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## Compelled Medical Treatment of Pregnant Women: The Balancing of Maternal and Fetal Rights

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COMPELLED MEDICAL TREATMENT OF PREGNANT  
WOMEN: THE BALANCING OF MATERNAL AND  
FETAL RIGHTS

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## I. INTRODUCTION

The general rule of medical treatment is that doctors may not act without a patient's informed consent.<sup>1</sup> Informed consent promotes patient autonomy<sup>2</sup> and safeguards the integrity of the physician.<sup>3</sup> Medical and legal experts agree that the informed consent process is "an invitation, asking for consent, seeking authorization to proceed, and not making a demand under the guise of a symbolic egalitarian gesture."<sup>4</sup> This consent process becomes more complicated when the patient is pregnant because The American College of Obstetricians and Gynecologists recognizes the fetus as a separate patient<sup>5</sup> even though the woman is the only patient able to give informed consent.

A competent pregnant woman may, for many reasons, refuse medical treatment, that a physician regards as beneficial to the woman, the fetus, or in some instances, both. These reasons may range from fear of surgery or other invasive procedures to a deep religious belief that conflicts with the physician's recommended treatment. These reasons may also include the pregnant woman's desire to preserve her own health. Physicians may find the refusal of medical treatment at odds with the desire to deliver a healthy baby. When a pregnant woman refuses treatment that will benefit her fetus, either directly or indirectly, she places her physician in a dilemma of conflicting loyalties. The physician must now choose between honoring the woman's refusal, which may subject the fetus to a possible fate of injury, disability, or even death, or despite her objections, compel her to treatment by seeking a court order.

If the physician chooses to honor the pregnant woman's refusal of treatment, he appears to be abandoning the fetus, a patient to whom he owes an ethical and legal

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<sup>1</sup>Early statements of this axiom are introduced in *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) ("[n]o 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.") and *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 317 P.2d. 170, 181 (Cal. Dist. Ct. App. 1957) ("[a] physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment").

<sup>2</sup>"The root premise is the concept, fundamental in American Jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body...' True consent to what happens to one's self is the informed exercise of choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each." *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) (quoting *Schloendorff v. Society of N.Y. Hosps.*, 105 N.E. 92, 93 (N.Y. 1914)), *cert. denied*, 409 U.S. 1064 (1972).

<sup>3</sup>See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 67-113 (3d ed. 1989).

<sup>4</sup>ROBERT J. LEVINE, *ETHICS AND REGULATION OF CLINICAL RESEARCH* 99 (2d ed. 1986) (quoting Jay Katz, *The Regulation of Human Research—Reflections and Proposals*, 21 *CLINICAL RES.* 785-91 (1973)).

<sup>5</sup>AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS COMMITTEE ON ETHICS, *OPINION NUMBER 55, PATIENT CHOICE MATERNAL FETAL CONFLICT* (Oct. 1987) [hereinafter ACOG].

duty of care.<sup>6</sup> If the physician chooses to treat the pregnant woman, he must ethically justify his refusal to honor the woman's right to control her own body. This dilemma may lead the physician to seek and obtain a court order compelling the pregnant woman to submit to the recommended treatment regardless of her refusal. Whether it is a physician or a judge attending to this dilemma, the same question arises: should a pregnant woman be compelled to submit to medical treatment that, for her own reasons, she does not want?

This note explores the question: is it ever permissible for a physician or a judge to compel a pregnant woman to submit to medical treatment for the benefit of her fetus? This note begins by examining the ideology of motherhood<sup>7</sup> and the legal status of the fetus.<sup>8</sup> This note then examines the ethical aspects and legal issues involved in compelling a pregnant woman to undergo treatment for the benefit of her fetus. This note then explores the controls of pregnancy that result in maternal-fetal conflicts. Finally, this note examines the court's use of a balancing test in reaching decisions in cases of compelled medical treatment of pregnant women.

I argue that neither physicians nor the judiciary should compel a pregnant woman to submit to medical treatment for the sake of her fetus. This conclusion is based on a view of the legal status of the fetus and the woman's constitutional right to privacy. The fetus is not a person under the Fourteenth Amendment,<sup>9</sup> and the pregnant woman should be afforded the constitutionally protected right to privacy that would encompass the right to be free of bodily invasions.<sup>10</sup> Furthermore, for public policy reasons, it is not advisable for the law to use its power to invade a person's body for the benefit of another. "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."<sup>11</sup> This note concludes by suggesting that a competent

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<sup>6</sup>*Id.*

<sup>7</sup>*Taft v. Taft*, 446 N.E.2d 395 (Mass. 1983) (husband petitioned the court to order his wife to submit to a cerlage operation in order to hold the pregnancy. The judge ruled that the state's interest in the fetus justified and overrode that pregnant woman's free exercise of religion. The state's interest was based on the "fundamental and traditional interest in the physical and mental health of all parents, their children already born and their unborn children).

<sup>8</sup>*In re Jamaica Hosp.*, 491 N.Y.S.2d 898 (1985) (in this case, the court ordered a pregnant woman to undergo a blood transfusion against her religious belief. The court regarded the fetus as a human being, to whom the court stands in *parens patriae* and whom the court has an obligation to protect).

<sup>9</sup>U.S. CONST. amend. XIV ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

<sup>10</sup>*Id.*

<sup>11</sup>*McFall v. Shimp*, 10 Pa. D. & C. 3d 90 (Allegheny County Ct. 1978) (this court said in dicta that "Our Society...has as its first principle, the respect for the individual, and that society and government exist to protect the individual from being invaded and hurt by another.").

woman's choice to refuse to submit to medical treatment must always be honored even where her choice may be harmful to her fetus. A pregnant woman must be afforded the same rights as if she were not pregnant. The decision must be hers and hers alone.

## I. BACKGROUND

### A. *Motherhood Defined*

Motherhood is an enormously complicated term because of its emotional associations. It is a symbol for the caring, nurturing, and sensitivity that women bring to a world that is full of conflicts.<sup>12</sup> Motherhood has been interpreted as an instinct, a biological bond with a child, and an unyielding state of being that is the essence of female existence.<sup>13</sup> It has also been construed as primarily a relationship that develops within a social, political, and historical context, that customarily requires women to give up and to give of themselves.<sup>14</sup>

The potential relationship between a woman and her powers of reproduction was, in ancient motherhood, a power which compensated her for her powerlessness everywhere else.<sup>15</sup> This power gave or withheld nourishment, warmth, or even survival itself.<sup>16</sup> The idea of this maternal power has been domesticated under male control<sup>17</sup> and as Adrienne Rich argues, “[I]n transfiguring and enslaving woman, the womb—the ultimate source of this power—has historically been turned against us and itself made into a source of powerlessness.”<sup>18</sup>

This historical context of motherhood has developed into normative motherhood, which is a cultural expectation that all women should be mothers and that their subsequent behaviors accompany this expectation.<sup>19</sup> Dominant cultural notions of motherhood give way to the idea and practice of controlling women with regard to gestation and childbirth.<sup>20</sup> These subordinating social norms are being launched as legal duties, resulting in the regulation of pregnant women.<sup>21</sup>

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<sup>12</sup>JANICE G. RAYMOND, *WOMEN AS WOMBS* 29 (1993).

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 38.

<sup>15</sup>ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 67 (1976).

<sup>16</sup>*Id.*

<sup>17</sup>From very ancient times the identity of the male depends on power, and specifically the control of others, including a woman and her children. By controlling a mother, the male assures himself of the possession of his children. See RICH, *supra* note 15, at 64.

<sup>18</sup>RICH, *supra* note 15, at 68.

<sup>19</sup>See RAYMOND, *supra* note 12, at 30.

<sup>20</sup>Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At The Intersection Of The Ideology Of Motherhood, The Practice Of Defaulting To Science, And The Interventionist Mindset Of Law*, 53 OHIO ST. L.J. 1205, 1207 (1992).

<sup>21</sup>*Id.*

Women who do not conform to these expectations are considered to be bad mothers and their noncompliance is assumed to be willful and immoral.<sup>22</sup> This is problematic because women want to be in control of their own bodies. Respect for people as moral agents to control their own bodies is the backbone to a liberal society.<sup>23</sup> “The paradigm cases of such control consists of situations common to both men and women and those, like pregnancy, that are experienced only by women tend to be regarded as special cases and thrown into question.”<sup>24</sup> The debate over these cases is usually innocuous when it involves only moral claims; however, when it moves into the legal sphere and leads to coercion or punishment, the implications become alarming.<sup>25</sup>

Physicians may have a low tolerance for many patients’ refusals of medical treatment for what is considered to be low-risk invasive procedures, such as cesarean sections.<sup>26</sup> The confusion that these physicians face when an apparently competent mother decides not to take a suggested course of action and consequently places her fetus at risk is quite understandable.<sup>27</sup> However, the trepidation that the physician feels should not be the basis of his response, or that of the law, to a pregnant woman’s refusal of treatment.<sup>28</sup>

### B. Fetal Rights Defined

Historically, a fetus had almost no recognized legal existence before its birth because it was perceived, legally, as part of the woman.<sup>29</sup> However, recent developments in medical technology have given rise to an established presence before birth.<sup>30</sup> Physicians can now see the fetus, monitor it and check it for defects and imbalances.<sup>31</sup> The ability to see and monitor the fetus as a “distinct entity” and the acknowledgment that the pregnant woman’s and fetus’ needs sometimes differ, have led physicians to consider the treatment to be of two patients rather than one.<sup>32</sup>

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<sup>22</sup>*Id.* at 1306.

<sup>23</sup>LAURA M. PURDY, *REPRODUCING PERSONS* 89 (1996).

