Health Matrix: The Journal of Law-Medicine

Volume 15 | Issue 2

2005

Refusal to Undergo a Cesarean Section: A Woman's Right or a Criminal Act ?

Monica K. Miller

Follow this and additional works at: https://scholarlycommons.law.case.edu/healthmatrix

Part of the Health Law and Policy Commons

Recommended Citation
Monica K. Miller, *Refusal to Undergo a Cesarean Section: A Woman's Right or a Criminal Act ?*, 15 Health Matrix 383 (2005)
Available at: https://scholarlycommons.law.case.edu/healthmatrix/vol15/iss2/6

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Health Matrix: The Journal of Law-Medicine by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

REFUSAL TO UNDERGO A CESAREAN SECTION: A WOMAN'S RIGHT OR A CRIMINAL ACT?

Monica K. Miller†

INTRODUCTION

In March, 2004, Melissa Ann Rowland, a twenty-eight-year-old woman from Salt Lake City, gained national media attention when she was arrested on charges of homicide relating to the death of her son. Although there are many child homicide cases that occur regularly across the country that do not attract wide-spread media attention, this case was exceptional because her son died before he was ever born.[1]

Rowland had sought medical treatment several times between late December 2003 and January 9, 2004. Each time, she was allegedly advised to get immediate medical treatment, including a cesarean section (c-section), because her twin fetuses were in danger of death or serious injury. On January 2, 2004, she purportedly signed a document acknowledging that she was aware that her refusal of treatment might endanger, or result in the death of, her babies. She then left the hospital without treatment, choosing instead to wait until she went into labor naturally on January 13, 2004.

The female twin survived, while the boy was stillborn. An autopsy indicated that the boy had died two days before the birth. Thus, the child was still alive at the time doctors advised her to undergo the c-section. Rowland was arrested and charged with first-degree crimi-

---

† Monica K. Miller is Assistant Professor for the Criminal Justice Department and Interdisciplinary Social Psychology Ph.D. Program at the University of Nevada, Reno. She earned her J.D. from the University of Nebraska College of Law in 2002 and her Ph.D. from the University of Nebraska-Lincoln in 2004.

[1] *See generally Murder Charged in Stillbirth*, WASH. TIMES, Mar. 14, 2004, *available at* http://washingtontimes.com/national/20040314-121449-3356r.htm (last visited Apr. 28, 2005); Alexandria Sage, *Utah Woman Charged with Murder in Death of Fetus*, ASSOCIATED PRESS, Mar. 12, 2004, *available at* http://www.freep.com/news/latestnews/pm18858_20040312.htm (last visited Apr. 28, 2005) (detailing the facts surrounding the *Rowland* case); Jacob Santini, *Charge Against W. Jordan Mother Creates Legal Challenge*, SALT LAKE TRIB., Mar. 12, 2004, at A4.

nal homicide and child endangerment. She later pled guilty to two counts of child endangerment and the homicide charge was dropped.[2]

This case represents the first reported case of a prosecution of a mother for her refusal to have a c-section. This is an interesting precedent that raises several legal questions. Does a woman have the right to refuse treatment that will benefit, or even save the life of, her fetus? Can a woman be prosecuted for her behaviors during pregnancy? Will prosecuting the refusal of a c-section create a slippery slope of charges against mothers for their behavior during pregnancy?

Section I of this paper will begin by discussing a series of cases in which the state sought to compel a woman to have a c-section against her wishes. It will then discuss the rights of all the parties involved in such cases: the mother, the state, and the fetus. Section II will present the evolution of fetal rights from common law to the current prosecution of Melissa Rowland. Section III presents an analysis that answers two questions: (1) Under the current case law, will states be successful in prosecuting a woman for the failure to have a c-section?; and (2) Should the state prosecute women for failure to have a c-section?

This paper concludes that courts and prosecutors should not criminalize the failure to have a c-section. A woman's fundamental right to privacy and the right to refuse medical treatment should be honored, since individuals are not required to come to the aid of others. Women should not be treated as criminals for their choice to exercise their rights to refuse treatment instead of taking a doctor's advice, which may or may not be accurate. Making it a crime to refuse a c-section jeopardizes a woman's rights and subjects her to an increased risk of injury as a result of a surgery that may have been unnecessary.

I. COMPELLED CESAREAN SECTIONS

The case of Melissa Rowland illustrates the state of Utah's willingness to intervene with a woman's choices concerning pregnancy, a trend that is spreading throughout many states.[3] Ultimately, Utah is

---

[2] Alexandria Sage, *Mother Pleads Guilty to Lesser Counts of Child Endangerment*, ASSOCIATED PRESS, Apr. 7, 2004, *available at* http://desertnews.com/dn/print/1,1442,595054420,00.html (last visited May 2, 2005).

[3] *See e.g.*, *In re* Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994) (debating whether a mother's competent choice to refuse a c-section during pregnancy was to be notable); Jefferson v. Griffin Spalding County Hosp., 274 S.E.2d 457, 460 (Ga. 1981) (per curiam) (holding that the state's interest in the unborn child justified the intrusion into the lives of the unborn child's parents); *In re* A.C., 573 A.2d 1235 (D.C. 1990); Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., 66 F. Supp. 2d 1247 (N.D. Fla. 1999) (holding that in the case of a forced c-section, the scope of a plain-

sending a message to women: Follow your doctor's orders, or you will be held criminally responsible. The woman's wishes are irrelevant; if she refuses the c-section, she can be prosecuted for homicide or child endangerment.

