University of Richmond Law Review

Volume 22 | Issue 2 Article 9

1988

Unborn Child: Can You Be Protected?

Heather M. White
University of Richmond

UNBORN CHILD: CAN YOU BE PROTECTED?

I. INTRODUCTION

Continuing medical advancement in the area of prenatal care[1] raises the question of when, if ever, the state may intervene in the life of a pregnant woman to protect her unborn child from abuse and neglect. This issue, though troublesome, can no longer be ignored. Since the Supreme Court's decision in *Roe v. Wade*,[2] giving the pregnant woman the constitutional right to decide whether or not to terminate her pregnancy,[3] there has been abundant controversy over the allowance of state intervention to protect the human fetus.[4] This controversy necessarily entails a discussion as to when and in what manner[5] the state may legally infringe upon a woman's constitutional rights.[6]

This Comment argues that the unborn is a "person" entitled to legal protection. This Comment then considers the interests of the state and its power to intervene on behalf of the fetus. It will further explore the constitutional rights of the pregnant woman. A discussion of the state's ability to impose medical treatment upon women will follow, with a focus on the necessary distinction made in allowing intervention only in life-threatening situations. The Comment will then address whether a finding that a child is abused may be predicated solely upon the prenatal misconduct of the mother. Finally, this Comment will examine the court's balancing of the state's interests and the rights of the fetus with the constitutional rights of the pregnant woman in its determination of whether state intervention is permissible.

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1. *See* Waltz & Thigpen, *Genetic Screening and Counseling: The Legal and Ethical Issues*, 68 NW. U.L. REV. 696 (1973).

2. 410 U.S. 113 (1973).

3. *Id.* at 154. This right is not absolute. At the point of viability, the state may assert important interests sufficiently compelling to sustain regulation of the pregnant woman's decision.

4. The status of the fetus has been dealt with in great depth by a number of commentators. *See generally* Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647 (1979).

5. *See* Note, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1051, 1052-53 (1981); *see also* Reyes v. Superior Court, 75 Cal. App. 3d 214, 217, 141 Cal. Rptr. 912, 913 (1977) (mother's prenatal heroin use was not felonious child endangering within meaning of statute so court could not remove twins born addicted to heroin). *But cf. In re* Baby X, 9 Mich. App. 111, 116, 293 N.W.2d 736, 739 (1980) (newborn's symptoms of narcotics withdrawal sufficient evidence of mother's prenatal neglect to take temporary custody of baby).

6. *See* Note, *supra* note 5 at 1064-67.

II. The Unborn Child as a "Person" Entitled to Legal Protection

A. *Historical Development*

Laws relating to the unborn child have undergone tremendous change. Until recently, the courts have been reluctant to afford the unborn child any legal rights, except in relatively limited areas.[7] The fetus was viewed as a part of the mother.[8] It was not until after birth that the child gained any legal rights as a distinct entity.[9] Today, most American jurisdictions

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7. *See generally* Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 Duq. L. Rev. 1, 4-14 (1984).

In the law of property and inheritance the unborn child was recognized as a person. The unborn child could inherit if he was conceived before the death of the decedent, and was later born alive. *Id.* at 4-6.

The unborn child was not initially recognized in early tort law but was later permitted recovery for prenatal injuries if born alive. *Id.* at 6-9.

The common law also recognized as a crime the killing of a fetus. Today, abortions are legal except when the fetus has attained viability. In criminal law, however, most states have retained the rule, adopted by the Model Penal Code, that the definition of homicide is the "killing of another human being" and "human being" is defined as "a person who has been born alive." Thus the fetus is not warranted protection under the criminal law, unless the state, like California, incorporates the term "fetus" into its homicide statute. *Id.* at 11-13; *see also* Parness, *The Abuse and Neglect of the Human Unborn: Protecting Potential Life*, 20 Fam. L.Q. 197 (1986).

8. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884). Justice Oliver Wendell Holmes denied recovery when the pregnant woman's fall resulted in a miscarriage of her four to five month old fetus, who died moments after birth. He stated that "as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by [the mother]"; *see also* Morrison, *Torts Involving the Unborn—A Limited Cosmology*, 31 Baylor L. Rev. 131, 131-41 (1979).

9. Today, a cause of action for prenatal injuries is allowed in almost every jurisdiction. In most states, recovery is permitted only if the fetus is viable or quick at the time of the injury. Other states permit a cause of action to be maintained by a child, subsequently born alive, for prenatal injuries sustained from the time of conception. Still others recognize wrongful death recovery for the death of a viable fetus (and some states even allow an action maintained by the pre-viable fetus) if the fetus would have been able to maintain an action for personal injuries if it had lived. Five states have not dealt with the issue (Alaska, Colorado, Hawaii, Maine and Wyoming), and five states do not recognize recovery either for prenatal injuries or wrongful death of a fetus (Arizona, Arkansas, Montana, Nebraska and Virginia). For a complete and fairly recent listing of each state and the corresponding citation for the decision of the court, see Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive*, 21 San Diego L. Rev. 325, 331-32 (1984).