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* See also V. Kolder, *Women’s Health Law: A Feminist Perspective* 1-2 (Aug. 1985) (unpublished manuscript) (on file at the HARV. WOMEN’S L.J.) (a pregnant Nigerian woman was strapped to the table for surgery while her husband was thrown out of the hospital). See also *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (a terminally ill cancer patient was forced to submit to a cesarean section to give her marginally viable fetus a chance at survival; both died within two days).

<sup>26</sup>Lawrence J. Nelson et al., *Forced Medical Treatment Of Pregnant Women: ‘Compelling Each To Live As Seems Good To The Rest’* 37 HASTINGS L.J. 703, 713 (1986).

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>Katherine A. Knopoff, *Can A Pregnant Woman Morally Refuse Fetal Surgery?*, 79 CAL. L. REV. 499, 501-02 (1991).

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>See ACOG, *supra* note 5.

In order to determine which patient's interests should prevail, courts have analyzed whatever rights a fetus has against the rights of the competent pregnant woman.<sup>33</sup> The courts must first look at the moral status of the fetus and then to policies and Acts to determine what legal rights, if any, belong to the fetus.

### 1. The Moral Status of the Fetus

The determination of the moral status of the fetus generally focuses on the question of whether the fetus is a "person."<sup>34</sup> If the fetus is a person, it has a right to exist. Therefore, others would be morally obligated to take actions that have the potential of benefiting the fetus and to increase its prospects for life.<sup>35</sup> This determination "is not made by scientific observation of facts."<sup>36</sup> It is a philosophical matter that involves debates about moral principles and issues.<sup>37</sup> As a result, the moral status of a fetus is both controversial and unresolved.<sup>38</sup>

Given that there is no consensus about whether a fetus is a "person" and the variety of plausible moral arguments about the status of the fetus, it seems that the resolution of maternal-fetal conflict should not be based on this ambiguous issue of the moral status of a fetus.<sup>39</sup> A look into fetal protection policies may better define fetal rights.

### 2. Fetal Protection Policies

Fetal protection policies are positions that are put into written form, and backed by the courts.<sup>40</sup> These policies control, exclude, and marginalize women in the face of protecting fetal interests.<sup>41</sup> Some of these policies have been found to be illegal. In *United Auto Workers v. Johnson Controls*, the United States Supreme Court held that the fetal protection practice of the employer that excluded "women with childbearing capacity from lead-exposed jobs" violated the Pregnancy

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<sup>33</sup>*In re Fetus Brown*, 294 Ill. App. 3d 159 (1997). (The appellate Court held that a woman's right to refuse medical treatment involving religiously offensive blood transfusions outweighed the State's interest in protecting the viable fetus). See also *In re Jamaica Hosp.*, 491 N.Y.S.2d 898 (the Court ordered a life-saving transfusion since the State had a highly significant interest in protecting the life of the fetus, which outweighs the patient's right to refuse). See also *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 458 (Ga. 1981) ("[t]he Court finds that the intrusion involved into the life of Jessie Mae Jefferson and her husband...is outweighed by the duty of the State to protect a living, unborn human being...").

<sup>34</sup>See Nelson, *supra* note 26, at 714.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 715.

<sup>39</sup>See Nelson, *supra* note 26, at 715. It is reasonable to argue that a fetus has human value and significance. It is also reasonable to argue that the recently fertilized egg is simply not the equivalent of a live born human.

<sup>40</sup>Ikemoto, *supra* note 20, at 1281-82.

<sup>41</sup>*Id.* at 1282.

Discrimination Act of Title VII.<sup>42</sup> The Court stated that decisions that affect the welfare of any future children are to be left to the parents who “conceive, bear, support, and raise them,” not the employer who hires the parents.<sup>43</sup> Nevertheless, these illegal protection policies are limited to employers covered by Title VII,<sup>44</sup> and those employers may, instead, provide women with “counseling and education” concerning certain health risks.<sup>45</sup> The point is that this provision of counseling and education could become coercive, thus allowing these illegal protection policies to survive.<sup>46</sup>

It is argued that the often unarticulated bases of these fetal protection policies assume that women should not make decisions concerning their own bodies and that fetal interests are superior to those of women.<sup>47</sup> Lisa Ikemoto argues that the bases of these policies “assume that women cannot and should not make decisions for themselves.”<sup>48</sup> This attitude has historically set the tone for the rights of pregnant women,<sup>49</sup> and it reinforces the patriarchal control of maternal power.<sup>50</sup>

### 3. Fetal Rights Acts

There have been attempts made to pass fetal rights legislation at the federal level. During the last two decades, a number of “Human Life Bills” have been introduced.<sup>51</sup> For example, in 1981, there were proposed regulations “[t]o provide that human life shall be deemed to exist from conception,”<sup>52</sup> and a resolution proposing an amendment to the Constitution of the United States protecting unborn

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<sup>42</sup>111 S.Ct. 1196, 1198 (1991).

<sup>43</sup>*Id.* at 1207.

<sup>44</sup>42 U.S.C. § 2000e(b) (1988) defines “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks...but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States....”

<sup>45</sup>*United Auto Workers*, 111 S. Ct. at 1196 (1991).

<sup>46</sup>In March 1991, two waiters were fired after refusing to serve alcohol to a pregnant woman. The waiters received national attention and they became local heroes for their stand. Barbara Kantrowits, et al., *The Pregnancy Police*, NEWSWEEK, April 29, 1991, at 52.

<sup>47</sup>Ikemoto, *supra* note 20, at 1282.

<sup>48</sup>*Id.*

<sup>49</sup>*Muller v. Oregon*, 208 U.S. 412 (1908) (This case is characterized as the worst of legal arguments in terms of equality of treatment of women because the Court focused on the woman’s procreative functions. The Court stated that “the physical well being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race”).

<sup>50</sup>*See RICH, supra* note 15, at 67.

<sup>51</sup>S. 158, 97th Cong. (1st Sess. 1981) (introduced by Sen. Jesse Helms) (providing that unborn children are considered “persons” for the purpose of the Fourteenth Amendment right to life); S. 1741, 97th Cong. (1st Sess. 1981) (providing that life begins at conception); H.R. 900, 97th Cong. (1st Sess. 1981) (deeming that human life begins at conception).

<sup>52</sup>H.R. 900, 97th Cong. (1st Sess. 1981).



children.<sup>53</sup> In 1985, a bill was proposed to amend the Civil Rights Act of 1964.<sup>54</sup> These bills were clearly attempts to restrict women's rights to abortions.<sup>55</sup> If a bill of this magnitude were enacted today, it would introduce a range of restrictions on a woman's reproductive autonomy that could potentially regulate her completely. It would produce justification for physicians and the courts to subordinate the interests of pregnant women over the interests of their fetus'.

### III. ANALYSIS OF THE ETHICAL PROBLEMS

Research in medicine continues to reveal more and more ways in which a baby's health can be jeopardized by the conduct of a woman during pregnancy. As our knowledge of prevention and prenatal harm grows, so too has public pressure to change the behavior of non-compliant pregnant women. Well-intentioned physicians and others concerned with the interests of pregnant women and their fetuses often disagree over the ethical duties owed to both the woman and the fetus. These issues can be analyzed from several perspectives.

The American College of Obstetrics and Gynecologists (hereinafter "ACOG") has enunciated ethical analysis of certain bioethical problems. Although it treats pregnant women as two patients, its report notes that a resort to the court to compel treatment is almost never justified.<sup>56</sup>

A 1990 report in the Journal of The American Medical Association was based on the deliberations of the ACOG committee of medicolegal problems.<sup>57</sup> The American Medical Association (hereinafter "AMA") discourages resorting to the court, but acknowledges that some maternal fetal conflicts may require judicial intervention.<sup>58</sup> And finally, an analysis of the legal position on the ethical problem of maternal fetal conflicts is necessary because sometimes these conflicts progress from the hospital to the court.

#### A. *The American College of Obstetricians and Gynecologists Position on Maternal-Fetal Rights*

A physician generally has four choices when a pregnant woman refuses recommended medical treatment.<sup>59</sup> First, the physician can terminate the physician-patient relationship with the pregnant woman.<sup>60</sup> This choice seems morally acceptable only if the woman is able to find medical care elsewhere. Second, the physician can try to convince the pregnant woman to follow the recommended

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<sup>53</sup>H.R.J. Res. 62, 97th Cong. (1st Sess. 1981).

<sup>54</sup>S. 522, 99th Cong. (1st Sess. 1985).

<sup>55</sup>See Ikemoto, *supra* note 20, at 1284.

<sup>56</sup>See ACOG, *supra* note 5, at 2 (see comment at note 5).

<sup>57</sup>Joelyn Knopf Levy, *Jehovah's Witnesses, Pregnancy, and Blood Transfusions: A Paradigm For The Autonomy Rights Of All Pregnant Women*, 27 J.L. MED. & ETHICS 171 (1999).

<sup>58</sup>See Levy, *supra* note 57, at 177.

<sup>59</sup>See ACOG, *supra* note 5, at 2.