On one hand, the choice of whether to obtain medical treatment that would possibly save the life of the unborn child seems like an easy choice. Most women would unquestionably take their doctor's advice and do whatever was necessary to protect their fetus. On the other hand, there are a variety of reasons why women would refuse treatment.[4] For instance, a woman may be concerned for her health as a result of the c-section. A c-section is major surgery that brings with it the possibility of complications, some of which could be long lasting.[5] Some women may refuse for religious reasons[6] or because they do not trust the doctor's advice. No matter the reason for refusal, these women are exercising their right to refuse unwanted medical treatment. The question remains, however, as to whether this right is absolute. Can the state compel a woman to undergo surgery against her wishes?

As with most controversial issues, the courts are divided on the answer to this question. While the Rowland case is the first reported case in which a woman has been prosecuted for refusing to have a c-section, other women have been compelled by the courts to have c-sections to protect their fetuses.[7] Thus, the decisions issued in such

---

tiff's personal constitutional rights do not outweigh the interests of the state in preserving the life of the unborn child); *In re* Ruiz 500 N.E.2d 935 (Wood County C.P. 1986) (holding that a mother's heroin use prior to the birth of her fetus constituted child abuse); State v Ashley, 701 So. 2d 338 (Fla. 1997) (holding that an expectant mother cannot be criminally charged for the death of her "born alive" child as a result of self-inflicted injuries during the third trimester of her pregnancy); Johnson v. State, 602 So. 2d 1288 (Fla. 1992) (considering whether a Florida statute prohibiting the delivery of a controlled substance to a minor should apply to a woman who used drugs while pregnant); Whitner v. State, 492 S.E.2d 777 (S.C. 1997) (construing a state child abuse statute to include a mother's action against her viable fetus); *In re* Troy D., 263 Cal. Rptr. 869 (Cal. Ct. App. 1989) (explaining that a presumption arose that a child was in need of juvenile court protection when its mother caused it to be born with a detrimental condition by ingesting dangerous drugs).

[4] According to nurses, Rowland allegedly refused the c-section because she did not want the scar that accompanies the surgery. Rowland has disputed that claim. Rowland has disputed that claim. Alexandria Sage, *Mother Agrees to Guilty Plea in Fatal Delay of C-Section*, CHI. SUN TIMES, Apr. 8, 2004, at 28.

[5] *See generally* Pamala Harris, *Compelled Medical Treatments of Pregnant Women: The Balancing of Maternal and Fetal Rights*, 49 CLEV. ST. L. REV. 133 (2001) (stating risks of c-sections).

[6] *See e.g.*, *Jefferson*, 274 S.E.2d at 458; *In re* Baby Boy Doe, 632 N.E.2d at 327; *Pemberton*, 66 F. Supp. 2d at 1251.

[7] *E.g.*, *Jefferson*, 274 S.E.2d at 457; *Pemberton*, 66 F. Supp. 2d at 1248-49.

cases are relevant as to whether the state can use its criminal laws to essentially force a woman to have a c-section. Some courts have held that the decision of whether or not to have a c-section is a woman's choice that must be honored.[8] Other courts have determined that this right is limited and must be balanced against the rights of the state and/or the fetus.[9] States have even come to different conclusions as to the outcome of the balancing test. Several cases have indicated that the woman's rights are subordinate,[10] while another found that the rights of the mother prevailed.[11]

A. The Woman's Absolute Right to Refuse

Perhaps the ruling that most strongly favors mothers' rights is *In re Baby Boy Doe*,[12] a case in which a mother refused to have a c-section for religious reasons. The court ultimately ruled that a woman's refusal of an invasive procedure such as a c-section must prevail, even if it results in harm to the fetus. The court did not balance the woman's rights against the state's interests or the fetus's rights. Instead, it indicated that the woman had an absolute right to refuse treatment and no balancing of interests was needed.[13]

B. The Balancing of Rights

Other courts have indicated that a balancing test is necessary in order to determine whether the mother can refuse a c-section.[14] This idea of balancing rights comes from a line of abortion cases, which have determined that the state's interests must be weighed against woman's right to privacy.[15] In the case of *Jefferson v. Griffin Spal-*

---

[8] *E.g.*, *In re* Baby Boy Doe, 632 N.E.2d at 326.

[9] *Jefferson*, 274 S.E.2d at 460; *In re* A.C., 573 A.2d 1235, 1237-38 (D.C. 1990) (explaining that a trial court should try to determine the wishes of an incompetent patient who has a viable fetus when making medical decisions).

[10] *Jefferson*, 274 S.E.2d at 460; *Pemberton*, 66 F. Supp. 2d at 1251 (holding that forcing a mother to undergo a c-section does not violate her constitutional rights).

[11] *In re A.C.*, 573 A.2d at 1237.

[12] 632 N.E.2d 326.

[13] *Id.*

[14] *Jefferson*, 274 S.E.2d at 260; *In re A.C.*, 573 A.2d at 1251.

