme Court focused on equality in stating that denying an abortion does not allow a woman to become fully equal.³⁰ The Court set forth a three-part holding. The first part stated that a woman has the right to choose to have an abortion pre-viability and have the abortion without much state interference.³¹ The second part held that the state has the power to restrict abortions after viability,³² and the third part held that the state has a legitimate interest throughout the pregnancy in protecting the health of both the mother and the fetus.³³ In short, the Court developed a new test, which provides that a state can regulate abortion during the pregnancy so long as the state's regulations do not create an undue burden on the mother, and if no undue burden is found, rational basis review will apply.³⁴

The Court further found that a state can justify intruding into a woman's right to privacy during the pregnancy in order to preserve the fetus' life.³⁵ The Court reasoned that the "[s]tate has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child."³⁶ The Court concluded that laws restricting abortion in the first two trimesters will be valid as long as they do not place an undue burden on the mother.³⁷ However, the state can prohibit abortions once the fetus is deemed viable.³⁸

²⁸ *Id.* at 164-65.

²⁹ 947 F.2d 682 (3d Cir. 1991), cert. granted, 502 U.S. 1056, 1056-57 (1992).

³⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

³¹ *Id.* at 846.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 878. Under the rational basis test, a statute will be upheld as long as the state can demonstrate that the means employed are reasonably related to its objective. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1341 (2d ed. 1988). The rational basis test is the easiest standard for a state to meet in proving a statute's constitutional validity. See *id.*

³⁵ See *Casey*, 505 U.S. at 877-78; see also *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 503 (1989) (stating that a state's interest in potential life is compelling at twenty weeks).

³⁶ *Casey*, 505 U.S. at 846.

³⁷ *Id.* at 876-77.

³⁸ *Id.* at 879.

C. *Analysis*

The argument for refusing a Cesarean section under the right to reproductive privacy is that a woman has the right to terminate her pregnancy pursuant to the doctrines established in *Roe* and *Casey*. Therefore, it would allow for a woman to refuse a life-saving Cesarean section because she would legally be permitted to terminate the pregnancy instead of undergoing the Cesarean section. However, this argument is misplaced as the right to undergo an abortion is not absolute and can be regulated as long as the fetus is found to be viable.

Under the reasoning established in *Roe*, a state could force a woman to undergo a Cesarean section as long as the fetus has been deemed viable. Since the right to terminate the pregnancy is not absolute and because the viable fetus could live outside the womb, the state has a compelling interest in protecting the life of the fetus. Therefore, the argument for refusing a Cesarean section under the holding in *Roe* fails because the state's interest outweighs the woman's interests at the time the Cesarean section would be performed.

Although the *Casey* decision removed the trimester consideration from its analysis, the Supreme Court's decision in *Casey* does not provide any further basis for a woman to refuse a Cesarean section. Again, the Cesarean section would normally be performed only during the latter part of the pregnancy, after it has been determined that the fetus is viable. Once viability is determined, the state has a significant interest in protecting the life of the fetus. It follows that a woman cannot refuse a Cesarean section by simply citing a right to reproductive privacy because the woman's interests are outweighed by the state's interest in protecting the life of the fetus. Therefore, under an analysis using reproductive privacy rights, the state's interest in protecting the fetus far outweighs the woman's right to refuse a Cesarean section.

However, the analysis cannot end under reproductive privacy rights, as refusing a C-section is inherently different from an abortion. In most Cesarean refusal cases, the potential mother does not intend to abort the pregnancy. She does, however, refuse to undergo an intrusive surgery in order to deliver the baby. In the abortion cases, on the other hand, it is the intent of the woman to end the pregnancy and not deliver the fetus. Therefore, the issue of Cesarean section refusal must be analyzed under whether the procedure is generally one included under the constitutional right to refuse medical treatment.

IV. BASIS FOR REFUSING A CESAREAN SECTION UNDER THE RIGHT TO REFUSE MEDICAL TREATMENT

A. *History*

The right to refuse medical treatment has been generally accepted throughout every jurisdiction.³⁹ The Supreme Court has held that each person has a constitutional right to make healthcare decisions, including the right to refuse medical treatment.⁴⁰ Therefore, if state law requirements are met,⁴¹ a person may express his wishes about termination of medical treatment or appoint a surrogate to make the decision for him.⁴² In order to comply with state laws, documents known as living wills have been created, which contain directives concerning termination of medical treatment if the individual no longer has the capacity to make the medical decision.⁴³

Competent patients have a right to refuse medical treatment in end-of-life decisions.⁴⁴ State interests are not enough to overcome individual rights in refusing medical treatment, and the interests of third parties are also not enough

³⁹ See, e.g., *Conservatorship of Wendland*, 28 P.3d 151, 158 (Cal. 2001) (holding that “[a] competent adult has the right under the common law and the state constitution’s privacy clause to refuse medical treatment, even treatment necessary to sustain life”); *DeGrella v. Elston*, 858 S.W.2d 698, 709 (Ky. 1993) (holding that a mother could order the discontinuance of life-sustaining treatments in light of a medical finding that the patient’s condition was irreversible); *In re Guardianship of Grant*, 747 P.2d 445, 449 (Wash. 1987) (holding that “the right to refuse life sustaining treatment is not a mere creation of statute” but rather “stems from both the constitutional right of privacy and the common law right to be free of bodily invasion”); *Rasmussen v. Fleming*, 741 P.2d 674, 683 (Ariz. 1987) (holding that the doctrine of informed consent and the state constitution permits an individual to refuse medical treatment); *John F. Kennedy Mem’l Hosp., Inc. v. Blutworth*, 452 So. 2d 921, 926 (Fla. 1984) (holding that, in the cases of a terminally ill person with a living will in effect, the guardian need not obtain court approval before terminating life-support systems); *In re Quinlan*, 355 A.2d 647, 664 (N.J. 1976) (relying upon *Roe*, the court recognized a terminally ill woman’s right to privacy and allowed the discontinuance of her artificial life support).

⁴⁰ See *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 278 (1990).

⁴¹ *Id.* at 284 (holding that a State may require clear and convincing evidence in order to refuse medical treatment).

⁴² JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 403-404 (6th ed. 2000).

⁴³ See Bretton J. Horttor, *A Survey of Living Will and Advanced Health Care Directives*, 74 N.D. L. REV. 233, 233 (1998).

