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## A CHANGING OF THE GUARD: THE PROPRIETY OF APPOINTING GUARDIANS FOR FETUSES

Close to thirty years after *Roe v. Wade*,<sup>1</sup> Jean Reith Schroedel wrote, “[r]egardless of the specific policy, the fundamental dilemma remains balancing the rights of the fetus and the rights of the pregnant woman. . . . While *Roe*, perhaps unwittingly, began the balancing act between the woman and the fetus, subsequent cases permanently fixed it in the legal debate.”<sup>2</sup> Schroedel’s assessment of the “balancing” involved in fetal rights law and policy is increasingly evidenced by judicial and legislative efforts to extend legal rights to fetuses, including those areas of law in which the fetus’s rights conflict with the rights of the mother.<sup>3</sup> Many oppose increased fetal rights in any context, arguing that independent legal status for fetuses “diminishes a woman’s rights, creating a continuous ‘slippery slope’ of state intervention into women’s lives.”<sup>4</sup> Cynthia Daniels writes that the notion that the fetus has rights “has generated a deep crisis . . . which throws into question women’s rights to self-sovereignty, to work, and to due process under the law . . . and one that suggests the tenuous nature of women’s hold on liberal citizenship.”<sup>5</sup> By contrast, those in favor of fetal rights argue that *Roe*’s holding does not

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1. 410 U.S. 113 (1973).

2. JEAN REITH SCHROEDEL, *IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES* 44-45 (2000).

3. For example, the extension of personhood status to the fetus in wrongful death tort cases has, in Schroedel’s view, “contributed to the trend of viewing the fetus as a person with independent rights in civil law.” *Id.* at 174. Fetal rights have also expanded in criminal homicide law and in the prosecutions of mothers for prenatal substance abuse during pregnancy. *Id.* at 105-106, 137. However, courts extending such rights to fetuses in non-abortion contexts are careful to deny any implications for *Roe*’s holding that a fetus is not a person for purposes of the Fourteenth Amendment. For example, the Mississippi Supreme Court recently held that the term “person” in the Mississippi wrongful death statute includes a “quick” fetus. 66 Fed. Credit Union v. Tucker, 853 So. 2d 104, 112 (Miss. 2003). The court offered assurance that *Roe* “is not implicated here” because the mother’s fundamental right to privacy is not involved when considering a third party’s negligence. *Id.* at 113-14.

4. SCHROEDEL, *supra* note 1, at 44. See also Janet Gallagher, *Prenatal Invasions & Interventions: What’s Wrong with Fetal Rights*, 10 HARV. WOMEN’S L.J. 9 (1987); Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts With Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986).

5. CYNTHIA R. DANIELS, *AT WOMEN’S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 1 (1993). Daniels goes on to say that many challenge the expansion of fetal rights as “yet another attempt to reinstate social domination over women.” *Id.* at 3.

preclude states from recognizing and protecting the legal interests of fetuses outside the abortion context.<sup>6</sup> They also argue that advancing medical technology, which increasingly reveals the independent humanity of the unborn, provides tangible evidence of a protectible human being prior to birth.<sup>7</sup>

When the abortion right is at issue, States cannot legally extend rights *per se* to fetuses but have a recognized interest from conception in protecting potential human life under the Supreme Court's 1992 decision *Planned Parenthood v. Casey*.<sup>8</sup> In that case, the Court held that States may protect this interest by regulating abortion at any point in pregnancy, so long as the regulation does not place an undue burden on the woman's right to choose.<sup>9</sup> Thus, while a woman's right to a pre-viability abortion remained intact after *Casey*, the undue burden test gave more weight to the State's interest than had *Roe* and required a more significant showing to invalidate an abortion regulation.<sup>10</sup> The result has been a balancing of conflicting rights in abortion and non-abortion situations, sometimes a conflict that is between the fetus's rights and the mother's rights and sometimes between the State's interest in the fetus and the mother's rights.

A relatively recent question in this balancing act has been whether a court may properly appoint a guardian for a fetus in various court proceedings. Representative types of cases in which guardians are sought or appointed include "forced medical treatment cases, [c]ases involving allegations of substance abuse during pregnancy," and abortion cases.<sup>11</sup> There is, however, no consensus as to whether and in what situations such an appointment is proper. For example, in Alabama, courts have allowed a guardian for the fetus during proceedings in which a minor seeks a judicial bypass of parental

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6. See generally Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not To Be: Protecting The Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257 (arguing that some courts under *Roe* have incorrectly applied the denial of personhood under the Fourteenth Amendment to non-abortion contexts). See also Charles I. Lugosi, *Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn from Creation to Natural Death*, 48 ST. LOUIS U. L.J. 425 (2004).

7. SCHROEDEL, *supra* note 2, at 4-5. It is worth noting that both pro-life and pro-abortion advocates see granting fetuses rights outside of abortion as logically suspect. Those who favor abortion rights believe that any fetal rights ultimately threaten the right to abortion, and should be opposed. Those against abortion argue that the growing trend towards fetal rights is one of the reasons to call into question the continued recognition of the abortion right. See DANIELS, *supra* note 5, at 3-4. Both sides recognize the difficulty in maintaining the analytical distinction between fetal rights when abortion is at issue and when it is not.

8. 505 U.S. 833, 846 (1992).

9. *Id.* at 878.

10. *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 443 (6th Cir. 2003) (noting that one of *Casey's* goals was "restor[ing] a balance of interests between women seeking abortions and states seeking to regulate abortions by reasserting the importance of the states' interests").

11. Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem For Fetuses and Embryos*, 66 WASH. L. REV. 503, 521 (1991).

consent to have an abortion.<sup>12</sup> By contrast, the Florida Supreme Court has held such an appointment in a similar situation “clearly improper.”<sup>13</sup> Justifications for allowing the appointments center on either the need to protect the rights of the fetus in non-abortion related proceedings,<sup>14</sup> or the need to protect the State’s interest in the potential life of the fetus in abortion related proceedings.<sup>15</sup> By contrast, opponents of guardian appointments argue that guardianship statutes do not make provision for appointment of a fetal guardian, and thus the appointment is statutorily improper.<sup>16</sup> Others argue that as a practical matter, a guardian would have difficulty ascertaining the best interests of a fetus without resorting to personal moral judgments. Furthermore, they contend that the appointment creates an adversarial relationship between the woman and fetus that is “ultimately inimical to the promotion of the interests of both woman and fetus.”<sup>17</sup> Finally, opponents of guardians for fetuses contend that such an appointment strikes at the heart of the right of a woman to choose abortion by tacitly—and improperly under current law—recognizing the fetus as a “person” and placing an undue burden on women.<sup>18</sup> These are the basic contours of the arguments in what some have called the “wave of the future” in abortion regulations.<sup>19</sup>

This Comment will argue that appointing guardians for fetuses in court proceedings involving a “maternal-fetal” conflict is necessary and proper under

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12. *In re Anonymous*, 720 So. 2d 497, 500 (Ala. 1998) (holding that a guardian did not have a statutory right to appeal but nowhere indicating that such appointment was improper). By 2001 in Alabama, there had been at least seventeen instances in which minors seeking to waive parental consent had been questioned by an appointed representative of the fetus. Helena Silverstein, *In The Matter of Anonymous, A Minor: Fetal Representation in Hearings to Waive Parental Consent For Abortion*, 11 CORNELL J.L. & PUB. POL’Y 69, 87 (2001).

13. *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989) (holding that the appointment of a guardian ad litem for the fetus was “clearly improper,” but offering no reasoning for its decision on that issue).

14. *See Anonymous*, 720 So. 2d at 503. Here, the dissent argued that Rule 17(c) of the Alabama Rules of Civil Procedure, which historically had been applied to protect the property interests of the unborn and also had been used in divorce proceedings, ought to be used to require the appointment of a guardian ad litem for the fetus in judicial bypass proceedings. *Id.* at 501-02. According to the rule “[w]hen the interest of an infant unborn or unconceived is before the court, the court may appoint a guardian ad litem for such interest.” *Id.* at 499 n.2 (alteration in original).

15. *See* Brief of Amici Curiae Florida Right to Life, Inc., et. al. at 1, *In re Guardianship of J.D.S.*, 864 So. 2d 534 (Fla. Dist. Ct. App. 2004) (No. 5D03-1921). *See also* Silverstein, *supra* note 12, at 91-110 (arguing that appointment of guardians in parental consent waiver hearings for minors passes constitutional muster under *Casey*, but that such a conclusion evidences *Casey*’s “serious shortcomings”).

16. *See, e.g., In re Guardianship of J.D.S.*, 864 So. 2d 534, 538 (Fla. Dist. Ct. App. 2004).

17. *See* Goldberg, *supra* note 11, at 544.

18. *See* Renewed Brief of Amici Curiae ACLU, et. al. at 2, *In re Guardianship of J.D.S.*, 864 So. 2d 534 (Fla. Dist. Ct. App. 2004) (No. 5D03-1921) (arguing that a fetus is not a person within the meaning of Florida’s guardianship statutes, and therefore appointment is improper).

19. Silverstein, *supra* note 12, at 89 (quoting pro-life advocate Julian McPhillips).

current law.<sup>20</sup> It is important to note at the outset that the argument will proceed along two distinct lines of analysis, one considering the question when abortion is not at issue and the other when abortion is at issue. This Comment will argue that the rights and interests directly attributable to the fetus form the primary justification for guardianship appointments in non-abortion contexts, and the State interest articulated in *Casey* forms the primary justification in abortion contexts. In *non-abortion* contexts, fetal guardians are proper as the procedural means by which to protect a fetal right before the court. These normally take the form of 1) a grant by the state of fetal personhood; 2) a legal interest in beginning life with sound mind and free from harm; or, more indirectly, 3) a state interest in protecting the fetus from harm. As a procedural mechanism, the propriety of a guardian appointment is a distinct question from the propriety of the underlying substantive right or interest that it must protect. It is legitimized by or derives from either the prior existence of the right or a court's consideration of the right.<sup>21</sup> In short, if there is a protectible right or interest properly before a court, the State has a *parens patriae* duty to protect that right or interest, and a guardian for the fetus is the appropriate means to do so.<sup>22</sup>

In *abortion* contexts, fetal guardians are proper as the means to protect the State's interest in the potential life of the unborn and do not, under current federal constitutional jurisprudence, constitute an undue burden on the woman's right to choose abortion.<sup>23</sup> The Comment does not contend that under current law a fetus can have substantive legal rights that conflict with its mother's right to have an abortion such that increasing fetal rights outside the abortion context somehow "overflow" to legitimize guardianships in abortion situations. Instead, the argument will be limited to applying the *Casey* standard to guardianship appointments. Thus, whether the interest at stake is

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20. I use "maternal-fetal" conflict broadly here to encompass any court proceeding in which a mother's choice (e.g., to use illegal drugs) conflicts with what is arguably in the best interest of the fetus (e.g., to be free from beginning life addicted to drugs).

21. The interest at stake when the question of a right or legal status is before the court, where the State has yet to decide whether to extend the right or status to the fetus, is that the outcome of the litigation will either lead to a recognized right or it will not. Thus, the fetus has a protectible future interest in the outcome of the litigation, or, at the very least, the State has an interest in seeing that its interest in potential life is fairly represented at the proceeding. See more detailed discussion of this issue *infra* at 21-24.

22. The Comment will argue throughout Part II that the fact of such protectible rights is an increasing reality in many states.

23. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (stating that the "State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child"). For the record, the author is of the opinion that *Roe*, and by extension *Casey* insofar as it reaffirms *Roe*, was wrongly decided and that a fetus should have the protected rights of a constitutional person. However, the Comment argues in Part III that notwithstanding this denial of personhood, a fetus deserves the protection of a guardian.

imputed to the fetus (in non-abortion contexts) or the State (in abortion contexts), the result is a need to protect the interest before the court through appointment of a fetal guardian.

Part I will discuss the theory and purposes of appointing guardians, including the source of a court's authority to appoint guardians and its connection to the State's *parens patriae* duty. Part II will give a general history of fetal rights law and discuss those rights in cases of prenatal substance abuse and forced medical treatment cases generally, as well as in the few cases that consider the appointment of guardians. Part II will also offer analysis and conclusions regarding the propriety and appointment of guardians in these contexts. Part III will discuss *Casey* and subsequent "undue burden" jurisprudence, analyze abortion related cases involving appointments of guardians for fetuses, and argue that such appointments pass the *Casey* "undue burden" standard. Parts II and III will also discuss the primary arguments offered against appointing guardians.

#### I. A PRELIMINARY MATTER: THE PURPOSE AND FUNCTION OF A GUARDIAN

While the law governing guardianships historically did not contemplate fetuses, the question for the purpose of this Comment is whether the principles underlying court-appointed guardians are properly applicable to fetuses in the context of their expanding legal rights and in the context of the State's recognized interest in protecting them. The appointment of guardians for minors has its roots in property law.<sup>24</sup> Because minors "[were] presumed [to be] wanting in discretion to manage their own causes, or to appoint and instruct attorneys . . . it [became] the duty of courts, in order to preserve their property from destruction or waste, to appoint a guardian to take care of it pending the proceedings."<sup>25</sup> The State was seen to have a general right as "*pater patriae*" to interfere in particular cases, for the benefit of such who are incapable to protect themselves.<sup>26</sup> This duty of the state continues to exist in cases "where a potential conflict exists between the usual decisionmaker and the individual whose interests are at stake."<sup>27</sup> In the Twentieth Century, the guardian has been described as serving a dual function related to the state and to the child. The first and most "direct" function is in the relation between the guardian and his ward.<sup>28</sup> The second role is as "trustee of the state's interests

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24. J. G. WOERNER, A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP OF MINORS AND PERSONS OF UNSOUND MIND 1 (1897).

25. *Id.* at 63. Another author writing in the mid-1900s said that this duty of the court arises because the child is not a juridical person and thus has no standing in court if he sues or is sued without a guardian. RICHARD V. MACKAY, GUARDIANSHIP AND THE PROTECTION OF INFANTS (LAW FOR THE PARENT AND GUARDIAN) 13 (1948).

26. *Id.* at 2 (quoting Lord Hardwicke, speaking of the High Court of Chancery).

27. Goldberg, *supra* note 11, at 505.

28. HASSELLTINE BYRD TAYLOR, LAW OF GUARDIAN AND WARD 5 (1935).

in the ward” and as such, the guardian is the “actual” protector on behalf of the “metaphysical entity” of the state.<sup>29</sup>

The type of guardian appointed in a court proceeding is a guardian ad litem, “whose duty it is to bring the rights of the infant to the notice of the court.”<sup>30</sup> The power to appoint such a guardian is “inherent in every court.”<sup>31</sup> Historically, it was the duty of the court to see that the guardian ad litem made a proper defense of its ward and did not “surrender the rights” of the ward.<sup>32</sup> The state had an obligation to intervene “when it perceive[d] that a parent has acted in a manner that contravenes the state’s protective obligations.”<sup>33</sup> Today, such protective obligations often arise by statute in situations of suspected child abuse or neglect, as well as in response to allegations of medical neglect or withholding of medical treatment.<sup>34</sup> The question for this Comment is whether these traditional rules of guardianship appointments are applicable to a fetus, either to protect its own interests or the State’s interests. Indeed, Susan Goldberg has argued that they are not applicable but bases this contention on the fact that “[c]urrent legal theories do not accord to the fetus or embryo the status and legal protections afforded to children.”<sup>35</sup> Contrary to Goldberg’s assertion, the law in fact *does* accord the fetus many legal protections that are within constitutional bounds and does recognize a State interest in the fetus. As a result, the traditional rules of guardianship appointments are applicable to fetuses.

Prior to examining particular situations in which guardianship appointments arise, two objections of general application should be discussed. First, a common argument is that, absent a state statute authorizing appointment of a guardian for a fetus, a court has no power to make the

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29. *Id.* In Taylor’s view, this second function has not been generally recognized, but its importance is “fundamental.” *Id.* Taylor reasons that the responsibility of the state for all children is a long-established responsibility, and that as such, the state must be conscientious in its appointment and monitoring of guardians. *Id.*

30. WOERNER, *supra* note 24, at 64.

31. *Id.* A guardian ad litem is “appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party.” BLACK’S LAW DICTIONARY 713 (7th ed. 1999). According to Susan Goldberg, the role of the guardian ad litem is distinguishable from the role of an advocate. “The guardian ad litem represents the best interests of the individual, regardless of the individual’s preferences. An advocate . . . is a proponent of the individual’s point of view.” Goldberg, *supra* note 11, at 505 n.2.

32. WOERNER, *supra* note 24, at 71. In exercising this protection on behalf of minors, the courts did not wish to contravene the rights of parents and normally would only appoint a guardian if the parents were dead or declared unfit to have custody of their children. *Id.* at 90-91.

33. Goldberg, *supra* note 11, at 507.

34. *Id.* at 508.

35. *Id.* at 504.

appointment.<sup>36</sup> However, as the brief history above indicates, courts have long had an inherent power to appoint guardians absent statutory authority when the court identifies a protectible right before it.<sup>37</sup> Second, some have argued that a guardianship appointment is improper because it “creates” an adversarial relationship between the mother and the fetus.<sup>38</sup> However, as will be discussed in more detail below, it is the substantive right or interest that the guardian is charged with protecting that creates an adversarial relationship between mother and fetus. While a court proceeding may involve a guardian “confronting” the pregnant mother, such confrontation merely constitutes a necessary function of the court in discharging its “rights protecting” duty and does not itself create the maternal-fetal conflict. While one may argue for the impropriety or unconstitutionality of the right or State interest that triggers the appointment, the cause of the adversity is antecedent to the appointment and functioning of the guardian. Third, many argue that the fetus is not a legal “person” and therefore cannot be a “ward.” The short answer to this objection, which will be discussed further below, is that in the limited historical use of guardians for fetuses, a guardian has been deemed appropriate so long as the fetus has a protectible interest, notwithstanding a lack of legal personhood.<sup>39</sup> We now turn to an examination of the history and current state of substantive rights being granted to fetuses.

## II. FETAL RIGHTS IN NON-ABORTION CONTEXTS: A GROWING TREND

### A. *The Development of Fetal Rights With Respect to Third Parties*

While fetal rights with respect to third parties do not occasion the need for a court appointed guardian, the history of these rights is crucial to understanding the current extensions of fetal rights. According to Cynthia Daniels, the earliest fetal rights case was *Dietrich v. Northampton*,<sup>40</sup> in which a pregnant mother miscarried her four to five month old fetus after a fall

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36. See *In re Guardianship of J.D.S.*, 864 So. 2d 534, 539 (Fla. Dist. Ct. App. 2004) (offering the absence of a provision for fetuses in the state statute governing guardian appointments as one of its reasons for refusing to appoint a guardian).

37. See *supra* note 31 and accompanying text. See also Goldberg, *supra* note 11, at 506 (stating that “[c]ourts derive authority to appoint guardians ad litem from statutory provisions, procedural rules and their own inherent equity power”).

38. See Goldberg, *supra* note 11, at 528. In the context of the recent Florida case, the executive director of the ACLU of Florida said, “[w]hen you set up a guardian for a fetus, you’re creating a situation with the mother and the fetus having competing legal rights.” Abby Goodnough, *No Guardian for a Fetus, Court Rules*, at <http://www.nytimes.com/2004/01/11/national/11FLOR.html?pagew> (Jan. 11, 2004).

39. See *Roe v. Wade*, 410 U.S. 113, 162 (1973). See also, MACKAY, *supra* note 25, at 13.

40. DANIELS, *supra* note 5, at 10 (citing 138 Mass. 14 (1884)).



resulting from a defect in the town highway.<sup>41</sup> Oliver Wendell Holmes denied the mother damages in tort because the fetus was “part of the mother at the time of the injury” and not a person recognized by law as having standing in courts.<sup>42</sup> This view of the fetus held sway until, in 1887, a state court granted fetuses limited rights to inherit property even when the benefactor died prior to the birth of the fetus.<sup>43</sup>

In 1946, the court in *Bonbrest v. Kotz* allowed recovery for fetal harm caused by a doctor’s negligence during delivery.<sup>44</sup> While this case extended the rights of a fetus to *in utero* injuries, the holding was limited to post-viability injuries, and recovery was contingent upon the subsequent birth of the child.<sup>45</sup> This post-viability limitation fell in the context of tort law in 1953 when a New York court held that a child, born alive, may recover for prenatal

41. *Id.* at 14-15.

42. *Id.* at 17.

43. RACHEL ROTH, MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS 20 (2000). In American law, fetuses have been accorded their most significant and long-standing protections in the area of property law. At common law, a life in being existed from the moment of conception and the actual right to inherit was contingent upon live birth. Goldberg, *supra* note 11, at 517. Goldberg argues that the rationale for this protection was not the legal status of the fetus but rather the protection of the presumed intentions of the testator and a limitation on the harsh application of the rule against perpetuities. *Id.* See also Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women’s Live After Webster*, 138 U. PA. L. REV. 179, 186-87 (1989). The author stated:

Legal recognition of the fetus first occurred in narrow, specifically identified contexts under tort and probate law to advance specific purposes that do not depend on a particular moral view of the fetus’ value and do not create legal conflicts with pregnant women. . . .

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... [and] were applied solely in ways consistent with and supportive of the interests of pregnant women.

*Id.*

44. 65 F.Supp. 138, 142-43 (D.D.C. 1946).

45. The born-alive rule stood for the proposition that unless a child was born alive, the ostensible right connected to prenatal injury did not attach or come to fruition. Aaron Wagner, Comment, *Texas Two-Step: Serving Up Fetal Rights By Side-Stepping Roe v. Wade has Set the Table for Another Showdown on Fetal Personhood in Texas and Beyond*, 32 TEX. TECH L. REV. 1085, 1100 (2001). The English common law described the rule as follows:

If a woman be quick with child, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the child dyeth in her body, and she is delivered a dead child, this is a great misprision, and no murder; but if the child be born and dyeth of the potion, battery, or other cause, this is murder; for in the law it is accounted a reasonable creature, in *rerum natura*, when it is born alive.