[15] *See* Roe v. Wade, 410 U.S. 113 (1973) (balancing mother's interests with the state's); Planned Parenthood v. Casey, 505 U.S. 883 (1992) (espousing undue burden standard as a test for abortion restrictions); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (prohibiting the state from placing onerous restrictions on abortions); Moses Cook, *From Conception Until Birth: Exploring the Maternal Duty to Protect Fetal Health*, 80 WASH. U. L.Q. 1307 (2002) (discussing abortion cases and right to privacy).

ding County Hospital,[16] the court ordered a woman to have a c-section even though the procedure was counter to her religious beliefs. The court found that the fetus was a viable human being which was protected by the laws of the state and that the state had a "compelling" interest in the fetus after viability.[17] The court granted custody of the child to the state and ultimately found that the fetus's right to life outweighed the parents' wishes.[18]

The Supreme Court of the District of Columbia came to a different conclusion after applying a balancing test.[19] The court determined that the lower court had incorrectly found that the rights of the mother were subordinate to those of the fetus.[20] The court also found that individuals have a right to make informed treatment decisions,[21] and in "virtually all cases the decision of the patient ... will control."[22] Finally, the court stated that only in extraordinary cases would the state's interests outweigh those of the mother.[23]

The major rights and interests that are typically discussed in such cases are the state's interest in protecting the fetus, the mother's rights to privacy and bodily integrity, and fetus's right to be born healthy. The next three sections will discuss these rights in more detail.

C. The Mother's Rights

Generally, when courts find in favor of the mother, their conclusions are based on her constitutional rights.[24] The strongest argument a mother can make is that she has a right to refuse medical treatment. This right is based on common law and the constitutional concepts of an individual's right to bodily integrity, self-determination, and privacy.[25] The Constitution provides a competent individual the right to refuse unwanted medical procedures.[26] This concept is also imbedded

---

[16] 274 S.E.2d at 460.

[17] *Id.* at 461 (Smith, J., concurring) (explaining that the state's interest in preserving the life of the child outweighs the intrusion on the mother).

[18] *Id.* at 460.

[19] *In re A.C.*, 573 A.2d at 1237.

[20] *Id.* at 1244.

[21] *Id.* at 1247.

[22] *Id.* at 1252.

[23] *Id.*

[24] *See generally* Harris, *supra* note 5, at 143 (discussing judicial considerations in compelled c-sections).

[25] *In re* A.C., 573 A.2d 1235, 1235 (D.C. 1990); Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972) (discussing the legal importance of self-determination).

[26] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (discussing individual constitutional rights as guaranteed by the Fourth Amendment and the Due Process Fourteenth Amendment). *See also* Julie B. Murphy, Note, *Competing Inter-*

in the notion of informed consent; physicians are prohibited from performing medical procedures on a patient without consent,[27] and the failure to gain consent is considered battery.[28]

Although this right to privacy is not relinquished when a woman becomes pregnant, it is not absolute, and the state can intervene in some circumstances.[29] Some courts have determined that the presence of a fetus allows the state to intervene and compel a c-section.[30] On the other hand, the court in *In re Baby Boy Doe* applied the right of privacy to a woman's refusal of a c-section and found that this right is absolute.[31]

Another right that is often argued, but largely ignored by the courts, is the woman's right to free exercise of religion.[32] Generally speaking, the First Amendment provides the right to act according to one's religious beliefs, although these rights can be regulated by the state.[33] For example, parents do not have an absolute right to refuse medical treatment for their children, even when refusal is based on religious grounds.[34] In such cases, the state's compelling interest in the health and welfare of its children outweigh the parents' rights.

Some women who have refused c-sections have done so on religious grounds.[35] Typically, the courts in these cases have barely acknowledged the mother's religious interests. In *Jefferson v. Griffin Spalding*, the court "weighed the right of the mother to practice her religion and to refuse surgery on herself, against her unborn child's right to live [and] found in favor of her child's right to live."[36] Addi-

---

ests: When a Pregnant Woman Refuses to Consent to Medical Treatment Beneficial to Her Fetus, 35 SUFFOLK U. L. REV. 189 (2001) (reviewing a pregnant woman's right to refuse treatments).

[27] *Cruzan*, 497 U.S. at 269.

[28] *Canterbury*, 464 F.2d at 783.

[29] *See generally* Roe v. Wade, 410 U.S. 113 (1973); *In re Baby Boy Doe*, 632 N.E.2d 326, 332 (Ill. App. Ct. 1994) (stating that the woman's right to refuse is absolute).

[30] Jefferson v. Griffin Spalding County Hosp., 274 S.E.2d 457, 460 (Ga. 1981); Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., 66 F. Supp. 2d 1247, 1251 (N.D. Fla. 1999).

[31] *In re Baby Boy Doe*, 632 N.E.2d at 332.

[32] *See generally* April L. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563 (2002) (examining the intersection of a mother's freedom to exercise religion and the rights of an unborn child).

[33] *See* Niemotko v. Maryland, 340 U.S. 268 (1951); *see also* Cherry, *supra* note 32.

[34] *See* Prince v Massachusetts, 321 U.S. 158 (1944) (holding that the state has a broad range of powers in limiting parental freedom).

[35] *E.g.*, *Jefferson*, 274 S.E.2d at 458; *Pemberton*, 66 F. Supp. 2d at 1251.

[36] *Jefferson*, 274 S.E.2d at 460.

tionally, the court determined that "the intrusion involved into the life of [the parents] . . . is outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live."[37]

Similarly, the court in *Pemberton v. Tallahassee Memorial Regional Medical Center* ordered a woman to undergo a c-section, stating, "[w]hatever the scope of Ms. Pemberton's personal constitutional rights in this situation, they clearly did not outweigh the interests of the [s]tate. . ."[38] Thus, the court ordered Pemberton to undergo the c-section despite her religion-based objections. As these cases demonstrate, the courts have not given the woman's religious rights substantial weight in their balancing tests.