Virginia, when presented with this issue, refused to allow a wrongful death action for a stillborn child because of the view that an unborn child is part of the mother until birth. Lawrence v. Craven Tire Co., 210 Va. 138, 142, 169 S.E.2d 440, 442 (1969). Again in September, 1986, the Supreme Court of Virginia allowed recovery only to the mother for injuries and mental anguish suffered by her as the result of the fetal death occurring while the infant was part of her, stating that the lower court had correctly instructed the jury that "injury to an unborn child in the womb of the mother is to be considered as physical injury to the mother." Modaber v. Kelley, 232 Va. 60, 67, 348 S.E.2d 233, 237 (1986); *see also* Miller v. Johnson, 231 Va. 177, 184, 343 S.E.2d 301, 305 (1986). Although Virginia has only

allow tort claims for prenatal injuries if the child is subsequently born alive.[10] This satisfies the basic purposes of tort law to compensate the innocent victim and deter harmful acts.[11] In accordance with these purposes, courts allow an infant to recover against third parties for injuries suffered as a result of tortious conduct inflicted on the pregnant woman.[12] In this area, the courts have recognized that a fetus has legal rights.[13]

B. *The Effect of* Roe v. Wade *on the Rights of the Fetus*

In the context of the abortion issue, the Supreme Court in *Roe v. Wade*[14] stated that the fetus is not considered a "person" entitled to fourteenth amendment protection.[15] This statement must be given narrow application. It does not necessarily imply that the state may not grant legal recognition to the unborn in non-fourteenth amendment cases.[16] The Court, in fact, has noted that the state has an "important and legitimate interest in potential life."[17] *Roe* also defines when the state's interest be-

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confronted the issue of whether or not the fetus has a cause of action for wrongful death, the United States District Court for the Western District of Virginia has determined that the Virginia Supreme Court would allow actions for prenatal injuries. Bolen v. Bolen, 409 F. Supp. 1371 (W.D. Va. 1975). In *Bolen*, an action was brought by the father against physicians and the hospital for damage allegedly resulting when his infant sons were born with defects following the performance of a tubal ligation on the mother without determining that she was pregnant prior to the operation. The court pointed out that "there are fundamental policy distinctions between a wrongful death action such as that in *Craven* and the case at bar." *Id.* at 1373. The federal court reasoned that there were compelling objectives in favor of allowing actions for prenatal injuries; foremost was the belief that "fundamental notions of justice dictate" compensation be made to children who "must endure life with physical and mental handicaps which proximately resulted from the negligence of others." *Id.* Thus, if the reasoning of *Bolen* is to be accepted, it would seem Virginia would allow an action to be brought by an infant who had sustained prenatal injuries. ("This court simply cannot believe that Virginia would opt to be a minority of one among the numerous states considering this issue."). *Id.*

10. W. KEETON, D. DOBBS, R. KEETON, AND D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 55 (5th ed. 1984) [hereinafter PROSSER]. Several jurisdictions have abandoned the requirement that the child be born alive. *See* O'Grady v. Brown, 654 S.W.2d 904, 908 (Mo. 1983) (en banc) ("[t]he timing of the tortious conduct does not affect either the extent of the child's injuries or the desirability of the defendant's conduct").

11. *See* PROSSER, *supra* note 10, at § 4.

12. Johnsen, *supra* note 4, at 601-02.

13. *Id.*

14. 410 U.S. 113 (1973).

15. *Id.* at 158.

16. Parness & Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 258 (1982) ("The failure to understand the *Roe* decision has led not only to courts mistakenly denying the unborn non-fourteenth amendment protections to which the unborn are entitled, but also to the public failing to comprehend the discretion remaining to American lawmakers in characterizing personhood.").

17. *Roe*, 410 U.S. at 163.

comes compelling[18] and authorizes the state to regulate the abortion decision at that point.[19]

If the state is bestowed with the power to govern a pregnant woman's decision whether to terminate her pregnancy when the fetus is at the stage of viability, then it would seem logical to further confer on the state the power to protect the unborn from abuse and neglect.[20] Since the unborn is entitled to legal protection against the tortious conduct of third persons,[21] this protection should be extended to safeguard the unborn from abuse and neglect from the pregnant woman without overstepping the parameters of the Supreme Court's decision in *Roe v. Wade*.[22] Although the unborn child has been granted only limited legal personhood in the past,[23] the recent trend is toward greater acknowledgement.[24] Protection from prenatal abuse and neglect, therefore, is consonant with the current developments in the law and with sound public policy.[25]

III. State Interest v. Rights of the Pregnant Woman

A. *State Interest*

The Supreme Court's decision in *Roe v. Wade*[26] legitimized the state's interest in protecting the potential life of the unborn as well as the health of the pregnant woman.[27] At the point of viability, the Court authorized the state to "go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[28] This authorization allows the state to make the act of aborting a viable fetus in the third trimester a criminal offense.[29] Thus, it should ensue that the Court would allow the state to intervene when other acts which would lead to the same result were being committed by the mother.[30] This would include omissions, because a failure to act could lead to similar results.[31]

Since the state can require the pregnant woman to complete the term of her pregnancy after the fetus becomes viable, it follows that the state

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18. *Id.*
19. *Id.* at 163-64.
20. Myers, *supra* note 7, at 16.
21. *See supra* notes 10-13 and accompanying text.
22. Myers, *supra* note 7, at 16.
23. *Id.* at 16 n.57.
24. *See supra* note 9.
25. Myers, *supra* note 7, at 16 n.57; *see also* King, *supra* note 4, at 1659-64.
26. 410 U.S. 113 (1973).
27. *Id.* at 162.
28. *Id.* at 163-64.
29. *Id.* at 164-65.
30. *See infra* notes 106-34 and accompanying text.
31. *See infra* notes 70-105 and accompanying text.

would have as great an interest in protecting the quality of life that it has saved. In order to do so, the court should be entrusted with limited authority to proscribe any acts which would result in injury or disfigurement to the child.[32] The states have argued that such authority to protect the unborn derives from the doctrine of parens patriae[33] and the state's police power. In *Prince v. Massachusetts*,[34] the Supreme Court extended the parens patriae authority to limit a parent's freedom in matters affecting a child's welfare.[35] In decisions since *Prince*, courts have given the states abundant authority through both the parens patriae and the police power[36] to protect children from abuse and neglect.[37] This authority would then attach to secure the health and safety of the fetus. In fact, certain courts have interpreted state abuse and neglect statutes as providing for the fetus.[38]

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32. Myers, *supra* note 7, at 19.

33. Parens patriae has been defined as the "inherent power and authority of a Legislature of a state to provide protection of the person and property of persons *no sui juris*." McIntosh v. Dill, 87 Okla. 1, 12, 205 P. 917, 925 (1922).

