

# Maternal Duties During Pregnancy: Toward a Conceptual Framework

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## I. INTRODUCTION

As medical science improves its ability to monitor fetal development and treat fetal maladies, the courts must begin to question whether a pregnant woman should properly be regarded as one patient or two.<sup>1</sup> Courts will increasingly face suits to enjoin maternal acts or omissions that are likely to result in permanent harm or death to the fetus.

To determine whether and when to allow fetal interests to prevail over maternal interests, courts will need to address several legal issues. A pregnant woman seeking to protect her choice of lifestyle, or to avoid an intrusive procedure, can assert her constitutional rights to make certain intimate decisions, to bodily integrity, and to the free exercise of religion. In a *parens patriae* suit to enjoin detrimental conduct by a mother, a state could raise claims on behalf of a fetus in tort and in equity.<sup>2</sup>

To resolve these competing doctrines in particular cases, courts will need to consider the broad range of situations in which maternal-fetal conflicts can arise. To date, courts have only imposed duties on pregnant women to save the

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The author wishes to thank Professor Walter J. Wadlington for his continuous guidance throughout the research and writing of this article. In addition, the author is greatly indebted to Professors John Calvin Jeffries, Jr., Elizabeth S. Scott, Richard D. Balnave and James F. Childress for their constructive comments. The author would also like to thank Karen L. Hess and James R. Pagano for their final editing suggestions.

1. At least one obstetrician gynecologist has asserted that both the mother and the fetus ought to be regarded as patients. See, e.g., Bowes & Selgestad, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 OBST. & GYNECOL. 209 (1981).

2. This article will address whether states can and should intervene to protect fetal health. Because order and contempt proceedings are quasi civil and quasi criminal, persons with an interest in protecting the health of a given fetus must rely on reporting devices to prompt state intervention.

lives of viable fetuses in situations where the medical procedure posed little or no risk to the mother.<sup>3</sup> No court has addressed whether a pregnant woman has a duty to protect or improve fetal health where the life of her fetus is not at stake.<sup>4</sup> Nor is it clear whether a court can impose a duty to protect or benefit a pre-viable fetus without violating a woman's constitutional rights.<sup>5</sup>

A pregnant woman can seriously harm her fetus through adverse conduct early in gestation. Certain adverse conduct, especially during early pregnancy, including excessive alcohol consumption and drug abuse, can result in a variety of birth defects affecting physical growth and mental development.<sup>6</sup> In ad-

3. In fact, thus far courts have only imposed duties on pregnant women when both their lives and those of their fetuses were threatened by their refusal to accept medical care. *See* *Jefferson v. Griffin Spalding County Hosp. Auth.*, 247 Ga. 86, 88, 274 S.E.2d 457, 458 (1981). "Delivery by Caesarean section prior to labor beginning would have an almost 100% chance of preserving the life of the child, along with that of defendant." *Id.* *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 42 N.J. 421, 423, 201 A.2d 537, 538 (1964). "The welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them . . ." *Id.*

In a recent California case, however, a woman was charged with the crime of fetal abuse for her failure to abstain from taking drugs, resulting in the death of her child at birth. *See* *Washington Post*, Oct. 9, 1986, at A22, col. 1; Chambers, *Woman facing criminal charges over her pregnancy*, *N.Y. Times*, Oct. 9, 1986 at A22, col. 1. Unlike in *Jefferson* and *Anderson*, *supra*, the woman's life in this case was not immediately threatened by her conduct. Thus, she is being charged solely for the harm she caused her fetus. On February 26, 1987, the trial judge dismissed the charges on the ground that the California statute that makes it "a crime for a parent to 'willfully omit, without lawful excuse' to furnish necessary medical attendance for a child" and that "permits a fetus to be deemed a person," was intended as a financial support statute and not as one to prosecute pregnant women. *See* Chambers, *Case Against Woman in 'Baby Death Dropped'*, *N.Y. Times*, Feb. 28, 1987 at A32 col. 1. The district attorney in this case is considering an appeal. *Id.* While this article involves whether the state can impose affirmative duties to prevent harm to fetal health rather than whether it can criminally sanction a woman's failure to aid fetal health, the two issues are closely related.

4. However, at least one commentator has taken such a position. *See generally* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 441 (1983) [hereinafter Robertson, *Procreative Liberty*]. "The mother who chooses not to abort has the same duty as an outsider to avoid prenatal actions injurious to a child who would otherwise be born healthy." *Id.*

5. *See, e.g.*, *Taft v. Taft*, 388 Mass. 331, 334 n.4, 446 N.E.2d 395, 397 n.4 (1983). "No case has been cited to us, nor have we found one, in which a court ordered a pregnant woman to submit to a surgical procedure in order to assist in carrying a child not then viable to term." *Id.*

6. For example, Fetal Alcohol Syndrome (FAS) may result in ". . . multiple congenital anomalies with microcephaly, micrognathia, microphthalmia, cardiac defects, prenatal growth retardation and developmental delay." Ouellette, Rossett, Rosman & Weiner, *Adverse Effects on Offspring of Maternal Alcohol Abuse During Pregnancy*, 297 NEW ENG. J. MED. 528, 528 (1977). Moreover, FAS increases prenatal mortality. *Id.* Heavy drinking during the first trimester poses the greatest risk to fetal maldevelopment, while heavy drinking later in pregnancy has a "greater effect on fetal nutrition and size." *Id.* at 530. Women using psychotropic drugs during pregnancy may give birth prematurely to underweight and malnourished infants. Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 74 (1984) [hereinafter Shaw]. Moreover, such infants may experience symptoms of withdrawal. *Id.* at 75; *see also* Finnegan & Wapner, *Drug Abuse During Pregnancy*, 111 MED. TIMES 4 (1983) (describing effects of maternal drug addiction on the fetus); Tye, *Alarm raised on cocaine, pregnancy*, *The Boston Globe*, July 1, 1986, at 21, col. 1 (single use of cocaine at any time during pregnancy poses high risk of death to

dition, women may endanger fetal health prior to viability by failing to maintain their own health. Examples include diabetic women who fail to properly monitor their insulin levels,<sup>7</sup> women with phenylketonuria who fail to follow certain dietary restrictions<sup>8</sup> and epileptic women who fail to take proper medication.<sup>9</sup> Finally, recent medical advances enable doctors to correct certain fetal abnormalities in utero.<sup>10</sup> For example, doctors have successfully performed in utero surgery to drain excess fluid buildup in the cranial cavity and kidneys of fetuses thus preventing serious injury or death at birth.<sup>11</sup> While many in utero surgical procedures are currently experimental, they may become accepted

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both mother and fetus, and of brain damage to fetus).

7. Diabetic women who neglect to monitor adequately their insulin levels may expose their fetuses to high risks of heart defects, hypoglycemia, loss of neurological function and other birth defects. *See generally* Pildes, *Infants of Diabetic Mothers*, 289 *NEW ENG. J. MED.* 902 (1973) (describing morbidity of fetuses with diabetic mothers); Sosenko & Kitzmiller, *The Infant of the Diabetic Mother*, 301 *NEW ENG. J. MED.* 859 (1979) (describing case study involving fetuses with diabetic mothers).

8. Pregnant women who suffer from phenylketonuria (p.k.u.) or who carry the gene may give birth to severely retarded infants. *See generally* Waisman, *Role of Hyperphenyllaninemia in Pregnant Women as a Cause of Mental Retardation in Offspring*, 99 *AM. J. OBST. GYNEC.* 431 (1967) (discussing extent that maternal p.k.u. can be controlled to benefit offspring). The offspring of women with p.k.u. who were successfully treated are now at the reproductive age and as carriers of the gene themselves suffer the same risk. *See* Shaw, *supra* note 6, at 85. By placing themselves on a severely restrictive and unpleasant diet, women can reduce this risk. *Id.* Since the disorder is caused by the high phenylalanine level in the mother's bloodstream which travels across the placenta, in-vitro fertilization to a surrogate mother can prevent this disorder. *Id.* at 85-86. Women can also endanger their fetuses by failing to provide themselves with adequate nutrients during pregnancy. *See generally* *Fetal Malnutrition May Impair Intelligence Despite Birthweight*, 11 *OB. GYN. NEWS* 1 (Jan. 15, 1976) (discussing adverse effects of malnourishment on the fetus).

9. While seizure disorders in pregnant women can result in "[s]tillbirth, microcephaly, mental retardation, and nonfebrile seizure disorders in . . . offspring," anticonvulsant drugs themselves have significant teratogenic effect. *See* Dalessio, *Seizure Disorders and Pregnancy*, 312 *NEW ENG. J. MED.* 559, 560 (1985). Thus, the American Academy of Pediatrics Select Committee on Anticonvulsants in Pregnancy has recommended "that medication should be withdrawn before pregnancy from a woman who has been free of seizures for 'many years.'" *Id.* at 561. For other women, Dalessio recommends "optimal seizure control with a single anticonvulsant drug." *Id.* at 562.

10. *See generally* Elias & Annas, *Perspectives on Fetal Surgery*, 145 *AM. J. OBST. GYNEC.* 807 (1983) [hereinafter, Elias & Annas, *Perspectives*] (discussing recent medical advances in in-utero surgery and ethical and legal issues raised by these advances).

11. Hydrocephalus involves excessive fluid build up in the skull during gestation and results in abnormal brain development. *See generally* Harrison, Golbus & Filly, *Management of the Fetus With a Correctable Congenital Defect*, 246 *J. A.M.A.* 774, 775 (1981) [hereinafter Harrison, Golbus & Filly] "In obstructive hydrocephalus, high intraventricular pressure compresses the developing brain." *Id.*; *see also* Brinholz & Frigoletto, *Antenatal Treatment of Hydrocephalus*, 303 *NEW ENG. J. MED.* 1021 (1981) (discussing case report of in utero surgical procedure to correct fetal hydrocephalus). Hydronephrosis involves post-urethral valves blocking the passage of urine to the bladder and results in destruction of the kidneys. *See generally* Harrison, Golbus & Filly, *supra* this note, at 775. "In congenital hydronephrosis, unrelieved urinary tract obstruction results in progressive deterioration of renal function." *Id.*; *see also* Harrison & Golbus, *Fetal Surgery for Congenital Hydronephrosis*, 306 *NEW ENG. J. MED.* 591 (1982) (discussing unsuccessful case involving in utero surgery to correct hydronephrosis).

medical practice in the near future.<sup>12</sup>

A prenatal-duty rule would require a pregnant woman to manage her pregnancy in a way that benefits the health of her fetus. Because fetal harm can result from a variety of maternal acts and omissions,<sup>13</sup> potential prenatal duties could require a pregnant woman to avoid particular activities which directly harm the fetus, to care for her own health where failing to do so might harm the fetus, or to engage in medical procedures which will correct or ameliorate exogenously-caused fetal maladies. This article will propose a framework for restricting the scope of prenatal duties based upon whether the mother caused the fetal harm.

The first section will address the constitutional issues that may be implicated by a prenatal-duty rule. The Constitution provides the floor of maternal rights below which the state may not go to protect the fetus. The second section will go beyond the issue of whether such a rule can be imposed constitutionally and will address whether it should be created, given existing legal doctrines and policy considerations. The rescue doctrine and existing state laws on child abuse and neglect provide the ceiling beyond which states are unlikely to go in protecting fetal health, thus providing a useful starting point for analyzing maternal-fetal conflicts. The final section will divide maternal-fetal conflicts that may arise into three categories: maternal *conduct* harming fetal health; maternal *omissions* harming fetal health; *exogenous factors* harming fetal health. By drawing on the legal principles outlined in the first two sections, this section will explain which categories are and are not suitable for judicial intervention.

## II. CONSTITUTIONAL RESTRICTIONS ON PRENATAL DUTIES

While most pregnant women undoubtedly welcome technological advances that enable them to give birth to healthier children, some are unwilling or unable to act in the best interest of their fetuses. Courts cannot intervene, however, each time a woman acts against the best interest of her fetus.

The Constitution guarantees individuals, especially women, the right to make certain intimate decisions regarding reproductive matters.<sup>14</sup> Duties to protect fetal health may therefore be inconsistent with a woman's right to make these decisions. In addition, several Supreme Court decisions restrict the degree to which a state may invade a person's body through the exercise of its police power without violating that person's right to due process.<sup>15</sup> Forced pre-

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12. Elias & Annas, *Perspectives*, *supra* note 10, at 807. "Experimentation with fetal surgery has come of age, and its routine clinical application seems inevitable." *Id.*

13. *See supra* notes 6-9 and accompanying text.

14. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to use contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of single persons to use contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (right of women to abort).

15. *See, e.g.*, *Winston v. Lee*, 470 U.S. 753 (1985) (disallowing compelled surgical removal of a bullet); *Schmerber v. California*, 384 U.S. 768 (1966) (allowing compelled blood test in exigent circumstances); *Rochin v. California*, 342 U.S. 165 (1952) (disallowing use of stomach pump to obtain evidence). Numerous state court decisions have extended the right to bodily integrity to include the right to decline medical treatments. *See, e.g.*, *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (allowing family of irreversibly comatose patient in consultation with physicians and hospital ethics committee to terminate respiratory life-support system); Superintendent of

natal testing<sup>16</sup> as well as corrective procedures themselves<sup>17</sup> may therefore impinge upon a woman's due process rights. Finally, some medical procedures may contravene a woman's religious beliefs thereby implicating her right to free exercise of religion.<sup>18</sup> This section will address each of these constitutional issues.

#### A. *Right of Autonomy in Decision Making*

Beginning with *Griswold v. Connecticut*,<sup>19</sup> the modern Court has recognized the right of individuals, especially women, to make certain intimate decisions regarding reproductive matters.<sup>20</sup> While the *Griswold* Court character-

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*Belchertown v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (allowing severely retarded adult with myeloblastic monocytic leukemia to forego life-sustaining chemotherapy where doing so is in the patient's best interest). Patients do not lose this right when they are incompetent. *Quinlan*, 70 N.J. 10, 41, 355 A.2d 647, 664. "[A] valuable incident of her right of privacy, . . . should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice." *Id.*; *Saikewicz*, 373 Mass. 728, 745, 370 N.E.2d 417, 427. "[A] general right . . . to refuse medical treatment in appropriate circumstances . . . must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both." *Id.* For a discussion of the constitutional right to bodily integrity, see *infra* notes 72-110 and accompanying text.

16. There are several forms of prenatal testing including sonograms, amniocentesis, fetoscopy, amniography and collecting fetal fluid. See Harrison, Golbus & Filly, *supra* note 11. "Real-time sonographic evaluation may yield important information on fetal breathing, fetal movements and fetal vital functions." *Id.* at 776. "Amniocentesis allows culture of amniotic fluid cells for detection of chromosomal defects and inherited metabolic abnormalities, evaluation of fetal pulmonary maturity from lecithinsphingomyelin analysis, and detection and quantization of fetal hemolysis." *Id.* This procedure involves passing a "needle attached to a syringe . . . through the mother's abdominal wall and uterine wall and [puncturing] the fetal membranes so that a sample of fluid surrounding the fetus may be withdrawn." See Shaw, *supra* note 6, at 76 n.85 (citing Kolata, *First Trimester Prenatal Diagnosis*, 221 SCIENCE 1030, 1031 (1983)). "Fetoscopy allows direct fetal visualization, fetal skin biopsy, and fetal blood sampling for diagnosis of hemoglobinopathies and other hematologic diseases." Harrison, Golbus & Filly, *supra* note 11, at 776. "Amniography affords further definition of fetal anatomy including the fetal GI tract." *Id.* "[F]luid collections in the fetus . . . can be aspirated under real-time sonographic guidance for both diagnosis and therapy." *Id.* Chronic villi biopsy, a less common method of prenatal testing involves inserting a "thin catheter through the cervix and [removing] a small plug of chorionic tissue surrounding the fetus by suction." Shaw, *supra* note 6, at 76 n.85 (citing Kolata, *First Trimester Prenatal Diagnosis*, 221 SCIENCE 1030, 1031 (1983)). A final test, still in the experimental stage, involves retrieving fetal cells from the mother's blood stream. *Id.* at 76 n.89 (citing Herzenberg *et al.*, *Fetal Cells in the Blood of Pregnant Women: Detection and Enrichment of Fluorescence — Activated Sorting*, 76 PRAC. NAT'L ACAD. SCI. 1453 (1979)).