D. State's Interests

When the state claims an interest in the situation in which a mother refuses a c-section, it often relies on the logic behind *Roe v. Wade* and other abortion cases.[39] Since the state has an "important and legitimate interest in protecting the potentiality of human life,"[40] states have the authority to regulate abortions after the fetus has reached viability.[41] *Planned Parenthood v. Casey* expanded this ruling by asserting that the state has an interest in protecting the fetus from conception.[42] When applied to the refusal of a c-section, the assumption is made that, if the state's interest is strong enough to protect a viable fetus from abortion, the state can compel medical treatment against the mother's wishes. The *Casey* court stated, "[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[43] This suggests that a woman's rights are subordinated when she becomes pregnant, allowing the state to intervene.

While the Supreme Court in *Roe* and *Casey* seemingly gave the lower courts the authority to intervene, the Court has also affirmed a

---

[37] *Id.* at 460.

[38] *Pemberton*, 66 F. Supp. 2d at 1251.

[39] *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 883 (1992); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986); *see generally* Barbara Ann Leavine, *Court-ordered Cesareans: Can a Pregnant Woman Refuse?*, 29 HOUS. L. REV. 185 (1992) (discussing court ordered c-section cases' reliance on balancing interests).

[40] *Roe*, 410 U.S. at 162.

[41] *Id.* at 163.

[42] *Casey*, 505 U.S. at 837 (rejecting *Roe's* trimester framework as being too rigid).

[43] *Id.* at 870.

woman's right to put her own health before that of her fetus.[44] In *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court struck down portions of an abortion law that required physicians who were performing a post-viability abortion to use a technique that improved the chances that the fetus would survive and put the mother at higher risk.[45] This case suggests that the mother does have rights that are superior to that of the fetus and that the state's interests are somewhat limited in their ability to protect the fetus over the interests of the mother. While states generally find their interests in the abortion cases, it is unclear how these cases would apply in a situation in which the mother has refused a c-section.

E. Fetal Rights

Courts have issued various statements regarding the rights of the fetus. For example, courts have ruled that children have the right to be born with a healthy mind and body.[46] Courts have also determined that the fetus has the right to be protected by the court in refusal of c-section cases[47] and maternal drug use cases.[48] The court ultimately upheld the conviction of a mother for endangering her baby through pre-birth cocaine use. While the *Whitner* court determined that the term "child," as used in the statute, includes a viable fetus,[49] other courts have held that the legislature did not intend for the term "child" to refer to a fetus.[50] Although some of the cases regarding forced c-sections have discussed the rights of the fetus, these rights are rela-

---

[44] *See Thornburgh*, 476 U.S. 747.

[45] *Id.* at 768-69 (agreeing with the appellate court that the statute was "unconstitutional because it required a 'trade-off' between the woman's health and fetal survival, and failed to require that maternal health be the physician's paramount consideration.").

[46] *E.g.*, Greater S.E. Cmty. Hosp. v. Williams, 482 A.2d 394, 398 (D.C. 1987) (recognizing "the right of a viable fetus to be free of tortious injury"); Jarvis v. Providence Hosp., 444 N.W.2d 236, 238-39 (Mich. Ct. App. 1989); *In re* Ruiz, 500 N.E.2d 935 (Ohio Ct. Com. Pl. 1986) (holding that a child has the right to begin life with a sound mind and body); Womack v. Buchhorn, 187 N.W.2d 218 (Mich. 1971) (allowing a negligence action brought on behalf of a child).

[47] *E.g.*, Jefferson v. Griffin Spalding County Hosp., 274 S.E.2d 457, 460 (Ga. 1981).

[48] Whitner v. State, 492 S.E.2d 777 (S.C. 1997).

[49] *Id.* at 778. *See* Regina M. Coady, Comment, *Extending Child Abuse Protection to the Viable Fetus:* Whitner v. State of South Carolina, 71 ST. JOHN'S L. REV. 667 (1997) (discussing courts that have and have not extended protection to fetuses).

[50] *In re* Steven S., 178 Cal. Rptr. 525 (Cal. Ct. App. 1981) (ruling that an unborn fetus is not a person for the purpose of determining dependency); *In re* Dittrick Infant, 263 N.W.2d 37 (Mich. 1977); Reyes v. Superior Court, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977).

tively new and the law has not always granted rights to the fetus. The next section is a brief review of the development of fetal rights.

II. EVOLUTION OF FETAL RIGHTS

The criminalization of the refusal to undergo a c-section is the latest development in a growing trend of granting rights to a fetus. At common law, a fetus was not a "person" that was entitled to be protected by the law; it was seen simply as an extension of the mother until birth.[51] Inheritance law was the first area to grant a fetus rights. The court in *Cowles v. Cowles* held that an individual can will property to a fetus who is conceived before his/her death and later is born alive.[52]

In 1946, a fetus was granted rights in tort law when the District Court of the United States for the District of Columbia determined that a child could recover for pre-birth injuries.[53] Even after courts began to give the fetus rights to recover in tort, they resisted making mothers and fetuses adversaries, by denying the fetus the right to sue the mother for pre-birth behavior.[54]

Under most criminal law statutes, a fetus was traditionally not considered a "person."[55] The fetus gained significant rights under criminal law in 1984, when the Massachusetts Supreme Judicial Court held that a fetus was a "person" and was entitled to protection under the state's criminal homicide statute.[56] However, states were slow to extend criminal prosecutions to maternal acts. While third parties could be prosecuted for harming a fetus, mothers could not. In *State v. Ashley*, a pregnant teenager shot herself in the abdomen, intending

---

[51] For a more detailed account of the evolution of fetal rights, see Coady, *supra* note 49; Cook, *supra* note 15, at 1318-19.

[52] 13 A. 414 (Conn. 1887); *see also* Christian v. Carter, 137 S.E. 596 (N.C. 1927) (upholding the lower court's ruling that a child conceived before decedent's death, but born after decedent's death was entitled to recover under intestancy).