34. 321 U.S. 158 (1944).

35. *Id.* at 166-67. In addition, the parens patriae doctrine imposes a positive duty to protect the child, according to *In re* Weberlist, 360 N.Y.S.2d 783, 786 (Sup. Ct. 1974) ("The rationale of parens patriae is that the state must intervene in order to protect an individual who is not able to make decisions in his own best interest.").

36. *See* Myers, *supra* note 7, at 24 and nn.102, 103.

37. *Id.* at 26-31.

38. *See* Hoener v. Bertinato, 67 N.J. Super. 517, 521, 171 A.2d 140, 144 (1961) ("nothing in any of [the statutory] provisions . . . would preclude their applicability to an unborn child"); *see also* In re Baby X, 97 Mich. App. 111, 115-16, 293 N.W.2d 736, 739 (1980) (prenatal conduct causing post partum injury could constitute child abuse within the meaning of the juvenile code); In re Baby Boy Santos, 71 Misc. 2d 789, ___, 336 N.Y.S.2d 817, 820 (Fam. Ct. N.Y. 1972) ("The court is sitting as parens patriae in a matter such as this.").

Professor Myers, in his extensive article entitled *Abuse and Neglect of the Unborn: Can the State Intervene?*, has suggested that state interests in the unborn support statutory construction to extend coverage to the unborn child. He argues that this would be the only way to give meaningful effect to the important state interests in "preservation of life, the potentiality of life, and child welfare." Myers, *supra* note 7, at 29. He writes:

> An interest stripped of a method of enforcement is a feckless thing. Nowhere in the law are significant state interests unaccompanied by a means of implementation. This is certainly true where the state seeks to prevent death or serious bodily injury. The only reasonable mechanism to implement state interests is through existing abuse and neglect statutes. Since these statutes can be construed to include the unborn, protection of legitimate state interests calls for such an interpretation. The law should follow the course charted in *Bertinato*. Doing so will nourish important state interests, and extend long overdue legal protection to the unborn.

Id.

Myer further argues that recent scientific advances in prenatal medicine and fetal surgery create a demand for care which will grow. There will still be parents who refuse to consent to care but these objections can be ignored by the courts if child abuse and neglect statutes are interpreted to include the unborn. *Id.* at 30-31. Myer concludes "[i]n an age when medicine can treat and cure the unborn child, society will not tolerate a complete vacuum of authority to provide care in compelling cases." *Id.* at 31.

B. *Constitutional Rights of the Pregnant Woman*

The Supreme Court has interpreted the Constitution to endow American citizens with a variety of rights.[39] The pregnant woman is no exception. Commentators[40] and courts[41] have argued that the pregnant woman is entitled to such constitutional rights as the right to bodily integrity, the right to make intimate family decisions, the right of privacy, and the right to liberty and freedom from bodily restraint.

The right to bodily integrity was firmly established as early as 1891 in *Union Pacific Railway v. Botsford.*[42] It gives every individual the right to "possession and control of his own person, free from all restraint or interference," except by "clear and unquestionable authority of law."[43] The constitutional right to bodily integrity empowers a woman to refuse medical treatment,[44] even when such refusal would result in death.[45] This right, however, is a qualified one. Not all interference is prohibited. Courts have allowed state interference where there has been a legitimate state interest and no less intrusive means would accomplish the state's goal.[46] The state in these instances, however, must provide procedural safeguards.[47] Hence, a state may intervene only if the intrusion is necessary to realize a state objective that is of greater consequence than the woman's right to bodily integrity.[48]

The New York Supreme Court in *Crouse Irving Memorial Hospital v. Paddock*[49] permitted state intervention over the mother's objections by authorizing the hospital to administer necessary blood transfusions to the mother and child during surgical procedures. The court conceded it would not have forced a blood transfusion on a woman who was not pregnant over her religious objections.[50] The court justified the ordering of the

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39. *See generally Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980) [hereinafter *Developments in the Law*].

40. *See* Note, *supra* note 5, at 1053-64; Johnsen, *supra* note 4, at 614-25.

41. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

42. 141 U.S. 250, 251 (1891).

43. Terry v. Ohio, 392 U.S. 1, 9 (1968).

44. Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978).

45. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976); *see also* Comment, *The Right of Privacy and the Terminally Ill Patient: Establishing the "Right-to-Die,"* 31 MERCER L. REV. 603 (1980).

46. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973); *Rennie*, 462 F. Supp. at 1144.

47. *See Rennie*, 462 F. Supp. at 1145-48; *see also* Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979).

48. *See generally* Note, *Lifesaving Medical Treatment for the Nonviable Fetus: Limitations on State Authority Under* Roe v. Wade, 54 FORDHAM L. REV. 961, 970-74 (1986).

49. 127 Misc. 2d 101, 485 N.Y.S.2d 443 (Sup. Ct. 1985); *see also In re* Jamaica Hosp., 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (Sup. Ct. 1985).