<sup>60</sup>*Id.*

treatment.<sup>61</sup> The physician must be careful when selecting this choice because if the persuasion turns to coercion, it becomes dangerously unethical. The third choice that a physician may select is to seek a court order to compel the pregnant woman to submit to the recommended medical treatment.<sup>62</sup> This is the choice that the ACOG strongly recommends that the physician avoid.<sup>63</sup> The fourth and final choice is for the physician to respect the pregnant woman's decision and the principle of autonomy.<sup>64</sup> This choice appears to be the recommended choice of ACOG<sup>65</sup> and probably the hardest one for most physicians to accept. Physicians may have a low tolerance for a pregnant woman refusing treatment that may be beneficial to her fetus, yet the physician-patient relationship is based on trust and respect. ACOG makes clear that in balancing maternal-fetal conflict, the physician should put more weight on the autonomy of the pregnant woman and honor her refusal of treatment.<sup>66</sup>

In 1987, the ACOG Committee on Ethics issued an opinion entitled "Patient Choice: Maternal-Fetal Conflict."<sup>67</sup> The Committee's opinion states that "the obstetrician should be concerned with the health care of both the pregnant woman and the fetus within her, assessing the attendant risks and benefits to each during the course of care."<sup>68</sup> However, the opinion makes quite clear that an obstetrician's concern for the health care of both patients should be apparent by "present[ing] a balanced evaluation of maternal and fetal expectations."<sup>69</sup> The Committee went on to say that this concern should not involve coercive action "to obtain consent or force a course of action," and that an obstetrician should be cognizant of the principles of autonomy and physician-patient relationship.<sup>70</sup>

The ACOG Committee on Ethics further asserted what an obstetrician's obligations are in order to promote these principles. The Committee stated that when a pregnant woman refuses recommended treatment that would be beneficial to her fetus' health, an obstetrician should urge the woman to consult with other physicians.<sup>71</sup> It went on to suggest that an ethics committee would be the best source of arbitration for any further conflict, rather than the judiciary, based on the "destructive effect of court orders on the pregnant woman's autonomy and on the physician-patient relationship."<sup>72</sup>

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<sup>61</sup>*Id.*

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

<sup>64</sup>See ACOG, *supra* note 5, at 2.

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>Levy, *supra* note 57, at 176; see also ACOG, *supra* note 5.

<sup>68</sup>See ACOG, *supra* note 5, at 1.

<sup>69</sup>*Id.* at 2.

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

*B. The American Medical Association's Position on Maternal-Fetal Rights*

A 1990 report in the Journal of the American Medical Association contained findings similar to that of the ACOG in that they discourage judicial intervention in cases of maternal-fetal conflict.<sup>73</sup> The report finds that the physician's ethical duty is to act in the best interest of the fetus as well as the woman.<sup>74</sup> In doing so, the physician must balance the interests of both the fetus and the woman bearing in mind that in no other situation is it appropriate for a physician to require a patient to sacrifice on behalf of another.<sup>75</sup> The AMA concluded that the circumstances of maternal-fetal conflict are no different.<sup>76</sup>

The AMA report lists several reasons why it does not recommend physicians to seek judicial intervention to compel pregnant women to submit to recommended medical treatment.<sup>77</sup> First, the AMA is of the opinion that courts are not the appropriate forum to resolve medical treatment debates.<sup>78</sup> A quick decision is usually necessary in these obstetric cases; therefore, the judge, who is in most cases not a medical expert and must rely on the professional opinion of the physician seeking the order, is asked to make a speedy and informed decision.<sup>79</sup> Also, the pregnant woman is not in the best position because she is given very little time to prepare a defense of her autonomy.<sup>80</sup>

Secondly, the report finds that the cases that are selected for a court order are based on the physician's individual opinion of compelled medical treatment; which is an inconsistent application of the law.<sup>81</sup>

Third, the physician is under no legal obligation to seek a court order to compel a pregnant woman's submission to the recommended treatment, even if the woman's refusal puts the fetus' life in danger.<sup>82</sup>

Finally, the AMA's report notes that when a physician requests court intervention, he/she interferes with the physician-patient relationship.<sup>83</sup> This creates an adversarial relationship which may discourage women from seeking medical

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<sup>73</sup>See Levy, *supra* note 57, at 177; see also *In re Doe*, 632 N.E.2d 326 Ill. App. (1994) (the AMA states that a physician's duty "is not to dictate the pregnant woman's decision, but to ensure that she is provided with the appropriate information to make an informed decision").

<sup>74</sup>H. M. Cole, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA, 2663, 2664 (1990).

<sup>75</sup>*Id.* at 2664.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>*Id.* at 2665.

<sup>79</sup>See Cole, *supra* note 74, at 2665.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

<sup>82</sup>*Id.*

<sup>83</sup>*Id.* at 2666.

care.<sup>84</sup> In conclusion, the AMA report, similar to the ACOG committee opinion, recommends that physicians be mindful of a pregnant woman's autonomy and, except under "exceptional circumstances," a physician should refrain from seeking judicial intervention.<sup>85</sup>

Thus, physicians are motivated to seek court orders to force pregnant women to submit to recommended medical treatments, not out of a legal duty or an obligation imposed upon them by the AMA or the ACOG, but rather out of a moral belief that is based on the normative ideology of motherhood discussed above.<sup>86</sup> In balancing the interests of both of their patients, physicians must mediate their relationship to the fetus by the woman in whose body it resides.

#### IV. ANALYSIS OF THE LEGAL ISSUES

When a judge is called upon to rule on whether a pregnant woman should be compelled to submit to recommended medical treatment he is to draw his conclusions from consecrated principles.<sup>87</sup> A judge may base his decision on constitutional grounds,<sup>88</sup> case law,<sup>89</sup> or statutory law. In drawing his conclusion, a judge must bear in mind that these cases possess great symbolic and precedential significance on the legal status of women.<sup>90</sup> A conclusion in favor of the compelled medical treatment of a pregnant woman may reinforce societal stereotypes of pregnant women as being incompetent to make moral decisions.<sup>91</sup> It may also legitimize a forceful assertion of physicians' control over pregnancy and childbirth.<sup>92</sup> A judge must, therefore, be wary of enforcing a medical model that would interfere with a decision that should be a private, family decision.

##### A. *The Legal Position on Maternal-Fetal Rights*

Courts are split on the issue of compelling a pregnant woman to submit to recommended medical treatment for the benefit of her fetus. In *Raleigh Fitkin-Paul Morgan Memorial Hospital*,<sup>93</sup> the court compelled a woman to submit to a blood

<sup>84</sup>See Cole, *supra* note 74, at 2665.

<sup>85</sup>*Id.* at 2666 (AMA report notes that "exceptional circumstances" encompass refusals of blood transfusions because a transfusion poses little risk to the woman, is minimally invasive, and in most cases has the potential to save the fetus's life).

<sup>86</sup>See RAYMOND, *supra* note 12, at 47-50.

<sup>87</sup>George J. Annas, *Forced Cesareans: The Most Unkindest Cut Of All*, 12 HASTINGS CENTER REP. 16 (1982) (quoting Application of the President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1010).

<sup>88</sup>*Id.*

<sup>89</sup>*Jefferson*, 274 S.E.2d at 457.

<sup>90</sup>Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 47 (citing Flanigan, *Fleeing the Law: A Matter of Faith*, DET. FREE PRESS, June 29, 1982, at 3A; Flanigan, *Mom Follows Belief, Gives Birth In Hiding*, DET. FREE PRESS, June 28, 1982, at 3A).

<sup>91</sup>*Id.*

<sup>92</sup>*Id.*

<sup>93</sup>201 A.2d 537 (1964).

transfusion to save the viable fetus that she was carrying.<sup>94</sup> The court reasoned that “the unborn...[are] entitled to the law’s protection.”<sup>95</sup> This reasoning was based on the court’s earlier holding in *State v. Perricone*<sup>96</sup> which held that “the State’s concern for the welfare of an infant justified blood transfusions.”<sup>97</sup> The court in *Raleigh* failed to consider the woman’s rights as a Jehovah’s Witness to refuse a blood transfusion because “the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them with respect to the sundry factual patterns....”<sup>98</sup>

In *Jefferson v. Griffin Spalding County Hospital Authority*,<sup>99</sup> the earliest reported opinion involving a pregnant woman’s right to refuse a cesarean section, the court authorized a cesarean section that was refused by a woman for religious reasons.<sup>100</sup> The court held that “because the life of defendant and of the unborn child are ... inseparable, the Court deems it appropriate to infringe upon the wishes of the mother to the extent necessary to give the child an opportunity to live.”<sup>101</sup> The court went on to find that the intrusion into the life of the woman is outweighed by the State’s duty to protect the fetus.<sup>102</sup> The court’s only legal basis for this finding is *Roe v. Wade*,<sup>103</sup> which the court characterized as “prohibiting the arbitrary termination of the life of an unborn fetus.”<sup>104</sup> However, the *Roe* court did not find that the State has an interest in a fetus sufficient to compel a pregnant woman to submit to medical treatment against her will.<sup>105</sup>

Other courts have honored the woman’s right to refuse recommended medical treatment. In *In re Baby Boy Doe*,<sup>106</sup> the court held that a competent woman’s choice to refuse to undergo a cesarean section must be honored, even where her choice may be harmful to her fetus.<sup>107</sup> The court went on to find that there should be no balancing of maternal-fetal interests and that a woman’s choice to refuse medical treatment as invasive as a cesarean section must be honored.<sup>108</sup> The majority also

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<sup>94</sup>*Id.*

<sup>95</sup>*Id.* at 423.

<sup>96</sup>181 A.2d 751 (N.J. 1962).

<sup>97</sup>*Id.*

<sup>98</sup>201 A.2d 537 (1964).

<sup>99</sup>274 S.E.2d at 457.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* at 458.

<sup>102</sup>*Id.* at 460.

<sup>103</sup>410 U.S. 113 (1973).

<sup>104</sup>*Jefferson*, 274 S.E.2d 457.

<sup>105</sup>See Levy, *supra* note 57, at 181; see also *Roe*, 410 U.S. at 113, 157.

<sup>106</sup>632 N.E.2d 326.