17. See *supra* notes 10-12 and accompanying text.

18. Jehovah's Witnesses, for example, interpret the Biblical proscription against drinking blood as prohibiting blood transfusions even if life saving. See *Application of President & Directors of Georgetown College*, 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964) (compelling women to consent to blood transfusion to save life of infant).

19. 381 U.S. 479 (1965) (statute proscribing married couples from using contraceptives violates right of privacy).

20. See, e.g., *Eisenstadt*, 405 U.S. 438 (upholding right of single persons to use birth control); *Roe*, 410 U.S. 113 (statute proscribing abortion impinges on woman's right to privacy); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976) (statute requiring spousal con-

ized the right of married couples to use contraceptives as a right of privacy,<sup>21</sup> the Court in subsequent cases has simply recognized a substantive due process right of individuals to make certain personal decisions.<sup>22</sup>

In *Griswold*,<sup>23</sup> the Supreme Court struck down a Connecticut statute proscribing all individuals, including married couples, from using birth control.<sup>24</sup> To justify applying the strict scrutiny test, a higher standard of judicial review used to strike statutes which impinge on fundamental rights, the Court asserted that the Bill of Rights implicitly protects a "zone of privacy."<sup>25</sup> While the Bill of Rights does not expressly mention "privacy," the Court found this right in the penumbras emanating from several specific guarantees.<sup>26</sup> In providing support for explicit guarantees, this implicit right of privacy makes these provisions "fully meaningful."<sup>27</sup>

The Connecticut statute violated the privacy rights of married couples in two distinct but related ways. First, the statute impinged on the right of married couples to make certain intimate decisions.<sup>28</sup> Second, the statute violated the privacy of married couples in a direct physical sense since enforcing the statute would require the state to invade "the sacred precincts of marital bedrooms."<sup>29</sup> While the *Griswold* Court emphasized the physical invasion of privacy,<sup>30</sup> the Court in subsequent cases extended this right to expand the protected sphere of autonomous decisionmaking.<sup>31</sup>

Six years after *Griswold*, the Supreme Court applied the equal protection

sent for abortion violates woman's right to abort); *Bellotti v. Baird*, 443 U.S. 622 (1979) (statute requiring parental consent for abortion for minor women violates a minors' right to abort).

21. 381 U.S. at 485. "[T]he zone of privacy [is] created by several fundamental constitutional guarantees." *Id.*

22. *See, e.g., Roe*, 410 U.S. at 168 (Stewart, J., concurring). "*Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it is such." *Id.*; *see also Carey v. Population Services International*, 431 U.S. 678, 687 (1977). "Read in light of its progeny, the teaching in *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Id.*

23. 381 U.S. 479 (1965).

24. *Id.* at 485.

25. *Id.* at 484.

26. Specifically, Douglas claimed that the right of privacy was implied in the penumbras of the first amendment right of association, the third amendment prohibition against quartering soldiers in peacetime, the fourth amendment prohibition against unreasonable searches and seizures, the fifth amendment protection against self incrimination and the ninth amendment, vesting in the people those rights not enumerated in the Constitution. *Id.*

27. *Id.* at 483.

28. *See, e.g., Note, Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1051, 1057 (1981) [hereinafter Note, *Constitutional Limitations*] (*Griswold* provides that "individual[s] should have a right to autonomy in making certain personal decisions.").

29. *Griswold*, 381 U.S. at 485.

30. *Id.*

31. *See, e.g., Eisenstadt*, 405 U.S. at 453 (1971). "[I]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* (partial emphasis added); *Roe*, 410 U.S. at 153 (1973). "This right of privacy, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* (emphasis added).

clause of the fourteenth amendment in *Eisenstadt v. Baird*<sup>32</sup> to extend the right to use contraceptives to nonmarried couples.<sup>33</sup> More importantly, two years after *Eisenstadt*, the Supreme Court in *Roe v. Wade*,<sup>34</sup> after applying the strict scrutiny test to a Texas statute prohibiting abortion, held the statute an unconstitutional infringement on privacy.<sup>35</sup> The Court asserted that, like the decision to use contraceptives, the decision to terminate a pregnancy falls within the zone of privacy protected by the Constitution.<sup>36</sup> To withstand the strict scrutiny test, the state would have had to have shown an interest sufficiently compelling to override this constitutional guarantee.<sup>37</sup> The Court recognized two state interests as legitimate: the state's interest in protecting the health of the mother<sup>38</sup> and the state's interest in protecting the potentiality of human life.<sup>39</sup>

Since abortion does not pose a greater risk to maternal health than does natural childbirth until the end of the first trimester, the state's interest in maternal health does not become sufficiently compelling to regulate abortion until that time.<sup>40</sup> At the end of the first trimester, the state can regulate abortion to protect maternal health.<sup>41</sup> The more difficult issue which the Court faced was: when the state's interest in the potentiality of human life becomes sufficiently compelling to allow it to proscribe abortion altogether. After reviewing a wide array of historical and medical data, the Court concluded that the state's interest in the potentiality of human life does not become compelling until the fetus can survive independently of the mother's womb.<sup>42</sup>

This point, which the Court termed "viability,"<sup>43</sup> occurs at approximately

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32. 405 U.S. 438 (1971).

33. *Id.* The Massachusetts statute made distributing contraceptives to married couples, except by prescription, a felony. *Id.* at 440-42.

34. 410 U.S. 113 (1973). The Supreme Court recently upheld *Roe* in *Thronburgh v. American Coll. of Obst. & Gyn.*, 106 S. Ct. 2169, 2185 (1986) (striking Pennsylvania statute requiring extensive informed consent and medical disclosures designed to discourage abortion).

35. 410 U.S. at 164. For a discussion of the jurisprudential flaws in *Roe*, see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973). Ely argues that *Roe* is worse than *Lochner* era substantive due process because while *Lochner* and its progeny proscribed certain state regulatory goals as altogether impermissible, *Roe* acknowledged the legitimacy of the state's interest but condemned the legislation as not satisfying an ad-hoc balancing test. *Id.* at 942. Ely concludes that *Roe* "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." *Id.* at 947. Ely further observes that the privacy interest protected in *Griswold*, based on the invasion which would be necessary to enforce the statute, is entirely lacking in *Roe*. *Id.* at 930. Thus, Ely asserts that the Court concludes without reason that the right of privacy embraces the right to abort. *Id.* at 932.

36. 410 U.S. at 153.

37. *Id.* at 155.

38. *Id.* at 162.

39. *Id.*

40. *Id.* at 163. "[U]ntil the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Id.*

41. *Id.*

42. *Id.* The Court added, "[s]tate regulation protective of fetal life after viability thus has both logical and biological justifications." *Id.*

43. *Id.* The viability criterion has been criticized as subject to change along with medical technology. See *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). "The *Roe* framework . . . is clearly on a collision course with itself."

the end of the second trimester.<sup>44</sup> The state may proscribe abortion altogether after viability except in cases where childbirth poses a serious risk to maternal health.<sup>45</sup>

To analyze whether a prenatal-duty rule would impinge upon a woman's constitutional right to make intimate decisions, it is necessary to consider the range of decisions that the right of privacy is designed to protect. Since *Roe v. Wade*, the Court has distinguished two types of abortion-related statutes: those affecting maternal conduct during pregnancy and those actually limiting or removing the right to abort.<sup>46</sup> While the Court has continued to strike down statutes which actually restrict the right to abort absent a compelling state interest, the Court has used a lesser standard of scrutiny to uphold statutes which collaterally affect the abortion decision.<sup>47</sup> For example, in *Akron v. Akron Center for Reproductive Health*,<sup>48</sup> the Court struck down an Ohio statutory scheme that restricted the medical procedure by which a woman could have an abortion on the ground that the restriction was unrelated to maternal health.<sup>49</sup> Similarly, in *Planned Parenthood of Missouri v. Danforth*,<sup>50</sup> the Court held invalid a statute requiring spousal consent during the first trimester, stating that even the husband may not prevent his wife from deciding to abort.<sup>51</sup> Finally, in *Bellotti v. Baird*,<sup>52</sup> the Court overruled a Massachusetts statute which required minor women to get parental consent or judicial approval for abortions, stating that for mature minors it is inappropriate to allow a third-party veto.<sup>53</sup>

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*Id.*

O'Connor argues that as technology advances, the point of viability will be pushed back until the state may only proscribe abortions to protect maternal health. *Id.* at 456-57.

44. 410 U.S. at 163.

45. *Id.* at 164-65.

46. See, e.g., Note, *Constitutional Limitations*, *supra* note 28, at 1059. "[T]he Court has applied a less demanding scrutiny to state actions that merely affect a woman's decision whether to have an abortion than to state actions that deny her the right to decide." *Id.*

47. This results from the Supreme Court's literal reading of *Roe v. Wade* as providing a legal right to abort which the state may not infringe upon, but as not providing protection against state regulation tending to make this legal right more difficult to act upon. See *infra* notes 48-58 and accompanying text.

48. 462 U.S. 416 (1983).

49. *Id.* The statute required women to have abortions in a hospital during the second trimester when outpatient abortions were safe. *Id.* at 422. The statute also required an elaborate disclosure provision designed to deter abortions, *id.* at 444-45, and a parental consent provision for minors seeking an abortion. *Id.* at 422, 439.

50. 428 U.S. 52 (1976).

51. *Id.* at 69. "[T]he state cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." *Id.* The Supreme Court also struck two additional provisions of the Missouri statute, one requiring parental consent for minors, *id.* at 74, and the other proscribing abortion by saline amniocentesis during the first twelve weeks of pregnancy, the most commonly used and safest method of abortion. *Id.* at 77-79.

52. 443 U.S. 622 (1979).

53. *Id.* at 647. The Court reasoned that the statute appropriately allowed a judicial veto where the superior court judge considers prohibiting abortion to be in the minor's best interest. *Id.* at 648. Thus, the Court held that provided a court finds the minor sufficiently mature to decide to abort, it must allow the minor to decide irrespective of parental consent. *Id.* at 647-48. If, on the other hand, the minor is not sufficiently mature, a court must still allow her to abort if in her best

While the Court has rejected statutes which prevent women from exercising their right to abort, it has upheld statutes which make it more difficult to act on a decision to abort. The state cannot make abortion more costly or difficult to obtain, but it need not make abortion more accessible. Thus, the Court has upheld statutes removing public funds for nontherapeutic<sup>54</sup> and even therapeutic<sup>55</sup> abortions. Similarly, the Court has sustained a parental notification provision for minor women seeking abortions.<sup>56</sup> Unlike the parental-approval statute held unconstitutional in *Bellotti v. Baird*,<sup>57</sup> this statute did not vest in parents the authority to veto a minor woman's abortion decision.<sup>58</sup>

Under the Supreme Court's analysis, the test of whether a statute unconstitutionally infringes on a woman's decision to abort is not whether a statute simply affects maternal conduct or choices during pregnancy, but whether it actually limits or removes this fundamental right. One author condemns prenatal duties imposed prior to viability for two reasons. First, *Roe v. Wade* appears to establish viability as the point at which the state's interest in the fetus is sufficiently compelling for the state to act on its behalf.<sup>59</sup> Second, by imposing prenatal duties prior to viability, states may encourage women to abort.<sup>60</sup> This reasoning is flawed since the second argument undercuts the first by confusing removal of a constitutional right with actually encouraging the exercise of that right. Whether a prenatal-duty rule imposed prior to viability will or will not actually encourage abortion in no way affects its constitutionality since it does not remove the right to abort.

If a prenatal-duty rule were imposed, a pregnant woman who inade-

interest. *Id.* at 647-48. *But cf.* *H. L. v. Matheson*, 450 U.S. 398, 413 (1981) (parental-notification statute "serves important state interests [and] is narrowly drawn to protect only those interests").

54. *See* *Maier v. Roe*, 432 U.S. 464 (1977). The Court stated: "We think it abundantly clear that a state is not required to show a compelling interest for its policy choice to favor normal childbirth." *Id.* at 477; *see also* *Beal v. Doe*, 432 U.S. 438 (1977) (state need not fund nontherapeutic abortion); *Poelker v. Doe*, 432 U.S. 519 (1977) (city need not fund nontherapeutic abortions).

55. *Harris v. McRae*, 448 U.S. 297 (1980). The Court stated: "where, as here, the Congress has neither invaded a substantive constitutional right or freedom . . . the only requirement of equal protection is that congressional action be rationally related to legitimate governmental interest." *Id.* at 326.

56. *Matheson*, 450 U.S. at 409 (1981). "Although we have held that a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion, a statute setting out a 'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent girl." *Id.* (footnotes omitted).

57. 428 U.S. 132 (1976).

58. 450 U.S. at 411. "The Utah statute gives neither parents nor judges a veto power over the minor's abortion decision." *Id.* (footnote omitted).

59. *See*, *Meyers, Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1 (1984) [hereinafter *Meyers*]. *Meyers* argues that a state may impose a duty to protect fetal health in certain situations, but it may never do so prior to viability. *Id.* at 65. *Meyers* states that "*Roe v. Wade* clearly marks viability as the point at which state interests[in the fetus] elevate to a level approximately at balance with those of the mother." *Id.* at 68 (footnotes omitted).

60. *Meyers* argues that if prenatal duties are imposed prior to viability, women may be more likely to abort. *Meyers, supra* note 59, at 68; *accord*, Note, *A Maternal Duty to Protect Fetal Health*, 58 IND. L. REV. 531, 540 (1984). "[I]mposing liability before viability may also encourage mothers to abort. . . . If a court were to order a pregnant alcoholic not to drink, she might opt to abort to avoid compliance." *Id.*

quately cares for the health of her preivable fetus may possibly be subject to a court order enjoining her adverse conduct.<sup>61</sup> While the purpose of the court order is to encourage her to alter her conduct and carry the fetus to term, she may instead decide to abort as a way to circumvent that order. The statute, therefore, could have a direct impact on her conduct prior to the viability of the fetus. It might also have an indirect or collateral affect in making abortion a relatively more attractive option after the court order than before, as continued pregnancy would carry an added duty. It is inconsistent to argue that a rule unconstitutionally removes the right to abort if in fact the rule actually encourages women to exercise that very right. Statutes held to be an unconstitutional violation of the right to abort have precisely the opposite effect of restricting, not encouraging, the abortion option.