*Id.* (quoting 3 SIR EDWARD COKE, INSTITUTES 58 (1648)). By contrast, a “viability” view holds that some level of fetal rights attach when the fetus is capable of independent existence outside the womb, whether or not the fetus is subsequently born alive. *Id.* at 1102. Today, most states have abandoned the born-alive rule in favor of the theory of viability as the appropriate measure for granting the fetus rights. *Id.*

injury caused by a third party's negligence at any time at or after conception.<sup>46</sup> While cases like this extended protection to the fetus from conception, the born-alive rule created a certain anomaly, namely that a woman whose fetus sustained injuries from a beating of the woman could recover damages so long as the child was born with those injuries but could recover nothing if the fetus died in utero from the injuries.<sup>47</sup> This problem led to an increase in advocacy for abolition of the born-alive rule and for greater protection for the fetus in utero, and, in 1984, Massachusetts affirmed the personhood of a fetus who died from injuries in a car accident.<sup>48</sup> In the subsequent history of tort law, some states have extended full rights of persons to fetuses from conception. For example, in 1995 the Missouri Supreme Court declared that its "legislature [had] intended the courts to interpret 'person' within [its] wrongful death statute to . . . [include] a claim for the wrongful death of [an] unborn child, even prior to viability."<sup>49</sup> In 2003, the Supreme Court of Mississippi held that the state wrongful death statute included a non-viable fetus who is "quick" in the womb.<sup>50</sup> As support for the conclusion, the court cited the state's general public and social policy of protecting life.<sup>51</sup>

Fetuses have also enjoyed increased protection from third-party harm under criminal homicide laws. The case law and statutes that apply to fetuses can be "classified according to whether they accord the fetus no independent

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46. Kelly v. Gregory, 125 N.Y.S.2d 696, 698 (N.Y. 1953). Other states soon followed suit. See, e.g., Hornbuckle v. Plantation Pipe Line Co., 93 S.E.2d 727 (Ga. 1956); Bennett v. Hymers, 147 A.2d 108 (N.H. 1958); Smith v. Brennan, 157 A.2d 497 (N.J. 1960). Daniels points out that the court's statement in *Brennan* that "the child has a legal right to begin life with a sound mind and body," used to affirm the right of the child to sue for third party damages also affirmed the more general "right of the child to be protected from negligence or harm in utero." DANIELS, *supra* note 5, at 12. This language laid the groundwork for later expansion of fetal rights beyond injuries caused by third parties. *Id.*

47. DANIELS, *supra* note 5, at 14.

48. Commonwealth v. Cass, 467 N.E.2d 1324, 1330 (Mass. 1984). According to Daniels, the 1980s was a decade of unprecedented extension of fetal rights as the fetus increasingly came to be viewed as a tiny "person" within the body of the pregnant woman. DANIELS, *supra* note 5, at 9. This expansion of fetal rights coincided with the technological ability to see the fetus in its human form ever earlier in pregnancy, thereby buttressing the argument for distinct legal rights. *Id.* at 10.

49. Connor v. Monkem Co., Inc., 898 S.W.2d 89, 92 (Mo. 1995). See also Strzelczyk v. Jett, 870 P.2d 730 (Mont. 1994); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996); Farley v. Sartin, 466 S.E.2d 522 (W. Va. Ct. App. 1995). But see Coveleski v. Bubnis, 634 A.2d 608, 610 (Pa. 1993) (rejecting a cause of action for wrongful death on behalf of a non-viable fetus); LaDu v. Oregon Clinic, P.C., 998 P.2d 733, 738 (Or. Ct. App. 2000) (en banc) (holding that a non-viable fetus was not a person under state wrongful death statute).

50. 66 Fed. Credit Union v. Tucker, 853 So. 2d 104, 112 (Miss. 2003). According to the court, every jurisdiction in the country as of the date of their decision allowed recovery for prenatal injuries when a child is born alive, and six states allowed recovery for a non-viable fetus that dies while still in the womb. *Id.* at 107.

51. *Id.* at 113.

value, some independent value but less than personhood status, or full personhood status.”<sup>52</sup> According to Americans United For Life, twenty-seven states currently treat the killing of a fetus as a form of homicide.<sup>53</sup> For example, in 1990 the Supreme Court of Minnesota declared constitutional a statute designating as first-degree murder the premeditated intentional killing of an unborn child.<sup>54</sup> In 1994, California’s Supreme Court held that viability was not a necessary element of fetal murder, thereby extending its fetal murder statute to include any fetus beyond the embryonic stage of development.<sup>55</sup> As recently as 2003, the Supreme Court of Arkansas denied postconviction relief to a defendant convicted under the state’s Fetal Protection Act, which defined a person under the state’s homicide statute to include a fetus beyond twelve weeks development.<sup>56</sup> At the federal level, the Unborn Victims of Violence Act was signed into law on April 1, 2004, making it a separate offense under federal law to kill an unborn child.<sup>57</sup> As states and the federal government have extended rights to fetuses vis-à-vis third parties, they have been careful to note that the extension does not implicate the constitutional right to an abortion.<sup>58</sup> However, the question whether states could or would extend rights to fetuses when those rights might conflict with the mother in *non-abortion* contexts remained unanswered.

## B. From Third Parties to Mothers

### 1. Fetal Rights in Prenatal Substance Abuse Cases

#### a. Is there a Fetal Right?

As the extension of rights to fetuses with respect to harm caused by third parties progressed, the states also began to recognize fetal rights vis-à-vis the mother. The seeds of this extension were sown in part by the language of earlier tort cases attributing to the fetus a “legal right to begin life with a sound mind and body” and by increasingly viewing the fetus as distinct from the

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52. SCHROEDEL, *supra* note 2, at 13.

53. Americans United for Life, *States that Prohibit Crimes Against the Unborn*, available at [http://www.unitedforlife.org/guides/fh/fh\\_statutes.htm](http://www.unitedforlife.org/guides/fh/fh_statutes.htm) (last visited Apr. 16, 2004) (providing specific statutory references and cases interpreting those references). According to The Alan Guttmacher Institute, there are twenty-nine states in which at least one section of the state’s homicide statute includes a fetus as a victim at some point in gestation. The Alan Guttmacher Institute, available at <http://www.agi-usa.org/>.

54. *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990).

55. *People v. Davis*, 872 P.2d 591 (Cal. 1994) (en banc).

56. *Beulah v. State*, 101 S.W.3d 802, 804 (Ark. 2003).

57. 18 U.S.C. § 1841.

58. *See supra* note 3 and accompanying text.

mother.<sup>59</sup> “As the language of the law shifted attention from the loss experienced by the parent or parents to the loss ‘experienced’ by the fetus” efforts increased to protect the fetus from harmful action taken by the *mother*.<sup>60</sup> This protection came primarily in the form of applying prenatal child abuse statutes to the fetus in cases of mothers’ prenatal substance abuse.<sup>61</sup> The 1980s saw the most significant increase in prosecutions for the use of narcotics by pregnant women, but such efforts date back to as early as 1969 when a New York trial court held that a mother’s narcotic addiction created a presumption of child abuse.<sup>62</sup> In 1974, another New York court held that withdrawal symptoms in a newborn constituted *prima facie* evidence of prenatal neglect.<sup>63</sup>

Not all jurisdictions followed New York’s lead. In 1977, a California appellate court declined to extend the meaning of the word “child” as used in the California Penal Code to protect twin fetuses from their mother’s addiction to heroin.<sup>64</sup> Three years later, however, a Michigan appellate court held that a newborn suffering narcotics withdrawal symptoms as a result of prenatal drug abuse may be considered a neglected child within the jurisdiction of the probate court.<sup>65</sup> Similarly, in 1985 a New York court again declared that “a finding that a child is a ‘neglected child’ may be predicated solely upon prenatal conduct by the mother” and the unborn child “may be considered a person, in order to receive the protection of [the Family Court] act.”<sup>66</sup> The

59. *See supra* notes 46 and 48 and accompanying text.

60. DANIELS, *supra* note 5, at 15. In addition to the language of cases such as *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984), rapid advances in fetal imaging technology and in physicians’ ability to treat fetuses directly as patients contributed to the view that fetuses were persons with an existence separate from their mothers. *Id.* at 18-19. Rachel Roth, in opposing efforts to create new feticide laws to further punish criminals for harm to fetuses, recognizes the inevitable, and in her view unwanted, extension of these rights. “There is no reason to think that the creation of rights for fetuses can be contained in this one realm, without potentially adverse effects on women, especially if the laws are not written explicitly to exempt pregnant women from their reach.” ROTH, *supra* note 43, at 12.

61. SCHROEDEL, *supra* note 2, at 105-109.

62. *Id.* at 49; *See also In re John Children*, 306 N.Y.S.2d 797 (N.Y. Fam. Ct. 1969).

63. *In re Vanessa F.*, 351 N.Y.S.2d 337, 340 (N.Y. Surrogate Ct. 1974).

64. *Reyes v. Superior Court*, 75 Cal. App. 3d 214, 21-19 (Cal. Ct. App. 1977) (justifying holding in part on the fact that other areas of the California criminal code and the Supreme Court in *Roe* had refused to recognize a fetus as a human being or person). *See also In re Steven S.* 126 Cal. App. 3d 23, 29-30 (Cal. Ct. App. 1981) (holding that a fetus would not be protected under child neglect laws); *Dittrick Infant v. Dittrick*, 263 N.W.2d 37, 39 (Mich. Ct. App. 1977) (declining to apply the meaning of “child” to a fetus).

65. *In re Baby X*, 293 N.W.2d 736, 739 (Mich. Ct. App. 1980).

66. *In re Danielle Smith*, 492 N.Y.S.2d 331, 332 (N.Y. Fam. Ct. 1985). The Act’s language, as quoted by the court, defined a neglected child as:

. . . a child less than eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care

court agreed with the contention that *Roe v. Wade* should not divest “the states of the power to grant legal recognition to the unborn in non-14th Amendment situations.”<sup>67</sup> Using more “state interest” centered reasoning, in 1989 a California appellate court held that a petition to protect a newborn child from prenatal drug abuse would be upheld because of the State’s significant interest in protecting already born babies from the ill-effects of prenatal drug abuse.<sup>68</sup> Thus, at the appellate court level, several states have been willing to grant a fetus rights in the face of a mother’s prenatal substance abuse.

In spite of the number of appellate courts willing to recognize fetal rights in this area, no state supreme court was willing to uphold convictions for prenatal substance abuse under existing child abuse laws until the South Carolina Supreme Court’s 1997 decision in *Whitner v. State*.<sup>69</sup> Taking a strongly fetus-centered approach, the court concluded that a fetus is a person under the South Carolina Children’s Code by analogizing the case with recent South Carolina cases that had recognized a viable fetus as a person under wrongful death and criminal statutes.<sup>70</sup> Such precedent led the court to say that “it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse.”<sup>71</sup> The court argued that the protection of fetuses in

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(A) in supplying the child with adequate food, clothing, shelter . . . or medical . . . care, though financially able to do so or offered financial or other reasonable means to do so; or (B) in providing the child with proper supervision or guardianship, . . . by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court . . .

*Id.* at 333 (alteration in original).

67. *Id.* at 334 (quoting John E.B. Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?* 23 DUQ. L REV. 1, 15 (1984)).

68. *Troy D. v. Kelly D.*, 215 Cal. App. 3d 889, 898 (Cal. Ct. App. 1989). *See also, In re Stefanel Tyesha C.*, 157 A.D.2d 322, 330-331 (N.Y. App. Div. 1990) (finding of child neglect against a mother for prenatal substance abuse was predicated upon the State’s interest in preventing newborn children from the significant ill-effects of prenatal drug abuse and from the probability that the mother could not care for the child after birth).

69. 492 S.E.2d 777 (S.C. 1997). Prior to *Whitner*, the supreme courts of Florida, Kentucky, Nevada, and Ohio had all overturned convictions of women prosecuted under child abuse statutes for drug abuse during pregnancy. SCHROEDEL, *supra* note 2, at 53.

70. *Whitner*, 492 S.E.2d at 779-780. Section 20-7-50 of the Code provides:

Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

*Id.* at 779 (emphasis omitted).