50. *Crouse*, 127 Misc. 2d at ___, 485 N.Y.S.2d at 445. In cases involving the ordering of blood transfusions and surgical procedures, the courts have denied the pregnant woman her

blood transfusion under its parens patriae power, because the state's interest in protecting the health and welfare of the unborn child required the parent's interest to yield to the state's interest.[51]

The right to autonomy in intimate decision-making was pronounced in *Griswold v. Connecticut*.[52] The Supreme Court determined that a married couple had a constitutional right to decide to use contraceptives.[53] This right later extended to non-married couples.[54] The Supreme Court in *Roe v. Wade*,[55] relied heavily upon the woman's right to autonomy in intimate decision making to prevent state interference in the pregnant woman's abortion decision before the third trimester.[56] In state actions which merely affect but do not prohibit a woman's abortion or child-bearing decision, the Court has permitted state interference.[57] The right to autonomy in intimate decision making is not absolute. As in cases involving bodily integrity, the state may limit the right to autonomy provided the state has a compelling reason to do so and its limitation does not result in an outright denial of the right.[58]

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right to freedom of religion. Most courts have ignored the issue or merely brushed over it. *See, e.g.*, Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964) (no mention of right to religious belief although mother was a Jehovah's Witness and objected to blood transfusions on religious grounds); *Crouse*, 127 Misc. 2d 101, 485 N.Y.S.2d 443. One court, in its concurring opinion, noted that courts have "drawn a distinction between the free exercise of religious belief which is constitutionally protected against any infringement and religious practices that are inimical or detrimental to public health or welfare." Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, ___, 274 S.E.2d 457, 461 (1981) (Smith, J., concurring); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1878); *In re* Jensen, 54 Or. App. 1, 633 P.2d 1302 (1981).

In *Jefferson*, 247 Ga. at ___, 274 S.E.2d at 461, Justice Smith further wrote that the power of the state was not absolute and, therefore, the state was required to find the least restrictive means of burdening the freedom of religion. There was, however, "no less burdensome alternative for preserving the life of a fully developed fetus than requiring its mother to undergo surgery against her religious convictions." *Id.* at ___, 274 S.E.2d at 461.

51. *Crouse*, 127 Misc. 2d at ___, 485 N.Y.S.2d at 445.

52. 381 U.S. 479 (1965).

53. *Id.* at 485-86; *see also* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (protecting the right of an extended family to live together); Stanley v. Georgia, 394 U.S. 557 (1969) (applying principles articulated in *Griswold* to invalidate an obscenity statute).

54. Eisenstadt v. Baird, 405 U.S. 438 (1972).

55. 410 U.S. 113 (1973).

56. *Id.* at 169-70 (Stewart, J., concurring).

57. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1973).

58. For a discussion of parental rights in situations of state intervention to protect the unborn child, see Myers, *supra* note 7, at 53-54, 59; Note, *supra* note 5, at 1061-64 (development of the right of parents to make child-rearing decisions).

Myers also has an excellent section on the rights of the father, in which he points out that "[a]t a minimum, [the father] is entitled to the constitutionally protected right of a parent to freedom from unwarranted government intrusion." Myers, *supra* note 7, at 61.

Myers writes further than when there is a controversy between the mother and father, the

The right to privacy, described as the "right to be left alone,"[59] has long been held as "the most comprehensive of rights and the right most valued by civilized men."[60] It is certainly a valuable right to a pregnant woman, who relies upon it to secure her body from physical intrusion by the state. The courts have recognized this right by declaring unconstitutional, intrusive state regulation of the pregnant woman.[61] If the state can prove it has a compelling reason for such intrusion, the state may encroach upon a woman's privacy. For example, the Georgia Supreme Court in *Jefferson v. Griffin Spalding County Hospital Authority*[62] authorized the hospital to perform a caesarean section upon the mother who was in her thirty-ninth week of pregnancy.[63] The court held:

> [T]he State has an interest in the life of this unborn, living human being. The Court finds that the intrusion involved into the life of Jessie Mae Jefferson and her husband John W. Jefferson, 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.[64]

Hence, even the sacrosanct right of privacy, that is held more "sacred" and is "more carefully guarded" than any other right,[65] can be interfered with when an interest such as protecting an unborn child is established by the state.

The fourteenth amendment further protects the fundamental right to liberty.[66] Freedom from unwarranted bodily restraint flows from this right, as pronounced in *Youngberg v. Romeo*.[67] Any state action to protect

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woman's greater rights will usually predominate for it is she who will physically bear the child and thus is more directly and immediately affected by the pregnancy. *Id*; *see also* Planned Parenthood v. Danforth, 428 U.S. 52, 67-71 (1976).

59. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

60. *Id.*

61. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (holding unconstitutional various provisions of an abortion statute, including: 1) a mandatory twenty-four hour waiting period before performance of any abortion; 2) a requirement that post first trimester abortions be performed in a hospital; 3) an "informed consent" provision; and 4) a requirement concerning the disposal of remains of abortions); *Planned Parenthood*, 428 U.S. at 67-71, 75-79 (holding unconstitutional statutory requirement of spousal consent for abortions and statutory prohibitions of saline amniocentesis as a method of abortion); Doe v. Bolton, 410 U.S. 179, 195-200 (1973) (striking down as "unduly restrictive" statutory requirements that all abortions be performed in accredited hospitals, be approved by a committee of at least three members of the hospital's staff and two physicians in addition to woman's physician, and be restricted to state residents).

62. 247 Ga. 86, 274 S.E.2d 457 (1981).

63. *Id.* at ___, 274 S.E.2d at 458.

64. *Id.* at ___, 274 S.E.2d at 460.

65. Union Pac. Ry. v. Botsford, 141 U.S. 230, 251 (1891).

66. U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .").

67. 457 U.S. 307 (1982) (due process requires freedom from unreasonable bodily restraints); *see also* Shapiro v. Thompson, 394 U.S. 618 (1969).

the unborn child would constrict a pregnant woman's freedom, depriving her of her fundamental right to liberty.[68]

As the above discussion illustrates, the pregnant woman's constitutional rights are not absolute. The state may intervene if it proves it has a compelling interest[69] and the interference is by the least intrusive means available. The next section discusses situations when the state's interest is not sufficiently compelling to warrant interference.

IV. FETAL MEDICAL TREATMENT CASES

State authorities may legally intervene when parents refuse to consent to necessary medical treatment for their children if such interventions will circumvent serious injury or death.[70] Parents have a duty to provide

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68. *See* Johnsen, *supra* note 4, at 619-20.