A prenatal duty imposed prior to viability may appear unconstitutional since the state's interest in the potentiality of human life does not become compelling until viability.<sup>62</sup> Imposing a duty to protect and nurture fetal health prior to viability seems to elevate the state's willingness to protect fetal health above its ability to protect fetal life in a logically inconsistent manner. In fact, however, the inconsistency does not result from elevating the state's interest in fetal health above its interest in potential life. The anomaly results because once the state protects a fetus' potential life, the mother automatically loses her right to abort. The state's willingness to protect fetal health and the mother's right to abort, by contrast, can exist simultaneously.<sup>63</sup> Thus, it is unnecessary to elevate the state's interest in fetal health above its interest in the potentiality of human life to justify the rule. Both the state's interests in fetal life and in fetal health are legitimate and coexist prior to viability.<sup>64</sup> Given the nature of the maternal rights against which these state interests are

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61. A hypothetical prenatal-duty rule could encompass a variety of duties such as duties to refrain from adverse conduct or duties to undergo medical procedures designed to cure fetal abnormalities. This article proposes that the appropriate bases for limiting the scope of prenatal duties stems not from the viability criterion established in *Roe v. Wade*, but rather stems from other legal doctrines including the right to bodily integrity and the rescue doctrine. See *infra* notes 72-110 & 221-77 and accompanying text. While these doctrines may restrict the scope of legal duties in any context to situations involving fairly egregious conduct, they absolutely prohibit imposing maternal duties to undergo in utero surgery to cure fetal abnormalities not caused by the mother.

62. See *Roe*, 410 U.S. at 163 (1973). "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." *Id.*

63. The state's interest in the potentiality of human life is by definition opposed to the mother's right to abort. The two rights are logically inconsistent because the exercise of abortion necessarily defeats the state's interest in potential life and the preservation of fetal life necessarily precludes abortion. Both the state's interest and the mother's right cannot be exercised simultaneously. By contrast, a state interest in protecting and nurturing fetal health is not opposed to the right to abort since the mother retains the right to abort until viability. *Roe*, 410 U.S. at 163. Instead, it is opposed to the mother's rights to control her body and to act on her personal beliefs. See *infra* notes 72-127, and accompanying text. Holding these rights aside, however, the rule is not opposed to the fundamental right to abort, and therefore may require only a legitimate state interest rationally related to a permissible end. See Note, *Constitutional Limitations*, *supra* note 28. at 1059.

64. See *Roe*, 410 U.S. at 162. "[T]he State does have an important and legitimate interest in . . . protecting the potentiality of human life." *Id.* (emphasis added).

opposed, however, courts can give force to the state's interest in fetal health before they give force to the state's interest in fetal life.<sup>65</sup>

Accepting the argument that a prenatal-duty rule would not violate a woman's right to abort, it also would not impinge upon the type of intimate decision making created by the right of privacy. The right of privacy protects women in their decisions not to conceive,<sup>66</sup> or, having conceived, not to bear a child.<sup>67</sup> The right to make these intimate decisions protects women from having to assume a responsibility which they may not desire to undertake. Regardless of one's personal view on the use of contraceptives and abortion, no one can deny that requiring a woman to bear a child against her will can have a lasting and potentially devastating impact upon her.

By contrast, preventing a woman from acting in ways detrimental to her fetus does not protect her interests in such a fundamental manner. Whether or not a woman ultimately decides to bear a child, requiring her to insure that if born, her child will be healthy, is not detrimental to her long-term self interest. In fact, the opposite is more likely to be true. A woman who is not prepared to raise a healthy child is even less prepared to raise one with a serious birth defect.<sup>68</sup> Ironically, therefore, a prenatal-duty rule may protect a woman's self interest by denying the right to make some intimate decisions while the right of privacy protects her self-interest by enabling her to make other intimate decisions.

Thus, while *Roe v. Wade*<sup>69</sup> precludes states from infringing upon the mother's right to abort prior to viability,<sup>70</sup> the state may have a legitimate interest in fetal health at an earlier point.<sup>71</sup> A prenatal-duty rule may, how-

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65. Cf. *Taft v. Taft*, 338 Mass. 331, 446 N.E.2d 395 (1983) (state may not protect potential life prior to viability).

66. See *Griswold*, 381 U.S. 479; *Eisenstadt*, 405 U.S. 438.

67. See *Roe*, 410 U.S. 113.

68. The costs associated with raising a physically or mentally handicapped child, both emotionally and financially are obviously higher than those associated with raising a normal child, all else being equal, since impaired children require special education and greater attention than normal children.

69. 410 U.S. 113.

70. *Id.* at 164-65.

71. In a recent article, one author stated that any prenatal-duty rule must withstand a strict scrutiny test. Johnson, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L.J. 599 (1986) [hereinafter Johnson]. The author adds that "[l]aws that attempt to regulate the actions of pregnant women by creating fetal rights clearly do not survive this standard." *Id.* at 619. While the author states that under a prenatal-duty rule a state could regulate a woman's eating and drinking, "the types of physical activities in which she engaged, with whom and how often she had sexual intercourse, and where she worked — to name only a few areas of regulation," her argument suffers two flaws. *Id.*

First, she fails to recognize the limits the Supreme Court has drawn on the constitutional right of privacy. Specifically, the Supreme Court has not required a compelling state interest for all state regulations affecting maternal choices regarding the decision to bear a child. See *supra* notes 46-58 and accompanying text. Thus, the Court may only require a legitimate interest where the state is not removing the right to abort. Second, and more importantly, Johnson does not explain why a prenatal-duty rule could not be narrowly tailored to prevent state intrusion except where needed to prevent serious harm caused by the mother's adverse conduct. Under such a narrowly defined rule, outlined in this article, most of the horrors envisioned by Johnson simply could not occur.

ever, be limited by other fundamental constitutional rights, specifically the rights to bodily integrity and to the free exercise of religion.

### B. *The Right to Bodily Integrity*

The constitutional right to bodily integrity is derived from two sources.<sup>72</sup> First, the fourth amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,"<sup>73</sup> thus providing a doctrinal basis for prohibiting unreasonably intrusive searches.<sup>74</sup> Second, courts have also stated that the right of privacy supports the right of individuals to have their bodily integrity respected.<sup>75</sup>

While the right of autonomy in intimate decision making might not be contravened by a duty to protect fetal health, the right to bodily integrity may be, since any prenatal duty would have a direct impact on how the mother controls her body. In granting injunctive relief to benefit a fetus, a court will impose constraints on maternal conduct and may even subject a woman to physically-intrusive procedures.

Intuitively it may be unclear whether brief physical bodily intrusions, including shots or X-rays, are more of an invasion of privacy than longer non-intrusive restrictions on conduct such as forced abstentions from drugs or alcohol. The Supreme Court, however, has expressed a stronger distaste for compelled physical intrusions than for compelled limitations on conduct.<sup>76</sup> The Court has sanctioned brief detentions based on reasonable suspicion of criminal activity, a standard lower than probable cause.<sup>77</sup> In a recent case,<sup>78</sup> the Court held that an alien suspected of smuggling cocaine by means of balloon swallowing may be detained at the border on this lower standard for as long as sixteen hours while restricted from unsupervised bowel movements.<sup>79</sup>

While the Court has been far more strict in determining the degree to which a state may compel physically-intrusive procedures, the Court has failed to adopt a *per se* rule.<sup>80</sup> Two early cases have established a rough set of crite-

72. See Note, *Constitutional Limitations*, *supra* note 28, at 1053 n.12. "Courts have found a basis for a right to bodily integrity in the fourth amendment . . . and in a general constitutional right to privacy." *Id.*

73. U.S. CONST. amend. IV.

74. See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952) (use of stomach pump to obtain evidence "is conduct that shocks the conscience" and "is bound to offend even hardened sensibilities"). *But see* *Schmerber v. California*, 384 U.S. 757 (1966) (in urgent circumstances, police may compel suspect to undergo blood test without search warrant).

75. See *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (right of privacy includes right to decline life sustaining medical treatment); *Superintendent v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (discussing patient's right to decline life-prolonging, as opposed to life-saving medical treatment).

76. See generally *Regan, Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1583-88 (1977) [hereinafter *Regan*] (discussing the reluctance of courts to compel physically-intrusive procedures)

77. See *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing stop and frisk based on reasonable suspicion of criminal activity).

78. *United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985).

79. *Id.* at 3310-11.

80. See, e.g., *Schmerber v. California*, 384 U.S. at 768. "[T]he fourth amendment's proper

ria for determining what constitutes acceptable compelled physical intrusions. In *Jacobson v. Massachusetts*,<sup>81</sup> the Court upheld a state statute compelling smallpox vaccinations stating, “[t]he safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect.”<sup>82</sup> In *Rochin v. California*,<sup>83</sup> by contrast, the Supreme Court condemned the use of an enema to pump defendant’s stomach for evidence.<sup>84</sup> The Court asserted that such conduct “shocks the conscience” and “is bound to offend even hardened sensibilities.”<sup>85</sup>

In *Schmerber v. California*,<sup>86</sup> the Court presented its first comprehensive statement on how to determine what constitutes an acceptable degree of intrusion. Specifically, the Court balanced the gravity of the invasion of privacy against the state’s legitimate interests in seeking evidence.<sup>87</sup> In *Schmerber*, the Court weighed several factors to decide whether it is constitutionally permissible to compel a blood test to determine the defendant’s blood-alcohol level. The Court stated that to extract bodily fluids without a warrant, the officers required a clear indication that the procedure would reveal the evidence they were seeking.<sup>88</sup> Since blood tests are commonplace,<sup>89</sup> an effective means of determining blood-alcohol level,<sup>90</sup> and a minimally intrusive means of securing the evidence sought,<sup>91</sup> the Court held that the state’s legitimate interest in securing evidence outweighed the defendant’s right to bodily integrity.<sup>92</sup>

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function is to constrain not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.” *Id.*; see also *Missouri v. Overstreet*, 551 S.W.2d 621, 625-26 (Mo. 1977). “*Schmerber* confirms . . . that it does not prohibit all intrusions.” *Id.* In *Schmerber*, the Court rejected the *per se* rule proposed by Warren, C.J. in *Breithaupt v. Abram*, 352 U.S. 432, 442 (1957) (Warren, C.J., dissenting). “[D]ue process means at least that law-enforcement officers in their efforts to obtain evidence . . . must stop short of bruising the body, breaking the skin, puncturing tissue or extracting body fluids . . .” *Id.* Thus, the Court added “that today we hold that the Constitution does not forbid the State’s minor intrusions into an individual’s body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.” 384 U.S. at 772. In addition to rejecting a fourth amendment challenge, the *Schmerber* Court rejected defendant’s claim that the blood test violated his fifth amendment privilege against self-incrimination. *Id.* at 760-61. The Court stated that the fifth amendment privilege only protects defendant from having to provide “evidence of a testimonial or a communicative nature.” *Id.* at 761.

81. 197 U.S. 11 (1905).

82. *Id.* at 38.

83. 342 U.S. 165 (1952).

84. *Id.* at 172.

85. *Id.* See also *Brown v. Mississippi*, 297 U.S. 278 (1936) (tortured confessions violate due process).

86. 384 U.S. 757 (1966).

87. *Id.* at 768.

88. *Id.* at 770. While the officers did not have a search warrant, the Court held that the exigency justified proceeding without one since blood alcohol-level changes quickly. *Id.*

89. *Id.* at 771. “Such tests are commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.” *Id.* (footnote omitted).

90. *Id.* “Extraction of blood samples . . . is a highly effective means of determining . . . the influence of alcohol.” *Id.*

91. *Id.*

92. *Id.* at 772. “We thus conclude that the present record shows no violation of petitioner’s

While the balancing test in *Schmerber* is more comprehensive than the "shocks the conscience" standard in *Rochin*, it is nonetheless imprecise. A review of how this test was applied to two bullet removal cases, however, may make it possible to discern the acceptable range of physical intrusions into a mother's body under a prenatal-duty rule.

In both *United States v. Crowder*<sup>93</sup> and *Winston v. Lee*,<sup>94</sup> the defendant was arrested and presented with a court order to have a bullet removed from his body.<sup>95</sup> Both defendants were afforded adversarial hearings and full appellate review.<sup>96</sup> In *United States v. Crowder*, the Court of Appeals for the D.C. Circuit upheld the admissibility of the removed bullet,<sup>97</sup> and in *Winston v. Lee*, the Supreme Court upheld the district court order enjoining surgical removal.<sup>98</sup> While both cases involved removal of a bullet, the major basis for distinguishing them is the extent to which the requested surgical procedure invaded the defendants' privacy.<sup>99</sup>

In *Crowder*, the removal involved a ten-minute surgical procedure under local anesthesia.<sup>100</sup> Because the bullet was lodged in fat rather than in muscle, the risk was minimal and the procedure was medically advisable. In *Winston*, by contrast, the bullet was lodged approximately three centimeters deep in muscle.<sup>101</sup> The removal procedure therefore required general anesthesia and posed some risks to the defendant.<sup>102</sup> Moreover, the estimated surgical time needed to remove the bullet from the defendant's leg ranged from twenty minutes to two and one-half hours.<sup>103</sup>

Two factors distinguish these cases. First, *Crowder* involved local anesthesia while *Winston* involved general anesthesia. Although the risks associated with general anesthesia may be low statistically,<sup>104</sup> the *Winston* Court took into consideration the fact that both lower courts believed "[t]he use of a gen-

right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures." *Id.*

93. 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

94. 470 U.S. 753 (1985).

95. *Winston*, 470 U.S. at 757; *Crowder*, 543 F.2d at 314.

96. *Winston*, 470 U.S. at 757-58; *Crowder*, 543 F.2d at 316.

97. *Crowder*, 543 F.2d at 316. In *Crowder*, the district court ordered the surgical removal of the bullet in defendant's forearm as the procedure posed no risk and was medically advisable. *Id.* at 313. It declined, however, to order removal of the bullet in defendant's leg as the procedure posed some risk of reduced function of the leg. *Id.* Both orders were affirmed. *Id.* While the distinction in *Crowder* between the two bullets comports with the distinction advanced in the text between *Winston* and *Crowder*, an additional factor may have influenced the *Crowder* court. Since the state was authorized to extract the bullet from the defendant's arm, the additional probative value of the second bullet may have been insufficient to justify the further invasion of privacy.

98. *Winston*, 470 U.S. at 755.

99. *Winston*, 470 U.S. at 755; *Crowder*, 543 F.2d at 316. In *Winston*, the Court noted that the evidentiary value of the bullet was itself suspect since the markings from the gun may have eroded. *Id.* at 766, n.10. This, however, does not appear to be the major basis for the Court's decision.

100. 543 F.2d at 315.

101. 470 U.S. at 757.

102. *Id.* at 763-64.

103. *Id.* at 764.

104. *Id.* at 764, n.7.

eral anesthetic, would be an extensive intrusion on respondent's personal privacy and bodily integrity."<sup>105</sup> The *Crowder* Court, by contrast, asserted that the use of local anesthesia was "reasonable and proper."<sup>106</sup> Second, removal of the bullet in *Winston* was not advisable given the medical risks to defendant apart from those associated with the use of general anesthesia.<sup>107</sup> In *Crowder*, by contrast, the procedure was medically advisable since it posed virtually no risk.<sup>108</sup> These two cases establish that courts can order minor surgery if the procedure is medically advisable for the patient, is the least intrusive means of obtaining the evidence sought, and does not unduly invade bodily integrity. When a requested procedure is not advisable for the patient, however, courts will be reluctant to grant orders compelling the intrusion. Unfortunately, these cases leave a large grey area regarding low risk procedures which are neither beneficial nor harmful to the patient.

In the context of prenatal duties, courts are likely to weigh two factors in deciding whether to issue orders compelling bodily intrusions. First, courts will apply the balancing test to see whether the medical test itself is a permissible intrusion. Most prenatal tests, amnioscentesis or chorionic villi biopsy,<sup>109</sup> for example, pose no significant risks to the mother yet can provide indirect benefits to the fetus by permitting doctors to discover problems they can later treat.<sup>110</sup> These tests are more intrusive than a blood test, yet are less intrusive than the surgical removal of a bullet. Thus, most prenatal tests, whether for injuries resulting from maternal misconduct or for genetic defects unrelated to maternal conduct, are likely to fall within the grey area that remains following the *Winston* and *Crowder* decisions. Second, and more importantly, however, courts will weigh whether the test results will yield information conducive to further judicial intervention.