71. *Id.* at 780. This language in the court’s opinion extending rights to the fetus by analogy from a third-party context to the fetus/mother relationship is, according to abortion advocates, simply a step away from proclaiming fetal rights in the abortion context. For an excellent survey of inconsistencies in fetal rights law and a contention that this is precisely the issue facing

these areas was justifiable not only “for the sake of its mother or both its parents,” but rather because of the State’s interest in the life of a fetus and in the protection of the fetus itself.<sup>72</sup> In addition,

It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy. Use of crack cocaine is illegal, period. . . . We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.<sup>73</sup>

Since *Whitner*, a New York appellate court has decided a substance abuse case using similar reasoning, and South Carolina has reaffirmed *Whitner*.<sup>74</sup> In the New York case, the court rejected the argument that a lack of constitutional “legal personality” precluded New York from extending legal personality under a New York child neglect statute.<sup>75</sup> The court noted that New York courts have “demonstrated concern and consideration with regard to protecting the unborn child or fetus” as reflected in homicide laws, legislative protection for the unborn in property disposition and tort law, and the State’s construal of a fetus as a medical patient.<sup>76</sup> Thus, “surely [the law] may be found to encompass protection of the fetus from intentional acts by its mother, which acts could cause the child to begin life in an impaired condition.”<sup>77</sup>

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abortion rights advocates see Wagner, *supra* note 45, at 1123-1125. “[T]his comment suggests for pro-lifers and pro-choicers alike that, if *Roe v. Wade* is going to fall, it will be through the recognition of fetal personhood and the inconsistencies that have come from treating a fetus differently under the law depending on the circumstances.” *Id.* at 1086.

72. *Whitner*, 492 S.E.2d at 783.

73. *Id.* at 786. In reaching its holding the court recognized and distinguished the “many” decisions from other state courts that did not allow criminal prosecution under similar state statutes but concluded that “both statutory language and case law compel the conclusion we reach.” *Id.* at 784. For criticism of the *Whitner* decision, see Alma Tolliver, Note, *Child Abuse Statute Expanded to Protect the Viable Fetus: The Abusive Effects of South Carolina’s Interpretation of the Word “Child”*, 24 S. ILL. U. L.J. 383, 400-03 (2000) (arguing, *inter alia*, that the *Whitner* court created new law and that the resolution of criminalization of prenatal drug use must be left to the legislature); Tara-Nicholle B. DeLouth, *Pregnant Drug Addicts as Child Abusers: A South Carolina Ruling*, 14 BERKELEY WOMEN’S L.J. 96, 99-103 (1999) (arguing that *Whitner* raises serious constitutional issues, including violation of the Eighth and Fourteenth Amendments as well as a woman’s privacy rights, and raises the public policy concerns of selective enforcement and deterring drug addicts from seeking prenatal care).

74. *In re Unborn Child*, 683 N.Y.S.2d 366 (N.Y. Fam. Ct. 1998); *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003). The case involved a stillborn baby girl whose autopsy revealed cocaine in her system. *Id.* at 171. The court in *McKnight* extended the South Carolina homicide by child abuse statute to an unborn child. *Id.* at 174.

75. *Unborn Child*, 683 N.Y.S.2d at 368.

76. *Id.* at 368-70.

77. *Id.* at 370. The court went on to find that “[p]rotection of the fetus, when the mother’s constitutional privacy right is not involved, is not precluded and is in fact a recognized legitimate state interest. In the instant matter, there is no maternal right to privacy involved as it concerns the use of illegal drugs.” *Id.* Further, with regard to the question of statutory construction:

By way of contrast, two state supreme courts since *Whitner* have declined to extend child protection statutes to the fetus.<sup>78</sup> In 2003, the Oklahoma Supreme Court declined to call a fetus a “child” under the Oklahoma Children’s Code and refused to allow the state to take temporary emergency custody of the fetus.<sup>79</sup> The court rejected an invitation to extend Oklahoma’s recognition of the fetus as a “human being” under criminal and wrongful death statutes to the Code, and held that “child” applies “only to those who are born, living outside the womb of the mother.”<sup>80</sup> Also in 2003, the Arkansas Supreme Court faced a similar child custody situation in which the State argued that a fetus who was in “imminent danger of severe maltreatment and was dependent-neglected” due to its mother’s drug use be placed in state custody.<sup>81</sup> According to the State, the fetus was an individual under the Arkansas Juvenile Code, and its mother’s right to privacy was “fairly and constitutionally circumscribed” under Arkansas’ constitutional Amendment 68, which established a public policy to protect the life of every unborn child.<sup>82</sup> The court rejected this reasoning based on the plain and unambiguous language of the statute’s definition of a juvenile as an individual from “birth to age eighteen”<sup>83</sup> as well as on the purposes of the Juvenile Code.<sup>84</sup>

What conclusions may be drawn as to the rights being afforded fetuses in cases of prenatal substance abuse? There is certainly no settled view among the states. Although most states still have not passed laws making substance abuse during pregnancy a separate crime,<sup>85</sup> “[b]y 1992 criminal charges had been brought against 167 pregnant women for delivering drugs to the fetus through the umbilical cord,” and for prenatal child neglect, abuse or

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... it would be incongruous to imagine the Family Court Act’s clear purpose being anything other than to protect children, including unborn children, from harm. . . .

It is evident that the legislature, as well as other courts and other jurisdictions, demonstrates intent to protect the unborn, not only with regard to property rights and tort concerns, but with regard to the safety, physical integrity, and overall well being of the unborn child.

*Id.* at 370, 371.

78. *In re Unborn Child of Julie Starks*, 18 P.3d 342 (Okla. 2001); Arkansas Dept. of Human Services v. Collier, 95 S.W.3d 772 (Ark. 2003).

79. *Unborn Child of Julie Starks*, 18 P.3d at 348.

80. *Id.* at 345-46. The court looked to other Oklahoma statutes to conclude that “[w]hen the legislature intends to refer to a fetus or to a pregnant woman, it does so specifically.” *Id.* at 347.

81. *Collier*, 95 S.W.3d at 774.

82. *Id.* at 776.

83. *Id.* at 779.

84. *Id.* The purposes of the Code included, *inter alia*, providing “guidance, care, and control, preferably in each juvenile’s own home,” “preserv[ing] and strengthen[ing] the juvenile’s family ties,” and considering the juvenile’s health and safety when “determining whether or not to remove the juvenile from the custody of his or her parents.” *Id.*

85. SCHROEDEL, *supra* note 2, at 52-53.

manslaughter when the pregnancy ended in the birth of a stillborn baby.<sup>86</sup> Further, “at least thirty-four [states] have prosecuted women for ‘fetal abuse’ since 1985” under the same types of statutes.<sup>87</sup> According to one institute, as of January 1, 2004, thirteen states considered substance abuse during pregnancy as child abuse under civil child welfare statutes, and three considered it grounds for civil commitment.<sup>88</sup> According to Rachel Roth, between 1973 and 1992 two-thirds of the states passed legislation specifically geared toward women’s drug and alcohol abuse during pregnancy.<sup>89</sup> In addition, the Supreme Court’s denial of certiorari in *Whitmer* has been seen by some as a tacit delegation of the matter to the states, thereby legitimizing state efforts to protect fetuses in this area if they so choose.<sup>90</sup> According to Schroedel, the Court probably will continue to grant wide latitude to the states in extending rights to the fetus without overturning *Roe*, which will probably lead to greater fetal rights in civil law and “enormous disparities in the rights accorded the fetus in different states and across policy areas.”<sup>91</sup> Thus, some states have decided to extend rights to fetuses in this area and efforts to prosecute substance-abusing mothers for harm to their fetuses show no signs of abating. Even in states that have not yet granted rights to fetuses, the question promises to remain before state courts and legislatures for the foreseeable future.

b. Guardianship Appointments in Prenatal Substance Abuse Cases

There is very little case law in which the issue of pregnant mothers’ substance abuse arises in combination with the issue of a guardianship appointment, and in the few cases that mention guardians, there is virtually no analysis of the issue. In a 1988 Ohio appellate case, a pregnant woman petitioned the court to issue a writ of prohibition ordering the respondent court “to cease the exercise of juvenile court jurisdiction over her in a dependency and neglect action.”<sup>92</sup> The respondent court appointed a guardian ad litem for the unborn child, and the court sustained a motion to intervene filed by the

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86. DANIELS, *supra* note 5, at 2. Prosecution under the “delivery of drugs to a minor theory,” which argues that the delivery occurs through the umbilical cord in the second after birth prior to the cord being cut, has been largely unsuccessful. James R. Schueller, *The Use of Cocaine by Pregnant Women: Child Abuse or Choice?*, 25 J. LEGIS. 163, 168 (1999).

87. SCHROEDEL, *supra* note 2, at 53.

88. Alan Guttmacher Institute, *Substance Abuse During Pregnancy*, available at <http://www.agi-usa.org/> (last visited Apr. 16, 2004).

89. ROTH, *supra* note 43, at 163.

90. *See, e.g.*, Tolliver, *supra* note 73, at 403.

91. SCHROEDEL, *supra* note 2, at 167.

92. *Cox v. Court of Common Pleas*, 537 N.E.2d 721, 722 (Ohio Ct. App. 1988).



guardian.<sup>93</sup> The appellate court made no mention of the propriety or impropriety of this appointment.

In 1997, the Wisconsin Supreme Court considered whether an unborn child could be placed in protective custody under the state's Children's Code when its mother was abusing illegal drugs.<sup>94</sup> In concluding on statutory construction grounds that a fetus was not a "child" under the Code, the court quoted extensively from an exchange at oral argument between the court appointed guardian ad litem and one of the appellate justices. It ultimately decline[d] "the guardian ad litem's invitation to 'take on this burden' to fill the legislative void" with regard to fetal protection.<sup>95</sup>

In 1999, an Ohio appellate court upheld a trial court's determination that a mother's prenatal cocaine abuse could constitute child abuse when the child was born with cocaine in his system.<sup>96</sup> The court pointed out that while *Roe* denied personhood to fetuses under the Fourteenth Amendment, it did not "eliminate the interest of the State in protecting a viable fetus."<sup>97</sup> In addition, the mother argued that the fetus was not a proper ward for the appointment of a guardian because the state guardianship statute authorized an appointment for a "child" (not a fetus) and also allowed the court to provide emergency medical treatment for the child if necessary, which could not logically apply to a fetus.<sup>98</sup> The court responded by stating "[w]e are not compelled to set precedence leaving unprotected similarly drug-exposed infants solely on the grounds that portions of the available statutory protections are logistically feasible only after the time of birth."<sup>99</sup> In the face of very little instruction from the guardianship cases, is it or is it not proper for a court to appoint guardians to protect fetal rights in prenatal substance abuse court proceedings?

c. Guardians for Fetuses?

Given the lack of a prevailing rule on guardianship appointments, the analysis must proceed by considering when, if ever, general rules of guardianship appointments are applicable to fetuses. First, once a state has determined by legislation or by court decision that the fetus is a "person" or "child," generally or under a specific child abuse/neglect statute, guardianship statutes that mandate appointments for minor children apply equally to fetuses. In the absence of a guardianship statute, the court's *parens patriae* duty to protect a legal person triggers its inherent power to appoint a guardian for that

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93. *Id.*

94. *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 731 (Wis. 1997).

95. *Id.* at 739-740.

96. *In re Baby Boy Blackshear*, No. 99CA00018, 1999 WL 770788, at \*7 (Ohio Ct. App. Sept. 7, 1999).

97. *Id.* at \*2.

98. *Id.* at \*5.