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*

suggested that an order compelling a pregnant woman to undergo an invasive procedure would violate her constitutional rights.<sup>109</sup>

In *Taft v. Taft*,<sup>110</sup> the Supreme Judicial Court of Massachusetts vacated the lower court's ruling and found that the defendant wife could not be ordered to submit to a cerclage or "purse string" operation to hold the pregnancy.<sup>111</sup> Justice Wilkins reasoned that the woman has a constitutional right to privacy and that the State failed to show circumstances so compelling as to justify the invasion of this right.<sup>112</sup> The justices further reasoned that no case was cited to them, nor have they found one, in which a court ordered a pregnant woman to submit to medical treatment to benefit a fetus not then viable.<sup>113</sup>

Thus, there are two approaches the courts use when deciding to honor a woman's refusal to submit to recommended medical treatment. One is an "absolute approach" that gives the pregnant woman an absolute right to refuse treatment. The other is a "balancing approach" or test, where the court weighs the interests of the woman and the fetus and concludes that the woman's interest outweighs that of her fetus. In using the balancing test, the courts usually base their conclusion on the constitutional rights of the woman.

### B. Constitutional Issues

When courts honor a pregnant woman's right to refuse recommended medical treatment they do so based on several fundamental rights that are granted in the United States Constitution.<sup>114</sup> First, they recognize the fundamental right to refuse medical treatment that is accorded to all competent adults.<sup>115</sup> Second, they recognize an individual's right of privacy which is implicitly granted in the Fourth Amendment.<sup>116</sup> Finally, they also recognize the First Amendment freedom of religion as a fundamental right in determining one's destiny.<sup>117</sup>

#### 1. The Right of Privacy

The United States Constitution protects an individual's right to bodily integrity. A number of courts have expressly recognized this constitutional right of privacy.<sup>118</sup> For example, the Massachusetts Supreme Judicial Court, in *Superintendent of Belchertown State School v. Saikewicz*, stated:

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<sup>109</sup>*Id.* at 394.

<sup>110</sup>446 N.E.2d at 395.

<sup>111</sup>*Id.* at 396.

<sup>112</sup>*Id.* at 397.

<sup>113</sup>*Id.*

<sup>114</sup>Rebekah R. Arch, R.N., *The Maternal-Fetal Rights Dilemma: Honoring A Woman's Choice Of Medical Care During Pregnancy*, 12 J. CONTEMP. HEALTH L. & POL'Y 637, 659 (1996) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

<sup>115</sup>*Id.*

<sup>116</sup>*Id.* See also U.S. CONST. amend. IV.

<sup>117</sup>See Arch, *supra* note 114, at 657; see also U.S. CONST. amend. I.

<sup>118</sup>See Nelson, *supra* note 26, at 747.

[A]rising from the same regard for human dignity and self-determination, it is the unwritten constitutional right of privacy.... As this constitutional guaranty reaches out to protect the freedom of a woman to terminate her pregnancy under certain conditions..., so it encompasses the right of a patient to preserve his or her right to privacy against unwanted infringements of bodily integrity in appropriate circumstances.<sup>119</sup>

The United States Constitution implicitly grants this right of privacy in the Fourth Amendment.<sup>120</sup> The function of the Fourth Amendment “is to protect personal privacy and dignity against unwarranted intrusion by the State.”<sup>121</sup> The Fourth Amendment also protects the expectations of individuals that in certain places, and at certain times, they have, the right to be left alone; and this is one of the most valued rights an individual has. A pregnant woman has just as strong an interest in protecting her bodily integrity as a non-pregnant woman, and the constitutional guaranty of the right of privacy should reach her as well. However, while the pregnant woman’s right of privacy is strong, the question that remains is whether it is strong enough to withstand the challenge of compelled medical treatment when the health of her fetus is at risk.<sup>122</sup>

In *In re Baby Doe*, the Appellate Court of Illinois applied the Fourth Amendment’s guaranty of the right to privacy to pregnant women.<sup>123</sup> The court held that a pregnant woman retains the same right to refuse medical treatment that she can exercise when she is not pregnant.<sup>124</sup> In recognition of a pregnant woman’s rights, the court “explicitly rejected the view that the woman’s rights [could] be subordinated to fetal rights.”<sup>125</sup> The court, in *Doe*, following the lead of the Illinois Supreme Court, went on to say that the “ ‘circumstances in which each individual woman brings forth life are as varied as the circumstances of each woman’s life,’ ...the court strongly suggested that there can be no consistent and objective legal standard by which to judge a woman’s actions during pregnancy.”<sup>126</sup> *Doe*

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<sup>119</sup>*Id.* (quoting Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728 (1977)); see also Bartling v. Superior Court, 163 Cal. App. 3d 186 (1984) (right of privacy guaranteed by the California Constitution, as well as by the United States Constitution); Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978) (terminally ill competent adult patient has constitutional right to refuse of discontinue medical treatment), *aff’d* 379 So.2d 359 (Fla. 1980); *In re Quinlan*, 70 N.J. 10 (1976) (decision to terminate vegetative existence by natural forces was valuable incident of right of privacy), *cert. denied*, 429 U.S. 922 (1976).

<sup>120</sup>U.S. CONST. amend. IV.

<sup>121</sup>*Winston v. Lee*, 105 S. Ct. 1611, 1615-16 (1985) (surgical removal of bullet from suspect’s chest violated his fourth amendment rights).

<sup>122</sup>*See Nelson*, *supra* note 26, at 749.

<sup>123</sup>260 Ill. App. 3d at 392 (court held that in the context of compelled medical treatment of pregnant women, a woman’s right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy).

<sup>124</sup>*Id.* at 392.

<sup>125</sup>*Id.* at 401.

<sup>126</sup>*In re Baby Boy Doe*, 260 Ill. App. 3d at 400 (quoting *Stallman v. Youngquist* 125, Ill. 2d. 267, 279 (1988) (Supreme Court refused to recognize tort action against a mother for

applied the rationale of *Stallman*<sup>127</sup> and held that “a woman’s right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy...and the potential impact upon the fetus is not legally relevant.”<sup>128</sup>

## 2. The Scope of the Free Exercise Clause

Along with the right to privacy, the United States Constitution also provides for religious liberty.<sup>129</sup> The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”<sup>130</sup> The Supreme Court has identified two concepts embodied in the Free Exercise Clause; the right to religious belief, and the right to act in accordance with that religious belief.<sup>131</sup>

The Court, in *Cantwell v. Connecticut*,<sup>132</sup> reiterated this belief-action dichotomy and signaled a trend whereby certain religiously-motivated conduct was protected from governmental interference.<sup>133</sup> In an opinion authored by Justice Roberts, a unanimous Court held that a Connecticut statute deprived Cantwell of his religious liberty without due process of law in violation of the Fourteenth Amendment.<sup>134</sup>

In applying this belief-action dichotomy, the Supreme Court has noted that its case law respects a private realm of family into which the state cannot generally enter.<sup>135</sup> However, the Court has also recognized that “the family itself is not beyond

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unintentional infliction of prenatal injuries)); *see also* Family Lie League v. Dep’t of Pub. Aid, 112 Ill. 2d 449 (1986) (Supreme Court of Illinois acknowledged that the state right of privacy protects substantive fundamental rights, such as the right to reproductive autonomy).

<sup>127</sup>*Stallman*, 125 Ill. 2d at 267.

<sup>128</sup>*In re Baby Boy Doe*, 260 Ill. App. 3d at 401.

<sup>129</sup>U.S CONST. amend I.

<sup>130</sup>U.S CONST. amend I. By way of incorporation into the Due Process Clause of the Fourteenth Amendment, the United States Supreme Court has held that the provisions of the First Amendment are fully applicable to the states. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). Therefore, state legislatures as well as Congress are prohibited from enacting laws that prohibit the free exercise of religion. *Id.* at 303.

<sup>131</sup>Laura M. Plastine, “*In God We Trust*”: *When Parents Refuse Medical Treatment For Their Children Based Upon Their Sincere Religious Beliefs*, 3 SETON HALL CONST. L.J. 123, 126 (1993) (citing *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (while the court upheld the idea that religious beliefs are protected by the First Amendment, it allowed state regulation of religiously motivated conduct)).

<sup>132</sup>310 U.S. 296.

<sup>133</sup>Plastine, *supra* note 131, at 127 (citing *Cantwell*, 310 U.S. at 296) (although *Cantwell* marked a victory for religious freedom, it was primarily decided on First Amendment free speech grounds.)

<sup>134</sup>*See Cantwell*, 310 U.S. at 309. As previously noted, this landmark First Amendment case was the first to incorporate the provisions of the Free Exercise Clause into the Due Process Clause of the Fourteenth Amendment. *See supra* note 130.

<sup>135</sup>*See Arch*, *supra* note 114, at 656.



regulation in the public interest, as against a claim of religious liberty.”<sup>136</sup> According to the Court in *Prince*, there is a delicate balance between the exercise of parents’ freedom of control over their children and the exercise of state control over its citizens.<sup>137</sup> The free exercise of religion may yield when the state has a compelling interest in the health and welfare of children under its protection.<sup>138</sup>

Application of the *parens patriae*<sup>139</sup> principle has been held not to violate the constitutional right to freedom of religion when the basis of parental objection to the medical treatment is based upon a religious belief.<sup>140</sup> However, some courts, in applying this principle to cases involving pregnant women, have held that a pregnant woman and her fetus “are so intertwined...that it would be impracticable to attempt to distinguish between them...”<sup>141</sup> Accordingly, the courts tip the balance in favor of the pregnant woman’s protected religious freedom.<sup>142</sup> Therefore, since “a woman’s right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy...and the potential impact upon the fetus is not legally relevant,” the courts must honor the pregnant woman’s wishes.<sup>143</sup>

### C. Case Law

The cases permitting the state to compel bodily intrusions do not strongly support the forced medical treatment of pregnant women for the welfare of their fetuses. Most of the cases supporting these intrusions are intended to benefit society as a whole,<sup>144</sup> involve the *sui generis*<sup>145</sup> circumstances of a prisoner under state custody,<sup>146</sup>

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<sup>136</sup>*Id.*

<sup>137</sup>*Id.* at 166-67.