For example, a court would be more likely to order a series of blood tests that will reveal whether a woman is an alcoholic than it would be to order a sonogram which will reveal fetal hydrocephalus. If the court determines that the woman is an alcoholic, it can compel her to favorably alter her conduct without violating her right to bodily integrity. The court cannot, however, compel her to submit to corrective prenatal surgery without violating this constitutional right. The dispositive factor is therefore not only the intrusiveness of the medical test, but also the intrusiveness of the corrective measure indicated by the test results.

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105. *Id.* at 764.

106. *Crowder*, 543 F.2d at 316.

107. These risks included "injury to the muscle as well as injury to the nerves, blood vessels and other tissue in the chest and pleural cavity." *Winston*, 470 U.S. at 764.

108. *Crowder*, 543 F.2d at 316.

109. See *supra* note 16 for an explanation of these and other prenatal testing procedures.

110. Certain prenatal tests, however, pose significant risks to the fetus itself. See Harrison, Golbus & Filly, *supra* note 11, at 776. "[T]he risks involved in fetal diagnosis and treatment are generally greater for the fetus than the mother and vary greatly according to the magnitude and invasiveness of the procedure." *Id.* The issue of prenatal duties will only arise, of course, where the benefit of the test to the fetus outweighs the risks.

### C. *Right to Free Exercise of Religion*

In addition to implicating a woman's rights to privacy and bodily integrity, a prenatal-duty rule also may, in certain situations, contravene a woman's religious beliefs.<sup>111</sup> In fact, the two reported cases requiring pregnant women to save the lives of their viable fetuses involved medical procedures which the mothers opposed on religious grounds.<sup>112</sup> The Constitution does not, however, provide an unlimited right to act in accordance with one's religious beliefs, especially where doing so will harm others.<sup>113</sup>

Thus, in *Reynolds v. United States*,<sup>114</sup> for example, the Supreme Court upheld a statute proscribing bigamy against petitioner's religious challenge.<sup>115</sup> While petitioner had an unlimited right to believe that bigamy is morally correct, the state had a legitimate interest in preserving the institution of monogamous marriage and could therefore prevent petitioner from actually engaging

111. The Constitution also provides parents a limited right to raise children in accordance with their beliefs. Like the right to bodily integrity, the right to autonomy in child-rearing is derived from two sources: the free exercise clause of the first amendment and the right of privacy. *See generally* Note, *Constitutional Limitations*, *supra* note 28, at 1061-64 (discussing the constitutional right to rear children).

In *Griswold v. Connecticut*, which created the modern right of privacy, the Supreme Court relied on two early substantive due process cases involving the right to rear children. 381 U.S. 479, 481-82 (discussing *Pierce v. Society of Sisters*, 268 U.S. 510 (1924); *Meyer v. Nebraska*, 262 U.S. 390 (1923)). In *Meyer v. Nebraska* the Supreme Court held unconstitutional a statute preventing the instruction of foreign languages in school. The Court asserted that due process includes the right "to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [one's] conscience." 262 U.S. 390, 399. Similarly in *Pierce v. Society of Sisters*, the Court upheld the "liberty of a guardian to direct the upbringing and education of children . . ." holding unconstitutional a statute requiring public education. 268 U.S. 510, 534. In a more recent case, the Court upheld the first and fourteenth amendment challenge by Amish parents to a statute requiring public school attendance until the age of sixteen. *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972). The Court asserted that when the rights enunciated in *Meyer* and *Pierce* are combined with a first amendment challenge, the state must satisfy more than a "reasonable relation test." *Id.* at 235; *see also* *Parham v. J.R.*, 442 U.S. 584 (1979) (upholding right of parents to civilly commit child without adversarial hearing).

Like the right to free exercise of religion, however, the right to autonomy in child rearing is not unlimited. The Constitution secures the right of parents to raise children because the family unit is generally the most suitable for that purpose. *See* Note, *Constitutional Protection*, *supra* note 28, at 1062. Where parents demonstrate that they are not concerned with their child's well-being, however, the state can legitimately disrupt the family unit in the same way it can restrict a person's right to act in accordance with his or her religious beliefs. *See infra* notes 159-220 and accompanying text.

112. *See* *Jefferson v. Griffin Spalding Cty. Hosp.*, 247 Ga. 86, 274 S.E.2d 457 (1981) (upholding court-ordered Caesarian section to save lives of mother and fetus over mother's religious objection); *Raleigh-Fitkin Paul Morgan Mem. Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964) (upholding court-ordered blood transfusion to save the lives of mother and fetus over mother's religious objection).

113. *See, e.g., Prince*, 321 U.S. 158 (1944) (upholding statute proscribing child labor over aunt's religious objections); *Reynolds*, 98 U.S. 145 (1878) (upholding statute proscribing bigamy over defendant's religious objections).

114. 98 U.S. 145 (1878).

115. *Id.* at 166.

in bigamy.<sup>116</sup> Similarly, in *Prince v. Massachusetts*,<sup>117</sup> the Court upheld a statute proscribing child employment notwithstanding the first and fourteenth amendment challenge of her aunt and custodian.<sup>118</sup> The aunt, a Jehovah's Witness, asserted that the statute that restricted the right of her nine-year-old niece to distribute religious materials violated her rights of free exercise of religion and equal protection.<sup>119</sup> After noting the state's legitimate interest in protecting children, the Court stated that "[p]arents may be free to become martyrs themselves. But it does not follow that they are free, . . . to make martyrs of their children . . . ."<sup>120</sup>

The distinction between the right to hold religious beliefs and the right to act on those beliefs applies in the context of prenatal duties. A pregnant woman faced with a court-ordered medical procedure may claim that her right to practice her religion is thereby violated. In *Jefferson v. Griffin Spalding County Hosp. Auth.*,<sup>121</sup> for example, a Jehovah's Witness was ordered to submit to a Caesarean section followed by a blood transfusion to save her life and the life of her fetus.<sup>122</sup> In rejecting petitioner's first amendment challenge, one concurring justice distinguished the "freedom to believe" from "the freedom to act,"<sup>123</sup> essentially echoing the distinction set forth in *Prince v. Massachusetts*.<sup>124</sup> Similarly, in *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,<sup>125</sup> the Supreme Court of New Jersey upheld a court-ordered blood transfusion to save the life of the mother and her fetus over the mother's religious objections.<sup>126</sup>

The right to free exercise of religion is therefore unlikely to pose a significant threat to a prenatal-duty rule in cases involving a serious threat to fetal health.<sup>127</sup> During gestation, the needs of a fetus are entirely physical in nature. Where a fetus' health is seriously threatened by a mother's religious practices, the state can legitimately override the mother's right to act in accordance with her religious beliefs. The mother's right to bodily integrity will therefore place more significant restraints on the acceptable range of prenatal duties than either the right to intimate decision making or the right to free exercise of religion.

116. *Id.* "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." *Id.*

117. 321 U.S. 158 (1944).

118. *Id.* at 170.

119. *Id.* at 164.

120. *Id.* at 170. The Court added, "[w]e think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, . . . and the rightful boundary of its power has not been crossed in this case." *Id.*

121. 247 Ga. 86, 274 S.E.2d 457 (1981).

122. *Id.* at 87, 274 S.E.2d at 458.

123. *Id.* at 91, 274 S.E.2d at 461 (Smith, J., concurring).

124. 321 U.S. 158 (1944).

125. 42 N.J. 421, 201 A.2d 537 (1964).

126. *Id.* at 424, 201 A.2d at 538.

127. See Note, *Constitutional Limitations*, *supra* note 28, at 1062-64.

### III. STATE INTERVENTION

As indicated above, maternal misconduct can cause several severe fetal abnormalities.<sup>128</sup> A suit for damages after birth cannot provide a permanently impaired child with adequate compensation. A *parens patriae* suit compelling the mother to alter her conduct can, however, have a significant impact on ameliorating or eliminating such disorders. While a duty to protect fetal health prior to viability is constitutionally permissible in certain situations, the more difficult issue is whether and when to adopt such a rule. This section will consider state law doctrines which may influence whether and when prenatal duties may be appropriate.

Part A of this section will review fetal rights in tort law.<sup>129</sup> While a *parens patriae* suit involves equitable relief rather than damages, this discussion will demonstrate the law's flexibility in providing relief for fetal injuries which occur throughout gestation. Part B of this section will consider the rights of children to equitable relief for parental misconduct.<sup>130</sup> Since a fetus will not be granted greater legal status than a child, these cases will demonstrate the maximum likely extent of state intervention for a child not yet born. Part C of this section will then consider how the rescue doctrine may serve to limit the scope of any prenatal-duty rule.<sup>131</sup> While our legal system imposes duties not to harm, it generally eschews affirmative duties to rescue.<sup>132</sup> The personal autonomy protections created by this doctrine are similar to those created by the constitutional right to bodily integrity. Given the unique physical and emotional relationship between a pregnant woman and her fetus, the rescue doctrine may provide an appropriate basis for restricting the scope of any prenatal-duty rule. Finally, part D of this section will briefly discuss some enforcement and monitoring problems associated with prenatal duties in an effort to demonstrate why, even though these problems are significant, they are not insurmountable.

#### A. *The Legal Rights of the Fetus*<sup>133</sup>

Courts have granted even pre-viable fetuses certain legal rights in several contexts. In property law fetuses traditionally could inherit.<sup>134</sup> In criminal law

128. See *supra* notes 6-12 and accompanying text.

129. See *infra* notes 136-59 and accompanying text.

130. See *infra* notes 165-220 and accompanying text.

131. See *infra* notes 221-77 and accompanying text. The rescue doctrine stands for the proposition in our legal system that people are not required to come to the aid of others. See Regan, *supra* note 76, at 1572.

132. See Regan, *supra* note 76, at 1638 (discussing Bad Samaritan doctrine as restricting duty to aid others).

133. This section addresses the rights of a child to assert claims for injuries sustained prior to birth. Because these rights are primarily in tort, they are legal rights and must therefore be distinguished from interests in health or life which the state may be willing to protect. The former involve damages; the latter involve injunctive relief and thus possess added complications. The point of this section is simply to show that the viability criterion has been rejected for recovery at law and is no longer appropriate as a bar to injunctive relief to prevent prenatal injuries.

134. See, e.g., *Deal v. Sexton*, 144 N.C. 157, 156 S.E. 691 (1907) (holding that inheritance vests in fetus at death of father); *Briggs v. McCarty*, 86 Ind. 352 (1882) (establishing right of

fetuses are sometimes protected by statute.<sup>135</sup> Similarly, in tort law, children may recover for prenatal injuries inflicted on them by third parties and even by parents.<sup>136</sup> This right of individuals to sue for injuries inflicted upon them prior to birth is, however, both recent and ambiguous.

Traditionally, children could not recover in tort for such injuries.<sup>137</sup> The first major criticism of this doctrine was Judge Boggs' dissenting opinion in *Allair v. St. Luke's Hospital*.<sup>138</sup> Judge Boggs asserted that since a fetus can survive independently of the mother prior to birth, viability was a more appropriate criterion for limiting tort recovery than birth.<sup>139</sup> At the point of viability, Boggs reasoned, the fetus should no longer be considered "part of the bowels of the mother."<sup>140</sup>

The first tort case to grant a fetus legal status separate from that of its mother was *Bonbrest v. Kotz*.<sup>141</sup> In *Bonbrest*, the court adopted Judge Boggs' reasoning to deny defendant's motion for summary judgment, thus enabling a

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fetus to inherit).

135. See CAL. PEN. CODE § 187 (West 1979). "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." *Id.* In a recent Massachusetts case, a man was convicted of first degree murder of a pregnant woman and involuntary manslaughter for the death of her six month old fetus. See Taylor, *Man convicted in death of teenager, fetus*, *The Boston Globe*, Dec. 17, 1986, at 39, col. 1. This is the first case in which a Massachusetts court convicted a person for the death of a fetus. *Id.*

136. See, e.g., *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Womack v. Buchhorn*, 384 Mich. 718, 187 N.W.2d 218 (1971); see also *Grodin v. Grodin*, 102 Mich. App. 396, 301 N.W.2d 869 (1981) (allowing tort recovery against mother for injuries from negligent use of tetracycline during pregnancy). While courts have recognized a broad right of children to sue for prenatal injuries, few courts have allowed children to sue for wrongful life. See PROSSER & KEETON, TORTS § 55, at 371 (5th ed. 1984). A wrongful-life suit is based on a claim that due to severe birth defects the child would have been better off not living. *Id.* For example, in *Turpin v. Sortini*, an infant afflicted with Tay-Sachs disease was allowed to sue her mother's doctor for failing to disclose her birth defects, depriving her parents the opportunity to abort the pregnancy. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). Most courts, however, have rejected wrongful-life claims due to the impossibility of assessing damages stemming from a failure to be aborted. See, e.g., *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980); *Procanik by Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984).

137. See Simpson, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47, 50 (1978):

Courts gave the following justifications for denying recovery: lack of precedent, stare decisis, the belief that there is no duty owed to an unborn child inasmuch as it is part of its mother and not a separate entity, difficulty in determining the existence of any causal relation between the wrong done and the resulting malady of the child after birth, danger of fraudulent claims and the fear that if such an action would be maintained, an infant could sue its own mother for injuries caused by the mother while pregnant.

*Id.*; see also King, *The Judicial Status of the Fetus: A Proposal for Legal Protection of The Unborn*, 77 MICH. L. REV. 1647, 1663 (1979). "Birth was traditionally the point at which the fetus was entitled to full legal protection of its interests because birth was once synonymous with viability." *Id.*

138. 184 Ill. 359, 370, 56 N.E. 638, 640 (1900).

139. *Id.* at 370, 56 N.E. at 641.

140. *Id.* The infant was injured as a fetus when the mother fell off a seat in an elevator which defendant had negligently operated. *Id.* at 361-62, 56 N.E. at 639.

141. 65 F. Supp. 138 (D.D.C. 1946).

child to recover for injuries inflicted after viability but prior to birth.<sup>142</sup> The more difficult issue is whether to allow a child to sue for prenatal injuries inflicted prior to viability.

Regardless of whether a fetus can survive independently of the mother's womb, injuries inflicted on it can be severely debilitating after birth.<sup>143</sup> Since severe injuries can occur throughout gestation, the viability criterion may itself be inappropriate for determining whether to grant relief. Thus, in *Smith v. Brennan*,<sup>144</sup> a severely deformed infant was allowed to recover for negligence notwithstanding that the injuries occurred prior to viability.<sup>145</sup> The Supreme Court of New Jersey stated, "[w]hether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress."<sup>146</sup> The court further explained that no court that granted tort recovery for prenatal injuries based on viability had subsequently denied recovery for injuries inflicted prior to viability.<sup>147</sup>

Similarly, in *Womack v. Buchhorn*,<sup>148</sup> the Supreme Court of Michigan allowed an infant to recover in tort for injuries resulting from an automobile accident which occurred during the fourth month of gestation.<sup>149</sup> The court noted a striking trend toward allowing prenatal tort recovery and stated that "a child has a legal right to begin life with a sound mind and body."<sup>150</sup>

Finally, in *Renslow v. Mennonite Hospital*,<sup>151</sup> the Supreme Court of Illinois allowed a child to recover for a preconception tort, stating that "the denial of claims for injuries to the preivable fetus may indeed cut off some of the most meritorious claims . . . ."<sup>152</sup> Thus, the court allowed a mother to sue on behalf of herself and her child for a foreseeable injury which the child sustained from a negligently administered blood transfusion to the mother eight years earlier.<sup>153</sup>

Fetal tort recovery has not been limited to claims against third parties. In *Grodin v. Grodin*,<sup>154</sup> the Court of Appeals of Michigan allowed a child to sue her mother for negligent conduct resulting in prenatal harm.<sup>155</sup> The mother's continued use of tetracycline during pregnancy resulted in injury to the

142. *Id.* at 142-43. The court rejected defendant's arguments that such suits would be "brought in bad faith and might present insuperable difficulties of proof . . . ." *Id.*

143. *See supra* notes 6-9 and accompanying text.