99. *Id.*

purpose. Susan Goldberg concedes as much, observing that, if in cases where the issue of guardianship was not reached but the court granted personhood to the fetus, “the case [had] come before the court while the pregnancy was ongoing, the court could have appointed a guardian ad litem for the fetus.”<sup>100</sup> It would be incongruous for a state to grant a fetus legal personhood and then refuse to offer the protection that status necessitates in a court proceeding. Of course, the objection that granting legal personhood to the fetus even in non-abortion contexts is a constitutional violation under *Roe* remains.<sup>101</sup> However, as several courts have pointed out and as the Supreme Court’s denial of certiorari in *Whitner* indicates, determinations of personhood outside the abortion context have been left to the states and are not facially unconstitutional when they do not infringe upon a woman’s right to abortion.<sup>102</sup> Moreover, as *Whitner* noted, prenatal substance abuse is not a constitutionally protected interest.<sup>103</sup> Thus, if states are within constitutional bounds in extending rights to fetuses in this area, the appointment of a guardian to protect those rights is necessarily within constitutional bounds. Therefore, in a state such as Missouri, where a general statute grants “human being” status to fetuses for the purposes of all laws, as well as in states such as South Carolina, where such status has been granted for the purposes of specific statutes, any court proceeding involving the fetus that does not implicate the right to abortion or some other constitutional right of the mother requires the

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100. Goldberg, *supra* note 11, at 525.

101. Ronald Dworkin, who staunchly supports *Roe*, suggests that states can protect the life of a fetus in a variety of ways—including declarations of personhood—so long as those protections do not “curtail [another’s] constitutional rights.” Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 400 (1992). He writes, “[i]f a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women.” *Id.* at 401. Dworkin also suggests that the fetus’s rights deserve greater consideration when the mother’s prenatal activity threatens damage that will follow the fetus beyond birth. “But if a woman smokes during pregnancy, someone will later exist whose interests will have been seriously damaged by her behavior.” *Id.* at 405.

102. See Parness & Pritchard, *supra* note 6. “[T]he [*Roe*] Court’s position can be summarized as treating the unborn not as persons in the whole sense, while recognizing that the unborn can be treated as persons in many contexts.” *Id.* at 261. The authors contend that some post-*Roe* decisions incorrectly denied personhood to fetuses in the context of third-party harm to fetuses and that “[e]ven some laws prohibiting actions taken by the mother against the unborn are presumably unaffected [*by Roe*], e.g., third trimester abortions or neglect of the unborn where abortion is not the mother’s goal.” *Id.* at 267.

103. See also Schueller, *supra* note 86, at 175-78. “While the right to an abortion, post-*Roe*, is a fundamental right, the use of illegal drugs such as cocaine does not rise to the level of a protected liberty interest.” *Id.* at 176.

appointment of a guardian for the fetus in order to protect the fetus's interests.<sup>104</sup>

Second, could an appointment be proper when the state has yet to consider the issue of the personhood or has already determined that the fetus is not a person in general or for purposes of the statute at issue? The use of guardians in cases that have decided *against* a declaration of legal personhood is an instructive place to start. In the recent Arkansas Supreme Court case that decided against protecting a fetus under its Juvenile Code, the court nonetheless made significant use of the testimony and findings of a court-appointed special advocate.<sup>105</sup> The trial court based its findings in part on the testimony of the child advocate and heard arguments from the advocate that the supreme court subsequently relied upon.<sup>106</sup> The Wisconsin Supreme Court also refused to grant the fetus legal personhood but made similar use of the testimony of a court appointed guardian in refusing to protect the fetus.<sup>107</sup> Of course, the fact that an appellate court relied upon testimony presented at the trial court is not notable. The important point is that neither of these state supreme courts noted anything improper about the use of these guardians, even though they refused to recognize the fetus as a person.

The fact that these courts *did* allow guardian appointments still does not answer the question of whether they *ought* to have allowed them. The answer

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104. The Missouri statute reads, in pertinent part, as follows:

1. The general assembly of this state finds that:
  - (1) The life of each human being begins at conception;
  - (2) Unborn children have protectable interests in life, health, and well-being;
  - ...
2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state. . . .
4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

MO. ANN. STAT. § 1.205.

The United States Supreme Court in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), passed on deciding the constitutionality of the language of the statute, but left much power to the state to decide its applicability. The Court found that "*Roe v. Wade* 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.'" *Id.* at 506 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)). "We think the extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitively decide." *Id.*

105. *Arkansas Dept. of Human Services v. Collier*, 95 S.W.3d 772, 773 (Ark. 2003). The court also referred to her as a "child advocate representative." *Id.* at 775.

106. *Id.* at 773, 775.

107. *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 739-40. (Wis. 1997).

to this question is found in the fact that the limited historical use of court-appointed guardians for fetuses did not depend upon the legal personhood of the ward, but rather on the existence of a fetus's legal interest before the court. Well before the idea of assigning fetuses legal personhood, Blackstone saw that appointing a guardian was appropriate to protect the interests of a fetus.

Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. . .

An infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.<sup>108</sup>

Moreover, one historian has noted that the absence of juridical personhood is actually one of the reasons in favor of appointing a guardian because without a guardian the legal non-person has no means of protecting its legal interests.<sup>109</sup> The *Roe* Court also noted the use of guardians ad litem in property proceedings well before legal personhood had been extended to fetuses in any area of law.<sup>110</sup> The argument is not that, because the fetus has enjoyed a substantive property interest in the past, it should now enjoy substantive rights against its mother based on an analogy of those rights to property rights. Rather, notwithstanding a refusal to extend legal personhood to fetuses, courts have recognized that a fetus can have legally significant interests. Given the possibility that a court proceeding will affect those interests, it is incumbent upon the court to protect them.<sup>111</sup> Such rights are sometimes referred to as the rights of a "future person" that include a "right to begin life with a sound mind

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108. 1 WILLIAM BLACKSTONE, COMMENTARIES 117-18 (emphasis added).

109. MACKAY, *supra* note 25, at 13.

110. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

111. The important distinction between the fetal property interest and an interest in protection from prenatal substance abuse is that the former does not conflict with any right of the mother and the latter potentially does. However, as *Whitmer* noted, though the protection of the fetus in these cases creates a conflict, it does not create a constitutionally impermissible conflict because there is no constitutional right to use illegal substances. *Whitmer v. State*, 492 S.E.2d 777, 786 (S.C. 1997). In any case, see the following textual paragraph for my argument that the guardian cannot properly be considered the cause of any constitutional conflict even if one does exist.

It is also true that one purpose of the recognition of these property rights was to protect the wishes of the benefactor who had died. See *supra* note 43 and accompanying text. However, again, regardless of the justification, the point in using the property example here is not to compare the substantive rights, but simply to show that the protective function of a guardian does not depend upon the full legal personhood of its ward.

and body, and the right not to be harmed.”<sup>112</sup> As an alternative justification, the appointment of a guardian ad litem vindicates the state’s substantial interest in the outcome of cases involving the significant social problem of drug-addicted babies. Some courts have been explicit in using this state interest rationale to justify extending certain statutes to protect fetuses.<sup>113</sup> A guardian for the fetus plays a vital role in protecting this interest by presenting evidence, making arguments, and assuring a full hearing on the issue at hand.<sup>114</sup> Therefore, the presence of the fetus’s protectible future interest and the State’s interest in the problem of prenatal drug abuse both justify the appointment of a guardian, whether or not the state has recognized the fetus as a legal person.

Third, even if there is a protectable interest before the court, Goldberg argues that the appointment of the guardian itself is an unconstitutional invasion of privacy as it “would force a woman to justify her conduct to another individual, potentially compelling her to divulge intimate and private details of her life.”<sup>115</sup> She argues that the State interest in a fetus as part of the anatomy of the pregnant woman does not justify such an intrusion into the personal physical autonomy and privacy rights of a mother.<sup>116</sup> The problem with Goldberg’s argument is that its proper target is the underlying substantive right that the fetus has been given or the interest that the court is considering rather than the guardian appointment. Concluding that the guardian is the cause of these intrusions is to assign to the guardian a power it does not have. If there is a problem of intrusion, the problem is with the substantive law that gives rise to the court proceeding in the first place and dictates the extent to which the court must delve into the pregnant mother’s privacy in order to follow and correctly apply the law. If the substantive law is not unconstitutional, then the role of the guardian as an officer of the court is not, in itself, an unconstitutional violation of privacy.<sup>117</sup>

Finally, Goldberg raises the concern that because a guardian cannot possibly ascertain the “best interests” of a fetus, the guardian’s advocacy will be based on “subjective notions of what constitutes appropriate behavior.”<sup>118</sup> She asserts “[i]t would be extremely difficult at best for the guardian to

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112. DEBORAH MATHIEU, PREVENTING PRENATAL HARM: SHOULD THE STATE INTERVENE? 38-39 (2d ed. 1996); *see also supra* note 44 and accompanying text (discussing early tort case language affirming the right of in utero protection for the unborn child).

113. *See, e.g., In re Danielle Smith*, 492 N.Y.S.2d 331 (N.Y. Fam. Ct. 1985).

114. Cases involving a mother’s substance abuse not only involve the issue of convicting the mother of abuse or neglect, but often involve the question of termination of parental rights upon birth. Such a determination will always be particularly fact intensive and require the court to take into account many factors in determining whether to terminate parental rights.

115. Goldberg, *supra* note 11, at 534.

116. *Id.* at 533.

117. Even the courts that have refused to allow the terms “child” or “person” to extend to fetuses have done so on statutory construction grounds rather than constitutional grounds.

118. Goldberg, *supra* note 11, at 535.

ascertain what the ‘best interests’ of the fetus . . . would be in these circumstances.”<sup>119</sup> If this argument succeeds in defeating guardianship appointments for fetuses, it would also defeat guardianship appointments for incompetent adults who have not, prior to their incompetence, made known their wishes. A guardian’s job is to ascertain, based on all the available evidence, what the best interests of its ward are. That this function may pose a significant challenge is hardly reason to deny the appointment in the first place. For these reasons, the appointment of a guardian ad litem in court proceedings involving a mother’s prenatal substance abuse is a proper and necessary function of the court’s duty to protect the interests and rights before it.

## 2. Fetal Rights In Medical Treatment Cases

### a. Is There a Fetal Right?

A second area of non-abortion related fetal rights is the medical treatment of mothers for the sake of their fetuses. Physicians and hospitals “increasingly resort” to the courts in order to compel treatment of pregnant women for this purpose.<sup>120</sup> Between 1973 and 1992, courts in twenty-five states granted court orders to force pregnant women to undergo medical procedures for the benefit of the fetus.<sup>121</sup> Hospitals often petition courts for the orders, due in large part to the medical establishment’s increasing imputation of medical “personality” to the fetus itself, which engenders a “second patient” approach to treating the fetus.<sup>122</sup> This approach creates a balancing of rights between the fetus and the mother when the fetus is in need of medical treatment.<sup>123</sup>

A number of cases considering this issue also discuss guardianship appointments. The following overview of the case law will include both cases that discuss fetal rights but do not consider guardianships and those that discuss those rights along with guardianship appointments in medical treatment situations. The issue came before the New Jersey Supreme Court in 1964 when a Jehovah’s Witness refused blood transfusions for religious reasons.<sup>124</sup>

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119. *Id.* at 536.

120. April L. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563, 564 (2002). According to Rachel Roth, one California obstetrician claims that he obtained forty-nine out of the fifty court orders he sought for cesarean section surgeries for non-consenting pregnant women which, if accurate, exceeds all published accounts of forced cesareans in law and medical journals. ROTH, *supra* note 43, at 95.

121. ROTH, *supra* note 43, at 95.

122. *Id.* at 105.

123. *Id.* at 106. Some argue that such an approach is improper because it ignores women’s free exercise of religion rights (in cases involving refusal on religious grounds) and/or ignores a woman’s constitutional right to refuse medical treatment. *See* Cherry, *supra* note 120, at 588-93.

124. *Raleigh Fitkin-Paul Morgan Mem’l Hosp. v. Anderson*, 201 A.2d 537, 537-38 (N.J. 1964).