> Similarly, in order to enforce fetal rights or state regulations dictating behavior during pregnancy, the state would necessarily intrude in the most private areas of a woman's life. The state would have to police what a woman ate and drank, the types of physical activity 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. The enforcement of direct state regulation of pregnant women's actions, as in cases involving court-ordered medical treatment against the pregnant woman's wishes, would require the state forcibly to take the pregnant woman into physical custody in order to impose the ordered action.

Id. at 619.

Johnsen develops a thought-provoking argument that granting the fetus rights would infringe on a woman's equal protection clause guarantee under the fourteenth amendment by "serv[ing] to disadvantage women as women by further stigmatizing and penalizing them on the basis of the very characteristic that historically has been used to perpetuate a system of sex inequality." *Id.* at 620. She develops the argument more fully, see *id.* at 620-25, and concludes:

> Granting rights to fetuses in a manner that conflicts with women's autonomy reinforces the tradition of disadvantaging women on the basis of their reproductive capability. By subjecting women's decisions and actions during pregnancy to judicial review, the state simultaneously questions women's abilities and seizes women's rights to make decisions essential to their very personhood . . . . Fetal rights could be used to restrict pregnant women's autonomy in both their personal and professional lives, in decisions ranging from nutrition to employment, in ways far surpassing any regulation of the actions of competent adult men. The state would thus define women in terms of their childbearing capacity, valuing the reproductive difference between women and men in such a way as to render it impossible for women to participate as full members of society. In light of the great threat to women's right to equality posed by legal recognition of the fetus, the state should bear the burden of ensuring that any law granting fetal rights does not disadvantage women or in any way infringe on the autonomy of pregnant women.

Id. at 624-25.

69. The state almost always asserts an interest in protecting potential life. *See supra* notes 27-38 and accompanying text.

70. *See* Prince v. Massachusetts, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.").

for the maintenance of their children.[71] Both the courts[72] and legislatures[73] have mandated that the term "maintenance" includes medical care; a failure to provide essential medical care constitutes parental neglect.[74] There is, however, a limit on what can be required of the parents. The courts distinguish between two types of parental objection to medical treatment for children—necessary treatment needed to save the life of the child and treatment which is not intended to save the child's life but to improve the quality of that life. The former treatment involves situations where the state may intervene to order the necessary treatment over the parent's objection;[75] the latter involves situations in which the ability of the state to intervene is conditional.

In situations where medical treatment is not necessary for survival, the courts have reached varying results, depending on the unique facts of each case.[76] The courts do offer some basis for the varied decisions. As the

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71. I W. BLACKSTONE, COMMENTARIES 447.

72. *See In re* Appeal in Cochise County, 133 Ariz. 157, 160, 650 P.2d 459, 462 (1982) (en banc); Mitchell v. Davis, 205 S.W.2d 812, 813 (Tex. Civ. App. 1947).

73. *See, e.g.*, ALASKA STAT. § 47.17.070 (Supp. 1987); FLA. STAT. APP. § 827.05 (West Supp. 1987); Virginia does not specifically include "medical care" in its abuse and neglect statute but rather states:

> A. "*Abused or neglected child*" shall mean any child less than eighteen years of age: 2. Whose parents or other person responsible for his care neglects or refuses to provide care necessary for his health; provided, however, that no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be an abused or neglected child.

VA. CODE ANN. § 63.1-248.2 (Repl. Vol. 1987).

74. *Id.*

75. *See, e.g.*, People in the Interest of D.L.E., 645 P.2d 271 (Colo. 1982) (en banc) (parents supported teenager's decision to decline medicine for serious seizure disorder based on religious grounds but court ordered therapy, concluding that the state's parens patriae interest in guarding the well-being of the boy prevailed over his religious objection); Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978) (state was allowed to intervene when parents refused to administer only type of medical treatment which would save child's life); Muhlenberg Hosp. v. Patterson, 128 N.J. Super 498, ___, 320 A.2d 518, 521 (Super. Ct. Law Div. 1974) ("The courts have been and will continue to be the guardian of the religious rights of the individuals to see that this power of the State is not exercised beyond the area where treatment is necessary for the sustaining of life or the prevention of grievous bodily injury.").

76. *See In re* Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955) (court split four to three against ordering surgical repair of fourteen-year-old boy's cleft palate and harelip); *In re* Green, 452 Pa. 373, 307 A.2d 279 (1973) (since fifteen year old boy's life was not in danger, although he could become bedridden due to collapse of his spine, court did not require surgery over mother's and boy's religious objections). *But see In re* Sampson, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972) (court declared fifteen-year-old boy neglected in order to allow lengthy and dangerous cosmetic surgery to be performed on his deformed face); Application of Cicero, 101 Misc. 2d 699, ___, 421 N.Y.S.2d 965, 967 (Sup. Ct. 1979) (court held that infant girl born with spinal disorder should be given a reasonable opportunity to live, grow, and surmount her handicaps).

degree of risk inherent in the medical treatment increases, the greater the deference will be to the parent's decision. Likewise, the less likely the treatment will be successful, the more likely the court will deny intervention. The most important consideration is the degree of harm the child will suffer if the medical care is forbidden. The greater the harm, the more likely the court will intervene to allow the medical treatment.[77]

The well-developed body of law on medical care over parental objection gives the courts substantial guidance when they must determine whether to allow state intervention over the pregnant woman's objection.[78] There are, of course, other considerations which must be included in the analysis of prenatal medical care controversies.[79] Several recent cases are instructive.