[53] Bonbrest v. Kotz, 65 F. Supp. 138 (D.C. 1946) (ruling that the child had standing to sue a physician for injuries sustained while a viable fetus in the womb).

[54] Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988) (ruling that no cause of action exists for a fetus to sue his/her mother for unintentional infliction of prenatal injuries that arose out of an automobile accident). *But see* Grodin v. Grodin, 301 N.W.2d 869, 871 (Mich. Ct. App. 1980) (court held that the mother does not have immunity from parent-child tort actions if she acted unreasonably).

[55] *In re* Dittrick Infant, 263 N.W.2d 37 (concluding the legislature did not intend for the statute to be applied to a fetus).

[56] Commonwealth v. Cass, 467 N.E.2d 1324, 1330 (Mass. 1984). *See also* State v. Horne, 319 S.E.2d 703 (S.C. 1984) (ruling that the murderer of a viable fetus can be prosecuted for homicide, but reversing the conviction in the case at hand because such prosecution was unprecedented at the time the event occurred).

to harm the child.[57] The child was delivered by c-section but later died due to complications related to being premature. Ms. Ashley was charged with manslaughter and third degree felony murder; however the Supreme Court of Florida determined that the mother was immune from criminal prosecution for harming her fetus.[58]

While the *Ashley* case represented an extreme case, prosecutors were also interested in penalizing mothers for causing more common injuries to their fetuses. For years, prosecutors argued in vain that the transmittal of drugs from mother to child through the umbilical cord should be covered in criminal statutes,[59] or that the fetus was a "child" that was protected by statute.[60] Finally, in 1997 the South Carolina Supreme Court found that the word "child" in the child abuse statute applied to a viable fetus.[61] Ultimately, the court upheld a conviction of a woman who admitted to using drugs during pregnancy,[62] paving the way for prosecutions of mothers for their behavior during pregnancy.

A. Criminal Charges Against Mothers

Women have been charged for a variety of behaviors during pregnancy, including use of illegal drugs, use of alcohol, and failure to follow a doctor's orders.[63] The charges have included child abuse or neglect, distribution of illegal substances to a minor, and homicide.[64]

---

[57] 701 So. 2d at 339.

[58] *Id.* at 339.

[59] *E.g.*, Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992).

[60] *E.g.*, Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993) (concluding that drug use during pregnancy does not constitute criminal child abuse); State v. Gray, 584 N.E.2d 710 (Ohio 1992) (holding that a parent cannot be prosecuted for child endangerment as a result of substance abuse during pregnancy); Reyes v. Superior Court, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977).

[61] Whitner v. State, 492 S.E.2d 777, 779 (S.C. 1997).

[62] *Id.*

[63] *See* Jean Reith Schroedel & Pamela Fiber, *Punitive Versus Public Health Oriented Responses to Drug Use by Pregnant Women*, 1 YALE J. HEALTH POL'Y L. & ETHICS 217 (2001) (discussing the various responses to prenatal drug use); *Whitner*, 492 S.E.2d at 779; People v. Stewart, No. M508197, slip op. (San Diego Mun. Ct. Feb 26, 1987) *reported in* Cook, *supra* note 15, at 1309 n.23, and James Drago, Note, *One for My Baby, One More for the Road: Legislation and Counseling to Prevent Prenatal Exposure to Alcohol*, 7 CARDOZO WOMEN'S L.J. 163, 173-74 (2001).

[64] *See generally In re* Troy D., 263 Cal. Rptr. 869, 873 (Cal. Ct. App. 1989) (explaining why juvenile courts should have jurisdiction over child born addicted to drugs); *In re* Ruiz 500 N.E.2d 935, 939 (Ohio Ct. Com. Pl. 1986); *Johnson*, 602 So. 2d at 1290, 1297 (reversing the conviction of a mother who used drugs within twenty-four hours of giving birth).

The pre-birth use of illegal drugs is considered child abuse in many jurisdictions[65] and has been written into many child abuse or neglect statutes.[66] Even before courts were willing to press criminal charges against mothers for illegal drug use during pregnancy, they were willing to terminate the parent's rights to the child when there was evidence of pre-birth drug use. For example, in *In re Troy D.*, the court determined that the mother's drug abuse constituted child abuse.[67] Similarly, the court in *In re Ruiz* determined that a child who was born addicted to heroin was covered under the child abuse statute and that pre-birth drug use constituted child abuse.[68] In contrast, the court in *In re Valerie D.* determined that drug use during pregnancy was not grounds for terminating a woman's parental rights because the statute was not intended to apply to a fetus.[69]

Prosecutors were slower to press criminal charges for pre-birth drug use. In a typical case, *Reyes v. Superior Court*, a woman gave birth to heroin-addicted twins and was charged with two felony counts of child endangerment.[70] The court determined that the legislature did not intend the statute to include the abuse of a fetus. Some jurisdictions have also sought convictions of women for delivering controlled substances to a minor.[71] In *Johnson v. State*, a woman admitted to using drugs during her pregnancy and was prosecuted for delivering a controlled substance to a minor in the time between birth and when the umbilical cord was severed. The Supreme Court of Florida later overturned the conviction, deciding that the legislature did not intend for the statute to be used in such situations.[72] It was not until 1997, in *Whitner v. State*, that a court became willing to extend a statute to provide protection for a fetus harmed by drug abuse.[73]