The plaintiff hospital sought authority to give the transfusions, if they should be necessary to save the life of the mother or her unborn, quick child.<sup>125</sup> The New Jersey Supreme Court granted the hospital's request because it was "satisfied that the unborn child is entitled to the law's protection" and remanded the case to the trial court with instructions to appoint a special guardian for the unborn child.<sup>126</sup> In 1981, a hospital petitioned a Georgia court to allow its physicians to perform a cesarean section and administer blood transfusions to save the life of an unborn viable child and the mother.<sup>127</sup> The court concluded that the unborn child had a legal right to the court's protection and authorized the hospital to administer "all medical procedures deemed necessary by the attending physician to preserve the life of [the] defendant's unborn child."<sup>128</sup> A day later the Georgia Department of Human Resources petitioned the juvenile court for temporary custody of the unborn child, at which point the court appointed counsel for the parents and the unborn child—to represent "the interests of the unborn child."<sup>129</sup> The court granted temporary custody to the Georgia Department of Human Resources, giving it authority to make all decisions pertaining to the birth of the child. It did so on the grounds that the intrusion into the life of the mother was 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."<sup>130</sup>

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125. *Id.* Doctors believed there was a "probability" that the mother would hemorrhage severely at some point during the pregnancy, which would lead to the death of both her and the fetus. *Id.* at 538.

126. *Id.* The case did not offer any analysis of this appointment.

127. *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 458 (Ga. 1981) (per curiam). The examining physician found that there was a 99% certainty that the child would not survive a vaginal delivery, a 50% chance that the mother would not survive, and that both would have an almost 100% chance of survival with a cesarean section. *Id.*

128. *Id.* The court also noted that an abortion of a viable fetus would be a criminal offense in Georgia, and that, under *Roe*, a viable child has the right to the protection of the State. *Id.*

129. *Id.* at 459. As is common in many fetal representation cases as well as in cases involving questions of fetal rights generally, the court used both a State's interest rationale for protecting the unborn child's rights and a seemingly distinct fetal rights language to justify appointing representation for the fetus. *Id.*

130. *Id.* at 460. A fuller excerpt from the court's order is as follows:

... Should said sonogram indicate to the attending physician that the complete placenta previa is still blocking the child's passage into this world, Jessie Mae Jefferson, is Ordered to submit to a Caesarean section and related procedures considered necessary by the attending physician to sustain the life of this child.

The Court finds that the 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. *Id.*

In a concurrence, one of the justices pointed out that the power of the court to order a competent adult to submit to surgery is "exceedingly limited" but that in this instance, the unborn child's

In 1985, a New York court, faced with a pregnant woman in imminent danger of death who had refused blood transfusions on religious grounds, held that the hospital could give her the transfusions over her objection.<sup>131</sup> The court noted that it would not interfere if the woman's life were the only one involved, but that it "must consider the life of the unborn fetus."<sup>132</sup> The court noted that though the fetus was not viable, in a non-abortion context 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 grounds" and, therefore, "the fetus can be regarded as a human being, to whom the court stands in *parens patriae*, and whom the court has an obligation to protect."<sup>133</sup>

In 1999, a United States District Court in Florida upheld a state court's order compelling a pregnant woman to submit to a cesarean section.<sup>134</sup> The court recognized the important constitutional interests at stake,<sup>135</sup> but asserted that because of the risk to the fetus, "the scope of Ms. Pemberton's personal constitutional rights in this situation . . . clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child."<sup>136</sup> Thus, the order compelling the cesarean section was proper.

By contrast, other courts have refused to hold that a fetus's rights outweigh a mother's right to refuse medical treatment. In 1983 the Supreme Judicial Court of Massachusetts reversed a trial court ruling compelling a pregnant woman to have a surgical procedure to prevent a miscarriage.<sup>137</sup> The court left open the possibility that in certain instances the State interest might be sufficient to justify such an intrusion for the benefit of the child but concluded that the record in the case at bar did not show "circumstances so compelling as

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right to live outweighed the right of the mother to refuse the surgery. *Id.* (Hill, J., concurring). In a separate concurrence, another justice highlighted the fact that there was "no less burdensome alternative for preserving the life of [the] fully developed fetus than requiring [the] surgery," because the risk to the fetus and the mother would be minimal as compared to the almost certain death of the fetus and significant risk to the mother if the surgery was not performed. *Id.* at 461 (Smith, J., concurring).

131. *In re Application of Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (N.Y. Sup. Ct. 1985). *See also* *Crouse Irving Mem'l Hosp., Inc., v. Paddock* 485 N.Y.S.2d 443, 446 (N.Y. Sup. Ct. 1985) (holding that the hospital and attending physicians were entitled to give blood transfusions to baby and mother subsequent to the baby's birth over mother's religious objections).

132. *Jamaica Hosp.*, 491 N.Y.S.2d. at 899.

133. *Id.* at 900.

134. *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp.2d 1247 (N.D. Fla. 1999).

135. *Id.* at 1251. Ms. Pemberton asserted violations of her "right to bodily integrity, [ ] right to refuse unwanted medical treatment, and a right to make important personal [ ] decisions regarding the bearing of children without undue governmental interference." *Id.*

136. *Id.*

137. *Taft v. Taft*, 446 N.E.2d 395, 397 (Mass. 1983). The procedure involved suturing the cervix so that it would "hold" the pregnancy. *Id.* at 396.



to justify curtailing the wife's constitutional rights."<sup>138</sup> The trial court had appointed a guardian ad litem for the fetus, but beyond mentioning the fact, the court did not indicate its view of the propriety of the appointment.<sup>139</sup>

In 1990, the Court of Appeals of New York rejected a hospital's application for an order authorizing blood transfusions over the objections of a woman who had just given birth by cesarean section.<sup>140</sup> The court held that there was no countervailing interest to outweigh the right of a competent adult "to determine the course of [his or] her own [medical] treatment."<sup>141</sup> However, the court noted that an identified state interest may be sufficient to override this right and, in the appropriate case, the courts must weigh "the interests of the individual against the interest asserted on behalf of the State to strike an appropriate balance."<sup>142</sup> Also in 1990, the District of Columbia Court of Appeals held that "in virtually all cases [involving a pregnant mother's decision to receive medical treatment] the question of what is to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus."<sup>143</sup> The case involved a pregnant woman, A.C., who was near death with cancer, and her twenty-six week old fetus. The lower court ordered a cesarean section delivery, but shortly thereafter both the baby and mother died.<sup>144</sup> The court rested its decision to reverse the lower court on its inability to tell from the record whether A.C. was competent to make the decision to allow the cesarean section.<sup>145</sup>

We have no reason to believe that, if competent, A.C. would or would not have refused consent to a cesarean. We hold, however, that without a competent refusal . . . it was error for the trial court to proceed to a balancing analysis, weighing the rights of A.C. against the interests of the state.<sup>146</sup>

In 1994, an Illinois appellate court denied a petition to force a competent pregnant woman to undergo a cesarean section for the benefit of her fetus but

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138. *Id.* at 397. More specifically, there were:

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.

*Id.*

139. *Id.* at 395-96.

140. *Fosmire v. Nicoleau*, 551 N.E.2d 77 (N.Y. 1990).

141. *Id.* at 84.

142. *Id.* at 81.

143. *In re A.C.*, 573 A.2d 1235, 1237 (D.C. 1990).

144. *Id.* at 1241.

145. *Id.* at 1247.

146. *Id.* The court also noted that overriding a woman's objection to medical treatment poses the problem of "driv[ing] women at high risk of complications during pregnancy and childbirth out of the health care system to avoid coerced treatment." *Id.* at 1248.

did not comment on the fact that the juvenile court below had appointed a guardian.<sup>147</sup> In so holding, the appellate court concluded that Illinois courts should *not* engage in a balancing of the rights of the viable fetus and the rights of a competent woman to refuse medical care.<sup>148</sup> A woman's choice to refuse such invasive surgery "must be honored, even in circumstances where the choice may be harmful to her fetus"<sup>149</sup> and "[t]he potential impact upon the fetus is not legally relevant."<sup>150</sup> The court indicated the possibility that relatively non-invasive and risk-free procedures might require a different conclusion, but it did not rule on that issue.<sup>151</sup>

Finally, three years later, an Illinois appellate court faced the question of whether the State's interest in the potential life of a fetus (as opposed to the interests of the fetus itself) may be weighed against the woman's decision to refuse medical treatment.<sup>152</sup> The medical situation involved a pregnant woman's seriously low hemoglobin levels that, in one doctor's opinion, put the woman and her fetus's chances of survival at five percent if not corrected by a blood transfusion.<sup>153</sup> The court "appoint[ed] the public guardian of Cook County, over his [own] objection, to represent the fetus."<sup>154</sup> After "balancing the mother's right to refuse medical treatment against the State's substantial interest in the viable fetus," the court held that on the facts of this case "the State may not override a pregnant woman's competent treatment decision,

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147. *In re Baby Boy Doe*, 632 N.E.2d 326, 335 (Ill. App. Ct. 1994).

148. *Id.* at 330.

149. *Id.* The court based its decision on the general right of every competent individual to refuse medical treatment under Illinois common law, the Due Process Clause of the Fourteenth Amendment, and under the religious liberty protection of both the Illinois and U.S. constitutions. *Id.* at 330-331.

150. *Id.* at 332. In reaching this conclusion, the court relied heavily on a 1988 Illinois Supreme Court decision dealing with unintentional infliction of prenatal injuries in which "the court strongly suggested that there can be no consistent and objective legal standard by which to judge a woman's actions during pregnancy" and in which the court "explicitly rejected the view that the woman's rights can be subordinated to fetal rights." *Id.* (citing *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988)).

151. *Id.* at 333. In addition, the court rejected the argument that such a situation was analogous to the state's ability under *Roe* to proscribe abortion due to its compelling interest in the potential life of a viable fetus. It reasoned, "[t]he fact that the state may prohibit post-viability pregnancy terminations does not translate into the proposition that the state may intrude upon the woman's right to remain free from unwanted physical invasion of her person when she chooses to carry her pregnancy to term." *Id.* at 334.

152. *In re Fetus Brown*, 689 N.E.2d 397, 398 (Ill. App. Ct. 1997).

153. *Id.* at 399.

154. *Id.* The trial court subsequently appointed the hospital administrator as temporary custodian of the fetus, with the right to consent to blood transfusions for the mother upon the advice of a physician. *Id.* at 400. Darlene Brown, the mother, was given six units of blood over the course of two days. When she resisted the transfusion, she was forced to comply with the decision of the temporary custodian. *Id.*

including refusal of recommended invasive medical procedures, to potentially save the life of the viable fetus.”<sup>155</sup> The court then distinguished this proper balancing of the State’s interest in potential life and the mother’s rights from a balancing of the ostensible rights of the fetus and the mother’s rights, which would be improper.<sup>156</sup> Because the case involved the mother’s rights vis-à-vis the State’s interest, rather than the fetus’s rights, the “asserted legal interests did not require” a guardian to be appointed for the fetus, and the circuit court had, therefore, erred in the appointment.<sup>157</sup>

b. Guardians for Fetuses?

Probably more so than with prenatal substance abuse, the court decisions on forced medical treatment indicate no clear trend regarding the extent that courts will recognize a fetal interest and no clear view on the appointment of guardians. There has been much criticism of forced medical treatment, and some writers see medical intervention for the sake of the fetus as “subjugation of one human being to another.”<sup>158</sup> Rachel Roth opposes the practice in part because many situations involve doctors and hospitals in effect railroading courts into approving emergency medical procedures that are not truly necessary for the health of mother or fetus.<sup>159</sup> Roth’s objection to coercive tactics has merit, and the extent to which Roth is right at least raises questions with regard to how such decisions are reached and executed.