⁴⁴ See *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 304 (Cal. App. 1986) (holding that the decision to refuse treatment is the sole decision of the competent adult, not a conditional right subject to approval by ethics committees or courts of law); *McKay v. Bergstedt*, 801 P.2d 617, 624 (Nev. 1990) (holding that a patient’s right to refuse treatment overrode the state’s interest in preserving life); *In re Peter*, 529 A.2d 419, 423 (N.J. 1987) (holding that medical choices “are not to be decided by societal standards of reasonableness or normalcy” rather “it is the patient’s preferences-formed by his or her unique personal experiences-that should control”).

to overcome the individual's interests.⁴⁵ A competent adult has the right to refuse any medical treatment, even treatment that may save or prolong her life.⁴⁶ Courts have allowed individuals to refuse medical attention even if the competent patient requests removal of something such as a feeding tube necessary to keep the individual alive.⁴⁷

One of the more extreme examples of the courts upholding a refusal of medical treatment is found in *In re Quinlan*.⁴⁸ On April 15, 1975, Karen Quinlan stopped breathing for at least two fifteen minute periods.⁴⁹ Ms. Quinlan lapsed into a coma and a respirator was attached in order to ventilate her lungs.⁵⁰ The medical testimony revealed that Ms. Quinlan did have some brain function and therefore was not brain dead.⁵¹ Ms. Quinlan's father petitioned the court to be appointed her guardian in order to authorize the discontinuance of all life-sustaining medical devices.⁵²

The New Jersey Supreme Court analyzed the application to be appointed guardian and remove life-sustaining measures under the right to privacy.⁵³ The court stated that the interests of the State are "the preservation and sanctity of human life and defense of the right of the physician to administer medical treatment according to his best judgment."⁵⁴ The court found that Ms. Quinlan's independent right of choice would outweigh the interests of the State; however, in this case, the court could not discern her supposed choice since she was grossly incompetent and did not present enough credible evidence through discussions with friends that she would have refused treatment.⁵⁵ Nevertheless, the court held that Karen's right of privacy could be asserted on her behalf by her guardian, and therefore life-sustaining medical treatment could be withheld.⁵⁶

⁴⁵ See *In re Quinlan*, 355 A.2d 647, 664-65 (N.J. 1976).

⁴⁶ See *id.* at 663.

⁴⁷ See *id.* at 663-64.

⁴⁸ 355 A.2d 647 (N.J. 1976).

⁴⁹ *Id.* at 653-54.

⁵⁰ *Id.* at 654-55.

⁵¹ *Id.* at 654.

⁵² *Id.* at 651.

⁵³ *Id.* at 662-63.

⁵⁴ *Id.* at 663.

⁵⁵ *Id.* at 664.

⁵⁶ *Id.*

*In re Schiavo*⁵⁷ is another more recent example of a court following a patient's wishes to refuse life-sustaining treatment. Ms. Schiavo was in a persistent vegetative state as a result of cardiac arrest and as a result only had function of her brain stem.⁵⁸ The medical evidence concluded that since Ms. Schiavo's brain stem was functioning, she could control basic life functions such as breathing and heartbeat, but she was unaware of her surroundings and was incapable of thought.⁵⁹

The *Schiavo* case gained national attention because Ms. Schiavo did not have a living will, yet the court found that her oral statements to her friends and family were sufficiently clear and convincing evidence that she would have refused life-sustaining treatment.⁶⁰ Additionally, Ms. Schiavo did not require life-saving treatment, such as a ventilator, but she did require feeding and hydration via a feeding tube.⁶¹ Therefore, the *Schiavo* case is an example of the willingness of courts to follow the wishes of the individual in right to refuse medical treatment cases because the treatment to be withheld was nutrition, which many consider maintenance and not treatment. Additionally, the court found certain statements made to friends as clear and convincing evidence even though there was no living will.

Although the right to refuse medical treatment may seem to be absolute, the right to refuse medical treatment has been limited in two significant areas that may restrict the rights of a pregnant woman to refuse treatment. First, the living will statute of virtually every state contains a pregnancy exception, which states that the provisions of the living will authorizing the discontinuation of live-saving measures do not apply when the patient is pregnant.⁶² "A number of states with living will statutes have determined that the right to refuse medical treatment, or the right to bodily integrity, carries less weight when the individual asserting the right is pregnant."⁶³ The pregnancy clauses "automatically invali-

⁵⁷ 780 So. 2d 176 (Fla. Dist. Ct. App. 2001). The Terri Schiavo case gained national attention in 2005 after the state court entered an order forcing the removal of Ms. Schiavo's feeding tube and Congress reconvened during the Easter break to pass legislation for the case to be heard by a federal judge and President Bush cut short a vacation to come back to Washington to sign the law. The federal courts subsequently denied all appeals filed by Ms. Schiavo's parents. See Daniel Eisenberg, *Lessons of the Schiavo Battle*, TIME, Apr. 4, 2005, at 24-25.

⁵⁸ Eisenberg, *supra* note 57, at 26.

⁵⁹ *Id.*

⁶⁰ *In re Schiavo*, 780 So. 2d at 180.

⁶¹ *Bush v. Schiavo*, 885 So.2d 321, 325 (Fla. 2004).

⁶² See, e.g., ALA. CODE § 22-8A-4(e) (2004); ALASKA STAT. § 18.12.040(c) (2004); COLO. REV. STAT. § 15-18-104(2) (2004); CONN. GEN. STAT. § 19a-574 (2003); DEL. CODE ANN. tit. 16, § 2503(j) (2003); GA. CODE ANN. § 31-32-3(b) (2002); IDAHO CODE ANN. § 39-4504 (2004); IOWA CODE ANN. § 144A.6 (West 2003); MINN. STAT. ANN. § 145B.13(3) (West 2005); MO. ANN. STAT. § 459.025 (West 2004); NEV. REV. STAT. § 449.624(4) (2004); N.H. REV. STAT. ANN. § 137-H:14 (2005); S.C. CODE ANN. § 44-77-70 (2003); UTAH CODE ANN. § 75-2-1109 (2004).

⁶³ See Molly C. Dyke, Note, *A Matter of Life and Death: Pregnancy Clauses in Living Will Statutes*, 70 B.U. L. REV. 867, 868 (1990).

date the living will during the course of the patient's pregnancy in order to protect the life of the fetus."⁶⁴ In effect, a pregnancy clause restricts the right to die.⁶⁵ States that have enacted pregnancy clauses have effectively determined that the state's interest in protecting the fetus outweighs the patient's right to determine whether to forgo medical treatment.⁶⁶

The right to refuse medical treatment is also not absolute in the situation where a parent refuses medical treatment for his or her minor child. "[P]arents generally have authority to make medical decisions . . . about life-sustaining medical treatment on behalf of their children."⁶⁷ "The child's lack of decision-making capacity precludes the adoption of a standard based solely on the child's wishes."⁶⁸ However, if the parental decision places the child in harm, courts may review the parental decision by looking at the best interests of the child.⁶⁹ "As the best interests standard suggests, parents will be denied authority to refuse life-sustaining treatment in some situations."⁷⁰

The classic cases of parents refusing life-sustaining treatment involve "families of Jehovah's Witnesses where the children need blood transfusions and their parents decline the transfusions on religious grounds."⁷¹ In those cases, the courts have held that the children must be given the transfusions.⁷² In ordering treatment, courts typically cite *Prince v. Massachusetts*,⁷³ where the Supreme Court stated, "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of

⁶⁴ *Id.* at 868-69.

⁶⁵ *Id.* at 869.

⁶⁶ *Id.* at 870.

⁶⁷ WILLIAM J. CURRAN ET AL., HEALTH CARE LAW AND ETHICS 642 (5th ed. 1998) [hereinafter HEALTH CARE LAW AND ETHICS].

⁶⁸ *Id.*

⁶⁹ *See, e.g., In re L.H.R.*, 321 S.E.2d 716, 722 (Ga. 1984) (stating that in cases of suspected neglect or abuse or when parents assume a stance which in any way endangers the child, the parents' right to speak for the child may be lost). *See also In re Phillip B.*, 156 Cal. Rptr. 48, 51 (Cal. Ct. App. 1979) (stating factors to consider in determining the best interest of a child as "the seriousness of the harm the child is suffering or the substantial likelihood that he will suffer serious harm; the evaluation for the treatment by the medical profession; the risks involved in medically treating the child; and the expressed preferences of the child").