144. 31 N.J. 353, 157 A.2d 497 (1960).

145. *Id.* at 367, 157 A.2d at 504. The fetus was in its seventh month of gestation, which at the time of the opinion was considered pre-viable. *Id.*

146. *Id.* The injuries resulted from an automobile accident in which defendant was negligent. *Id.* at 355, 157 A.2d at 498. The infant suffered deformities of his legs and feet. *Id.*

147. *Id.* at 366-67, 157 A.2d at 504.

148. 384 Mich. 718, 187 N.W.2d 218 (1971).

149. *Id.*

150. *Id.* at 725, 187 N.W.2d at 222 (quoting *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960)).

151. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

152. *Id.* at 352-53, 367 N.E.2d at 1252.

153. *Id.* at 349, 367 N.E.2d at 1250.

154. 102 Mich. App. 396, 301 N.W.2d 869 (1981).

155. *Id.* at 401, 301 N.W.2d at 871. The court stated that the "litigating child's mother would bear the same liability for injurious, negligent conduct as a third person." *Id.* at 870.

child.<sup>156</sup>

The viability criterion is no more appropriate in the context of maternal duties than in the context of torts by third parties. As indicated above, many severe fetal abnormalities are the direct result of maternal misconduct early in pregnancy. Thus, as stated in *Renslow*,<sup>157</sup> a viability restriction would deny recovery for "some of the most meritorious claims."<sup>158</sup> The more difficult issue is whether courts should issue orders compelling pregnant women to alter conduct detrimental to their fetuses. The next section on child abuse and neglect will address this issue by examining the degree to which courts are willing to compel parents to alter conduct detrimental to their children.

### B. Child Abuse and Neglect

While courts are willing to provide damages to children injured prior to birth, they may be less willing to compel a pregnant woman to alter her conduct to prevent such injuries. Family decisionmaking is not only protected by the Constitution,<sup>159</sup> albeit with certain limitations, but also is protected by state laws on child abuse and neglect.<sup>160</sup> Since fetal rights cannot exceed those of children, these laws provide the likely ceiling of state intervention to benefit fetal health. Although child abuse and neglect statutes vary from state to state,<sup>161</sup> most share certain common characteristics.<sup>162</sup> In general, modern statutes are designed to preserve the family unit to the maximum possible extent, while protecting children from parental conduct which falls outside the bounds of acceptable parenting.<sup>163</sup>

#### 1. Defining Medical Neglect<sup>164</sup>

In general, child neglect laws establish a bifurcated system designed to

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156. *Id.* at 398, 301 N.W.2d at 869. In fact, the suit was originally filed only against the doctor, but because the parents' attorney was concerned that the jury may find the mother at fault and because the mother's homeowner's insurance policy included coverage for tort liability, the attorney advised the parents to attach the mother as a defendant. See Robertson, *Procreative Liberty*, *supra*, note 4, at 441 n.114.

157. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

158. *Id.* at 352-53, 367 N.E.2d at 1252.

159. See *supra* note 111.

160. See generally, Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 250-67 (1982) [hereinafter Note, *Unequal and Inadequate Protection*] (outlining history of state child abuse and neglect statutes).

161. *Id.* at 252.

162. *Id.*

163. See generally W. WADLINGTON, *DOMESTIC RELATIONS* 518 (1985) (commenting on The Juvenile Justice Standards Relating to Abuse and Neglect (1981)). "One of the goals of the proposed system would be 'to allow intervention only where there is reason to believe that coercive intervention will benefit the child.'" *Id.*

164. While this section discusses child abuse and neglect, the author does not equate a fetus with a child. The section is designed to demonstrate a ceiling beyond which the state will not rise to protect fetal health.

The author's own view is that a fetus does not instantly become a person at any particular point during gestation. Instead the fetus starts closer to a thing at the moment of conception and becomes more and more like a person throughout gestation. By viewing the transformation of a fetus

protect children and to limit state intervention into the family unit. Child neglect statutes do not permit state intervention whenever parents make a medical decision which the state does not consider to be in a child's best interest.<sup>165</sup> Before the state can substitute its judgment for that of the parents, it must demonstrate that the parents have failed to meet the standards of acceptable parenting.<sup>166</sup> Thus, the first step in the two part statutory scheme is to decide whether the parents have failed to provide minimally acceptable or adequate care.<sup>167</sup> If it cannot be shown that the parents have failed to provide minimum or adequate care, the state cannot second guess their decisions. If, however, the parents do fail to provide minimally acceptable care the state can then substitute its judgment for the that of the parents and decide what is in the

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in these terms, one can avoid the difficulty of having to vest a fetus with full human rights at a given moment. Since human rights are categorical, one has them or one does not, equating the fetus with a person at any point, for example viability, has tremendous ramifications. If a fetus becomes a person at viability it has a full right to life at that point and no right to life the moment before. Because a categorical approach can often lead to undesirable and inconsistent results, it is important not to discuss fetal interests in terms of rights but rather in terms of a state's willingness to protect those interests.

In the author's view a state's willingness to protect particular fetal interests should evolve over the nine-month gestation period. Since serious fetal harm can occur early in gestation, a state should be willing to protect fetal health relatively early in pregnancy. A state's willingness to protect fetal life can arrive later, for example, at viability under *Roe*, since in protecting fetal life, a state removes an important right from the mother. Finally, a state's willingness to require women to save a fetus' life through affirmative conduct may come later still. Thus, while the *Jefferson* and *Anderson* courts were willing to require blood transfusions to save the life of a fetus about to be born, they may have been less willing to do so one month earlier. The fetus is unique in that it is a nonperson which becomes a person. By allowing a state's interest in the well-being of a fetus to evolve over a continuum, a state has greater flexibility to protect the fetus without cutting off all maternal rights at a set date during gestation.

165. See, e.g., MASS. GEN. LAWS ANN. ch. 119, §§ 24, 26 (West Supp. 1986). Section 24 provides that for the Boston Juvenile Court to assert jurisdiction over a child without proper care, a petition on behalf of the child must allege that said child is without:

- (a) necessary and proper physical or educational care and discipline; or (b) is growing up under conditions or circumstances damaging to the child's sound character development; or (c) who lacks proper attention of parent, guardian with care and custody, or custodian; or (d) and whose parents, guardian or custodian are unwilling, incompetent or unavailable to provide any such care . . . .

MASS. GEN. LAW ANN. ch. 119, § 24 (West Supp. 1986). Only if the allegations are proved, may the court "make any . . . appropriate order . . . as may conduce to [the child's] best interests. . . ." MASS. GEN. LAWS ANN. ch. 119, § 26 (West Supp. 1986).

166. See Arthur, *Judicial Procedures, Child Abuse and Neglect*, JUV. & FAM. CT. J. ch. 3, 15 (Winter 1984) "The issue [in cases of child abuse] is not whether a child will be better off with natural parents or with foster parents, the issue is whether the parents meet minimum standards of care." *Id.*

167. See, e.g., *In re Hudson*, 13 Wash. 2d 673, 700, 126 P.2d 765, 778 (1942). "The mere fact that the court is convinced of the necessity of subjecting a minor child to a surgical operation will not sustain a court order which deprives a parent of the responsibility and right to decide respecting the welfare of the child." *Id.* See also *In re Hofbauer*, 47 N.Y.2d 648, 656, 393 N.E.2d 1009, 1014 (1979) "Nor can a court assume the role of a surrogate parent and establish as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided . . . ." *Id.*

child's best interest.<sup>168</sup>

While the statutory scheme distinguishes failure to provide minimal care from failure to act in the child's best interest, the difficult issue is defining what constitutes a lack of minimum care. Where a child's life is threatened by a parent's failure to consent to a medical procedure, this statutory distinction makes little difference.<sup>169</sup> Courts will compel parents to provide their children with life-saving medical treatment over religious or other objections. In fact, one court acquired jurisdiction over a fetus whose mother indicated that she would not consent to a life-saving blood transfusion for the child after it was born.<sup>170</sup>

Cases that involve unconventional medical treatment for illnesses that are life threatening, or remedial medical procedures for illnesses that are not life threatening, present courts with more difficult questions. To illustrate the difficulty in defining lack of minimal care, this section will consider two cases involving unconventional medical treatments, one allowing state intervention and one leaving the decision to the parents.

In *Matter of Hofbauer*,<sup>171</sup> the Court of Appeals of New York refused to compel the parents of a child with Hodgkin's disease to consent to conventional medical treatment, including chemotherapy, for their child.<sup>172</sup> The parents, with the guidance of a physician, pursued an alternative course of treatment involving nutritional therapy and laetrile.<sup>173</sup> The New York statute defined child neglect as "failure of [a] . . . parent . . . to exercise a minimum degree of care in supplying the child with adequate . . . medical . . . care, though financially able to do so."<sup>174</sup> The court explained that the statute did not authorize courts to become surrogate parents and that provision of adequate medical care did not involve a "'right' or a 'wrong' decision."<sup>175</sup> Since the parents' preferred course of medical treatment was not "totally rejected by all responsible medical authority," the court held that the parents exercised adequate care.<sup>176</sup>

The Supreme Judicial Court of Massachusetts reviewed a similar set of

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168. See Ewald, *Medical Decision Making for Children: An Analysis of Competing Interests*, 25 St. Louis U.L.J. 689, 693 (1982). "If a child is in serious danger because of lack of medical care, state neglect statutes normally authorize intervention by courts having juvenile jurisdiction." *Id.*

169. See, e.g., *Wallace v. Labrenz*, 411 Ill. 618, 624, 104 N.E.2d 769, 773 (1952) (compelling blood transfusion to save child's life over parent's religious objections under statute defining neglect as failure to provide "proper parental care"); *Jehovah's Witnesses in the State of Washington v. King County Hosp. Unit No. 1 (Harborview)*, 278 F. Supp. 488, 498-99 n.1 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (declining to enjoin defendant hospital from giving blood transfusions to plaintiffs' children under statute defining dependent child as one "who is grossly and willfully neglected as to medical care necessary for his well-being").

170. *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140 (1961).

171. 47 N.Y.2d 648, 393 N.E.2d 1009 (1979).

172. *Id.* at 648, 393 N.E.2d at 1009.

173. *Id.* at 652, 393 N.E.2d at 1011.

174. *Id.* at 654, 393 N.E.2d at 1013 (citation omitted).

175. *Id.* at 656, 393 N.E.2d at 1014.

176. *Id.* at 656-57, 393 N.E.2d at 1014. The child subsequently died at the age of ten. *N.Y. Times*, July 18, 1980, at D13, col. 5.

facts in *Custody of a Minor*.<sup>177</sup> In that case, the parents of a three-year-old boy with acute lymphocytic leukemia had been ordered to submit their child to chemotherapy. The parents wished to supplement this treatment with metabolic therapy, including laetrile.<sup>178</sup> Unlike the New York court in *Hofbauer*, the Massachusetts court found the child "to be in need of care and protection"<sup>179</sup> under the Commonwealth's statute, enabling it to apply its "substituted judgment" in the "best interest of the child."<sup>180</sup> The court dismissed metabolic therapy not only as ineffective but also as possibly detrimental to the child's health.<sup>181</sup> The court distinguished *Hofbauer*,<sup>182</sup> explaining that in the present case there was no medical evidence that the parents' course of treatment was curative.<sup>183</sup> Thus, the court also found irrelevant "arguments which posit the existence of a fundamental right in competent adults to make personal health care decisions and to choose or reject medical treatment, whether orthodox or unorthodox, rational or foolish."<sup>184</sup> The Massachusetts court ordered the parents to both continue chemotherapy and cease metabolic therapy.<sup>185</sup>

When medical procedures are not life saving, courts are generally more deferential to parental choices. For example, in *In Re Seiferth*,<sup>186</sup> the Court of Appeals of New York declined to compel a father to consent to three operations to correct his sixteen year old son's harelip and cleft palate.<sup>187</sup> Because the condition could be corrected at a later date<sup>188</sup> and because the father was willing to allow the boy to decide whether to have the operations, the court did not consider the child neglected.<sup>189</sup>

In a somewhat aberrational decision, the same court ordered corrective surgery and blood transfusions for a sixteen-year-old boy with Von Recklinghausen's disease, over his mother's religious objections.<sup>190</sup> In *In Re Sampson*<sup>191</sup> the boy's condition, though it included severe deformities of the face and neck, was not life threatening.<sup>192</sup> While, the statutory definition of neglect was failure "to exercise a minimum degree of care,"<sup>193</sup> the *Sampson* court simply stated that *Seiferth*<sup>194</sup> expressly or implicitly recognized the court's authority to order corrective surgery even where the underlying condition is not

177. 378 Mass. 732, 393 N.E.2d 836 (1979).

178. *Id.* at 735, 393 N.E.2d at 839.

179. *Id.* at 733, 393 N.E.2d at 838.

180. *Id.* at 744, 393 N.E.2d at 843.

181. *Id.* at 742, 393 N.E.2d at 842.

182. 47 N.Y.2d 648, 393 N.E.2d 1009 (1979).

183. 378 Mass. at 746, 393 N.E.2d at 846.

184. *Id.* at 744, 393 N.E.2d at 844.

185. *Id.* at 745, 393 N.E.2d at 844. The boy died in Mexico at the age of three. San Francisco Chron. Oct. 19, 1979, at 1, col. 1.

186. 309 N.Y. 80, 127 N.E.2d 820 (1955).

187. *Id.*

188. *Id.* at 83, 127 N.E.2d at 822.

189. *Id.* at 86, 127 N.E.2d at 822.

190. *In re Sampson*, 29 N.Y.2d 900, 278 N.E.2d 918 (1972).

191. *Id.*

192. *Id.* at 901, 278 N.E.2d at 919.

193. *In re Sampson*, 65 Misc. 2d 658, 663, 317 N.Y.S.2d 641, 647 (1970).

194. 309 N.Y. 80, 127 N.E.2d 820 (1955).

life threatening.<sup>195</sup>

The Supreme Court of Pennsylvania criticized the *Sampson* holding in *In Re Green*,<sup>196</sup> a case involving "virtually identical facts."<sup>197</sup> The Pennsylvania court refused to order corrective surgery for a boy with several non-life-threatening conditions even though they prevented him from standing or moving.<sup>198</sup> The court stated that non-lifesaving procedures are not "required" within the meaning of the Pennsylvania neglect law.<sup>199</sup> The court also added that unless the fatal/nonfatal distinction is maintained courts will be drawn into "a medical and philosophical morass: if spinal surgery can be ordered, what about a hernia or gall bladder operation or a hysterectomy?"<sup>200</sup> Ultimately the court took a middle path and remanded to determine the child's wishes.<sup>201</sup>

No clear standard has evolved to determine when a state may intervene to order corrective surgery when there is a non life-threatening medical problem. One author has suggested that there may be no optimal legislative solution and, therefore, that courts inevitably must choose between maintaining the fatal/nonfatal distinction or engaging in entirely ad hoc determinations.<sup>202</sup>

In the context of maternal duties, these line-drawing problems are not insurmountable. In fact, the bifurcated scheme of most child neglect laws is helpful in distinguishing those cases in which states should protect fetal health from those in which it should defer to maternal decisionmaking. Specifically, the state should not intervene merely because a pregnant woman fails to provide her fetus with optimal care. Instead the state should limit intervention to cases in which the mother has crossed the boundary of acceptable maternal conduct by failing adequately to manage her pregnancy.