In *Jefferson v. Griffin Spalding County Hospital Authority*,[80] the Supreme Court of Georgia denied the parent's motion for a stay of the Superior Court's order authorizing that a caesarean section be performed in the event the mother presented herself for delivery of her child.[81] The examining physician had found that the afterbirth was between the baby and the birth canal and that it would have been virtually impossible for the condition to correct itself prior to delivery.[82] The doctor advised the mother that there was a ninety-nine percent certainty that the child would not be able to survive natural childbirth and only a fifty percent possibility that she would survive vaginal delivery.[83] If a caesarean section were performed before the onset of labor, the mother and child would have an almost one hundred percent chance of survival.[84] The mother refused such delivery and necessary blood transfusion on religious grounds.[85] The court granted temporary custody of the unborn child to the Department of Family and Children Services, giving it full authority to make all decisions including consenting to a surgical delivery.[86] The court rested its decision on the basis that the unborn child was a viable human being entitled to the protection of the Juvenile Court Code of Georgia. It concluded that the child was without proper parental care and subsistence necessary for its physical life and health.[87]

Although the Georgia Court did not cite as authority any of the cases involving parental objection to medical treatment, it is apparent that a

77. Myers, *supra* note 7, at 49-50.
78. *Id.* at 51-52.
79. *See supra* Section II.
80. 247 Ga. 86, 274 S.E.2d 457 (1981).
81. *Id.* at ___, 274 S.E.2d at 460.
82. *Id.* at ___, 274 S.E.2d at 458.
83. *Id.*
84. *Id.*
85. *Id.* at ___, 274 S.E.2d at 459.
86. *Id.*
87. *Id.*

similar analysis, as described previously,[88] was used. In *Jefferson*, the harm to the child was considerable—the child had only a one percent chance of surviving a natural birth. The likelihood of success was also extremely high—almost one hundred percent. Thus, there is a logical basis for allowing such extreme intervention, even though the court neglects to explain its rationale.[89]

The New York courts have also been presented with this issue. In *Crouse-Irving Memorial Hospital v. Paddock*[90] and *In re Jamaica Hospital*,[91] the New York Supreme Court permitted the necessary blood transfusions. In *Crouse-Irving*, the court stated that the state's interest, as parens patriae, in protecting the health and welfare of the child must take precedence over the parent's decision to decline necessary treatment based on constitutional grounds.[92] The court did recognize that it may not "determine the most effective treatment when the parents have chosen among reasonable alternatives."[93] However, the court established its authority to "not permit a parent to deny all treatment for a condition which threatens [the child's] life."[94] In *In re Jamaica Hospital*, the court indicated that the life of the unborn child must be considered,[95] although it recognized that the patient "has an important and protected interest in the exercise of her religious beliefs."[96] Using its parens patriae power, the court held that it was under an obligation to protect the fetus.[97] The New York court regarded the fetus as a human being even though the fetus was not yet viable.[98] After conceding that in the context of abortion, the state does not have a compelling interest to protect potential human life until the fetus reaches viability,[99] the court declined to offer any rationale for its decision and stated that "[i]n this case, the state has a highly significant interest in protecting the life of a mid-term fetus, which outweighs the patient's right to refuse a blood transfusion on religious

88. *See supra* note 78 and accompanying text.

89. Bross, *Court Ordered Intervention on Behalf of Unborn Children*, 7 CHILDREN'S LEGAL RTS. J. 11 (1986).

90. 127 Misc. 2d 101, 485 N.Y.S.2d 443 (Sup. Ct. 1985) (mother would allow a caesarean section delivery but refused the necessary blood transfusions for religious reasons).

91. 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (Sup. Ct. 1985) (mother eighteen weeks pregnant and in critical condition refused blood transfusion on religious grounds although necessary to stabilize her condition and save life of unborn child).

92. 127 Misc. 2d at ___, 485 N.Y.S.2d at 445.

93. *Id.*

94. *Id.* The court further held that the blood transfusions to safeguard the mother's welfare were also permissible. *Id.* at ___, 485 N.Y.S.2d at 445-46.

95. 128 Misc. 2d at ___, 491 N.Y.S.2d at 899.

96. *Id.* The court indicated that if the pregnant woman's life were the only one involved, it would not interfere. *Id.*

97. *Id.* at ___, 491 N.Y.S.2d at 900.

98. *Id.*

99. *Id.* at ___, 491 N.Y.S.2d at 899-900.

grounds."[100] Once again, the pregnant woman's objections were ignored because the state's interest in protecting the fetus was greater than the woman's right to exercise her religious beliefs.

In a similar case, *Taft v. Taft*,[101] the Supreme Court of Massachusetts reached a different result by permitting the pregnant woman's right to prevail. Susan Taft appealed an order that she submit to an operation to hold her pregnancy.[102] The Probate and Family Court judge ordered Mrs. Taft to submit to the operation because the Commonwealth had an interest that justified the burden on her free exercise of religion.[103] The Supreme Court of Massachusetts, however, was concerned with Mrs. Taft's constitutional right to privacy. Since the record did not show circumstances compelling enough to justify the state curtailing Mrs. Taft's constitutional rights,[104] the court held that "[a]ny interest the State may have in requiring a competent adult woman to submit to the operation is not established."[105] Thus, when there is not sufficient evidence that medical treatment is necessary for the sake of the unborn child, the woman's constitutional rights override the interests of the state.[106]

V. Maternal Behavior as a Form of Prenatal Abuse and Neglect

By adopting an analysis similar to that used in deciding prenatal medical care controversies, the courts can determine when the state may intervene in the life of a pregnant woman who is engaged in activities that present a substantial risk to the potential life of her unborn child. Drug addiction or alcohol abuse have been reported to affect the fetus seriously.[107] Even less serious activities such as smoking, social drinking, poor nutrition and other inadequate prenatal care have been shown to cause disorders in the fetus and even death.[108] In its analysis, the court should concentrate mainly on the likelihood and severity of the harm to the fetus

100. *Id.* at ___, 491 N.Y.S.2d at 900.

101. 388 Mass. 331, 446 N.E.2d 395 (1983).

102. *Id.*

103. The court stated that the state had "a fundamental and traditional interest in the physical and mental health of all parents, their children already born, and their unborn children." *Id.* at ___, 446 N.E.2d at 396.