⁷⁰ HEALTH CARE LAW AND ETHICS, *supra* note 67.

⁷¹ *Id.*

⁷² *See, e.g., In re McCauley*, 565 N.E.2d 411, 412 (Mass. 1991) (eight-year-old child needed a blood transfusion as part of treatment for acute leukemia); *In re Cabrera*, 552 A.2d 1114, 1120 (Pa. Super. Ct. 1989) (six-year-old child with sickle cell anemia who had already suffered two strokes needed weekly blood transfusions over at least a year's time to reduce the risk of a recurrence of her strokes from 70% to 10%). *But see In re E.G.*, 549 N.E.2d 322, 328 (Ill. 1989) (allowing a minor to make the decision to refuse a blood transfusion for religious reasons because the court determined that mature minors enjoy a right to refuse life-sustaining medical treatment).

⁷³ 321 U.S. 158 (1944) (holding that the First Amendment freedom of religion does not allow a parent to have her children distribute religious articles on a highway if the distribution places the children in danger of being harmed).

their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”⁷⁴ The Court further held that a state may infringe upon religious freedom if it protects a child against some clear and present danger.⁷⁵ As *Prince* indicates, the theory of denying parents authority to refuse treatment in some situations is that “children must be given an opportunity to reach adulthood to decide for themselves which religious [beliefs] they will follow.”⁷⁶

In summary, the law regarding the right to refuse medical treatment is almost absolute. However, two major exceptions exist that both protect children and fetuses. These two areas of law show a distinct policy of protecting children and fetuses from parental decisions that may harm the child or fetus. Therefore, a pregnant woman cannot claim she has a right to refuse a Cesarean section based upon the right to refuse medical treatment because the refusal of treatment takes place at a stage when the right to refuse is not absolute. The right to refuse is not absolute because refusal would cause harm to the fetus, and therefore, the state’s interest in protecting the fetus outweighs any right to refuse medical treatment.

B. *Basis for Refusing a Cesarean Section under the Duty to Rescue*

Another argument for the right to refuse a Cesarean section is derived from the doctrine that there is no duty to rescue.⁷⁷ There is generally no duty to rescue in American jurisprudence.⁷⁸ In *Harper v. Herman*,⁷⁹ the court enunciated the general rule that a person has no duty to rescue, but also stated that there is an exception to the general rule when a special relationship exists between the parties.⁸⁰ The *Harper* court defined special relationship as giving rise to a legal duty to protect another where one person has “custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection.”⁸¹ Other courts have held that there is a duty to rescue in situations where aid is voluntarily started or there is a pre-existing relationship between the parties.⁸²

⁷⁴ *Id.* at 170.

⁷⁵ *Id.* at 167.

⁷⁶ CURRAN, *supra* note 67, at 643.

⁷⁷ See *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993).

⁷⁸ *Brown v. Pa. Dep’t of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 477 (3d Cir. 2003) (citing RESTATEMENT (SECOND) OF TORTS §§ 314, 323 (1965)).

⁷⁹ 499 N.W.2d 472, 474 (Minn. 1993).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *Rhodes v. Ill. Cent. Gulf R.R.*, 665 N.E.2d 1260, 1270 (Ill. 1996) (stating that the law imposes no duty to rescue an injured stranger upon one who did not cause the injury, but a duty may arise when a special relationship exists between the parties); *Farwell v. Keaton*, 240 N.W.2d 217, 220-22 (Mich. 1976) (holding that there is a duty to rescue when there is a special relation-

The general rule of one's right not to be compelled to rescue has been used in cases where an individual seeks to force another to donate an organ or bone marrow.⁸³ An individual generally has no duty to donate an organ or bone marrow to another, even if it will save another's life.⁸⁴

In *In re Richardson*,⁸⁵ the plaintiff filed suit against his wife, as mother of their minor child, to compel her to consent to surgical removal and transplantation of one of the boy's kidneys for donation to the boy's sister.⁸⁶ The plaintiff alleged that the boy's sister would die within a matter of months without the kidney transplant.⁸⁷ The court held that the boy could not be compelled to donate since the individual has a "right to be free in his person from bodily intrusion."⁸⁸

Likewise, in *McFall v. Shimp*,⁸⁹ the plaintiff suffered from "a rare bone marrow disease and the prognosis for his survival [was] very [slim], unless he receive[d] a bone marrow transplant from a compatible donor."⁹⁰ After an extensive search, the defendant was found to be the only suitable donor.⁹¹ The defendant refused to donate the bone marrow, so the plaintiff filed suit to compel the defendant to submit to the bone marrow transplant.⁹²

The court began its discussion by stating that "[t]he common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue."⁹³ The court further stated that "[o]ur society, contrary to many others, has as its first principle, the respect for the individual, and that society and gov-

ship between the parties as well as when aid is voluntarily started); *Gilger v. Hernandez*, 997 P.2d 305, 310 (Utah 2000) (holding that a person generally has no duty to protect another from harm unless a special relationship exists between the parties).

⁸³ See *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (Pa. Ct. Comm. Pleas 1978).

⁸⁴ See *In re Richardson*, 284 So. 2d 185, 187 (La. Ct. App. 1973) (holding that a minor cannot be compelled to donate a kidney to his sister); *McFall*, 10 Pa. D. & C.3d at 92 (holding that an individual is under no duty to donate bone marrow to another even if it will save that person's life). *But see* *Strunk v. Strunk*, 445 S.W.2d 145, 149 (Ky. 1969) (allowing the parents of an incompetent person to decide to have the incompetent individual donate his kidney to a sibling because the operation would benefit the incompetent individual).

⁸⁵ 284 So. 2d 185 (La. Ct. App. 1973).

⁸⁶ *Id.* at 185-86. The mother actually consented, but the suit was used as a procedural vehicle to produce the matter before the court. *Id.* at 186.

⁸⁷ *Id.* at 186.

⁸⁸ *Id.* at 187.

⁸⁹ 10 Pa. D. & C.3d 90 (Pa. Ct. Comm. Pleas 1978).

⁹⁰ *Id.* at 90.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 91.

ernment exist to protect the individual from being invaded and hurt by another.”⁹⁴

For our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle 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 limits, and one could not imagine where the line would be drawn.⁹⁵

The court, therefore, denied the request for the preliminary injunction to order the defendant to undergo the transplant.⁹⁶

C. Analysis

The right to refuse medical treatment is derived from the notion of one’s own bodily integrity and the right not to be forced to undergo bodily intrusions. This is derived from the law of informed consent, which asks whether a patient was led into a procedure or medical decision without consent or with inadequate consent.⁹⁷ The doctrine of informed consent is based on the law of battery since a surgeon who performs a surgery without informed consent may be guilty of a battery.⁹⁸ Because a Cesarean section is an invasive medical procedure, on the surface it would appear that a woman could refuse to undergo the procedure.

The right to refuse to donate organs is also based on the notion that “courts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person’s health.”⁹⁹ This set of cases simply explains that if a person can refuse medical treatment that will save his or her own life, he or she can certainly refuse medical treatment that may save another’s life.¹⁰⁰ This law is based on the fact that there is generally no duty to rescue in American jurisprudence.¹⁰¹ A woman could certainly argue that she has no duty to rescue the baby because there is no right to compel her to

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 92.