<sup>138</sup>*Id.* See also Shannon K. Such, *Lifesaving Medical Treatment For The Nonviable Fetus: Limitation On State Authority Under Roe v. Wade*, 54 *FORDHAM L. REV.* 961, 969 n.48 (1986) (noting that the Supreme Court has upheld parents’ right to make decisions concerning their child’s welfare, however, this right is not absolute. Under the state’s *parens patriae* authority, court orders for certain forms of medical treatments for children against their parents’ wishes have been upheld).

<sup>139</sup>*Id.* See accompanying text.

<sup>140</sup>*Reynolds*, 98 U.S. at 145.

<sup>141</sup>*Ralieggh*, 201 A.2d at 538 (1964).

<sup>142</sup>See *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963).

<sup>143</sup>See *In re Doe*, 260 Ill. App. 3d at 392.

<sup>144</sup>*E.g.*, *Selective Draft Law Cases*, 245 U.S. 366 (1918).

<sup>145</sup>Of its own kind or class; i.e., the only one of its own kind; peculiar. *BLACK’S LAW DICTIONARY* 1602 (4th ed. 1968).

<sup>146</sup>See *In Commissioner of Correction v. Myer*, 379 Mass. 255 (1979) (the court held that a competent prisoner suffering from kidney disease could be compelled by the state to submit to hemodialysis despite his refusal of treatment, because the state’s interest in upholding orderly prison administration outweighed the prisoner’s interest).

or are very minor in nature.<sup>147</sup> Many of the cases involving compelled medical treatment of pregnant women neither benefit society as a whole, nor affect any significant state interests. More importantly, these compelled medical treatment cases involving pregnant women are not usually minor in nature.

In *Taft v. Taft*,<sup>148</sup> the court examined whether a husband could compel his wife to undergo a cerlage or “purse string” operation in order to hold her pregnancy.<sup>149</sup> The pregnant woman refused this operation based on her religious beliefs.<sup>150</sup> The Supreme Judicial Court of Massachusetts overturned a judgment ordering the pregnant woman to undergo the operation in order to hold her pregnancy.<sup>151</sup> The court based a portion of its decision on the lack of facts in the record stating the nature of the risk to the pregnant woman.<sup>152</sup>

In *Jefferson*, the Griffin Spalding County Hospital petitioned the Superior Court of Butts County for an order authorizing it to perform a cesarean section upon Mrs. Jefferson.<sup>153</sup> The pregnant woman’s physician determined that Ms. Jefferson had placenta previa and that a c-section would be necessary to sustain the fetus’ life.<sup>154</sup> Ms. Jefferson and her husband both refused to consent to the surgery based upon their religious beliefs.<sup>155</sup> Justice Smith, in his concurring opinion, stated that “such an intrusion by the state would be extraordinary, presenting some medical risks to both the mother and fetus.”<sup>156</sup>

In both of these cases, the courts considered the nature of the risk of a cesarean section to the pregnant woman. These cesarean sections involve surgery that is not minor in nature.<sup>157</sup> During cesarean surgery the mother is under anesthesia and the surgery itself involves making incisions in the abdominal and uterine walls and then removing the infant.<sup>158</sup> The risks involve infection, hemorrhage, and urinary tract

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<sup>147</sup>United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (removal of bullet lying superficially beneath skin did not involve any harm or risk).

<sup>148</sup>446 N.E.2d at 395 (a cerlage or “purse string” operation is one in which the cervix is sewn closed to prevent miscarriage).

<sup>149</sup>*Id.*

<sup>150</sup>*Id.*

<sup>151</sup>*Id.*

<sup>152</sup>*Id.*

<sup>153</sup>*Jefferson*, 274 S.E.2d at 457.

<sup>154</sup>*Id.* Placenta previa is a condition in which the placenta grows over the opening of the birth canal. JACK PRITCHARD ET AL., WILLIAMS OBSTETRICS 3 (17th ed. 1985).

<sup>155</sup>*Id.*

<sup>156</sup>He went on to add that the circumstances of this case show that the mother’s chance of survival without the cesarean section would be no better than fifty percent. Based on this fact, and medical evidence that shows the risk of a cesarean section to be well below fifty percent, Smith agreed with the majority and concluded that the order did not violate Mrs. Jefferson’s First Amendment rights.

<sup>157</sup>Joel Jay Finer, *Toward Guidelines For Compelling Cesarean Surgery: Of Rights, Responsibility, And Decisional Authenticity*, 76 MINN. L. REV. 239, 275 (1991).

<sup>158</sup>*Id.*

injury; and these risks are higher among women who undergo cesarean sections in emergency situations.<sup>159</sup> Because these involuntary cesareans are not minor in nature and can pose health risks to the pregnant woman, courts should refrain from compelling a pregnant woman to submit to such a bodily invasion.

#### D. Statutory Law

No state has a statute that expressly grants any court jurisdiction over disputes concerning a pregnant woman's refusal to submit to physician recommended medical treatment when the refusal may compromise the health and welfare of her fetus. All states, however, do have statutes that prohibit child abuse and neglect.<sup>160</sup>

Physical abuse has been defined as "[p]hysical injury to a child, including deliberate poisoning where there is a definite knowledge, or a suspicion, that the injury was inflicted or knowingly not prevented."<sup>161</sup> This abuse has also been defined as "violence and other nonaccidental, proscribed human actions that inflict pain on a child and are capable of causing injury or permanent impairment to developing or functioning."<sup>162</sup>

Child neglect has been defined as "parents' or caretakers' failure to provide basic physical health care, supervision, nutrition...";<sup>163</sup> "the persistent or severe neglect of a child (for example, by exposure to any kind of danger...) which results in serious impairment of the child's health or development...";<sup>164</sup> and "the deprivation or nonprovision of necessary and societally available resources due to proximate and proscribed human actions that create the risk of permanent impairment to development of functioning."<sup>165</sup>

The definitions of child abuse and neglect vary among states,<sup>166</sup> and all states have statutes authorizing the state to assume control of a minor whose parents or guardian have endangered the minor's health and welfare.<sup>167</sup> These statutes allowing

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<sup>159</sup>*Id.*

<sup>160</sup>Sanford Katz et al., *Child Neglect Laws In America*, 9 FAM. L.Q. 1 (1975) (includes a list and analysis of these statutes).

<sup>161</sup>Sana Loue, *Legal And Epidemiological Aspects Of Child Maltreatment*, 19 J. LEGAL MED. 471 (quoting S. CREIGHTON, CHILD ABUSE TRENDS IN ENGLAND AND WALES, 1988-1990: AN OVERVIEW FROM 1973-1990 (1992)).

<sup>162</sup>*Id.* (quoting David Finkelhor & Jill Korbin, *Child Abuse as a International Issue*, 12 CHILD ABUSE & NEGLECT 3, 4 (1998)).

<sup>163</sup>*Id.* (quoting James Gaudin, *Effective Intervention with Neglectful Families*, 20 CRIM. JUST. & BEHAV. 66, 67 (1993)).

<sup>164</sup>*See* Loue, *supra* note 161, and accompanying text.

<sup>165</sup>*Id.*

<sup>166</sup>*See, e.g.*, CAL. PENAL CODE § 11165(c)(2) (West Supp. 1986) ("general neglect defined as failure of parent for parent to make an informed and appropriate medical decision regarding a child's care after consultation with a physician who has examined the child"); NEV. REV. STAT. § 201.090(3) (1983) (neglected child is any person under eighteen years of age not provided with the necessities of life by its parents).

<sup>167</sup>*See, e.g.*, CAL. WELF. & INST. CODE § 300 (West Supp. 1986); N.J. STAT. ANN. § 30:4C-11 (West 1981).

the state to assume control of an endangered minor have become the jurisdictional basis for judicial orders compelling a pregnant woman to submit to medical treatment for the health and welfare of her fetus.<sup>168</sup>

The question with respect to these child neglect statutes as the jurisdictional basis for judicial action in cases of maternal-fetal conflict is whether the fetus is a “child” within the meaning of the statute. There is only one state that has a child neglect statute that expressly defines “child” to include a fetus.<sup>169</sup> This lack of expression suggests that legislators were not considering fetuses when they drafted child neglect laws.<sup>170</sup>

Two appellate courts have relied on this apparent lack of legislative intent to conclude that fetuses are not within the scope of child neglect statutes. In *In re Steven S.*,<sup>171</sup> a California court of appeal held that a fetus is not a “person” within the meaning of the statute that confers jurisdiction on the juvenile court to adjudge any “person under the age of 18 years” a dependent of the court on specified grounds.<sup>172</sup> In this case, the mother was in the process of challenging her confinement to a mental hospital when the county sought to have her fetus declared a dependent child.<sup>173</sup> The juvenile court ordered the fetus, and hence the mother, detained pending its adjudication on the merits of the dependent child petition.<sup>174</sup> The juvenile court sustained the petition and the mother gave birth during confinement.<sup>175</sup>

The Court of Appeal of California reversed and held that previous decisions had not found fetuses to be “persons” within the meaning of child neglect statutes and that when the legislature intended statutes to include fetuses, it expressly said so.<sup>176</sup> The court also disapproved of the juvenile court’s proceeding to detain the mother for two months that resulted in the child being born in confinement and placed in a foster home.<sup>177</sup>

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<sup>168</sup>*Jefferson*, 274 S.E.2d at 458; *In re Unborn Baby Wilson*, No. 81-108 AV (Calhoun County P. Ct. Feb. 3, 1981). Watson Bowes & Brad Selgestad, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 OBSTETRICS & GYNECOLOGY 209-10 (1981).

<sup>169</sup>N.J. STAT. ANN. § 30:4C-11 (West 1981).