104. *Id.* at ___, 446 N.E.2d at 397. The court stated:

> The record is devoid of facts that support the judgment ordering the wife to submit to an operation against her consent. We have no findings, based on expert testimony, describing the operative procedure, stating the nature of any risks to the wife and to the unborn child, or setting forth whether the operation is merely desirable or is believed to be necessary as a life-saving procedure. We have no showing of the degree of likelihood that the pregnancy will be carried to term without the operation.

105. *Id.*

106. For an excellent discussion of *Taft* and *In re Jamaica Hosp.*, see Note, *supra* note 48, at 966-70; *see also* Myers, *supra* note 7, at 70-71.

107. *See generally* Beal, *supra* note 9, at 358-62.

108. *Id.*

and weigh that against the degree of intrusion in the life of the pregnant woman necessary to achieve the purpose of protecting the unborn child.[109]

Few cases have been decided by the courts in this area. Of those cases that have dealt with this issue, most have been actions against the mother for neglect or abuse. For example, in *In re "Male" R*,[110] the New York Family Court allowed removal of the newborn when neglect proceedings were brought against the mother.[111] Evidence showed that the infant was born suffering from mild drug withdrawal symptoms, that the mother was an abuser of barbiturates, and, as a result of the drug abuse, was unable to care adequately for her child.[112] Thus, under the Family Court Act, the infant was a "neglected child."[113] The court, however, had difficulty using the mother's prenatal conduct as the sole basis for its decision.[114] Instead, the court used the finding of "imminent danger of impairment of the child's physical condition"[115] as the foundation for its holding. In a more recent New York decision, *In re Smith*,[116] the Family Court held that the unborn child could be considered a person under the Family Court Act.[117] Similar to *In re "Male" R*, the court decided that the child, who was born with the possibility of having fetal alcohol syndrome, was a neglected child under the theory of imminent danger of impairment.[118] The court then addressed the issue, raised but side-stepped in *In re "Male" R*,[119] of whether a finding of neglect could be predicated solely upon the basis that the prenatal drug use caused an actual physical impairment.[120] The court held that it could.[121] This decision and a Michigan decision, *In re*

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109. *See* Myers, *supra* note 7, at 52-53.
110. 102 Misc. 2d 1, 422 N.Y.S.2d 819 (Fam. Ct. 1979).
111. *Id.* at ___, 422 N.Y.S.2d at 825.
112. *Id.* at ___, 422 N.Y.S.2d at 820.
113. *Id.*
114. *Id.* at ___, 422 N.Y.S.2d at 824-25.
115. *Id.* at ___, 422 N.Y.S.2d at 825.
116. 128 Misc. 2d 976, 492 N.Y.S.2d 331 (Fam. Ct. 1985).
117. *Id.* at ___, 492 N.Y.S.2d at 335.
118. *Id.*
119. *See supra* note 114 and accompanying text.
120. *Smith*, 128 Misc. 2d at ___, 492 N.Y.S.2d at 334.
121. *Id.* The court stated:

> In at least one reported decision, a court has held that the excessive use of drugs, prior to birth, would support a finding that a child was a "neglected child" on the theory that the parent would be unable to provide adequate care subsequent to birth. *In re "Male" R*, 102 Misc. 2d 1, 422 N.Y.S.2d 819 (1979). However, the same court expressed reservation in regard to predicating such a finding solely upon the basis that the prenatal drug use caused an actual physical impairment. *Cf.* dictum contained in *In re Vanessa "F"*, 76 Misc. 2d 617, 351 N.Y.S.2d 337 (1974). The only distinction, of course, is the fact that, after birth, a child is a person who requires care and supervision, and it may be safely concluded that a mother, who is addicted to drugs would not possess the mental capabilities of providing that care because of her continued addiction and use. On the other hand, drug or alcohol abuse, which results in actual physical impairment at the time of birth, depends solely upon conduct and

Baby X,[122] establish that prenatal mistreatment can be considered probative of neglect,[123] giving the state authority to remove the infant from the mother's custody, at least temporarily.[124]

In re Ruiz[125] is the most helpful decision on this issue. *In re Ruiz* held that an infant born to a mother addicted to heroin was abused by the mother within the meaning of a statute prohibiting parents from creating a substantial risk to the health or safety of their child.[126] The court determined that at the point of viability the state had an interest in the child's care, protection and development.[127] In a lengthy opinion, the court decided that the unborn was entitled to legal protection.[128] The court then determined that the unborn child was a person under the child abuse statute, and as such had the right to begin life with a sound mind and body.[129]

In *Reyes v. Superior Court*,[130] a decision contrary to the previous examples, the court held that a statute relating to felony-child endangering did not refer to an unborn child or fetus.[131] Thus, a pregnant woman who continued taking heroin during her pregnancy and failed to seek prenatal care resulting in the birth of twins addicted to heroin, could not be charged with felony-child endangering.[132] The court concluded that if the legislature had intended to confer legal personhood on the fetus, it would have expressed that intent in specific and appropriate terms.[133] Since there was no reference to the fetus in the statute, the legislature clearly

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> consequences, involving an unborn child. Although the proof in the instant proceeding is insufficient to establish that the Respondent's abuse of alcohol, during pregnancy, actually caused fetal alcohol syndrome at the time of birth, the Court nevertheless, holds that such proof was sufficient to establish an "imminent danger" of impairment of physical condition including the possibility of fetal alcohol syndrome, to the unborn child. For similar reasons, the Court furthermore holds that the failure to obtain prenatal, medical care except on one occasion, constituted conduct which created the same "imminent danger", given the Respondent's history of alcohol abuse.

Id.

122. 97 Mich. App. 111, 293 N.W.2d 736 (Ct. App. 1980).

123. *Id.* at ___, 293 N.W.2d at 739.

124. *Id.* "We pass no judgment upon whether such conduct will suffice to permanently deprive a mother of custody. Such custody determinations will be resolved at the dispositional phase where prenatal conduct will be considered along with postnatal conduct." *Id.*

125. 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (Ct. Com. Pl. 1986).