⁹⁷ See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) (quoting *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (stating that the premise of the informed consent case is the concept that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body”)); *Culbertson v. Mernitz*, 602 N.E.2d 98, 103-04 (Ind. 1992).

⁹⁸ *Canterbury*, 464 F.2d at 783.

⁹⁹ *In re A.C.*, 573 A.2d at 1243-44 (D.C. 1990).

¹⁰⁰ *Id.*

¹⁰¹ See RESTATEMENT (SECOND) OF TORTS §§ 314, 323 (1965).

undergo a significant bodily intrusion, i.e. Cesarean section, for the benefit of another's health, i.e. the baby.

The Cesarean section analysis, however, cannot simply end with a discussion of the right not to donate organs. The difference is that the woman has become pregnant and chosen not to abort the pregnancy. Therefore, the fetus is completely dependent on the mother, so the fetus' situation is different because there is a special relationship between the mother and the fetus. This special relationship develops into a duty for the mother to undergo a Cesarean section. However, this duty does not exist in the organ donation cases. The argument has been raised that a woman would have a duty to donate an organ to a child she has given birth to because there would still be a duty to save the child.¹⁰² However, there would be no such a duty in this situation because after birth the child is no longer completely dependent on the mother as the fetus is dependent *in utero*.¹⁰³ It is a result of this complete dependence that develops the special relationship between the mother and fetus and subsequently a duty for the mother to undergo a Cesarean section.

V. CASES INVOLVING THE REFUSAL OF TREATMENT BY PREGNANT WOMEN

A. *Cases Leading Up to the Cesarean Section Decisions*

Only four appellate level courts have decided the issue on whether a woman can refuse to undergo a Cesarean section. These four courts have split on the issue and none of the courts have provided a full and coherent analysis for the specific issue of a woman refusing a Cesarean section. Some of the courts have analyzed the issue under *Roe* and reproductive rights while the others have concentrated on the right to refuse medical treatment or the right to not save another's life. However, none of the courts have considered the fact that the situation cannot be fully analyzed specifically under one area of law. Instead, courts should more fully analyze the special relationship that has formed between the mother and fetus at the time of viability.

Even though only a few appellate level courts have decided the precise issue of whether a woman can refuse a Cesarean section, several courts have encountered issues that seem to suggest the direction a certain jurisdiction may be heading if faced with the Cesarean issue. In *In re Jamaica Hospital*,¹⁰⁴ a "patient was [eighteen] weeks pregnant and had refused a blood transfusion necessary to stabilize her condition and save the life of the unborn child."¹⁰⁵

¹⁰² China Batista, R.N., raised this argument that if a woman has a duty to undergo a Cesarean section in order to save the fetus, she should also have a duty to donate an organ while the child is a minor if it were the only way to save the child's life.

¹⁰³ *In utero* defines the state of the fetus while it is still in the mother's womb. BLACK'S LAW DICTIONARY 842 (8th ed. 2004).

¹⁰⁴ 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985).

¹⁰⁵ *Id.* at 899.

The patient refused the blood transfusion based on her religious beliefs.¹⁰⁶ According to one of the doctors treating the patient, both she and the fetus would die without the blood transfusion.¹⁰⁷ The court stated that the patient “has an important and protected interest in the exercise of her religious beliefs.”¹⁰⁸ The court further stated that if the patient’s life were the only one involved, the court would not interfere.¹⁰⁹

The court concluded that even though the fetus was not yet viable and that the state’s interest in protecting the life of the fetus would be less than “compelling” in the context of the abortion cases, the state did have a highly significant interest in protecting the life of a mid-term fetus.¹¹⁰ The state’s interest in protecting the life of the mid-term fetus outweighs the patient’s right to refuse a blood transfusion on religious grounds.¹¹¹

The New York Court of Appeals came to a different conclusion in *Fosmire v. Nicoleau*,¹¹² where the patient refused blood transfusions necessary to save her life after she gave birth to a child.¹¹³ The state attempted to force the woman to undergo the blood transfusions, but the woman refused on religious grounds.¹¹⁴ The court stated that “a competent adult has the right to determine the course of his or her own medical treatment, and may decline even lifesaving measures, in the absence of a superior state interest.”¹¹⁵ The state argued that it had a substantial interest in protecting a minor child from the loss of the mother.¹¹⁶ The patient argued that compelling her to submit to blood transfusions “violated her common-law, statutory and constitutional right to make her own medical decisions as well as her constitutional right to practice her religion free of government interference.”¹¹⁷

The court held that the patient had a personal common-law and statutory right to refuse medical treatment.¹¹⁸ However, the court stated that the right is not absolute and may have to yield to superior state interests under certain cir-

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing *In re Melideo*, 390 N.Y.S.2d 523, 524 (N.Y. Sup. Ct. 1976) (holding that because the patient was fully competent, not pregnant and had no children, her refusal to submit to a blood transfusion must be upheld, even though it might be necessary to save her life)).

¹¹⁰ *Id.* at 900.

¹¹¹ *Id.*

¹¹² 551 N.E.2d 77 (N.Y. 1990).

¹¹³ *Id.* at 77-78.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 78.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 79.

¹¹⁸ *Id.* at 80-81.

cumstances.¹¹⁹ Other courts have also found that the state's interest in preserving life may outweigh the patient's interests.¹²⁰

The *Fosmire* court further stated that the "[s]tate has a well-recognized interest in protecting and preserving the lives of its citizens."¹²¹ The court stated that "a distinction should be drawn between the [s]tate's interest in protecting the lives of its citizens from injuries by third parties, and injuries resulting from the individual's own actions."¹²² The state's interest is manifest, and the state can generally be expected to intervene when the individual's conduct threatens injuries to others.¹²³

In *In re President & Directors of Georgetown College, Inc.*,¹²⁴ attorneys for Georgetown Hospital applied for an emergency writ seeking permission to administer blood transfusions to an emergency patient.¹²⁵ The attending physicians stated that the transfusions were necessary in order to save the patient's life, but the patient and her husband refused based on their religious beliefs.¹²⁶ The patient was not pregnant but was the mother of a seven-month-old child at home.¹²⁷ The court cited the reasoning in *Prince, supra*, stating that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."¹²⁸ The court concluded that the state, as *parens patriae*,¹²⁹ will not allow a parent to abandon a child, and so it should not allow the most ultimate of voluntary abandonments.¹³⁰ The court ordered the patient to undergo the blood transfusion, reasoning that the patient had a responsibility to the community for the care of

¹¹⁹ *Id.* at 81.

¹²⁰ See, e.g., *In re Caulk*, 480 A.2d 93, 96-97 (N.H. 1984) (permitting the state to forcibly feed a prisoner, citing concerns about institutional order); *Von Holden v. Chapman*, 450 N.Y.S.2d 623, 627 (N.Y. App. Div. 1982) (holding that the obligation of the state to protect the health and welfare of persons in its care and custody and its interest in preservation of life outweigh any right of privacy or self-expression).

¹²¹ *Fosmire*, 551 N.E.2d at 81.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 331 F.2d 1000 (D.C. Cir. 1964).

¹²⁵ *Id.* at 1001.