Thus, when the mother is harming her fetus through affirmative conduct or failure to care for her own health, the state may have grounds to intervene. The state should not intervene, however, when the mother has provided adequate prenatal care but is nevertheless carrying a fetus that suffers from an exogenously-caused defect and that would benefit from an in utero medical procedure. Requiring a woman to engage in such a procedure would violate the bifurcated scheme since the mother has done nothing indicating a lack of adequate care for her fetus. In fact, the woman's conduct may have been entirely responsible such that her child would have developed normally but for the fortuity of an exogenously-caused defect. Another possible basis upon which courts might determine whether maternal conduct justifies state intervention is whether that conduct will result in permanent fetal harm. While the fatal/nonfatal distinction advanced in *Green*<sup>203</sup> is easier to apply, it may lead to unjustified results in many cases.

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195. 29 N.Y.2d at 901, 278 N.E.2d at 919.

196. 448 Pa. 338, 292 A.2d 387 (1972).

197. *Id.* at 347, 292 A.2d at 391.

198. *Id.* at 340-41, 292 A.2d at 388.

199. *Id.* at 348, 292 A.2d at 392.

200. *Id.*

201. *Id.* at 349, 292 A.2d at 392.

202. See W. WADLINGTON, CHILDREN IN THE LEGAL SYSTEM 935 (1983). "The courts must either abide by the time-honored limitation of relief to life-threatening circumstances or engage in a series of wholly ad hoc responses to differing factual situations." *Id.*

203. 448 Pa. 338, 292 A.2d 387 (1972).

As indicated in *Seifert*<sup>204</sup> and *Green*,<sup>205</sup> certain nonfatal conditions can be corrected at a later point, especially if the neglected child is close to majority. By contrast, the result of maternal misconduct during gestation can be severe and permanent harm. Since fetal alcohol syndrome can result in permanent growth retardation and cardiac disorders, conditions which may not prove fatal, yet which cannot be corrected at a later point,<sup>206</sup> excessive drinking may provide reasonable grounds for intervention. Similarly, pregnant diabetics who fail to monitor adequately their insulin may expose their fetuses to high risks of heart defects and loss of neurological function.<sup>207</sup> Thus, these women might appropriately be subjected to court orders. By contrast, neither maternal conduct which merely slows development, nor genetically transmitted defects provide a state with grounds to intervene on behalf of a fetus.

## 2. Procedural Aspects of Abuse and Neglect<sup>208</sup>

As shown, not only do child neglect laws define the parameters of acceptable parental decision making on medical care, but they also provide procedural requirements designed to further limit state intervention into the family unit. These procedures reflect a delicate balance between efforts to maintain the family unit and efforts to protect children who may be subject to serious harm.<sup>209</sup> State laws on child abuse and neglect contain elaborate procedures to ensure that parents are given reasonable opportunities to provide their neglected or abused children with adequate care.<sup>210</sup>

While some neglect statutes will not allow judicial intervention unless the parents intentionally or recklessly harm their child<sup>211</sup> others only require a

204. 309 N.Y. 80, 127 N.E.2d 820 (1955).

205. 448 Pa. 338, 292 A.2d 387 (1972).

206. See *supra* note 6 and accompanying text.

207. See *supra* note 7 and accompanying text.

208. In the prenatal context the distinction between abuse and neglect is unclear. Whether a mother harms her fetus through affirmative conduct or failure to care for her own health, the harm which the fetus endures is closer to child medical neglect than child abuse. The problems associated with excessive discipline and sexual abuse do not arise in the prenatal context. Therefore this section will focus on procedures common to both abuse and neglect.

209. See *supra* notes 165-68 and accompanying text. To some extent this area of the law has been "constitutionalized" due to the potential criminal sanctions and loss of custody. For example, in *Santosky v. Kramer*, the Supreme Court held that a state may not permanently remove custody over parental objections upon establishing permanent neglect by a mere preponderance of the evidence. 455 U.S. 745, 764 (1982). Because of the parents' fundamental interest in child-rearing and the uncertainty over whether removing custody is in the child's best interest, due process requires that a state prove by clear and convincing evidence that abuse or neglect is likely to continue. *Id.* at 768-70. Since prenatal abuse or neglect will not involve permanent custody removal, *Santosky* does not apply in this context.

210. See generally Brown & Riley, *Agency Procedures With Abuse Reports*, JUV. & FAM. CT. J. 45 (Winter 1984) [hereinafter Brown & Riley, *Agency Procedures*] (outlining procedures from referral to adjudication). The authors explain that among the purposes behind conducting investigations is to "offer appropriate ameliorative services in support of the family, and . . . [to] ensure that these services are being rendered effectively in conjunction with a specific treatment plan." *Id.* at 45.

211. See Simpson, *supra* note 137, at 66. "[S]ome courts require that the act [of child abuse] be done in *malo animo* whereas others have held that acts done recklessly, in willful and

showing that the child suffered some harm.<sup>212</sup> Most states require individuals "with reasonable cause or knowledge to believe that a child is being neglected or abused" to report neglect or abuse to a state agency.<sup>213</sup> Failure to make such a report can result in civil or even criminal sanctions.<sup>214</sup> Many states have set up agencies to screen reported cases.<sup>215</sup> These agencies attempt, wherever possible, to remedy neglect or abuse without resorting to adjudication in an effort to preserve the family unit.<sup>216</sup> Finally, states must allow parents the opportunity to alter their allegedly neglectful and abusive conduct, and must employ the least restrictive means to help the child.<sup>217</sup> Thus, judicial sanctions are always measures of last resort.

Since court-ordered prenatal duties might impose a social stigma and indirectly harm the fetus, a parallel system of agency intervention prior to adjudication is appropriate. Unfortunately, the duration of pregnancy and the severity of the harm to the fetus which can occur over a short period of time may require states to curtail these procedures to a significant extent. Nonetheless, some intermediate step between reporting and adjudication is necessary to protect the interests of both the mother and the fetus and to ensure that states employ the least restrictive means of correcting the adverse conduct. Even with the use of an intermediate agency, states might still pursue judicial proceedings and court orders for pregnant women who resist less restrictive means.

One final procedural safeguard for pregnant women is necessary in prenatal abuse and neglect cases. Although parents know or should know when their acts or omissions harm their children, a pregnant woman often may not know when her acts or omissions could harm her fetus. A woman may act in a manner harmful to her fetus, for example, before she knows she is pregnant. Since the purpose of a prenatal-duty rule is to protect the fetus rather than to punish the mother, judicial intervention at this point would be inappropriate. Alternatively, a prenatal-duty rule could delay judicial intervention until the woman has clearly decided to carry her fetus to term.<sup>218</sup> Unfortunately, this

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wanton disregard of the consequences and rights of others, will suffice." *Id.*

212. See ten Bensel, *Reporting Child Abuse, Child Abuse and Neglect*, 35:4 JUV. & FAM. CT. J. ch. 6, at 42 (Winter 1984-85) "In general, the proof of neglect and abuse is based on the effects of the parent's act and not the reason for the act itself. The issue is . . . that harm was done to the child." *Id.*

213. *Id.* at 41. "Most states have taken the necessary steps to remove the barriers in reporting systems so that anyone who is suspicious of, or has reasonable cause or knowledge to believe that a child is being neglected or abused, is mandated to report." *Id.*

214. These statutes immunize reporters acting in good faith from tort liability. See Note, *Unequal and Inadequate Protection*, *supra* note 160, at 262-63.

215. In fact, only 20% of reported cases result in adjudication. See Brown & Riley, *Agency Procedures*, *supra* note 210, at 48.

216. See *id.* at 49. "Whenever possible, all efforts should be focused on maintaining the family as a unit." *Id.*

217. See Armstrong, *Termination of Parental Rights*, 8 J. JUV. LAW 442, 445 (1984). "The state has the obligation to allow the parents the opportunity to develop parental skills and to re-establish the parental bond." *Id.*

218. See Robinson, *Procreative Liberty*, *supra* note 4, at 438. "Once the mother decides not to terminate the pregnancy, the viable fetus acquires rights to have the mother conduct her life in ways that will not injure it." *Id.* But see Shaw, *supra* note 6, at 83. "Her failure to decide to abort

may encourage women to delay their decisions until they lose their legal right to abort. Since significant harm can occur prior to viability, this would undermine the very purpose of a prenatal-duty rule. A better solution is to provide a pregnant woman a reasonable opportunity in which to conform her conduct. While she has until viability to make her abortion decision, she should not be allowed to harm her fetus by failing to decide earlier. Even after the woman conforms her conduct, she may still abort under *Roe v. Wade*.<sup>219</sup> If a reasonableness standard is difficult in practical application, however, legislatures can mandate the precise point at which a pregnant woman is expected to conform her conduct to benefit her fetus's health.<sup>220</sup>

### C. *The Rescue Doctrine*

Under current child abuse and neglect laws certain maternal conduct during pregnancy adverse to fetal well-being may provide grounds for a court order to protect a fetus's life or health. The more difficult issue involves correctable fetal defects which the mother did not cause through her acts or omissions.<sup>221</sup> While a woman may have a duty not to harm her fetus, she may not have a corresponding duty to improve its health.<sup>222</sup>

To date, only two courts of record have required women to engage in

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should not relieve her of prenatal duties earlier in pregnancy." *Id.*

219. 410 U.S. 113 (1973).

220. A state legislature could choose one of several methods to derive the appropriate point at which prenatal duties begin. For example, it could determine that after one or two months there is a rebuttable presumption that a woman knows she is pregnant. This provides the opportunity to rebut in unusual circumstances. Or, the legislature could choose the point at which fetal brain waves begin on the theory that at this point a fetus may be able to experience pain. Finally, it could give an additional grace period up to the end of the first trimester, although this would prevent enforcement during a period where potential harm from maternal misconduct can be great.

221. *See supra* notes 10-12 and accompanying text.

222. For an interesting analysis on how the rescue doctrine may be combined with the equal protection clause of the fourteenth amendment to hold statutes proscribing abortion unconstitutional on non-substantive due process grounds, see Regan, *supra* note 76. Regan argues that pregnancy should be viewed properly as a continuous state of rescue. *Id.* at 1573-83. While a pregnant woman may have assumed the duty in some sense through conception, Regan essentially asserts that the punishment does not fit the crime. *Id.* at 1583. Since the legal system generally condemns affirmative duties to rescue, a law requiring pregnant women to rescue fetuses by carrying them to term violates equal protection by imposing duties on women which are "not consistent with our legal tradition." *Id.* at 1638. While the rescue doctrine provides an exception for parties voluntarily starting to aid, and while women may be viewed as "starters," Regan rejects this argument on the ground that unlike traditional starters, pregnant women do not excite the expectations of the rescuer. *Id.* at 1600. In fact, however, the starter doctrine may be justified on an alternative ground, namely that by starting to rescue, the rescuer deters other would-be rescuers. By its very nature, pregnancy precludes others from rescuing the fetus without maternal consent, and therefore the starter analogy may be sound. While the rescue doctrine may not provide an appropriate basis for holding statutes proscribing abortion unconstitutional, it may provide a way to limit maternal duties to cases in which the woman is actually causing harm to the fetus. See *infra* notes 223-77 and accompanying text for a complete discussion of how maternal duties might be affected by the rescue doctrine.

medical procedures to protect their fetuses.<sup>223</sup> In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,<sup>224</sup> the Supreme Court of New Jersey ordered a Jehovah's witness, more than thirty-two weeks pregnant, to submit to a blood transfusion to save both her life and that of her fetus.<sup>225</sup> Although the court stated that "the unborn child is entitled to the law's protection," it then added that "the welfare of the child and the mother are intertwined and inseparable."<sup>226</sup> In a 1981 case,<sup>227</sup> the Supreme Court of Georgia faced a similar situation. In *Jefferson v. Griffin Spalding County Hosp. Auth.*,<sup>228</sup> the court ordered a Jehovah's witness with placenta previa<sup>229</sup> to have a Caesarean section to save herself from a fifty percent chance of death and her fetus from a ninety-nine percent chance of death through natural childbirth.<sup>230</sup> In ordering the Caesarean section contingent upon a complete placental blockage, the court stated that "the State has an interest in the life of this unborn, living human being."<sup>231</sup>

In a 1983 case,<sup>232</sup> the Supreme Judicial Court of Massachusetts refused to order a woman four months pregnant to submit to a purse string operation<sup>233</sup> in order to prevent a miscarriage.<sup>234</sup> In *Taft v. Taft*,<sup>235</sup> the court held that the woman who opposed the operation for religious reasons was competent to do so<sup>236</sup> and stated that "[n]o case has been cited to us, nor have we found one, in which a court ordered a pregnant woman to submit to a surgical

223. See *Jefferson*, 247 Ga. 86, 274 S.E.2d 457 (1981); *Anderson*, 42 N.J. 421, 201 A.2d 537 (1964). In addition to these reported cases, courts have enjoined maternal conduct in several unreported cases. In one recent case a doctor asked a Maryland court to enjoin a pregnant woman from taking unprescribed drugs. The court never tried the case, however, because the woman entered a drug rehabilitation program voluntarily. See Feldman, *Leading Them to Water and Making Them Drink*, LEGAL ASPECTS OF MEDICAL PRACTICE (Dec. 1985); F. Silas, *An Issue is Born*, 71 A.B.A.J. 21 (Aug. 1985). For a similar 1983 case, see *Doctor says Narcotics Endanger Fetus*, Boston Globe, Apr. 27, 1983, at 8, col. 1.

For a discussion of a case compelling a Caesarian section, see Bowes and Selgestad, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 OBSTET. & GYNEC. 209 (1981). Finally, for a case involving civil commitment of a psychotic woman in her seventh month of pregnancy who denied her condition and engaged in acts dangerous to her fetus, see Soloff, Jewell & Roth, *Civil Commitment and the Rights of the Unborn*, 136 AM. J. PSYCHIATRY 114 (Jan. 1979).

224. 42 N.J. 421, 201 A.2d 537 (1964).

225. *Id.* at 423, 201 A.2d at 537.

226. *Id.* at 422, 201 A.2d at 538.

227. *Jefferson v. Griffin Spalding County Hosp. Auth.*, 247 Ga. 86, 274 S.E.2d 457 (1981).

228. *Id.*

229. Placenta previa involves complete blockage of the placenta and makes vaginal delivery extremely dangerous for the mother and fetus. *Id.* at 86, 274 S.E.2d at 460.

230. *Id.* at 86, 274 S.E.2d at 459. In an unusual change of circumstances, the placenta moved and the woman was able to deliver through natural childbirth. *Pregnant Woman Believes Prayers Obviated Caesarean*, N.Y. Times, Jan. 26, 1981, at A12, col. 5.

231. 247 Ga. at 89, 274 S.E.2d at 460.

232. *Taft v. Taft*, 388 Mass. 331, 446 N.E.2d 395 (1983).

233. A purse string operation involves "suturing so that the cervix would hold the pregnancy." *Id.* at 332, 446 N.E.2d at 396 (citation omitted).

234. *Id.*

235. *Id.* at 331, 446 N.E.2d at 395.