With regard to whether there is a fetal right to be balanced against the mother’s right, and hence one deserving of a guardian’s protection, at least three things are clear even in the midst of the disparate court decisions. First, all courts recognize that a competent adult has a significant right to refuse medical treatment. Second, all courts acknowledge that this right is qualified rather than absolute and must at times give way to other interests—sometimes described as the State’s interest and sometimes described as the fetus’s interest. Third, all courts acknowledge, explicitly or implicitly, that this determination requires a careful factual inquiry as to the medical situation involved, the seriousness of the proposed procedure, and the risks of the procedure to the health of the mother and the fetus in order to reach a conclusion as to which interest(s) outweighs the other.<sup>160</sup> Each case discussed above embraced a

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155. *Id.* at 405.

156. *Id.* at 406.

157. *In re Fetus Brown*, 689 N.E.2d at 406.

158. Cheryl E. Amana, *Maternal-Fetal Conflict: A Call For Humanism and Consciousness In a Time of Crisis*, 3 COLUM. J. GENDER & L. 351, 369 (1992).

159. ROTH, *supra* note 43, at 89-107. Here Roth presents persuasive evidence that sometimes these cases do involve coercion. *Id.*

160. Even cases that do not consider the fetus’s rights “legally relevant” allow for balancing between the State’s interest and the mother’s interest (albeit with some indication that a State’s

balancing of competing interests as the appropriate analytical approach to resolution of the issue of forced medical treatment. As with prenatal substance abuse, opposition to or support of medical treatment for the benefit of fetuses does not change this balancing and the procedural process that accompanies it. It is the fact of the balancing itself that weighs in favor of the appointment of a guardian for the fetus, whether the interests being balanced are attributable to the fetus or to the State.

When the interest at stake is described as the State's rather than the fetus's, the functional capacity of the guardian is the same as if the interest were granted to the fetus. While a guardian is most often directly protective of the rights of the ward, a second recognized function of a guardian is to protect the interest of the state.<sup>161</sup> Thus, *In re Fetus Brown's* conclusion that a guardian was inappropriate because the State's "asserted legal interests did not require" the appointment is incorrect.<sup>162</sup> As I will argue in more detail below in Section III.C, because protection of the State's interest in such proceedings is dependent on some form of direct protection of the fetus itself, the fetal guardian as the protector of the State's interest is, at least in a formal sense, an appropriate role. Therefore, even in those jurisdictions, such as Illinois, that regard a balancing of fetal rights and a mother's rights as improper, a State interest triggers the balancing of interests that requires the protection of a guardian.

Finally, the arguments advanced in Section I.B(1)(c) in favor of fetal guardians in prenatal substance abuse cases, even in the absence of a state declaration of fetal personhood and in the absence of statutory authorization of the appointment, apply equally to the medical treatment cases. The argument advanced in the same section distinguishing the propriety of the guardianship appointment from the antecedent question of the propriety of the underlying interest applies here as well. In non-abortion related court proceedings, when a fetus's interests are before the court, the appointment of a guardian is the necessary and proper mechanism for the protection of those interests.

### III. ABORTION

Because states cannot, under current law, extend legal personhood and its attendant rights and interests to the fetus when a mother's right to abortion is at stake, a guardianship appointment in such cases cannot be justified by the need for protection of substantive rights and interests of the fetus. This section will discuss the appropriate basis for defending guardianship appointments in certain abortion-related court proceedings.

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interest can rarely outweigh the mother's). *In re Baby Boy Doe*, 632 N.E.2d 326, 332 (Ill. App. Ct. 1994).

161. *See supra* note 30 and accompanying text.

162. *In re Brown*, 689 N.E.2d 397, 406 (Ill. App. Ct. 1997).

### A. Pre-*Roe v. Wade*

Throughout the history of the abortion question, the issue of fetal “personhood” has been important to varying degrees. Early Western philosophers and theologians debated the exact time of “ensoulment”—the moment when a person’s soul entered the body—in order to establish a marker for when a fetus obtained the status of a human being, and later considered “quickening”—when movement in the womb is detectable—as the proper demarcation.<sup>163</sup> Far from being academic considerations, such moral beliefs had a significant impact on British common law and later on American abortion law.<sup>164</sup> From the early colonial period to the mid-twentieth century, American laws generally prohibited abortion. It was not until efforts in the mid-twentieth century to reform and liberalize abortion laws that there was a widespread focus in America on the fetus as a distinct life as the justification for opposing abortion.<sup>165</sup> A 1962 case involving the efforts of Sherrie Finkbine, a popular television host, to obtain an abortion pushed the question of fetal personhood into the public consciousness and became a flashpoint between those in favor of abortion reform and those opposed.<sup>166</sup> “‘The fundamental disagreement about whether or not an embryo represented a ‘real’ person or merely a potential person, a disagreement that had existed beneath the surface for at least a hundred years, was finally forced into the open by the Finkbine case.’”<sup>167</sup> For the next decade efforts at loosening abortion restrictions met with some success through legislative means.<sup>168</sup> Soon thereafter, the pro-choice movement turned its attention to challenging the constitutionality of abortion bans in the courts, culminating in the 7-2 decision

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163. SCHROEDEL, *supra* note 2, at 17. For example, Pythagoras and Hippocrates opposed abortion at any point during pregnancy based upon the belief that the soul formed at conception. *Id.* By contrast, Aristotle thought that ensoulment did not occur until the “animal” phase of human development which occurred forty days after conception for males and eighty days after conception for females. Thus, Aristotle supported abortion only before ensoulment had occurred. *Id.* at 17-18. Plato went even further in his support of abortion and suggested that the State could demand abortion for women over forty years old. *Id.* at 18.

164. *Id.* at 20. During the mid-seventeenth century, postquickening abortion was a crime in all the colonies, and some localities had laws making it difficult to obtain abortion at any stage of pregnancy. *Id.*

165. *Id.* at 38. The term “right to life” was used as early as 1963. *Id.* For a helpful, more detailed look at the historical development of abortion law through *Roe*, see *id.* at 16-40.

166. *Id.* at 37. The situation involved the host’s ingestion of an anti-nausea drug, thalidomide, that was found a couple of months later to be the cause of severe birth defects around the world. A hospital scheduled an abortion, only to cancel it at the last minute because of the negative publicity it had received. *Id.*

167. *Id.* (quoting KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 80 (1984)).

168. SCHROEDEL, *supra* note 2, at 38. For example, by 1970 four states had repealed their abortion bans and legalized abortion. *Id.*

in *Roe v. Wade* overturning and declaring unconstitutional a Texas ban on abortion.<sup>169</sup> *Roe*, of course, decided the personhood question in the negative, but it did so in a way that began the legal wrangling over what protection, if any, the state may exercise on behalf of the fetus in the face of the mother's right to abortion.<sup>170</sup>

## B. *Roe* and *Casey*

### 1. *Roe v. Wade*

Even as it granted the abortion right to women, for the purposes of this Comment, *Roe* is most significant for the way in which it qualified and placed certain limitations upon abortion as well. The Court reasoned that a person's right to personal liberty "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" but rejected the argument that such a right "is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."<sup>171</sup> Thus, the right of personal privacy, which includes abortion, is a qualified right that "must be considered against important state interests in its regulation . . . and . . . at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant."<sup>172</sup> In balancing these interests, the Court explained the point at which the State has a compelling interest in fetal life as follows:

With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after

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169. *Roe v. Wade*, 410 U.S. 113 (1973).

170. SCHROEDEL, *supra* note 2, at 44-45.

171. *Roe*, 410 U.S. at 153.

172. *Id.* at 154-55. The reason that the Court could speak of such a balancing was that it rejected the argument that a fetus is a person under the Fourteenth Amendment with a guaranteed right to life. *Id.* at 157-58. While this Comment will argue that guardianships ought to be allowed in certain abortion contexts notwithstanding this determination of personhood, it is interesting to note that much of the opposition to the recognition of fetal rights in non-abortion areas of the law is based upon the *Roe* Court's assertion that "[i]f this suggestion of personhood is established, the appellant's case, of course, collapses." *Id.* at 156-57. Abortion advocates recognize that expansion of personhood to fetuses in non-abortion contexts makes it difficult to ignore the question of personhood in the abortion context, and some have argued, following *Roe*'s lead, that the future of abortion rights hinges on the question of personhood. See, e.g., Wagner, *supra* note 45. In the context of guardianships for fetuses, the ACLU recently has argued in a brief that a guardian for a fetus should not be allowed because of this lack of personhood. Renewed Brief of Amici Curiae ACLU et. al. at 5-11, *In re J.D.S.*, 864 So. 2d 534 (Fla. Dist. Ct. App. 2004) (5D03-1921).

viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.<sup>173</sup>

The Court concluded its analysis by stating that its holding “is consistent with the relative weights of the respective interests involved” and “leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests.”<sup>174</sup> Thus, the *Roe* decision, while firmly entrenching the right of a woman to choose abortion, affirmed the State’s right to regulate the decision at certain points of the pregnancy. As Schroedel notes, in the abortion arena, *Roe* began the balancing act between the woman and the fetus.<sup>175</sup>

## 2. *Planned Parenthood v. Casey*

Nearly 20 years after *Roe*, *Planned Parenthood v. Casey* considered the constitutionality of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989.<sup>176</sup> The Court began its opinion by reaffirming the three parts of the essential holding of *Roe*,<sup>177</sup> reaffirming *Roe*’s placement of the abortion decision within a woman’s fundamental individual liberty interest,<sup>178</sup> and justifying its affirmation in part on the importance of *stare*

173. *Roe*, 410 U.S. at 163-64.

174. *Id.* at 165. Schroedel calls the decision “an uneasy compromise between competing rights” that “presented the Court with the problem of balancing one value . . . against another.” SCHROEDEL, *supra* note 2, at 42. She goes on to say that this balancing of interests:

changed the conception of maternal-fetal relations. Until *Roe*, the legal system supported the biological unity of woman and fetus and viewed their interests as identical. Even when courts had found some degree of legal personhood in the fetus . . . they had assumed that the interests of the woman and fetus at least coincided. In *Roe*, however, the Court’s trimester framework established a precedent that viewed the interests of mother and fetus as adversarial.

*Id.* at 44.

175. SCHROEDEL, *supra* note 2, at 44-45.

176. *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992). For a recent and unequivocal criticism of the decision, see Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003). Paulsen argues that “[i]f the human embryo . . . is morally entitled to be treated as a human being . . . then the regime created in *Roe* and dramatically reaffirmed in *Casey* creates an essentially unrestricted substantive legal right of some human beings to kill . . . other human beings. *Id.* at 996-97.

177. *Casey*, 505 U.S. at 846. As stated by the *Casey* Court, those parts are: (1) a woman has a “right to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect [abortion]”; (2) the State has power to restrict abortion after viability, “if the law contains exceptions for pregnancies which endanger the woman’s life or health”; (3) “[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.” *Id.*

178. *Id.* at 846-53.