¹²⁶ *Id.* at 1002. See also *In re Long Island Jewish Med. Ctr.*, 557 N.Y.S.2d 239, 240 n.1 (N. Y. Sup.Ct. 1990) (noting the common scripture quotes for the refusal of blood transfusions) (citing *Genesis* 9:3-4 ["Only flesh with its soul - its blood - you must not eat."]; *Leviticus* 17:13-14 ["[You must] pour its blood out and cover it with dust."]; *Acts* 15:19-21 ["Abstain from . . . fornication and from what is strangled and from blood"]).

¹²⁷ *In re President & Directors of Georgetown College*, 331 F.2d at 1006.

¹²⁸ *Id.* at 1008 (quoting *Prince v. Mass.*, 321 U.S. 158, 166-67 (1944)).

¹²⁹ *Parens patriae* is defined as "the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

¹³⁰ *In re President & Directors of Georgetown College*, 331 F.2d at 1008.

her infant, and therefore, the state had an interest in preserving the life of the mother.¹³¹

In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,¹³² the hospital brought an action seeking authority to administer blood transfusions to a patient who was over thirty-two weeks pregnant.¹³³ The New Jersey Supreme Court concluded that the fetus was viable because the patient was beyond thirty-two weeks pregnant.¹³⁴ The patient refused the transfusions as they were contrary to her religious beliefs as a Jehovah's Witness.¹³⁵ The court found that the unborn child was entitled "to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time."¹³⁶ The court reasoned that "the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them"¹³⁷

In *In re Dubreuil*,¹³⁸ the patient was admitted to the hospital in an "advanced stage" of pregnancy.¹³⁹ The physicians determined that the patient needed to undergo a Cesarean section, which she consented to, but she did not consent to the transfusion of blood based on her religious beliefs as a Jehovah's Witness.¹⁴⁰ The physicians subsequently delivered the baby via Cesarean section.¹⁴¹

Because the patient had lost a significant amount of blood and she had a severe blood condition preventing her blood from clotting properly, the attending physicians contacted the patient's estranged husband, who subsequently consented to the blood transfusion.¹⁴² The hospital obtained a declaratory judgment allowing it to continue to administer the blood.¹⁴³ The trial court reasoned that the interests of the state outweighed the patient's interests because there was no indication as to how the patient's four minor children would be cared for if she died.¹⁴⁴

¹³¹ *Id.* at 1008-09.

¹³² 201 A.2d 537 (N.J. 1964).

¹³³ *Id.* at 537.

¹³⁴ *See id.* at 538.

¹³⁵ *Id.* at 537-38.

¹³⁶ *Id.* at 538.

¹³⁷ *Id.*

¹³⁸ 629 So. 2d 819 (Fla. 1993).

¹³⁹ *Id.* at 820.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 820-821.

¹⁴² *Id.* at 821.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

The Supreme Court of Florida quashed the district court's decision.¹⁴⁵ The court found that "[t]he state has a duty to assure that a person's wishes regarding medical treatment are respected."¹⁴⁶ However, the court found that the protection of innocent third parties could be considered in determining whether to give force to a patient's right to refrain from medical treatment.¹⁴⁷ The court stated that "the state[']s interest in maintaining a home with two parents for the minor children does not override a patient's constitutional rights of privacy and religion to refuse a potentially lifesaving blood transfusion."¹⁴⁸

The patient argued that the court should completely eliminate any consideration of state interest in protecting innocent third parties from abandonment.¹⁴⁹ However, the court refused to rule out the possibility that cases may present a compelling interest to prevent abandonment.¹⁵⁰

In *Taft v. Taft*,¹⁵¹ the patient had three previous children born after the mother had a "purse string" operation.¹⁵² One other pregnancy, during which no purse string was performed, terminated in the seventh month.¹⁵³ The patient was in the fourth month of her pregnancy and without the purse string operation it was probable that she would miscarry.¹⁵⁴ The wife was a "born-again Christian" and, based on her religious beliefs, refused to have the operation.¹⁵⁵

The court concluded that the wife's religious beliefs combined with her right to privacy outweighed any circumstances so compelling as to justify curtailing the wife's constitutional rights.¹⁵⁶ The court concentrated on the fact that the record was devoid of any facts that would support the wife to submit to an operation against her consent.¹⁵⁷ However, the court stated that there might be

¹⁴⁵ *Id.* at 828.

¹⁴⁶ *Id.* at 822 (quoting *In re Browning*, 568 So. 2d 4, 13-14 (Fla. 1990)).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 825-26. See also *In re Osborne*, 294 A.2d 372, 376 (D.C. 1972) (approving trial court's refusal to appoint a guardian to consent to blood transfusions for the father of two minor children); *Wons v. Pub. Health Trust of Dade County*, 500 So. 2d 679, 688 (Fla. Dist. Ct. App. 1987), *aff'd*, 541 So. 2d 96 (Fla. 1989).

¹⁴⁹ *In re Dubreuil*, 629 So. 2d at 826. (The patient argued that if the court forced a woman to undergo blood transfusions in order to prevent her from abandoning her children, it would lead beyond blood transfusions to major medical procedure such as Cesarean sections and heart bypass surgery).

¹⁵⁰ *Id.* at 827.

¹⁵¹ 446 N.E.2d 395 (Mass. 1983).

¹⁵² *Id.* at 396. A "purse string" operation involves suturing so that the cervix "holds" the pregnancy. *Id.*

¹⁵³ *Id.* This is presumably because the woman did not have the purse string operation. See *id.*

¹⁵⁴ *Id.* The court was presented with a letter from a physician stating that the mother needed a purse string operation to hold the pregnancy. *Id.* at 396 n.2.

¹⁵⁵ *Id.* at 396.

¹⁵⁶ *Id.* at 397.

¹⁵⁷ *Id.*

some other factual situation that would justify a court ordering a woman to submit to medical treatment in order to carry a child to term.¹⁵⁸

At first glance it may appear that the rules regarding forced treatment to pregnant women vary widely among jurisdictions. However, upon taking a closer look at the facts presented in each particular case, the outcomes do not actually vary that much. The different conclusions in the two New York cases clarify this point. In *Jamaica Hospital*, the patient was pregnant and the court ordered the blood transfusions based on the fact that the fetus would die without the transfusion. However, the court did not compel treatment in *Fosmire*, where the woman had already given birth so the fetus was no longer completely dependent on the mother.

The policy statement adopted by the American College of Obstetrics and Gynecology states that doctors “should refrain from performing procedures unwanted by the pregnant woman,” and that “[t]he use of judicial authority to implement treatment regimens in order to protect the fetus violates the pregnant woman’s autonomy.”¹⁵⁹ However, with the exception of the outcome in *Taft*, most courts will force a woman to undergo medical treatment if refusal of the treatment will directly put the fetus in danger. However, courts will be more willing to follow the mother’s wishes if the treatment decision will only directly affect the mother.

Although these cases are helpful in determining how these jurisdictions may come out on the specific issue of the Cesarean section, one must remember that a Cesarean section is much more invasive than forcing a woman to undergo a blood transfusion. In addition, most of these cases dealt with the narrow issue of whether the woman had a religious right to refuse the medical treatment, and courts have consistently held that the freedom of religion does not allow the woman to harm the fetus. Although the religious freedom argument has been presented in the Cesarean cases, courts have had to focus on other, more compelling, arguments.