126. *Id.* at 35, 500 N.E.2d at 939.

127. *Id.* at 34, 500 N.E.2d at 938.

128. *Id.* at 32, 500 N.E.2d at 936.

129. *Id.* at 35, 500 N.E.2d at 939.

130. 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (Ct. App. 1977).

131. *Id.* at 219, 141 Cal. Rptr. at 915.

132. *Id.* at 219, 141 Cal. Rptr. at 914.

133. *Id.* at 219, 141 Cal. Rptr. at 915.

excluded the unborn child from protection under the statute.[134] *Reyes*, however, can be distinguished from the cases examined previously. Foremost is the fact that the statute in *Reyes* was a criminal statute requiring a strict interpretation.[135] In addition, the decision is ten years old. In light of the previous discussion of recent case law, it would seem appropriate for the California court to reach a different result today.

VI. Achieving the Optimal Balance of Interests

By virtue of the fact that prenatal cases, without exception, involve a pregnant woman's constitutional rights, a balancing approach must be used by the courts to determine when the state may intervene.[136] On one side of the scale sits the state's interest in the unborn child;[137] on the other side rests the constitutionally protected rights of the pregnant woman—the right to bodily integrity, to make intimate decisions, to privacy and liberty from bodily restraint.[138] The degree of justification for state action which the state must establish rises in direct proportion to the level of intrusion upon the pregnant woman's rights. To justify intervention, the state must show a compelling interest.[139] The state must also demonstrate that its action will be by the least intrusive means available.[140] Each prenatal neglect case will entail a balancing of interests by the judge, since no absolute rule can be established.[141] Because the interests involved will vary from case to case, it is necessary that the court's decision be tailored to the unique facts of the particular case.[142] While this approach requires the court to devote more time and effort, the interests involved certainly warrant such attention.

To make the court's task a bit easier, limitations on state intervention can be established. *Roe v. Wade* validated the state's interest in potential human life.[143] This interest extends to protecting the unborn child from injury. It would be inconsistent for the law to require a woman to give

134. *Id.*

135. *Id.* at 219, 141 Cal. Rptr. at 914.

136. *See Developments in the Law, supra* note 39, at 1166-87, 1193-97.

137. *See supra* notes 27-38 and accompanying text.

138. *See supra* notes 39-71 and accompanying text.

139. For a discussion of the "compelling state interest doctrine" as applied to fetal medical cases, see Note, *supra* note 48, at 975-77.

140. *See* People v. Pointer, 151 Cal. App. 3d 1128, 1139, 199 Cal. Rptr. 357, 365 (1984) (quoting People v. Arvanites, 17 Cal. App. 3d 1052, 95 Cal. Rptr. 493, 500 (1971)) ("If available alternative means exist which are less violative of a constitutional right and are narrowly drawn so as to correlate more closely with the purpose contemplated, those alternatives should be used.").

141. *See* Note, *supra* note 5, at 1066-67.

142. *Id*; *see Developments in the Law, supra* note 39, at 1197.

143. 410 U.S. 113, 150 (1973).

birth to a child but not protect that same infant from preventable injuries which may mar it for life.[144]

After establishing that the state has a legitimate interest in protecting the unborn child which extends to protecting the fetus from injury, the difficult question arises in determining the point in the pregnancy at which the state may intervene. The strongest argument is that the state may intervene only after the fetus is viable.[145] Before such time, it is argued, the state does not have a compelling enough interest to justify intrusion into the constitutional rights of the mother.[146] The problem with this position is the "stark reality"[147] that prenatal abuse and neglect can occur from the moment of conception. For this reason the non-viability argument is persuasive and appealing.[148] The argument for state intervention before the fetus is viable must be rejected because, according to the Supreme Court's decision in *Roe v. Wade*, the state's interest is only compelling enough to justify interference in the pregnant woman's action after the fetus is viable.[149] Before viability, the state's interest is subordinate to the woman's right "to be left alone."[150]

VII. CONCLUSION

Although there are still unresolved issues in this area, recent court decisions offer an improved framework for answering the initial question: when, if ever, may the state intervene in the life of a pregnant woman to curtail abuse or neglect of her unborn child. Based on recent decisions and the trend toward giving the fetus rights, albeit limited with respect to the constitutional rights of the mother, the answer is that the state is authorized to intervene in limited situations. There can, however, be no absolute rule, as the decision rests upon a careful balancing of the state's interests and the rights of the unborn child with the mother's constitutional rights and interests. If the state can show it has a compelling inter-

144. For an exceptional argument for recognition of limited state authority to prevent prenatal neglect and abuse, see Meyers, *supra* note 7, at 64-65.

145. Professor Patricia King extensively argues for protection of the viable fetus. *See* King, *supra* note 4, at 1673-87.

146. *See* Note, *supra* note 48, at 980.

147. Myers, *supra* note 7, at 66.

148. Myers argues:

> Since fetal damage can be substantial and permanent when injury occurs prior to viability, state authority to intervene should exist throughout the period of vulnerability. It makes little sense to force the state to sit powerless while a pregnant woman inflicts irreparable injury on her fetus simply because the child is a month or a day shy of viability. Added to this is the fact that tort law has abandoned viability as a line of demarcation for liability because it is an illogical cut off point. The state's role in prevention of abusive injury should not be more limited.

Id. at 66-68.

149. 410 U.S. 113, 162-64 (1973).

150. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

est in the viable fetus, that the intervention is necessary to prevent serious injury or save the life of the unborn child, and that the intrusion is to be accomplished by the least invasive means available, then the pregnant woman's rights to privacy and liberty must yield to the government action. In situations where the fetus is not yet viable or the interference is not imperative to save the life of the unborn child, the mother's constitutional rights will usually prevail.

Heather M. White