Criminal prosecutions based on the consumption of alcohol during pregnancy are even more controversial because the use of alcohol is legal, though some courts have not distinguished the use of alcohol from the use of other illegal drugs. For instance, a New York court found that "[p]roof that a person repeatedly misuses a drug or drugs or alcoholic beverages . . . shall be prima facie evidence that a child . . . is a neglected child."[74] Similarly, the *Whitner* court stated that the

---

[65] *E.g.*, *In re* Troy D., 263 Cal. Rptr. at 872; *In re* Ruiz, 500 N.E.2d at 935.
[66] *See* Schroedel, *supra* note 63.
[67] *In re* Troy D., 263 Cal. Rptr. at 872.
[68] *In re* Ruiz, 500 N.E.2d at 935.
[69] 613 A.2d 748 (Conn. 1992).
[70] 141 Cal. Rptr. 912 (Cal. Ct. App. 1977).
[71] *E.g.*, Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992).
[72] *Id.*
[73] 492 S.E.2d 777 (S.C. 1997).
[74] *In re* Smith, 492 N.Y.S.2d 331, 334 (Monroe County Fam. Ct. 1985).

legality of the substance does not reduce the harm done to the state's interest.[75] Thus, it is likely that the *Whitner* court would have convicted Ms. Whitner even if she had abused alcohol rather than cocaine.

The *Whitner* decision represents a step towards criminal prosecution of mothers for their pre-birth behavior. Whether this step is a sufficient bridge towards the criminalization of c-section refusal is a question yet to be answered. The next section discusses the issue and determines that c-section refusal will likely not be a prosecutable offense in most jurisdictions, at least not under current case law and statutory schemes. Since other states have yet to follow the *Whitner* decision, and no state has successfully prosecuted a woman for failing to follow her doctor's orders, it is unlikely that many states are willing to take the leap that the Utah prosecutor has suggested. Further, there are a variety of reasons why states should refrain from prosecuting women for refusing a c-section. Section III presents a detailed analysis of these issues.

III. ANALYSIS

The future of prosecuting women for their failure to have a c-section is uncertain but near. The Melissa Rowland case indicates an increasing willingness to penalize women for their prenatal decisions. This article has reviewed the case law regarding court-ordered c-sections and the criminalization of prenatal drug use. The review revealed that some states are willing to compel a woman to have a c-section against her wishes, and some are willing to prosecute mothers for pre-birth drug use. These cases lay the groundwork needed for an analysis of the prosecution for refusal to undergo a c-section. Two questions remain unanswered: (1) Under the current case law, will a state be successful in prosecuting a woman for the failure to have a c-section?; and (2) Should the state prosecute women for failure to have a c-section?

A. Will a Prosecution Be Successful?

There are a number of obstacles standing in the way of a prosecution for failure to have a c-section. The first is related to the issue of court-ordered c-sections. If the jurisdiction has indicated that a woman cannot be forced to undergo an unwanted c-section, then the state cannot logically prosecute her criminally for refusing to do so. Some states faced with the issue of forced c-sections have found in

---

[75] *Whitner*, 492 S.E.2d at 781-82.

favor of the mother's right to refuse treatment,[76] and would likely favor the mother in striking down a criminal conviction as well.

The second obstacle is related to the issues of statutory interpretation. Because there are currently no statutes directly addressing the issue of refused c-sections, a prosecution would have to rely on statutes similar to those that have been used to prosecute women for prebirth drug abuse, such as child endangerment or neglect statutes. When prosecutors have attempted to use such statutes to prosecute mothers who used drugs, they often failed because the court ultimately found that the legislature did not intend the statute to be used in that way. For example, in the *Reyes v. Superior Court* case discussed above, the court determined that the child endangerment statute was not intended to protect a fetus.[77] It is not likely that such a prosecution would be effective in states that have refused to find that the applicable statutes (e.g. child abuse) apply to a fetus.[78] Such a prosecution is more likely in a state, such as South Carolina, which has given the fetus rights and allowed a mother to be prosecuted for child neglect for exposing her fetus to drugs.[79]

Another question of statutory interpretation was dealt with by the *Johnson* court, discussed above, which determined that the statute prohibiting delivery of a controlled substance to a minor was not intended to cover the transfer of drugs through the umbilical cord.[80] Similarly, the court in *People v. Stewart* held that a neglect statute was not intended for use in criminal prosecutions, and therefore a woman could not be charged with fetal neglect for failing to adhere to her doctor's orders, such as maintaining bed rest and avoiding sex with her husband.[81] In these cases, prosecutors attempted to stretch existing laws in order to prosecute a woman for her prenatal behavior. A similar stretch would be necessary to prosecute a woman for failing to have a c-section. Based on the courts' reactions in cases such as *Johnson* and *Stewart*, most courts are likely to hold that the legislature did not intend for child endangerment or other such laws to apply to the refusal to have a c-section.

---

[76] *In re* A.C., 573 A.2d 1235, 1237 (D.C. 1990); *In re* Baby Boy Doe, 632 N.E.2d 326, 332 (Ill. App. Ct. 1994).

[77] 141 Cal. Rptr. 912 (Cal. Ct. App. 1977); *see also In re* Valarie D., 613 A.2d 748 (Conn. 1992) (ruling that a mother's parental rights could not be terminated due to cocaine use during pregnancy).

[78] *E.g, Reyes*, 141 Cal. Rptr. 912; *In re* Valarie D., 613 A.2d at 748.

[79] *Whitner*, 492 S.E.2d at 786.

[80] Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992).

[81] People v. Stewart, No. M508197, slip op. (San Diego Mun. Ct. Feb 26, 1987) *reported in* Cook, *supra* note 15, at 1309 n.23 and Drago, *supra* note 63, at 173-74.