B. *The Unique Case of the Caesarean Section*

1. *Jefferson v. Griffin Spalding County Hospital Authority*

The Supreme Court of Georgia was the first court to decide the issue of whether a woman could refuse a Cesarean section in *Jefferson v. Griffin Spalding County Hospital Authority*.¹⁶⁰ The defendant was in her thirty-ninth week

¹⁵⁸ *Id.*

¹⁵⁹ Tamar Lewin, *Courts Acting to Force Care on the Unborn*, N.Y. TIMES, Nov. 23, 1987, at A1. See also American Medical Association, Board of Trustees, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2670 (1990).

¹⁶⁰ 274 S.E.2d 457 (Ga. 1981).

of pregnancy and presented to the hospital for pre-natal care.¹⁶¹ The examining physician told the defendant that she had a complete *placenta previa*¹⁶² and that there was almost a 100% certainty that the child could not survive natural childbirth.¹⁶³ The defendant's chances of surviving the vaginal delivery were no better than 50%.¹⁶⁴ In addition, the examining physician opined that a delivery via C-section would have an almost 100% chance of preserving the life of the fetus and the defendant.¹⁶⁵

On the basis of religious beliefs, the defendant refused surgical removal of the fetus.¹⁶⁶ The court framed the issue as whether the unborn fetus had any legal right to the protection of the court.¹⁶⁷ The court stated that it would be a criminal offense to abort the fetus under Georgia law.¹⁶⁸ The court also cited *Roe v. Wade*¹⁶⁹ in stating that a viable fetus "has the right under the U.S. Constitution to the protection of the [s]tate through such statutes prohibiting the arbitrary termination of the life of an unborn fetus."¹⁷⁰ The court reasoned that "[b]ecause the life of [the] defendant and of the unborn child are, at the moment, inseparable, the [c]ourt deems it appropriate to infringe upon the wishes of the mother to the extent it is necessary to give the child an opportunity to live."¹⁷¹ As a result, the court ordered the defendant to undergo the Cesarean section.¹⁷²

2. *Pemberton v. Tallahassee Memorial Regional Medical Center, Inc.*

The United States District Court for the Northern District of Florida came to a similar conclusion in *Pemberton v. Tallahassee Memorial Regional Medical Center, Inc.*¹⁷³ In *Pemberton*, the plaintiff was in labor and attempting vaginal delivery at home when the hospital sought an order forcing the woman to submit to a Cesarean section that was medically necessary in order to avoid a substantial risk that her baby would die during delivery.¹⁷⁴ The state court

¹⁶¹ *Id.* at 458.

¹⁶² *See infra* note 14.

¹⁶³ *Jefferson*, 274 S.E.2d at 458.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ 410 U.S. 113 (1973).

¹⁷⁰ *Jefferson*, 274 S.E.2d at 458.

¹⁷¹ *Id.*

¹⁷² *Id.* at 460.

¹⁷³ 66 F. Supp. 2d 1247 (N.D. Fla. 1999).

¹⁷⁴ *Id.* at 1249.

granted the order and the physicians performed the C-section that resulted in the birth of a healthy baby.¹⁷⁵

The plaintiff had previously delivered a baby via Cesarean section. The previous Cesarean was performed using a vertical incision that extended well beyond a traditional low vertical incision.¹⁷⁶ The nature of plaintiff's prior Cesarean section presented a greater risk of uterine rupture during any subsequent vaginal delivery than would be the case with a more typical Cesarean.¹⁷⁷ In her subsequent pregnancy, plaintiff searched for a physician who would allow her to deliver vaginally, but every physician the plaintiff contacted advised her that vaginal delivery was not an acceptable option.¹⁷⁸

Plaintiff made plans to deliver vaginally at home with a mid-wife.¹⁷⁹ However, she went to defendant hospital for intravenous (IV) fluids since she was becoming dehydrated.¹⁸⁰ The doctors informed plaintiff that she needed a Cesarean, but plaintiff refused and simply requested the IV so she could return home and deliver vaginally.¹⁸¹ The plaintiff then left the hospital against medical advice.¹⁸² The hospital secured a court order requiring plaintiff to return to the hospital and undergo the Cesarean section.¹⁸³

Plaintiff sought damages against the hospital in claiming that the forced Cesarean violated her substantive constitutional rights, and the hospital moved for summary judgment.¹⁸⁴ Under the theory that the Cesarean section violated her substantive constitutional rights, plaintiff asserted "a right to bodily integrity, a right to refuse unwanted medical treatment, and a right to make important personal and family decisions regarding the bearing of children without undue governmental interference."¹⁸⁵ Plaintiff also invoked her right to religious freedom.¹⁸⁶

Although the court recognized that the plaintiff did in fact have important constitutional interests that were implicated by the events the hospital had set in motion, it did not outweigh the interests of the State of Florida in preserv-

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* The court also noted that most cesareans are performed using a horizontal incision. *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 1250.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1251.

¹⁸⁶ *Id.* The court dismissed plaintiff's freedom of religion claim as there was no showing that the woman's beliefs were rooted in any traditional religion. Plaintiff simply argued that most C-sections are unnecessary, but the court did not find this to be enough to support a religion claim. *Id.* at 1251 n.5.

ing the life of the unborn child.¹⁸⁷ The court reasoned that *Roe v. Wade*¹⁸⁸ stood for the notion that by the point of viability, the state's interests in preserving the life of the fetus outweighs the mother's own constitutional interest in determining whether she will bear a child.¹⁸⁹ The court determined that the state's interest was greater and the mother's interest less since the full-term baby's birth was imminent and the mother sought to preserve a particular procedure, not avoid giving birth altogether.¹⁹⁰ Therefore, the court found that the interests of the state outweighed any constitutional interests of the plaintiff.¹⁹¹

3. *In re Baby Boy Doe*

The Appellate Court of Illinois came to a completely opposite result than *Pemberton* and *Jefferson* in *In re Baby Boy Doe*.¹⁹² The defendant, Mother Doe, was thirty-five weeks pregnant when medical doctors determined that the fetus was not receiving an adequate amount of oxygen.¹⁹³ The mother refused to undergo a Cesarean section, and the state filed a petition seeking that the hospital be appointed custodian for the fetus.¹⁹⁴

On appeal, the court phrased the issue as whether the court can balance the rights of a fetus against the rights of a competent woman to refuse medical advice to obtain a Cesarean section for the supposed benefit of the fetus.¹⁹⁵ The court held that no such balancing should be employed, and that a woman's competent choice to refuse medical treatment as invasive as a Cesarean section must be honored, even in circumstances where the choice may be harmful to her fetus.¹⁹⁶

The court supported its decision by relying on the well-settled law that a competent person has the right to refuse medical treatment.¹⁹⁷ The court further stated that the right "to withhold consent and refuse treatment incorporates all types of medical treatment, including life saving or life sustaining procedures," thus demonstrating that the right to refuse treatment does not depend upon whether the treatment is perceived as risky or beneficial to the individual.¹⁹⁸ The

¹⁸⁷ *Id.* at 1251.

¹⁸⁸ 410 U.S. 113 (1973).

¹⁸⁹ *Pemberton*, 66 F. Supp. 2d at 1251.

¹⁹⁰ *Id.* at 1251-52.

¹⁹¹ *Id.* at 1252.

¹⁹² 632 N.E.2d 326 (Ill. App. Ct. 1994).

¹⁹³ *Id.* at 327.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 330.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* (citing *In re Estate of Longeway*, 549 N.E.2d 292, 297 (Ill. 1989)).