<sup>170</sup>See Nelson, *supra* note 26 (citing Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1 (1984)).

<sup>171</sup>126 Cal. App. 3d 23 (1981).

<sup>172</sup>*Id.* at 28-30; see CAL. WELF. & INST. CODE § 300 (West Supp. 1986) (“Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:...Who is in need of proper and effective parental care or control.”). Section 300 has been used as a jurisdictional cases for the state’s challenge to a parent’s refusal to consent to medical treatment of a child. *In re Phillip B.*, 92 Cal. App. 3d 796 (1979).

<sup>173</sup>*In re Stevens*, 126 Cal. App. 3d at 23.

<sup>174</sup>*Id.*

<sup>175</sup>*Id.*

<sup>176</sup>*Id.* In an influential decision that preceded *In re Steven S.*, the California Supreme Court held that a fetus was not a “person” within the meaning of the wrongful death statute. *Justus v. Atchinson*, 19 Cal. 3d 564 (1977).

<sup>177</sup>*In re Stevens*, 126 Cal. App. 3d at 30-31.

Similarly, in *In re Dittrick Infant*, a Michigan court of appeals held that fetuses did not fall within the meaning of the state juvenile code.<sup>178</sup> In that case, a woman became pregnant while she had a pending proceeding against her for abuse of her children.<sup>179</sup> The probate court granted custody to a state agency pursuant to the juvenile code.<sup>180</sup> The appellate court reversed and held that the word “child” could be read as applying to unborn persons. However, it concluded “that the legislature did not intend application of these provisions to unborn children.”<sup>181</sup>

In contrast, some courts may find that the child abuse statutes do provide a jurisdictional basis for a petition seeking to compel a pregnant woman to submit to medical treatment, depending on the court’s interpretation of the law to fetuses. This is extremely problematic because it is most likely that legislative intent was not to include fetuses in the abuse statutes based on the critical difference between a fetus and a live-born child. In order to address the abuse of the former, the state must invade the body and liberty of the mother.

#### V. CONTROL OF PREGNANCY

In the past decade, the state has begun to reinforce the idea that a pregnant woman should conform to particular behaviors in order to protect the health and welfare of her fetus.<sup>182</sup> These controls have taken two forms. First, there are direct regulations of pregnancy which deny the woman a possibility of choice.<sup>183</sup> These direct regulations are usually imposed by the state through the patient-physician relationship.<sup>184</sup> The second category of pregnancy control regulations is indirect regulations which suggest that a woman may have a choice; however, a wrong choice may result in legal penalties.<sup>185</sup>

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<sup>178</sup>80 Mich. App. 219 (1977).

<sup>179</sup>*Id.*

<sup>180</sup>*Id.*

<sup>181</sup>*Id.*

<sup>182</sup>*See Raleigh*, 201 A.2d at 537 (the Supreme Court held that the fetus was entitled to the law’s protection, and an appropriate order would be issued to force the mother to submit to a blood transfusion). *See In re Jamaica*, 491 N.Y.S.2d at 899 (the mother of ten children was ordered to submit to a life-saving blood transfusion in order to protect her fetus). *See Jefferson*, 274 S.E.2d at 457 (the Court authorized the plaintiff hospital to administer to defendant (thirty nine week pregnant woman) “all medical procedures deemed necessary by the attending physician to preserve the life of defendant’s unborn child”).

<sup>183</sup>Ikemoto, *supra* note 20, at 1235.

<sup>184</sup>*Id.*

<sup>185</sup>*Id.* *See also Johnson v. State*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991). Jennifer Johnson, an addict who took cocaine while pregnant, was prosecuted for delivering a controlled substance to a minor after the birth of her daughter. The Prosecutor’s theory was that Johnson had delivered this cocaine to her child between the time the child emerged from the birth canal and the time the umbilical cord was severed (statute did not define a fetus as a minor).

### A. Direct Control

Direct control of a pregnancy involves the steps that a state takes to enforce a physician's prescribed medical treatment despite the woman's refusal of such treatment.<sup>186</sup> Consent is the key issue in this regulation.<sup>187</sup> Ordinarily, a physician may not act without the informed consent of the patient.<sup>188</sup> Without this consent from a pregnant woman, a physician may feel morally compelled to seek a court order to avoid harm to the fetus.<sup>189</sup> A state directly regulates a pregnant woman when a judge steps in and issues an order compelling the woman to a treatment prescribed by her physician.

Court orders have been sought for forced cesarean sections,<sup>190</sup> forced prenatal treatment in the form of blood transfusions and cerclage or "purse string" surgery,<sup>191</sup> forced hospital deliveries,<sup>192</sup> and there is a threat of future court orders involving forced fetal surgery.<sup>193</sup>

#### 1. Forced Prenatal Treatment

Courts have proven persistence in their willingness to step in and directly regulate pregnant women. "In a national 1987 survey, Kolder, Gallagher, and Parsons found that court orders had been obtained for cesarean sections in ten states, for hospital detentions in two states, and for intrauterine transfusions in one state."<sup>194</sup> Among these cases, the court orders obtained were received within six hours.<sup>195</sup>

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<sup>186</sup>See Ikemoto, *supra* note 20, at 1236.

<sup>187</sup>See LEVINE, *supra* note 4.

<sup>188</sup>See *supra* note 1 and accompanying text.

<sup>189</sup>See Nelson, *supra* note 26, at 721.

<sup>190</sup>*In re Baby Boy Doe*, 260 Ill. App. 3d at 392 (action brought to compel pregnant woman to submit to cesarean section).

<sup>191</sup>*In re Fetus Brown*, 294 Ill. App. 3d at 159 (the State filed a "Petition on Hearing on whether a temporary custodian can be appointed to consent to a blood transfusion"). A cerclage or "purse string" surgery is where suturing is involved so that the cervix can hold the pregnancy. See also *Taft*, 446 N.E.2d at 395 (husband sought a court order to force his four month pregnant wife to have her cervix sewn closed to prevent a possible miscarriage).

<sup>192</sup>See *Jefferson*, 274 S.E.2d at 457 (hospital petitioned the Superior Court for an order authorizing it to perform a caesarean section and any necessary blood transfusions upon pregnant woman before labor begins, which would necessitate a forced hospital delivery).

<sup>193</sup>Krista L. Newkirk, Note, *State Compelled Fetal Surgery: The Viability Test Is Not Viable*, 4 WM. & MARY J. WOMEN & L. 467, 470 (1998). There are no cases to date on forced fetal surgery. However, as the procedure becomes more available and less experimental, we can expect to see a case presenting the issue of compelled fetal surgery arise in the courts.

<sup>194</sup>Ikemoto, *supra* note 20, at 1248 (citing Veronica E.B. Kolder et al., *Court Ordered Obstetrical Interventions*, 316 NEW ENG.J. MED. 1192, 1193 (1987)). The number of states that court orders have been sought in for transfusions has increased since the date of the survey. See *In re Fetus Brown*, 294 Ill. App. 3d at 159.

<sup>195</sup>See Ikemoto, *supra* note 20, at 1248.

*In re Jamaica Hospital*, is a case that describes how these court orders are recurrently met.<sup>196</sup> The New York trial court ordered the life-saving blood transfusion where a woman who was eighteen weeks pregnant refused on religious grounds.<sup>197</sup> Judge Lonschein's opinion describes the eighteen-week old fetus as "a potentially viable human being in a life threatening situation."<sup>198</sup> It also describes the fetus as "a human being, to whom the court stands in *parens patriae*."<sup>199</sup> The court went on to say that the state has a "highly significant interest in protecting the life of a midterm fetus," and this outweighs the woman's right to refuse the transfusion.<sup>200</sup>

A pregnant woman's right to refuse treatment was also found not to outweigh the rights of her fetus at the trial court level in *Taft v. Taft*.<sup>201</sup> In this case, the trial court ordered a cerclage or "purse string" operation<sup>202</sup> to be performed on a pregnant woman carrying a four-month old fetus.<sup>203</sup> The Massachusetts Supreme Judicial Court vacated the judgment because the pregnant woman's constitutional rights had been established on record and any interest that the state might have had was not established.<sup>204</sup> This opinion implies that the state's interest might have been established if the record had contained more facts.

These cases have consistently subordinated the interests of the pregnant woman in order to protect the fetus, and the efforts to protect the fetus in these cases, as well as others,<sup>205</sup> have often proved pointless. What seems clear is that these women are being viewed by physicians, as well as judges, as violating the ideology of motherhood<sup>206</sup> because they fail to act selflessly to protect their fetus.

## 2. Forced Cesarean Sections

In some instances, judges have felt it necessary to step into the delivery room and order cesarean sections against the wishes of pregnant women. Since time is of the essence in these circumstances, a judge is usually summoned to the hospital to talk to the physician and the woman. Judges are not always good at making these emergency decisions.

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<sup>196</sup>*In re Jamaica*, 491 N.Y.S.2d at 898.

<sup>197</sup>*Id.* at 900.

<sup>198</sup>*See Ikemoto, supra* note 20, at 1249 (quoting *In re Jamaica*, 491 N.Y.S.2d at 899).

<sup>199</sup>*Id.* (quoting *In re Jamaica*, 491 N.Y.S.2d at 900).

<sup>200</sup>*Id.*

<sup>201</sup>*Taft*, 446 N.E.2d at 395.

<sup>202</sup>*See supra* note 160 (accompanying text).

<sup>203</sup>*See Taft*, 446 N.E.2d at 395.

<sup>204</sup>*Id.*

<sup>205</sup>*See In re A.C.*, 573 A.2d at 1235 (both mother and fetus died within two days of the court ordered cesarean section); *see also Jefferson*, 274 S.E.2d at 457 (mother uneventfully delivered a healthy baby without surgical intervention before the Supreme Court ruled on the parents petition to stay the lower courts order for a cesarean section).