Finally, states that adhere to the parental immunity rule would necessarily be barred from seeking such a prosecution. In the *Ashley* case discussed above, the Supreme Court of Florida determined that the mother was immune from criminal prosecution for attempting to harm her fetus by shooting herself in the abdomen.[82] A state that recognized this maternal immunity would likely be unwilling to support a prosecution for refusal of a c-section.

In sum, the case law of most states would not support the prosecution of women for failure to have a c-section. Beyond the question of whether a state *can* prosecute a woman for refusal to have a c-section is the question of whether a woman *should* be prosecuted. The next section poses several reasons that the answer to this question should be "no."

B. The State Should Not Prosecute Women for Refusing a C-Section

There are many reasons a state should refrain from the criminal prosecution of women for their refusal to have a c-section. First, such a prosecution stands to violate many of the mother's rights, such as the right to privacy, the right to refuse medical treatment, the right to free exercise of religion, the due process right of notice, and the right to equal protection. This analysis will focus on the first two.[83] A woman's right to privacy and the right to refuse medical treatment are essential, fundamental rights that are guaranteed to every American. Although becoming pregnant presents a difficult dilemma, these rights should not be subordinated by the presence of a fetus.

Courts have refused to compel an individual to undergo intrusive medical procedures in order to benefit another person.[84] In *McFall v. Shimp*, the court declined to compel Mr. Shimp to donate bone marrow which would have saved his cousin's life, stating,

> "[f]or our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which

---

[82] State v. Ashley, 701 So. 2d 338, 339 (Fla. 1997).

[83] Although the other rights are very important rights, they are beyond the scope of the current paper.

[84] Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941) (stating that patient consent is required before a surgeon can perform an operation for the benefit of another patient); McFall v. Shimp, 10 Pa.D. & C.3d 90 (Allegheny Cty. Com. Pl. 1978) (denying request for an injunction that would compel defendant to donate bone marrow).

would know no limits, and one could not imagine where the line would be drawn."[85]

Thus, it is illogical to force a woman to have a c-section against her will when courts have determined that an individual cannot be forced to undergo intrusive medical procedures to aid others. An argument can be made that, when a woman becomes pregnant, she assumes an enhanced duty towards the fetus. The *A.C.* court rejected this notion, stating, "a fetus cannot have rights in this respect superior to those of a person who has already been born."[86]

Like many of the previous c-section cases, a challenge to the proposed prosecution would likely rely heavily on the abortion case law. The *Thornburgh* Court offered the strongest support for the notion that the mother should not be forced to undergo a risky medical procedure for the sake of the fetus. In *Thornburgh*, the Supreme Court considered an abortion law that required doctors to perform a certain type of post-viability abortion because it increased the chance that the fetus would survive.[87] The Court struck down the statute because it created an unacceptable risk to the mother in order to protect the fetus.[88] Likewise, the state should not be allowed to force a c-section for the sake of the fetus because, in most cases, a c-section creates an increased risk (as compared to natural birth) for the mother. Although a few states have shown a willingness to force a woman to have a c-section,[89] courts should re-think these decisions and refuse to infringe upon women's rights to privacy and rights to refuse medical treatment.

The second reason that states should not prosecute women for refusing a c-section is because her refusal differs dramatically from other behaviors that women have previously been prosecuted for, namely, drug use. The differences between the two acts are significant and suggest that laws allowing women to be prosecuted for prebirth drug use should not be stretched to cover refusal to undergo a c-section.

---

[85] 10 Pa.D. & C.3d at 91.

[86] *In re* A.C., 573 A.2d 1235, 1244 (D.C. 1990). *See also* Katherine A. Knopoff, *Can a Pregnant Woman Morally Refuse Fetal Surgery?*, 79 CAL. L. REV. 499 (1991) (discussing duties owed to fetus and others); Blair D. Condoll, Comment, *Extending Constitutional Protection to the Viable Fetus: A Woman's Right to Privacy*, 22 S.U. L. REV. 149 (1994) (discussing woman's duties to a fetus).

[87] 476 U.S. 747 (1986).

[88] *Id.* at 768-69 (discussing Appeals Court ruling).

[89] Jefferson v. Griffin Spalding County Hosp., 274 S.E.2d 457, 460 (Ga. 1981); Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., 66 F. Supp. 2d 1247, 1251 (N.D. Fla. 1999).

The major difference between drug use and refusal of a c-section is that women do not have a fundamental right to use drugs, whereas a woman does have fundamental rights to privacy, and a fundamental right to refuse medical treatment. Thus, the leap that would be required to find that these statutes pertain to the refusal of a c-section is significant and should be prevented. Prosecuting a woman for using illegal drugs during pregnancy is substantially different from prosecuting a woman for exercising her right to refuse medical treatment.

Another reason women should not be prosecuted for failing to take a doctor's advice is because the charges would rest on the accuracy of medical predictions. Although doctors are trained professionals, they do make mistakes in their predictions. Doctors seek court orders to force c-sections because they feel it is in the best interest of the fetus and/or the mother. Trial courts often defer to the opinion of doctors; however doctors have, in many instances, been incorrect.[90] Even in the *Rowland* case, one of the twins was born healthy, even though the medical personnel predicted that both twins would likely suffer harm or death if the mother did not have an emergency c-section.[91] Although a fifty percent survival rate is not optimal, it demonstrates that doctors are not always accurate in their predictions. Similarly, in the cases of *Jefferson*[92] and *In re Baby Boy Doe*,[93] the women delivered healthy babies through natural childbirth after being told that they needed to undergo c-sections. If these women had been prosecuted for their refusal to undergo the c-section, the case would rest on the fact that they had refused a procedure that turned out to be unnecessary.