Illinois court further reasoned that religious liberty requires that a competent adult may refuse medical treatment on religious grounds.¹⁹⁹

4. *In re A.C.*

The District of Columbia Court Appeals had to decide a much more complex issue in *In re A.C.*²⁰⁰ George Washington University Hospital petitioned the emergency judge for declaratory relief on how it should treat its patient, A.C., who was close to death from cancer and was twenty-six and one-half weeks pregnant with a viable fetus.²⁰¹ The trial court ordered that the Cesarean section be performed on A.C. to deliver the fetus.²⁰² The hospital performed the Cesarean, but the mother and the baby died within the next few days.²⁰³ There was a question as to the patient's competency as she was suffering from cancer and unconscious at the time the Cesarean section was to be performed.²⁰⁴ At one point, the patient regained consciousness and seemed to have refused to undergo the Cesarean section.²⁰⁵ The appellate court accepted the appeal in order to decide the issue for later controversies.²⁰⁶

The court analyzed the issue under the settled law that "any person has the right to make an informed choice, if competent to do so, to accept or forego medical treatment."²⁰⁷ The court also cited *McFall v. Shimp*²⁰⁸ and *Bonner v. Moran*²⁰⁹ for the proposition that courts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person's health.²¹⁰ The court quickly dismissed any belief that the woman has an enhanced duty toward the fetus.²¹¹ The court emphasized the constitutional magnitude of the right for an individual to forego medical treatment.²¹²

The court distinguished *Jefferson* and *Anderson* by stating that courts have only overridden a patient's rights to decide her own course of treatment

¹⁹⁹ *Id.* at 331 (citing *In re Estate of Brooks*, 205 N.E.2d 435, 435 (Ill. 1965)).

²⁰⁰ 573 A.2d 1235 (D.C. 1990).

²⁰¹ *Id.* at 1238.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 1239.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1242.

²⁰⁷ *Id.* at 1243. *See also* *Canterbury v. Spence*, 464 F.2d 772, 780–81 (D.C. Cir. 1972) (outlining the common law doctrine of informed consent).

²⁰⁸ 10 Pa. D. & C.3d 90 (Pa. Ct. Comm. Pleas 1978).

²⁰⁹ 126 F.2d 121 (D.C. Cir. 1941).

²¹⁰ *In re A.C.*, 573 A.2d at 1243–44.

²¹¹ *Id.* at 1244.

²¹² *See id.* at 1244–45; *see also In re Bryant*, 542 A.2d 1216, 1218 (D.C. 1988) (examining the issue of the common law right to accept or forego medical treatment).

when protecting third parties, even if the third party is in a fetal state.²¹³ The court, therefore, adhered strictly to the right to refuse medical treatment and concluded that a court may not force a woman to undergo a Cesarean section.²¹⁴

VI. COMPLETE ANALYSIS OF THE FORCED CESAREAN ISSUE

The four courts that have struggled with the forced Cesarean issue have not conducted full analyses and each has only concentrated on a single issue. The *Jefferson* court focused exclusively on the reproductive right to privacy under *Roe*. Although *Roe* certainly must be considered in the Cesarean section cases, courts should not limit their analysis to reproductive rights. The *Jefferson* court did not make any mention of the right to refuse medical treatment, presumably because the court wanted to compel the Cesarean section but did not want to confront the right to refuse medical treatment. Interestingly, the court did state that the mother and child, at that moment, were inseparable. Although this is a very important aspect of the Cesarean section cases, the court did not expand on this issue. The recognition of the inseparable issue should have been the focal point of the court in distinguishing the Cesarean cases from other right to refuse medical attention cases. However, the court's failure to include any discussion of the right to refuse medical care did not permit it to explain how the inseparableness makes the Cesarean distinct from the other refusal of medical care cases.

The *Pemberton* court struggled with the same problems as the court in *Jefferson*. The court mentioned that the plaintiff had an interest in bodily integrity and a right to refuse unwanted medical treatment. Yet, after stating these rights, the court again focused on reproductive rights. The court did not analyze any of the plaintiff's rights pursuant to the rights to refuse medical treatment. As in *Jefferson*, the *Pemberton* court concentrated on the easier analysis of *Roe* in determining that the state could force a pregnant woman to undergo a Cesarean section. It is clear that both courts were eager to conclude that the state's interest in preserving the life of the fetus outweighed the mother's interest. However, the courts focused on reproductive rights since they did not attempt to distinguish the C-section case from other refusal of medical treatment cases.

In coming to the opposite decision and allowing the woman to refuse the Cesarean section, the *In re Baby Boy Doe* court relied solely on the individual's right to refuse medical treatment.²¹⁵ Although this analysis needs to be considered, the court did not consider the aspect of the special relationship formed between the mother and the fetus by the time fetus reaches viability. The court also completely ignored any analysis regarding reproductive rights.

²¹³ *In re A.C.*, 573 A.2d at 1246.

²¹⁴ *See id.* at 1252.

²¹⁵ *In re Baby Boy Doe*, 632 N.E.2d 326, 330 (Ill. App. Ct. 1994).

The *In re A.C.* court also focused on the right to refuse medical treatment and the right to not save another's life.²¹⁶ The court cited the decision in *McFall v. Shimp*²¹⁷ in stating that the woman can refuse a Cesarean since she is under no duty to save another's life.²¹⁸ The court seemed to suggest that the situation in *McFall* was the exact same situation that was presented in *A.C.*²¹⁹ The court rejected any possible distinction between donating organs to another and undergoing a Cesarean section in order to let the baby survive.²²⁰

The four courts that have directly considered the Cesarean question have tailored the issue in such a way as to come to the desired conclusion. The courts that found a woman should be forced to undergo a Cesarean section framed the analysis under reproductive rights. The courts that claim a woman is free to refuse the Cesarean discuss the legal issues under a right to refuse medical treatment. These courts completely ignored a discussion of the issues that were detrimental to their conclusion.

Courts should concentrate their discussion on how the maternal-fetal relationship differs from simply refusing medical treatment that would injure only the patient's life. Courts should also discuss the fact that there is a connection between the mother and the fetus that makes the relationship inherently different from the organ transplant cases. The *Jefferson* court mentioned this notion by stating that the mother and fetus are inseparable;²²¹ however, the court did not discuss the importance of this notion and also did not base its decision on this inseparable relationship.

The courts that argued that a woman has the right to refuse the Cesarean section as a result of the duty not to rescue have ignored the fact that there can be a duty to rescue when there is a special relationship or if the individual caused the underlying harm. A person may have a duty to rescue or protect another if there is a special relationship between them that gives rise to an affirmative duty to act.²²²

There is a special relationship formed between the mother and the fetus as a result of the mother becoming pregnant. This special relationship does not form simply by the woman becoming pregnant because the woman can elect to have an abortion pre-viability. However, the special relationship forms once the fetus reaches viability since the woman has refused to exercise her right to abort the pregnancy and therefore assumes the risk of reasonably caring for the fetus in order to safely deliver the baby. This assumption of the risk implies in it the

²¹⁶ *In re A.C.*, 573 A.2d at 1243.

²¹⁷ 10 Pa. D. & C.3d 90 (Pa. Ct. Comm. Pleas 1978).

²¹⁸ *In re A.C.*, 573 A.2d at 1244.

²¹⁹ *Id.*

²²⁰ *Id.* The court further implied that there is more of a basis to refuse a Cesarean section because a fetus cannot have rights superior to those who have already been born. *Id.*

²²¹ See *Jefferson v. Griffin*, 274 S.E.2d 457, 458 (Ga. 1981).