236. *Id.* at 333-34, 446 N.E.2d at 396-97.

procedure in order to assist in carrying a child not then viable to term."<sup>237</sup>

In fact, with the exception of the *Anderson*<sup>238</sup> and *Jefferson*<sup>239</sup> courts, no court has ever required an unwilling person to undergo an intrusive procedure to save another's life, much less to improve another's health. A leading commentator, John A. Robertson<sup>240</sup> argues that *Anderson*<sup>241</sup> and *Jefferson*<sup>242</sup> may imply that pregnant women have a broad duty to undergo in utero surgery to prevent birth defects if and when such procedures become accepted medical practices.<sup>243</sup> Thus, Robertson states, "If the mother has already foregone her right not to procreate by not aborting, then she no longer has a right to produce a dead or unhealthy baby."<sup>244</sup> This sweeping result does not follow, however, from either these cases or the general principles of tort law and equity.

To analyze the implications of *Jefferson*,<sup>245</sup> *Anderson*<sup>246</sup> and *Taft*,<sup>247</sup> it is necessary to distinguish two situations. The first involves a woman who discovers through prenatal testing that without an intrusive procedure, her fetus will not be born alive. Assuming the fetus is not then viable, the woman has no duty to engage in the procedure. Under *Roe v. Wade*<sup>248</sup> she has the right to abort her fetus prior to viability, and therefore she has no duty to bring her fetus to term alive.<sup>249</sup> Alternatively, if the fetus is viable, the state's interest in the potentiality of the human life is sufficiently compelling to override the

237. *Id.* at 334 n.4, 446 N.E.2d at 397 n.4.

238. 42 N.J. 421, 201 A.2d 537 (1964).

239. 247 Ga. 86, 274 S.E.2d 457 (1981).

240. His articles in this area include: Robertson, *Procreative Liberties*, *supra* note 4, and Robertson, *The Right to Procreate and In Utero Fetal Therapy*, 3 J. LEGAL MED. 333 (1982) [hereinafter Robertson, *Right to Procreate*].

241. 42 N.J. 421, 201 A.2d 537 (1964).

242. 247 Ga. 86, 274 S.E.2d 457 (1981).

243. See Robertson, *Right to Procreate*, *supra* note 240, at 357-59. Robertson further stated:

If resolution of the fetal-maternal conflict in *Raleigh-Fitkin* and *Jefferson* in favor of the near-term fetus over the mother's interest in bodily integrity was correct, then far-reaching intrusions on the mother's body and freedom of action for the benefit of the unborn child may legitimately follow. Women, for example, might then be forced to deliver by cesarean section. They may also be prohibited from using alcohol or other substances harmful to the fetus during pregnancy, or be kept from the workplace because of toxic effects on the fetus. They could be ordered to take drugs, such as insulin for diabetes, medications for fetal deficiencies, or intrauterine blood transfusions for RH factor. Pregnant anorexic teenagers could be force-fed. Prenatal screening and diagnostic procedures, from amniocentesis to sonography or even fetoscopy, could be made mandatory. And, in utero surgery for the fetus to shunt cerebroventricular fluids from the brain to relieve hydrocephalus, or to relieve the urethral obstruction of bilateral hydronephrosis could also be ordered. Indeed, even extra-uterine fetal surgery, if it becomes an established procedure, could be ordered, if the risks to the mother were small and it were a last resort to save the life or prevent severe disability in a viable fetus.

*Id.*

244. *Id.* at 360. *But see* Regan, *supra* note 76.

245. 247 Ga. 86, 274 S.E.2d 457 (1981).

246. 42 N.J. 421, 201 A.2d 537 (1964).

247. 388 Mass. 331, 446 N.E.2d 395 (1983).

248. 410 U.S. 113 (1973).

249. *Id.*; accord *Taft v. Taft*, 338 Mass. 331, 446 N.E.2d 395 (1983).

mother's right to abort.<sup>250</sup> *Jefferson*<sup>251</sup> and *Anderson*<sup>252</sup> go beyond *Roe v. Wade*<sup>253</sup> in holding that not only may a state proscribe abortion of a viable fetus, but also a state may impose an affirmative duty to engage in reasonably safe medical procedures to save a viable fetus's life.<sup>254</sup> *Taft*<sup>255</sup> holds, in accordance with *Roe v. Wade*,<sup>256</sup> that a state may not impose an affirmative duty to bring a nonviable fetus to term alive.<sup>257</sup>

The second and more difficult situation involves a pregnant woman who discovers through prenatal testing that, without an in utero surgical procedure, her child may be born with a birth defect. Professor Robertson<sup>258</sup> argues that the second situation is no different analytically than the first.<sup>259</sup> The traditional rescue doctrine, however, may compel the opposite result.

Some courts have issued orders authorizing legally incompetent individuals to undergo intrusive procedures to save the lives of others.<sup>260</sup> No court, however, has imposed upon a competent person an affirmative duty to rescue another by forcing the competent person to submit to an intrusive medical procedure against his or her express objection. Cases in which incompetent patients were ordered to undergo intrusive procedures to benefit others have been based upon finding, through the substituted-judgment doctrine,<sup>261</sup> that the donor would, on balance, benefit from the procedure.<sup>262</sup> For example, in *Strunk v. Strunk*,<sup>263</sup> a Kentucky appellate court authorized a kidney transplant from a twenty-seven-year-old mentally incompetent patient to his brother upon finding that the donor's "well being would be jeopardized more severely by the loss of his brother than by the removal of a kidney."<sup>264</sup> In *Hart v. Brown*,<sup>265</sup> the Superior Court of Connecticut employed the same test to authorize a seven-year-old girl to donate a kidney to save the life of her twin sister.<sup>266</sup> The court found that "insofar as she may be capable of understanding she desires to donate her kidney so that her sister may return to her."<sup>267</sup> The court added that "the donor would be better off in a family that was

250. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

251. 247 Ga. 86, 274 S.E.2d 457 (1984).

252. 42 N.J. 421, 201 A.2d 537 (1964).

253. 410 U.S. 113 (1973).

254. In fact, both cases also involved serious threats to the women's lives. *Jefferson*, 247 Ga. at 459, 274 S.E.2d at 458; *Anderson*, 42 N.J. at 423, 201 A.2d at 538.

255. 388 Mass. 331, 446 N.E.2d 395 (1983).

256. 410 U.S. 113 (1973).

257. *Taft*, 388 Mass. at 334, 446 N.E.2d at 397 (1983).

258. See Robertson, *Right to Procreate*, *supra* note 240.

259. *Id.* at 360-61. While Robertson would factor in risks to the mother from particular procedures, he would not limit intervention based on mere physical intrusiveness. *Id.*

260. See, e.g., *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. Ct. App. 1969) (authorizing retarded adult to donate kidney to brother); *Hart v. Brown*, 29 Conn. Supp. 368, 289 A.2d 386 (1972) (authorizing seven year old girl to donate kidney to twin sister).

261. *Strunk*, 445 S.W.2d at 148; *Hart*, 29 Conn. Supp. at 370, 289 A.2d at 388.

262. *Strunk*, 445 S.W.2d at 149; *Hart*, 29 Conn. Supp. at 378, 289 A.2d at 389.

263. 445 S.W.2d 145 (Ky. Ct. App. 1969).

264. *Id.* at 146.

265. 29 Conn. Supp. 368, 289 A.2d 386 (1972).

266. *Id.*

267. *Id.* at 375, 289 A.2d at 389.

happy than in a family that was distressed and in that it would be a very great loss to the donor if the donee were to die from her illness."<sup>268</sup> Where, on the other hand, the courts have found that an incompetent donor would not benefit from a surgical procedure intended to benefit another, they have not authorized the procedure.<sup>269</sup> Thus, in *Bonner v. Moran*,<sup>270</sup> the United States Court of Appeals for the District of Columbia held invalid a fifteen-year-old boy's consent to a skin-graft operation to benefit his cousin where the court found no corresponding benefit to the donor.<sup>271</sup> Furthermore, in *In re Guardianship of Pescinski*,<sup>272</sup> the Supreme Court of Wisconsin refused to apply the substituted-judgment doctrine where it found no benefit to the proposed kidney donor.<sup>273</sup>

These cases indicate that courts will order surgery to be performed on an incompetent donor to benefit another only upon finding that the donor would benefit from the procedure. When a competent woman declines surgery to improve her fetus's health, however, it is illogical to argue that imposing the surgical procedure against her will would in any way serve her best interest. Analytically, this situation, involving an affirmative duty to improve a fetus's health is different from the first situation which involves a duty to preserve a viable fetus's life.

Under the decision in *Roe v. Wade*,<sup>274</sup> the state's interest in the life of a viable fetus is compelling.<sup>275</sup> It is therefore within the state's power to require the mother to protect the life of that fetus. A fetus does not, however, have a corresponding right to have its health improved where the mother was not responsible for its condition and where correcting the condition would require surgery against the mother's will. Since courts will not impose surgical procedures against a competent donor's will to benefit another,<sup>276</sup> they should not do so to benefit a fetus, especially where the fetus's life is not at stake. As indicated above, the status of a fetus cannot exceed that of a child already born. Thus, any prenatal-duty rule must be limited by a causation criterion.

In the context of in utero therapy, there are also unique enforcement problems which make injunctive relief inappropriate.<sup>277</sup> Women who would prefer not to engage in in utero procedures may simply bypass tests that would reveal fetal abnormalities. Theoretically, a rule might require such tests for all

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268. *Id.*

269. *See, e.g., Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941); *In re Guardianship of Pescinski*, 67 Wis. 2d 4, 226 N.W.2d 180 (1975); *McFall v. Shimp* (unpublished, Ct. of Comm. Pleas, Allegheny County Pa. Civil Division, July 26, 1978).

270. 126 F.2d 121 (D.C. Cir. 1941).

271. *Id.*

272. 67 Wis. 2d 4, 226 N.W.2d 180 (1975).

273. *Id.*

274. 410 U.S. 113 (1973).

275. *Id.* at 163.

276. *See, e.g., Sirianna v. Anna*, 285 N.Y.S.2d 709 (1967) (mother has no duty to donate kidney to son). While in utero surgery does not involve donating an organ, and, in fact, may only result in the destruction of cells which will rejuvenate themselves, no recorded case has required a parent to donate blood or bone marrow, both of which are also self-rejuvenating, against his or her will to benefit a child.

277. For a more thorough discussion of enforcement problems generally associated with prenatal duties, see *infra* notes 278-80 and accompanying text.

pregnant women or women who have a higher risk of carrying a deformed fetus. This rule would be analogous, however, to requiring police inspection of all homes to find the occasional home in which child abuse occurs, thereby violating the fourth amendment prohibition against unreasonable searches and seizures.<sup>278</sup>

#### D. *Enforcing Prenatal Duties*

While a comprehensive discussion of enforcement procedures and problems for prenatal duties are beyond the scope of this article, this section will address a few issues which merit further exploration. The most obvious problems with imposing duties to protect fetal health involve ensuring compliance and monitoring. These problems are real and should be factored in when deciding whether to create a prenatal-duty rule. Nonetheless, states need not correct all instances of fetal abuse and neglect to justify the rule. In fact, by correcting even a few egregious cases, states may encourage women to weigh more seriously their decisions concerning conception.

One author has argued that court orders imposed prior to viability may encourage women to abort.<sup>279</sup> Assuming, however, that a woman has already decided to carry her fetus to term, she may be sufficiently committed to her fetus's well-being that the added burden will not encourage her to abort. If, however, the woman has not yet decided whether to ultimately give birth to her child, she may also wish to comply with the rule if doing so would be less intrusive physically, and less demeaning emotionally, than abortion itself. These women are the most likely to be affected favorably by a prenatal-duty rule.

One problem with judicial enforcement of prenatal duties is that an adversarial hearing may itself indirectly harm the fetus through the anxiety it causes the mother. The fetus is likely to be adversely affected by the mother's psychological state given the unique physical and emotional link between the two.<sup>280</sup> Nonetheless, in severe cases involving, for example, alcohol or drug abuse, the harm from maternal conduct will undoubtedly exceed that of a court order.

Even if a court orders the mother to conform her conduct, however, enforcement problems remain. One approach would be for the court to require the mother to see a doctor at fixed intervals for periodic testing. Thus, for example, courts could order diabetics to have their insulin level checked and alcoholics to have their blood-alcohol level monitored. Failure to comply with these orders would constitute contempt. In choosing sanctions for contempt,

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278. See U.S. CONST. amend. IV.

279. See Meyers, *supra* note 59, at 68. "[T]o extend state authority prior to viability may cause an increase in abortion, and abortion of the fetus which the state seeks to help is certainly not to be encouraged." *Id.*; see Note, *A Maternal Duty to Protect Fetal Health*, 58 IND. L.J. 531, 540 (1982). "Imposing liability before viability may . . . encourage mothers to abort. . . . If a court were to order a pregnant alcoholic not to drink, she might opt to abort to avoid compliance." *Id.*

280. See Note, *Constitutional Limitations*, *supra* note 28, at 1065. "[A] fetus and his mother are closely linked physiologically. If state intrusion causes the mother to suffer emotionally, the fetus probably will suffer too." *Id.*

however, courts must consider the effects on both the mother and fetus.

These enforcement and monitoring problems illustrate the need for intermediate agencies like those used in child abuse and neglect proceedings. Agency social workers could develop a more personal rapport with the pregnant woman while reminding her of possible sanctions for failure to improve the conditions leading to fetal harm.

Given the duration of pregnancy, however, state agencies and courts must be prepared to move quickly. In extreme cases, court orders may be essential to protect a child from permanent disfigurement and retardation. One difference between a prenatal-duty rule and child abuse and neglect laws involves reporting. Children at school age are exposed to many people who can report parental misconduct. Fetuses are not. Nonetheless, many cases of child abuse and neglect involve preschool children. Just as pediatricians report instances of child abuse and neglect, so too can obstetricians and family doctors report fetal abuse and neglect. It is quite possible that some pregnant women who irresponsibly manage their pregnancies will seek medical attention, just as some parents who abuse their children will bring them to a doctor.

Where a pregnant woman engages in certain acts or omissions which actually harm the fetus, a medical doctor through his observation of the woman has some grounds to suspect that the fetus is being harmed. Where a pregnant woman does not engage in such acts or omissions, however, her doctor has no equivalent basis for suspecting that her fetus is suffering from an exogenously-caused congenital abnormality. As indicated by the requisite probable cause standard in criminal law, states should limit investigation to cases in which there is a reasonable basis for suspecting that a mother's acts or omissions are causing harm to her fetus. This approach respects individual autonomy, whereas testing of pregnant women for genetically transmitted defects is unduly invasive. Respecting personal autonomy in the context of pregnancy is particularly crucial as excessive state intervention may harm the very being a prenatal-duty rule is intended to protect. Since the state should never discourage women from seeking proper medical care, the enforcement problems involved in forced in utero medical procedures make a prenatal-duty rule in this context inappropriate. Again, the enforcement problems associated with prenatal duties, while more difficult, are quite similar to those involved in cases of child abuse and neglect.

#### IV. PROPOSED ANALYTICAL FRAMEWORK

As indicated at the outset, maternal-fetal conflicts can arise in three contexts. A pregnant woman can engage in acts that are detrimental to her fetus.<sup>281</sup> In addition, a pregnant woman can neglect to care adequately for her own health, thereby adversely affecting her fetus' health.<sup>282</sup> Finally, a pregnant woman can refuse to improve her fetus' health upon discovering that her fetus has an exogenously-caused defect correctable through in utero or other medical procedures.<sup>283</sup> This section will address each of these situations and propose a basis for determining when to impose a maternal duty to protect

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281. See *supra* note 6 and accompanying text.

282. See *supra* notes 7-9 and accompanying text.

283. See *supra* notes 10-12 and accompanying text.

fetal health.