The criminalization of the refusal to have a c-section would almost certainly increase the number of c-sections performed, even if only marginally, which would then increase the number of women who are put at risk by unnecessary surgery. Critics suggest that many, if not most, c-sections are unnecessary and represent an unacceptable risk to the mothers.[94] That is not to say that c-sections are not appropriate in some cases to save the life of the fetus or the mother; however it does indicate that judges, policy makers, and prosecutors

---

[90] *See* Cherry, *supra* note 32, at 564-65; Charity Scott, *Resisting the Temptation to Turn Medical Recommendations into Judicial Orders: A Reconsideration of Court-Ordered Surgery for Pregnant Women*, 10 GA. ST. U. L. REV. 615, 660-65 (1994) (arguing that doctors are frequently wrong in their assessment of the need for c-sections).

[91] *See generally* WASH. TIMES, *supra* note 1; Sage, *supra* note 1; Santini, *supra* note 1.

[92] 274 S.E.2d 457 (baby was born healthy). *See* Scott, *supra* note 90, at 660.

[93] 632 N.E.2d 326, 332 (Ill. App. Ct. 1994).

[94] Scott, *supra* note 90, at 661.

should be cautious about putting too much faith in the doctor's predictions. Because the accuracy of a doctor's advice cannot be guaranteed, women should not be treated as criminals for their choice to exercise their rights to refuse treatment instead of taking the doctor's advice.

There are also many ethical, policy and economic reasons not to prosecute women for failing to have c-sections. First, mothers, especially those who practice religions that forbid c-sections, could avoid seeking pre-natal care in order to avoid prosecution. Making doctors responsible for reporting refusals is a breach of the doctor-patient relationship. If the state is truly interested in protecting a fetus, it should refrain from supporting laws that make it likely that some mothers will avoid prenatal care that would benefit the fetus.

Similarly, prosecution resulting in incarceration would not be healthy for a surviving baby or the other family members.[95] Sending the mother to jail would encourage separation of families, as the state may seek termination of parental rights of a surviving child. Further, incarceration is expensive and would place extra burdens on many states that are already dealing with overcrowded jails.

Finally, women should not be prosecuted because such charges could create a slippery slope of criminal prosecutions of women for their behavior during pregnancy. As discussed above, a fetus did not have extensive rights at common law, but piece by piece, courts have granted the unborn fetus rights in property, torts, and criminal law. Eventually, this trend led to the prosecution of mothers for their behavior during pregnancy. Some courts have directly controlled pregnant women's actions through court orders to have c-sections. Courts have also controlled women's behavior indirectly through child abuse guidelines and criminal sanctions for misbehavior during pregnancy.

The criminal prosecution of women who refuse c-sections represents the next step in this trend. The list of behaviors that present some level of risk to the fetus is seemingly endless. Thus, once we use the criminal law to force a woman to have major surgery, what's to stop courts from criminalizing smoking, using prescription drugs, engaging in sexual activity, playing sports, soaking in a hot tubs or changing the cat's litter box during pregnancy? Should the courts also force women to follow nutritional advice, comply with bed-rest orders, or have medical tests?

If it is illegal to cause harm to a fetus by using drugs or refusing to have a c-section, should it also be illegal to conceive a fetus when the

---

[95] *See* Schroedel & Fiber, *supra* note 63, at 220 (stating that "incarceration actually works against the goals of improving fetal health).

mother knows that, because of her condition, she may cause it harm? For example, should it be a crime for women with HIV to have a baby? How about women with inheritable diseases or defects? How about older women who are at greater risk of having an unhealthy baby? The very action of becoming pregnant creates a risk to babies in these situations, as they may inherit a harmful genetic disease or contract a deadly virus during development. Should we take away some women's rights to have children because society does not want the burden of caring for unhealthy children, or because society wants to punish mothers for their unacceptable behaviors?

At what point do we stop this slope from becoming too slippery? One could say that if a preventable harm is almost certain to occur, it should be criminalized. However, it is hard to determine whether a fetus will be harmed by any particular behavior, since not all babies exposed to alcohol or illegal drugs are actually harmed, and not all babies are harmed if they are not delivered through c-section. Harm from other proscriptions (e.g., bed rest, nutritional advice) is possibly even harder to predict. Further, it is impossible to tell whether the harm would have happened even if the woman had followed the advice. For example a woman ordered to bed rest may still have complications that harm the baby, even if she did comply with the doctor's orders. Thus, it is illogical to charge her with failing to follow the orders.

IV. CONCLUSION

Some states have demonstrated that they are willing to force women to undergo c-sections, and some are willing to prosecute women for prenatal drug use. Utah is the first state to press charges against a woman who refused a c-section, indicating a willingness to take this trend of fetal protection even further. Making the leap between court-ordered c-sections and criminalizing the failure to have a c-section is a huge step that the courts should be unwilling to make. Similarly, the courts should refuse to make the giant leap from prosecuting women for pre-birth drug use to refusal of a c-section.

Although the refusal to undergo a c-section that could save the life of a fetus may seem like a barbarian act, there may be legitimate reasons why a woman may choose to do so. Therefore, courts and prosecutors should be careful not to confuse moral obligations with legal obligations. While it seems like having a c-section is morally the right thing to do, making it a crime to refuse a c-section jeopardizes a woman's rights, and subjects her to an increased risk of injury as a result of a surgery that may have been unnecessary.