<sup>206</sup>*See RAYMOND, supra* note 12, at 38.

A famous example is Judge Skelly Wright's opinion in the *Application of the President & Directors of Georgetown College*.<sup>207</sup> In this case, Judge Wright, a circuit court judge, issued an order for an emergency blood transfusion after a lower court judge refused.<sup>208</sup> The U.S. Circuit Court of Appeals refused to review the case. However, several members dissented from the refusal and voiced their concerns noting that Judge Wright was:

Impelled, I am sure, by humanitarian impulses and doubtless was himself under considerable strain...In the interval of about an hour and twenty minutes between the appearance of the attorney at his chambers and the signing of the order at the hospital, the judge had no opportunity for research as to the substantive legal problems and procedural questions involved. He should not have been asked to act in these circumstances.<sup>209</sup>

This lack of reflection is apparent in two other cases where the courts held that a woman can be forced to undergo a cesarean section if her physician recommends it to safeguard the fetus.<sup>210</sup> Both of these cases were decided just hours after they were argued and neither court analyzed the rights of the pregnant women.<sup>211</sup> These forced cesarean cases are similar to the forced blood transfusion cases in that fetal rights are given preference over those of the woman. The physicians and judges are imprinting their interpretation of motherhood into their decisions.

This restriction of choice is inappropriate because it is unsuitable for a judge to act impetuously, without benefit of reflection on past precedent.<sup>212</sup> Warren Burger, former Chief Justice of the U.S. Supreme Court quoted Justice Cardozo on judicial restraint:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.<sup>213</sup>

Since the delivery room is not conducive to such reflection, judges do not belong there at all under these circumstances.

### 3. Forced Hospital Deliveries

Although there are no laws requiring that all births take place in a hospital, courts have ordered hospital deliveries for what physicians diagnose as high-risk pregnancies. In *Jefferson*, the Georgia Superior Court granted temporary custody of the fetus to the State of Georgia Department of Human Resources to ensure that

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<sup>207</sup>331 F. 2d at 1000 (1964).

<sup>208</sup>*Id.*

<sup>209</sup>*See Annas, supra* note 87, at 16.

<sup>210</sup>*See Jefferson*, 274 S.E.2d at 457.

<sup>211</sup>*See Annas, supra* note 87, at 16.

<sup>212</sup>*Id.*

<sup>213</sup>*Id.* at 17.



Jessie Mae Jefferson would deliver in the hospital.<sup>214</sup> Nevertheless, Ms. Jefferson delivered a healthy baby without state intervention while awaiting the Supreme Court to rule on the petition that was filed to vacate the judgment of the lower court.<sup>215</sup> In a Michigan case, the judge ordered a pregnant woman to admit herself to the hospital by a specific time and date and to submit herself to whatever medical treatment was deemed necessary by the medical personnel, including a cesarean section.<sup>216</sup> If the woman failed to follow this order, she was told that she would be picked up and taken to the hospital by the local police.<sup>217</sup> Instead, the pregnant woman went into hiding and delivered a healthy baby by vaginal birth.<sup>218</sup>

This principle of maternal subordination is spoken of as if it were natural and rational,<sup>219</sup> and yet these cases reiterate the actuality that intervention often occurs with no specific evidence of necessity. The possibility that women can control their own pregnancies is disappearing because the increasing weightiness of fetal interests seems to be enforcing maternal subordination.

#### 4. Forced Fetal Surgery

In 1981, doctors performed the first surgery on a fetus.<sup>220</sup> The surgery involved passing a needle through the woman's abdomen to repair her fetus' blocked urinary tract.<sup>221</sup> In 1989, University of California physicians successfully performed the first major surgery on a fetus outside of the womb.<sup>222</sup> The physicians partially removed the fetus from the womb, repaired a herniated diaphragm, and then returned it to the womb.<sup>223</sup>

Even though these techniques are presently in the experimental stage, there may soon be a great demand for such surgery once it becomes readily accessible.<sup>224</sup> Once these surgeries become more readily available and less experimental, one can expect to see a case of compelled fetal surgery come before the court.<sup>225</sup>

The current principle of direct control of pregnant women may greatly impact future courts addressing the issue of fetal surgery. The unsettled case law regarding

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<sup>214</sup>*Jefferson*, 274 S.E.2d at 459.

<sup>215</sup>*Id.*

<sup>216</sup>*See* Gallagher, *supra* note 90.

<sup>217</sup>*Id.*

<sup>218</sup>*Id.*

<sup>219</sup>*See* RAYMOND, *supra* note 12, at 29.

<sup>220</sup>Sharon Begley, *The Tiniest Patients*, NEWSWEEK, June 11, 1990, at 56.

<sup>221</sup>*Id.*

<sup>222</sup>Andrew Purvis, *Major Surgery Before Birth*, TIME, June 11, 1990, at 55.

<sup>223</sup>*Id.*

<sup>224</sup>*See* Marguerite Holloway, *Fetal Law: Experimental Surgery May Feed Ethical Debates*, SCI. AM., Sept. 1990, at 46 (noting that fetal surgery may become common, especially because "most women would do anything for the health of their fetus, despite the risk").

<sup>225</sup>*See* Newkirk, *supra* note 193.

court-ordered medical treatment to protect a fetus may indicate the possibility of compelling pregnant women to submit to unwanted fetal surgeries.<sup>226</sup> The pregnant woman's right to be free from coercion in making reproductive decisions is once again at stake with this rapidly advancing technology.<sup>227</sup>

### B. Indirect Control

The second category of pregnancy regulations is indirect control. This category differs from direct control in that it suggests that a woman has a choice. However, a wrong choice may result in legal penalties.<sup>228</sup> The indirect control of pregnant women is not through medical interventions, but this type of regulation does continue the cultural practice of requiring self-sacrifice as defined by the ideology of motherhood.<sup>229</sup> This indirect control is seen primarily in terms of tort liability,<sup>230</sup> criminal prosecutions,<sup>231</sup> and findings of child neglect or abuse based on a mother's conduct during pregnancy.<sup>232</sup>

#### 1. Tort Liability

Since 1946, courts have acknowledged tort actions brought by children for prenatal injuries caused by third parties.<sup>233</sup> Some courts have abolished the Prenatal Immunity Doctrine,<sup>234</sup> allowing children to bring a tort action against their parents as well as third parties.<sup>235</sup> It is becoming more likely that a child could recover against his or her parents for injuries caused by conception or for harms occurring during pregnancy.<sup>236</sup>

In *Grodin*, Randy Grodin brought a tort action against his mother for taking tetracycline during her pregnancy.<sup>237</sup> Randy's teeth were discolored because his

<sup>226</sup>David C. Blickenstaff, *Defining The Boundaries Of Personal Privacy: Is There A Paternal Interest In Compelling Therapeutic Fetal Surgery?*, 88 NW. U. L. REV. 1157 (1994).

<sup>227</sup>*See supra* note 2.

<sup>228</sup>*Johnson*, 578 So. 2d 419; *see also Grodin v. Grodin*, 301 N.W.2d 869 (Mich. Ct. App. 1980).

<sup>229</sup>*See RAYMOND*, *supra* note 12, at 38.

<sup>230</sup>*See Grodin*, 301 N.W.2d at 869.

<sup>231</sup>*See Ikemoto*, *supra* note 20, at 1264-65 (noting criminal transmission of HIV and criminal prosecution of pregnant women who are addicts).

<sup>232</sup>*Id.* at 1275 (noting child neglect and abuse laws).

<sup>233</sup>*Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946) (the first case allowing recovery for prebirth injury).

<sup>234</sup>The doctrine emerged in three state court decisions, referred to as the 'The Great Trilogy.' *Foldi v. Jeffries*, 461 A.2d 1145 (N.J. 1983); *see also Hewellette v. George*, 9 So. 885 (Miss. 1891); *McKelvey v. McKelvey*, 77 S.W. 664 (Tenn. 1903), *overruled by*, *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983); *Roller v. Roller*, 79 P. 788 (Wash. 1905), *overruled by*, *Borst v. Borst*, 251 P.2d 149 (Wash. 1952).

<sup>235</sup>*Grodin*, 301 N.W.2d at 869.

<sup>236</sup>*See Ikemoto*, *supra* note 20, at 1262.

<sup>237</sup>*See Grodin*, 301 N.W.2d at 869.

mother took this antibiotic while pregnant with him. The trial court granted summary judgment for Ms. Grodin.<sup>238</sup> The Michigan Court of Appeals reversed and remanded the case back to the trial court to determine the reasonableness of Ms. Grodin taking tetracycline for her own benefit in light of the risk to her unborn fetus.<sup>239</sup> The court's focus was on the reasonableness of parental discretion. This case strongly suggests that a woman is free to choose, but that her choice should not be a wrong choice. She must weigh her benefits against any harm to her fetus.

Another child plaintiff sued the laboratories that had failed to identify the parents as carriers of Tay-Sachs; subsequently the child was born with this disease.<sup>240</sup> In dicta, the court said that if parents made a conscious choice to proceed with a pregnancy despite warnings that a seriously impaired child could be born, the choice would be an intervening act of proximate cause to preclude liability of other third party defendants.<sup>241</sup> The court noted that they could see no public policy that would prevent those parents from being answerable for what they brought upon their child.<sup>242</sup>

As this idea of maternal tort liability grows, a pregnant woman's choices diminish and the state begins to play a role in her pregnancy. These choices are coercive in nature, for the woman must always act first for her fetus or risk exposing herself to liability. Fetal rights in tort would make a pregnant woman legally, as well as morally, responsible for her offspring's health and welfare.