A. *Affirmative Conduct Harming the Fetus*

The most common examples of affirmative fetal abuse include excessive alcohol consumption and drug abuse during pregnancy. In these cases, the woman is the direct cause of harm to her fetus. Thus, these cases may be the most morally and legally compelling for injunctive relief.

Duties to refrain from affirmative detrimental conduct are unlikely to be held unconstitutional, even if imposed on a woman before her fetus is viable. Since a state possibly could impose this duty prior to viability without impinging on the woman's constitutionally-protected realm of decision making, it need only demonstrate a legitimate interest in the health of the fetus.<sup>284</sup> Specifically, this prenatal-duty rule does not violate a woman's right to abort, nor does it in any way hinder her long-term self interest. In addition, under the Supreme Court's analysis, a duty to refrain from affirmative conduct does not violate a person's constitutional right to bodily integrity because it is not physically invasive.<sup>285</sup> Finally, this duty would not be likely to implicate a woman's right to practice her religion as the harmful conduct does not involve religious beliefs or practices.<sup>286</sup>

Maternal duties to refrain from adverse conduct would be similar to current child abuse and neglect laws.<sup>287</sup> Where a woman's conduct would likely inflict permanent harm on her fetus, states ought not to protect that conduct.<sup>288</sup> Courts should not, however, intervene whenever a pregnant woman does not conduct herself in a manner beneficial to her fetus. The purpose of a prenatal-duty rule is to protect fetal health. Excessive government intrusions into the lives of pregnant women can impede rather than promote that goal. State intervention should therefore be limited to cases where the mother fails to provide adequate or minimally-acceptable care<sup>289</sup> and where there is strong evidence that serious fetal harm will continue.<sup>290</sup>

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284. *See supra* notes 19-71 and accompanying text.

285. *See supra* notes 72-110 and accompanying text.

286. *See supra* notes 111-27 and accompanying text.

287. *See supra* notes 159-220 and accompanying text.

288. *See supra* notes 210-13 and accompanying text.

289. *See supra* notes 165-68 and accompanying text.

290. *See supra* notes 216-17 and accompanying text. One author has recently stated that:

The creation of fetal rights that can be used to the detriment of pregnant women is a very recent phenomenon, and thus far has occurred in only a relatively small number of cases. Yet absent an increased awareness of the costs to women's autonomy, these rights will almost certainly expand.

Johnson, *supra* note 71, at 605. The author further stated that, "[g]iven the fetus' complete physical dependence on . . . the woman, virtually every act of the pregnant woman has some effect on the fetus." *Id.* at 605-06. The author then listed numerous activities including taking drugs, drinking, smoking and failing to eat properly, as subject to a prenatal-duty rule. *Id.* at 606-07. While this line-drawing concern is legitimate, it is not insurmountable. Provided courts require proof that permanent harm is likely to continue from adverse maternal conduct, and provided women are first warned by doctors and intermediate state agents of the harm they may be causing their fetuses, judicial involvement in all but the most extreme cases will be unnecessary. Moreover, under this more narrowly defined rule which essentially incorporates the minimal care standard

### B. *Neglect of Own Health Harming the Fetus*

A woman may pose risks equal to or greater than those resulting from adverse conduct by failing to care adequately for her own health. The most common examples include diabetics who fail to monitor properly their insulin levels and women who fail to provide themselves with adequate nutrition. Just as parents can harm their children through abuse or neglect, pregnant women can severely harm their fetuses through affirmative conduct or failure to provide themselves with adequate health care. Since proper prenatal care involves providing the fetus with a healthy environment for gestation, a pregnant woman would be no less culpable for hindering that environment through neglecting her own health than she would be through affirmative prenatal abuse. Because a duty to maintain reasonable health during pregnancy is in accordance with state law principles,<sup>291</sup> the distinction between act and omission should not be accorded legal significance in this context.

Maternal duties prohibiting prenatal neglect are no more likely to pose constitutional problems than would those prohibiting prenatal abuse. Whether imposed prior to viability or not, this duty will not violate a woman's constitutional right to make intimate decisions.<sup>292</sup> Similarly, this duty would not impinge on a woman's right to practice her religion for the same reasons it would not in the case of affirmative acts.<sup>293</sup> The only difference between situations involving affirmative acts and failures to act is that imposing a duty on a mother to care for her own health so as not to harm her fetus may implicate

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established under child abuse and neglect laws, an appropriate line can be drawn to exclude state involvement over those types of maternal acts or omissions not likely to result in serious harm.

Thus, while certain acts or omissions are capable of producing fetal harm in rare instances, unless they are actually likely to result in fetal harm, they would not be subject to a prenatal-duty rule. This minimum or adequate care standard, if applied in the prenatal duty context, will prevent state involvement over maternal actions which although not optimal, will not likely produce permanent harm to fetal health.

291. Essentially, state child abuse and neglect law distinguishes minimal or adequate care from optimal care, requiring the former of parents rather than the latter. *See supra* notes 165-68 and accompanying text. This distinction applies whether the parental misconduct is through an affirmative act, namely child abuse, or through an omission, in the case of neglect. Thus, the state will not displace a parental decision to deny medical treatment which would be optimal in some sense but not considered essential to the child's well-being. *See supra* notes 169-207 and accompanying text. Nor will it second-guess a parental decision to discipline a child provided the conduct does not constitute abuse. *See A. KADUSHIN & J. MARTIN, CHILD ABUSE: AN INTERNATIONAL EVENT 5 (1981)*. "[T]he problem lies in distinguishing discipline, which is 'legitimate violence' toward children from abuse which is excessive and inappropriate and, hence, unacceptable violence toward children." *Id.*

Just as the distinction between affirmative and negative conduct toward a child is rejected in determining what constitutes unacceptable parenting under child abuse and neglect laws, so too should it be rejected in sanctioning fetal abuse and neglect. *See supra* notes 6-12 and accompanying text. Thus, the distinction between minimal or adequate care on the one hand, and optimal care on the other, should be borrowed from child abuse and neglect law. It should be used to decide when maternal conduct is sufficiently egregious to warrant state intervention on behalf of the fetus, regardless of whether the maternal misconduct is through an affirmative act, or by omission.

292. *See supra* notes 19-71 and accompanying text.

293. *See supra* notes 111-27 and accompanying text.

her right to bodily integrity.<sup>294</sup> For example, controlling insulin levels involves shots which pierce a woman's skin and providing proper nourishment requires a woman to eat food. For two reasons, however, the duty to aid fetal health by not neglecting maternal health will not violate this constitutional right. First, under the Supreme Court's analysis, the state's legitimate interest in fetal health would probably outweigh the relatively slight invasion of privacy from a commonplace shot or court-ordered self feeding.<sup>295</sup> Second, and more importantly, however, even if the intrusion is more than minimal, the Supreme Court would likely uphold the intrusion to the extent that it is medically advisable for the mother.<sup>296</sup> Subject to the same procedural requirements in cases involving prenatal abuse, therefore, maternal duties for neglect of fetal health do not contravene constitutional or state law doctrines.

At a policy level, duties in this context may actually be easier to enforce. Since medical doctors or state agency representatives will be counseling women on how to care for their own health as well as that of their fetuses, women may be less likely to view them as assuming an adversarial posture. Doctors and agency representatives, therefore, can probably cure many cases of prenatal neglect short of judicial intervention. Since judicial intervention itself may exacerbate a woman's anxiety during pregnancy, the result of this intermediate step may benefit both the mother and the fetus.

### C. *Exogenous Factors Harming the Fetus*

Where a woman engages in an affirmative act that harms her fetus or neglects her own health thereby harming her fetus, the woman has deprived the fetus of its opportunity for full development during a properly managed gestation period. The act or omission essentially denies the fetus its own developmental potential. Where a fetus is genetically defective, however, and where the defect can be corrected in utero, this is not the case. Rather than hindering the fetus' development, a woman who declines in utero therapy has decided not to improve its health.

Ironically, the only two courts of record to grant injunctive relief to benefit a fetus did so to remove a barrier to the fetus' well-being which the pregnant women did not cause.<sup>297</sup> Maternal duties in this context, however, impli-

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294. See *supra* notes 72-110 and accompanying text.

295. See *supra* notes 86-92 and accompanying text.

296. See *supra* notes 107-08 and accompanying text.

297. See *Jefferson*, 247 Ga. 86, 274 S.E.2d 457; *Anderson*, 42 N.J. 421, 201 A.2d 537.

While medical technology has not developed to the point where fetuses can be treated for exogenously-caused defects medically, rather than surgically, in the future technology may advance to help create a fourth category for this framework. Initially, this category would appear to fall between the cracks since, although the mother did not cause the defect, a highly intrusive procedure would not be required to treat the fetus. Nonetheless, the analysis developed in this article can be used to analyze maternal duties in this context as well.

As indicated in the section on the constitutional right to bodily integrity, requiring a woman to take medicine which poses little or no risk to her health might not be an unconstitutional invasion of her right of privacy. See *supra* notes 72-110 and accompanying text. Nonetheless, since the woman did not cause the fetal harm, it would appear to violate the state law doctrine of rescue. See *supra* notes 221-78 and accompanying text. The rescue doctrine, however, is a creature of state law and has exceptions. See, e.g., *Tarasoff v. Regents of University of California*, 17 Cal. 3d

cate a range of constitutional rights including the right to make intimate decisions, to bodily integrity and to the free exercise of religion. Moreover, they contravene the fundamental common law tenet generally proscribing affirmative duties to rescue.

To evaluate how a prenatal-duty rule in this context would affect a woman's right to decide to seek an abortion, one must distinguish two situations. In theory, a prenatal-duty rule could require a pregnant woman to engage in an intrusive procedure to save a fetus' life and to bring it to term successfully. Alternatively, the duty could require a pregnant woman to engage in an intrusive procedure to correct or ameliorate a potential birth defect.

The two reported cases imposing maternal duties both involved intrusive procedures intended to save the lives of viable fetuses.<sup>298</sup> Under *Roe v. Wade*,<sup>299</sup> the state's interest in the life of a viable fetus is sufficiently compelling to override the mother's right to abort.<sup>300</sup> While *Roe v. Wade*<sup>301</sup> holds that states may proscribe abortion altogether after viability,<sup>302</sup> these cases indicate that states may go further to impose an affirmative duty to save a viable fetus' life immediately prior to birth.<sup>303</sup> Since a woman has already lost her right to abort at the point of viability, imposing a duty to rescue at this point cannot violate that fundamental right. This duty may be further limited, however, to situations where the procedure in question is medically advisable for the mother as the reported cases involved significant threats to the lives of both the mother and the fetus. In addition, a state may never impose a duty to save the life of a previable fetus.<sup>304</sup> To do so is tantamount to proscribing abortion prior to viability, thus contravening *Roe v. Wade*.<sup>305</sup>

Unlike a duty to save a previable fetus' life, a duty to improve its health does not violate a woman's right to abort. In theory, a pregnant woman could be required to engage in an intrusive procedure to prevent her fetus from a birth defect and then, after going through the procedure, but prior to viability, abort the fetus. A maternal duty in this context does, however, implicate other constitutional and state law rights.

A duty to engage in intrusive procedures to improve fetal health may

425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), where the court stated:

[T]here now seems to be sufficient authority to support the conclusion that by entering into a doctor/patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third persons whom the doctor knows to be threatened by the patient.

*Id.* at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24 (quoting Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CAL. L. REV. 1025, 1030 (1974)). Given the unique relationship between the mother and fetus, an exception in this context may be appropriate. Thus, to determine whether to require medical treatment in a particular case, courts must weigh the potential benefit to the fetus against the inconvenience and potential risk to the mother.

298. See *Jefferson*, 247 Ga. 86, 274 S.E.2d 457; *Anderson*, 42 N.J. 421, 201 A.2d 537.

299. 410 U.S. 113 (1973).

300. *Id.* at 164-65.

301. *Id.*

302. *Id.*

303. See *Jefferson*, 247 Ga. 86, 274 S.E.2d 457; *Anderson*, 42 N.J. 421, 201 A.2d 537.

304. See *Taft v. Taft*, 388 Mass. 331, 446 N.E.2d 395 (1983).

305. 410 U.S. 113 (1973).

violate a woman's constitutional right to bodily integrity.<sup>306</sup> Unlike the duty of pregnant women to maintain their own health during pregnancy, a duty in this context involves far more intrusive procedures which may not be medically necessary or advisable for the mother. Under the Supreme Court's balancing test,<sup>307</sup> the greater the intrusion and hence the greater the invasion of privacy, the more compelling must be the state interest required to overcome it.<sup>308</sup> Court ordered surgical procedures which are neither medically advisable for the mother nor particularly harmful, fall into a grey area on which the Supreme Court has not yet ruled. Given the intrusiveness of such procedures, the Court is likely to apply a high level of scrutiny and probably strike down the duty.

In addition to potentially violating a woman's right to bodily integrity, a duty to engage in certain procedures, including blood transfusions, may impinge upon a woman's right to practice her religion.<sup>309</sup> While this right is not unlimited, when combined with the right to bodily integrity, it may further support a decision holding the rule unconstitutional.

Even if the rule could withstand constitutional muster, it may contravene another fundamental legal doctrine. While a woman may have general duty to protect and nurture fetal health by providing the fetus with a reasonably well-managed gestation period, this duty should be limited to situations in which the mother is the agent causing fetal harm either through acts or omissions. A limitation based on causation both conforms with general legal principles<sup>310</sup> and is sound from the standpoint of policy. Since a woman is under no duty to engage in intrusive surgery to save her child's life or improve its health, she should be under no duty to improve her fetus' health, whether or not the fetus is viable.

From a policy standpoint, duties in the context of exogenously-caused defects are particularly unsound. To avoid surgical procedures, women may forego prenatal testing. A statute requiring such testing would violate a woman's fourth amendment rights as well as her right to privacy.<sup>311</sup> In addition, the rule would not just affect pregnant women with defective fetuses, but rather all pregnant women. Finally, this rule would place pregnant women in an adversarial relationship with their doctors who would become agents of the state even when the women have done nothing wrong.

Therefore, this rule would impose too great an intrusion on the vast majority of pregnant women who are not burdened with defective fetuses and would create a duty at odds with general principles of personal autonomy. Pregnant women should not be subject to different legal standards than the rest of society simply because they are pregnant.

### CONCLUSION

While a pregnant woman has the right to abort until viability, she might

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306. See *supra* notes 72-110 and accompanying text.

307. See *supra* notes 86-92 and accompanying text.

308. *Id.*

309. See *supra* notes 111-27 and accompanying text.

310. See *supra* notes 221-78 and accompanying text.

311. See *supra* note 278 and accompanying text.

not have the right to engage in acts or omissions which harm her fetus at any point during pregnancy. A woman may have a duty to properly manage the gestation period and to allow her fetus to reach its developmental potential. This duty is unlikely to impinge on a woman's constitutional right to make intimate decisions and is in accordance with state law principles on child abuse and neglect.

States may not, however, impose affirmative duties to undergo surgical procedures to improve fetal health without violating a woman's right to bodily integrity and contravening the traditional common law doctrine eschewing affirmative duties to rescue. Any prenatal-duty rule should therefore be limited by a causation criterion.

In defining a prenatal-duty rule, courts and legislatures must be particularly sensitive to the unique relationship between a pregnant woman and her fetus. While certain maternal acts or omissions can cause a fetus permanent and severe harm thereby justifying state intervention, judicial involvement may in many cases exacerbate fetal harm. Only by restricting maternal duties in this fashion will states ensure that the vast majority of pregnant women will be able to manage their pregnancies without the undue burden of government intrusion.