²²² See *Hansell v. Santos Robinson Mortuary*, 64 Cal. App. 4th 608, 614 (Cal. Ct. App. 1998).

assumption that the mother may have to undergo a Cesarean section in order to deliver the baby. Once the fetus reaches viability, therefore, a special relationship forms between the mother and the fetus whereby the mother assumes the risk that she will have to undergo a C-section in order to deliver the baby.

In *Farwell v. Keaton*,²²³ the Supreme Court of Michigan stated that an individual has a duty to render aid to a person in peril where there is the existence of a special relationship between the parties.²²⁴ Therefore, the individual is under a duty to render reasonable care under the circumstances.²²⁵ Similarly, in *Hutchinson v. Dickie*,²²⁶ the court stated that a host had an affirmative duty to attempt to rescue a guest who had fallen off his yacht since the host “controlled the instrumentality of rescue.”²²⁷ The court reasoned that to ask of the host anything less than that he attempt to rescue his guest would be “so shocking to humanitarian considerations and the commonly accepted code of social conduct that the courts in similar situations have had no difficulty in pronouncing it to be a legal obligation.”²²⁸

The question of whether a duty can be owed to the fetus is illustrated by the transformation of tort law. Prior to 1946, nearly every jurisdiction denied recovery to children damaged *in utero* as a result of injury to the pregnant mother.²²⁹ The controlling rationale was that the defendant owed no duty to a fetus because a person was not deemed to be a “person” in existence at the time of the injury.²³⁰ However, by 1967, every jurisdiction maintained a cause of action for a child injured *in utero* that was subsequently born alive.²³¹ This development has been so widespread that a few courts have held that a woman may be liable for her prenatal negligent conduct if it harms her subsequently born child.²³²

²²³ 240 N.W.2d 217 (Mich. 1976).

²²⁴ *Id.* at 221-22.

²²⁵ *Id.*

²²⁶ 162 F.2d 103 (6th Cir. 1947).

²²⁷ *Id.* at 106.

²²⁸ *Id.*

²²⁹ KEETON ET AL., PROSSER AND KEETON ON TORTS 367 (5th ed. 1984).

²³⁰ *Id.*

²³¹ *Id.* at 368.

²³² See *Bonte v. Bonte*, 616 A.2d 464, 466 (N.H. 1992) (holding that a child born alive may maintain a cause of action against his or her mother for the mother’s negligence that caused injury to the child while in utero); *Grodin v. Grodin*, 301 N.W.2d 869, 870-71 (Mich. Ct. App. 1981) (holding that a woman may be liable for taking tetracycline while pregnant). *But see* *Chenault v. Huie*, 989 S.W.2d 474, 478 (Tex. App. 1999) (holding that state law did not recognize a cause of action in tort for injuries to a child caused by the mother’s use of illegal narcotics during pregnancy).

Criminal law has also witnessed an expansion of fetal rights. Several states have imposed punishments for the crime of feticide.²³³ The California legislature specifically included the killing of a fetus in its definition of murder.²³⁴ The California Supreme Court ruled that a person can be sentenced to death for killing a fetus.²³⁵ Child abuse statutes have also extended protection to the fetus.²³⁶ Courts have also ordered women to carry their pregnancies to term in jail or have seized custody of the fetuses so as to protect them from the mother's drug use.²³⁷

Applying this notion to the Cesarean section cases, a pregnant woman has a duty to rescue by delivering the baby. There can be no more of a special relationship than that between a mother and a baby, especially when the fetus is still *in utero* since the fetus is completely dependent on the mother. Since there is a right to an abortion pre-viability, the special relationship only forms after the fetus has reached viability. After viability, the mother owes a duty to deliver the baby as she became pregnant in the first place and then did not abort the pregnancy after viability.

This scenario presents a completely different situation from the cases concerning the right to refuse medical treatment and the cases dealing with the right not to be compelled to donate organs. The right to refuse medical treatment allows for the individual to refuse medical care when the refusal will affect only his or her life. No right to refuse medical care cases discuss the right when dying will directly affect another human's life. Therefore, the Cesarean issue is distinguishable from the right to refuse medical attention cases. In addition, the Cesarean cases are different from the organ donation cases because there is no special dependency formed by the potential donor in the organ cases. In the organ donation cases the potential donor has done nothing to cause the individual to be in his or her present predicament. However, in the Cesarean case, there is a special relationship since the woman first got pregnant and then did not abort the pregnancy. Therefore, the fetus is completely dependent on the woman to carry the pregnancy to term and deliver the fetus. As a result, there is a special relationship between the fetus and the mother, and a duty is imputed to the mother to complete the pregnancy, even if it means the woman has to undergo a Cesarean section.

²³³ See Johnson, *supra* note 3, at A9 (reporting that thirty-one states currently have fetal homicide laws).

²³⁴ See CAL. PENAL CODE § 187(a) (West 2004) (stating that murder is the "unlawful killing of a human being, or a fetus, with malice aforethought").

²³⁵ See *People v. Bunyard*, 756 P.2d 795, 827-830 (Cal. 1988) (holding that the act of murdering a pregnant woman can qualify as multiple homicide, thus triggering the death penalty).

²³⁶ See CAL. PENAL CODE § 270 (stating that "a child conceived but not yet born is to be deemed an existing person").

²³⁷ See Dawn E. Johnson, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 605 (1986).

VII. CONCLUSION

The constitutional right to privacy allows for a woman to elect to undergo an abortion pre-viability and also permits an individual to refuse life-sustaining medical treatment. The right not to be compelled to rescue another has led to the doctrine that one may refuse to donate bodily organs even if it will save another's life. Therefore, on its face, it may appear that a woman has a right to refuse to undergo a Cesarean section.

However, the maternal-fetal relationship is so unique that by the time the Cesarean would be performed, a separate analysis must be considered when a woman refuses to undergo a Cesarean section. Although reproductive rights must be considered in the Cesarean analysis, Cesarean sections are performed at a time when the fetus is viable outside the uterus, so at the time the woman refuses the Cesarean section she does not have the constitutional right to undergo an abortion. Additionally, the right to refuse medical treatment is close to absolute, however, the right to refuse medical treatment has been substantially limited when children or fetuses may be harmed. Therefore, a woman does not have the right to refuse a Cesarean section based on the right to refuse medical treatment because the refusal would cause imminent harm to the fetus. Finally, although there is no duty to rescue in American jurisprudence, there is a duty to rescue when there is a special relationship between the parties. Because the right to an abortion and the right to refuse medical treatment are not specifically applicable to the Cesarean issue, the major issue is whether a woman has a duty to undergo a Cesarean section post-viability.

There is a duty for the mother to rescue the baby due to the special relationship that has formed between the mother and the fetus. Once the fetus reaches viability and the woman has not aborted the pregnancy, the fetus is completely dependent on the mother, and therefore there is a duty to undergo medical procedures that give the fetus the best chance for survival. The complete dependence of the fetus on the mother and the fact that the mother has chosen to carry the baby until viability causes a distinct special relationship and a duty for the woman to undergo the Cesarean section. Based on this special relationship, the state can force a woman to undergo a Cesarean section only when it is first determined by the court that the risks of vaginal birth thoroughly outweigh the risks of undergoing the Cesarean section.