## 2. Criminal Prosecutions of Pregnant Women Who are Addicts

A second indirect control of pregnant women is expressed in the utilization of criminal law. Criminal prosecutions of pregnant women for acts which negatively affect their fetuses are another way for the state to domesticate maternal power and to reinforce the ideology of normative motherhood.<sup>243</sup> This practice of controlling women with regard to gestation and childbirth is strongly expressed when criminal penalties are employed.

*Johnson v. State* illustrates this indirect control.<sup>244</sup> Ms. Johnson used cocaine during her two pregnancies. Ms. Johnson admitted using cocaine the night before

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<sup>238</sup>*Id.* at 870.

<sup>239</sup>*Id.* at 871.

<sup>240</sup>*Curlender v. Dio-Science Labs*, 165 Cal. Rptr. 477 (Cal. Ct. App. 1980).

<sup>241</sup>*Id.* at 488.

<sup>242</sup>*Id.* In response to the dicta in *Curlender*, the California legislature enacted CAL. CIV. CODE § 43.6 (West 1981):

No cause of action arises against a parent of a child based upon the claim

- a) that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.
- b) The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action.
- c) As used in this section, "conceived" means the fertilization of a human ovum by a human sperm.

<sup>243</sup>See RAYMOND, *supra* note 12, at 30.

<sup>244</sup>*Johnson*, 578 So. 2d at 419.

her first child was born and while in labor with her second child. Both births were normal and there were no signs of fetal distress.<sup>245</sup>

Following the birth of her second child, Ms. Johnson was prosecuted. The complaint stated that Ms. Johnson was guilty of delivering a controlled substance to a minor. The prosecutor argued that Ms. Johnson delivered the cocaine to her children during the time between the child's emergence from the birth canal and the severance of the umbilical cord.<sup>246</sup> The court sentenced Ms. Johnson to fifteen years.<sup>247</sup> In 1992, the Supreme Court of Florida overturned the conviction.<sup>248</sup>

More than 160 pregnant women across twenty-four states have been arrested for drug use. Of the women pleading not guilty, none were convicted.<sup>249</sup> Prosecutors are losing these cases. The courts are finding that these criminal statutes are not intended to regulate pregnant women and that the prosecutors' theories are inappropriate.<sup>250</sup> However, the general tone is that they are willing to punish pregnant women for their behavior.<sup>251</sup>

There are four states that have carried this general tone by enacting statutes that make it illegal for HIV-infected women to give birth.<sup>252</sup> These statutes make the knowing transmission of HIV illegal.<sup>253</sup> Therefore, if a woman knows that she is HIV positive and then gives birth to a child, she may well have committed a felony.

If these statutes are used to prosecute women who give birth to HIV infected babies, the trend may be to also prosecute them for transmitting alcohol, legal substances, and nicotine to their fetus. Making drug use during pregnancy a punishable crime should be carefully studied before implemented. According to the American Academy of Pediatrics, "[p]unitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits to infant health...such involuntary measures are likely to discourage mothers and their

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<sup>245</sup>*Id.*

<sup>246</sup>*Id.* at 421-22. Note that an infant is a person under the statute; therefore, the prosecutor's only theory was to argue that the controlled substance was delivered once the fetus became an infant.

<sup>247</sup>*Id.*

<sup>248</sup>*Johnson v. State*, 602 So. 2d 1288 (Fla. 1992).

<sup>249</sup>*See* Tamar Lewin, *Drug Verdict Over Infants is Voided*, N.Y. TIMES, July 24, 1992, at B6.

<sup>250</sup>*See* Commonwealth v. Pellegrini, No. 87970 (Mass. Sup. Ct., Oct. 15, 1990) ("[t]o construe the statute in this manner would mean that every expectant mother who ingested a substance with the potential for harm to her child, e.g., alcohol or nicotine, would be criminally liable under R.C. 2919-22(A), [the child endangering statute]. We do not believe such a result was intended by the General Assembly.").

<sup>251</sup>*See* Ikemoto, *supra* note 20, at 1271.

<sup>252</sup>*See* ARK. CODE ANN. § 5-14-123 (Michie Supp. 1991); ILL. REV. STAT. ch. 38, ¶ 12-16.2 (Supp. 1992); LA. REV. STAT. ANN. § 14:43.5 (West Supp. 1992); MO. ANN. STAT. (Vernon Supp. 1992).

<sup>253</sup>*Id.*

infants from receiving the very medical care and social support systems that are crucial to their treatment."<sup>254</sup>

Not only is there no real benefit to infant health in using criminal law, it attempts to define the ideal mother by negative implication in that it declares certain behaviors as nonmaternal.<sup>255</sup> The prosecution of drug or alcohol use during pregnancy is counterproductive because it is overtly punitive rather than constructive.

### 3. Finding Child Neglect or Abuse Based on Mother's Conduct During Pregnancy

Civil child abuse and neglect statutes are also being used to regulate the conduct of pregnant women. Although these cases are similar to the criminal prosecution cases in that the state steps in to protect a fetus and the woman is blamed for knowingly harming her child, this strategy has proven more successful than the criminal prosecution strategy.<sup>256</sup> The state has a higher success rate in these cases and the women have a greater chance of losing their freedom, and their children, because the courts are more willing to recognize the fetus as a person.<sup>257</sup> The issue is fetal personhood, and the corollary is maternal de-personhood.<sup>258</sup>

In *In re Troy D.*, the court recognized fetal personhood.<sup>259</sup> The court reasoned that "the mother conducted herself in a manner that was dangerous to the child prior to the child's birth but with full knowledge the child would be born...the petition was concerned with the protection of a living child, not with a fetus."<sup>260</sup> Some courts find this reasoning too encompassing. A New York court addressed a similar issue stating that "[t]o carry the law Guardian's argument to its logical extension, the State would be able to supercede a mother's custody right to her child if she smoked cigarettes during her pregnancy, or ate junk food, or did too much physical labor or did not exercise enough. The list of potential intrusions is long and constitute [sic] entirely unacceptable violations of the bodily integrity of women."<sup>261</sup>

The indirect regulation of pregnant women is more than just a theory. When a court takes a child from his mother based on conduct during her pregnancy, it is exercising significant control over the woman. The frame of maternal-fetal conflict is advancing under child abuse and neglect laws.

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<sup>254</sup>Abigail English, *Prenatal Drug Exposure & Pediatric AIDS: New Issues for Children's Attorneys*, 24 CLEARINGHOUSE REV. 452, 454 (1990) (quoting PROVISIONAL COMM. ON SUBSTANCE ABUSE, AM. ACADEMY OF PEDIATRICS, DRUG EXPOSED INFANTS, PEDIATRICS (Oct. 1990)).

<sup>255</sup>See Iketomo, *supra* note 20, at 1273.

<sup>256</sup>*Id.* at 1275.

<sup>257</sup>*Id.*

<sup>258</sup>*Id.*

<sup>259</sup>263 Cal. Rptr. 869 (Cal. Ct. App. 1989).

<sup>260</sup>*Id.* at 872-74.

<sup>261</sup>*In re Torress*, No. N-3968/88 (N.Y. Fam. Ct. 1988).

## VI. ANALYSIS OF BALANCING FETAL AND MATERNAL RIGHTS

The courts recognize a woman's constitutional right to refuse to submit to medical treatment that violates her religious beliefs. There are some that believe that this right should be absolute among competent women.<sup>262</sup> State intervention in a pregnant woman's refusal of medical treatment has been upheld through the application of a balancing test where the state interest in the fetus is balanced against the interest of the pregnant woman.<sup>263</sup>

In 1981, the Supreme Court of Georgia decided *Jefferson* using this balancing test.<sup>264</sup> The court balanced the rights of the fetus against the rights of the mother and concluded that the state's interest in the rights of the fetus outweighed the rights of the mother. This case established a pregnant woman's duty to protect the health and welfare of her fetus. The court asserted that it was balancing the state's interest; however, this decision created rights in the fetus enforceable against the mother.<sup>265</sup>

## VII. CONCLUSION

In this emotionally charged area of the law, the conflict between pregnant women who refuse medical treatment that may benefit their fetus and the medical profession or the judiciary that seeks to protect the health and welfare of those fetuses, is far from settled. Whether it is a judge or a physician attending to this dilemma, the question remains the same: should a pregnant woman be compelled to submit to medical treatment that for her own reasons she does not want?

This question cannot be answered solely on the basis of whether the mother or the fetus may suffer any physical detriment. The fundamental ethical and legal values must also be taken into account and on balance, these values do not justify compelling a pregnant woman to submit to medical treatment that she does not want.

The law can take one of two paths when faced with such a dilemma. The first path is to require the woman to submit to the medical treatment. In doing this, the court places the pregnant woman in a relationship of servitude to her fetus and, thus, threatens the very core of her constitutionally-protected liberty.

The second, more ethically and legally proper alternative, is to honor the woman's refusal. Society must protect the rights of all competent adults, including pregnant women, from forcible, intrusive, physical violations of their physical self. The plight between fetal health and maternal liberty is intertwined with moral and ethical dilemmas and the strong arm of the law will not eliminate the conflict.

PAMALA HARRIS<sup>266</sup>

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<sup>262</sup>See Nelson, *supra* note 26, at 709-11.

<sup>263</sup>See *In re Jamaica*, 491 N.Y.S.2d at 898 (using the balancing test, the court found the state's interest outweighed the pregnant woman's interest, but conceded that an opposite finding would result if the woman were not pregnant).

<sup>264</sup>See *Jefferson*, 274 S.E.2d at 457 (This was the first reported opinion of a court imposed surgery on a pregnant woman to benefit a fetus).

<sup>265</sup>*Id.*

<sup>266</sup>A very special acknowledgement to Mike, Jennifer, Jacqueline, and Mom and Dad, for all their support and encouragement, which made this Note possible.