*decisis*.<sup>179</sup> However, in affirming *Roe*, the Court also acknowledged that some of *Roe*'s "factual assumptions" involving the "scheme of time limits on the realization of competing interests" were no longer valid.<sup>180</sup> One of the most significant changes wrought by *Casey* was its emphasis on and articulation of the "important and legitimate" State interest in potential life *prior* to viability. The Court began by asserting that, even in the earliest stages of pregnancy, the State may adopt rules "designed to encourage [the mother] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term" as well as rules requiring full divulgence of information about adoption options.<sup>181</sup> Thus, "measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere" with her right to choose an abortion, and "we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the *protection* of fetal life."<sup>182</sup> The Court recognized that laws that make a right more difficult to exercise are not "*ipso facto*, an infringement of that right" and that a law "which serves a valid purpose, one not designed to strike at the right itself" and also has the "incidental effect" of making an abortion more difficult to obtain, is not invalid.<sup>183</sup> Thus, only when a regulation imposes an "undue burden" on

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179. *Id.* at 854-69. For pointed criticism of the *stare decisis* justification, see Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15 (1993). Linton argues that the Court's heavy reliance on *stare decisis* "is seriously undermined by its near total abandonment of *Roe*." *Id.* at 34. Among other aspects in which *Casey* differs from *Roe*, Linton points out the following:

Roe identified governmental interests in preserving maternal health and protecting the "potentiality of human life," which interests become "compelling" at various stages of pregnancy, whereas *Casey* downgrades these interests to "legitimate" and "substantial." Roe held that regulations limiting the exercise of the right of abortion had to be "narrowly drawn to express only the legitimate state interests at stake;" *Casey* holds that such regulation, if otherwise valid, need only be "reasonably related" to those interests. Roe effectively employed the "strict scrutiny" standard of review; *Casey* substitutes the "undue burden" standard.

*Id.*

180. *Casey*, 505 U.S. at 860.

181. *Id.* at 872.

182. *Id.* (emphasis added). In dissent, Justice Blackmun disagrees that the State can have an interest in a pre-viable fetus: "The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman." *Id.* at 932-33 (Blackmun, J., dissenting in part).

183. *Id.* at 873-74.



the woman's decision is the State prohibited from enacting it during the pre-viability stage of pregnancy.<sup>184</sup>

The Court went on to attempt a definition of "undue burden" and in doing so paved the way for the ongoing contentiousness surrounding the extent to which the State may intervene in pre-viability abortion decisions. In general, "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>185</sup> The State's regulation must endeavor to inform rather than hinder the woman's choice,<sup>186</sup> and, as a "guiding principle[]" regulations "which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."<sup>187</sup> The Court summarized its "controlling principles" by saying that State "[m]easures designed to advance this interest [in potential life] should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion."<sup>188</sup>

In applying these principles to the case before it, the *Casey* Court upheld the medical emergency provision, the informed consent requirement, and the parental consent provisions of the Pennsylvania statute.<sup>189</sup> In upholding the informed consent portion of the statute, which required the physician to provide the woman with certain pre-determined information regarding the abortion,<sup>190</sup> the Court recognized that such information "furthers the legitimate

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184. *Id.* at 874. For a helpful brief history of the Court's use of the undue burden standard prior to *Casey*, see Valerie J. Pacer, *Salvaging the Undue Burden Standard—Is It A Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 296-305 (1995).

185. *Casey*, 505 U.S. at 877. In dissent, Justice Stevens says "[a] burden may be 'undue' either because [it] is too severe or because it lacks a legitimate, rational justification." *Id.* at 920 (Stevens, J. dissenting).

186. *Id.* at 877. Put another way, "a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.*

187. *Id.* A further guiding principle is that "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Id.* at 878.

188. *Id.* at 837. Justice Stevens, in dissent, is critical of allowing the State to persuade a woman to chose childbirth over abortion, arguing that "Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best . . . . [W]e have upheld regulations of abortion that are not efforts to sway or direct a woman's choice, but rather are efforts to enhance the deliberative quality of that decision." *Id.* at 916 (Stevens, J., dissenting).

189. *Id.* at 879-99.

190. *Casey*, 505 U.S. at 881. The statute requires that a woman certify in writing that at least twenty-four hours before the abortion the physician informs the woman of the nature and health risks of the procedure, the probable gestational age of the fetus, the availability of materials

[State] purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”<sup>191</sup> The Court further allowed the State to require doctors to inform the woman of available materials explaining effects of abortion on the fetus, “even when those consequences have no direct relation to her health.”<sup>192</sup> The Court also upheld the twenty-four hour waiting period element of the informed consent provision because even though the waiting period might impose a particular burden on some women, “[a] particular burden is not of necessity a substantial obstacle.”<sup>193</sup>

The spousal notification provision of the statute was the only portion of the statute that did not survive the Court’s scrutiny.<sup>194</sup> The district court findings included data on the prevalence of physical and psychological abuse of women at the hands of their husbands, including the fact that “[m]ere notification of pregnancy is frequently a flashpoint for battering and violence within the family.”<sup>195</sup> In addition, the primary reason that married women do not notify their husbands when they are seeking an abortion is that they are experiencing marital difficulties which often involve violence.<sup>196</sup> Thus, the spousal notification requirement “does not merely make abortions a little more difficult . . . to obtain;” instead, a significant number of women “are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”<sup>197</sup>

### C. “Undue Burden” After *Casey*

The question subsequent to *Casey*’s articulation of the undue burden standard is exactly what state action constitutes an undue, and therefore unconstitutional, burden on a woman’s right to choose an abortion. As for guardianship appointments, courts have not analyzed the issue under the *Casey* standard, and indeed all of the subsequent litigation in the area has focused on statutes directly regulating abortion itself. Therefore, an initial question may

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describing the fetus, information about medical assistance for childbirth, child support, and alternatives to abortion. *Id.*

191. *Id.* at 882.

192. *Id.*

We conclude . . . that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant . . . . [When there is] a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.

*Id.* at 883.

193. *Id.* at 886-87.

194. *Id.* at 888.

195. *Casey*, 505 U.S. at 889.

196. *Id.* at 892.

197. *Id.* at 893-94.

be whether the *Casey* standard is an appropriate one for analyzing the question of guardianship appointments in abortion contexts because (1) a guardianship appointment is not an abortion statute or direct regulation as such, and (2) one might argue that a guardian's role is as protector of the interests of the ward and not as a protector of the State's interest. As for the latter objection, one of the recognized purposes of guardianship appointments is the protection of a legitimate State interest.<sup>198</sup> As one historian points out, the guardian is the "actual" protector on behalf of the "metaphysical entity" of the State.<sup>199</sup> As a metaphysical entity the State is only able to protect its interests indirectly through secondary means, and the main secondary means available in abortion related court proceedings is a guardian for the fetus.<sup>200</sup> Because protection of the State's interest in a court proceeding is dependent on protection of the fetus itself, the role of a guardian for the fetus is, at least in a formal sense, an appropriate role—though the question of whether the role constitutes an undue burden remains.<sup>201</sup> As to the former objection, there is no indication in *Casey* or any of the subsequent undue burden cases that the standard applies only to statutory regulations or laws *per se*. The function of a guardian in an abortion context is "regulatory" in nature because the appointment affects a woman's abortion decision, so it properly falls within the *Casey* standard.<sup>202</sup> For these reasons, the *Casey* standard is appropriate for analyzing the propriety of guardians for pre-viable fetuses.

Only two types of regulations have "flunked" the undue burden test: partial birth abortion statutes and the spousal consent statute discussed in *Casey* itself.<sup>203</sup> In their rulings, courts have emphasized *Casey's* view that a regulation which has only the "incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it"<sup>204</sup> and that "laws that regulate, not abortion itself, but ancillary issues . . . do not affect fundamental rights *unless* the ancillary rule creates an undue burden on the underlying right."<sup>205</sup>

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198. *See supra* note 30 and accompanying text.

199. *See supra* note 30 and accompanying text

200. The court itself, in the form of the judge, cannot be the protector because the function of the court is to be an impartial arbiter rather than an advocate of any particular interest.

201. *See infra* Part III.D for a discussion of the contention that the State does not need a guardian to protect its interests because existing law fulfills that role.

202. *See* Silverstein, *supra* note 12 (applying the *Casey* undue burden standard to guardianship appointments for fetuses in judicial bypass proceedings for minors seeking abortions).

203. *Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 691 (7th Cir. 2002).

204. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 166-67 (4th Cir. 2000) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992)).

205. *Newman*, 305 F.3d at 688.

### 1. Partial-Birth Abortion Statutes

Prior to the Supreme Court's ruling in *Stenberg v. Carhart*,<sup>206</sup> in the area of partial birth abortion, the Sixth Circuit struck down an Ohio statute because it "inhibit[ed] the vast majority of second trimester abortions [and] would clearly have the effect of placing a substantial obstacle in the path of a woman seeking the pre-viability abortion."<sup>207</sup> In *Stenberg*, using almost identical reasoning, the Court struck down a Nebraska statute outlawing partial birth abortion because it "impose[d] an undue burden on a woman's ability to choose" D & E abortions, the most common second trimester abortion procedure.<sup>208</sup> In her concurrence, Justice O'Connor made clear that the regulation was an undue burden because it proscribed "the most commonly used method for performing previability second trimester abortions."<sup>209</sup> The common theme in striking down these partial birth abortion statutes is the significant and direct proscription of common legal abortion procedures.

### 2. Informed Consent Statutes

Following this theme of requiring substantial proscription of abortion to invalidate a statute, courts have upheld the constitutionality of several other types of statutes. In *Karlin v. Foust*, the Seventh Circuit upheld the constitutionality of a Wisconsin informed consent statute.<sup>210</sup> The court noted that a regulation may be designed to ensure that a woman's choice contemplates the consequences for the fetus, may express a profound respect for the life of the unborn, and may be designed to persuade a woman to choose

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206. 530 U.S. 914 (2000).

207. *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997). For other pre-*Stenberg* decisions following this reasoning exactly, see also *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 195 F.3d 386 (8th Cir. 1999); *Little Rock Family Planning Services, P.A. v. Jegley*, 192 F.3d 794 (8th Cir. 1999).

208. *Stenberg*, 530 U.S. at 930 (internal quotations omitted).

209. *Id.* at 949 (O'Connor, J., concurring). See also *Planned Parenthood v. Farmer*, 220 F.3d 127, 144-45 (3d Cir. 2000) (finding that the statute was "so vague as to be easily construed to ban even the safest, most common and readily available conventional pre- and post-viability abortion procedures" and that physicians would be "chilled" from performing these common types of abortions); *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003) (upholding partial birth abortion statute that did not restrict the most commonly used procedure for second trimester abortions).

210. 188 F.3d 446 (7th Cir. 1999). The statute at issue prohibited abortion unless the woman gave her voluntary and informed written consent. *Id.* at 454. To be voluntary, consent must be given freely and without coercion. *Id.* To be informed, the woman must be provided two tiers of information at least twenty-four hours before obtaining an abortion. *Id.* The first tier required a physician to meet with the woman in person and orally provide statutorily prescribed information. *Id.* The second tier required a qualified person other than a physician to orally provide to the woman, in person at least twenty-four hours prior to the scheduled abortion, certain statutorily prescribed information along with certain state-provided printed materials. *Id.*

childbirth over abortion if it is reasonably related to that goal.<sup>211</sup> Significant to its analysis was that a pre-viability regulation *by definition* will burden a woman's ability to obtain an abortion to some degree and that this level of interference from the state is constitutional.<sup>212</sup> To be an *undue* burden "a challenged state regulation must have a strong likelihood of *preventing* women from obtaining abortions rather than merely making abortions more difficult to obtain."<sup>213</sup>

An important aspect of the *Karlin* court's analysis dealt with the results of a Mississippi study showing that a similar statute caused (1) an 11 to 13% decrease in the number of Mississippi women undergoing reported abortions as compared with expected levels; (2) a 25% decrease in the number of Mississippi women obtaining abortions before reaching the nine-week point of their pregnancies as compared with expected levels; and (3) a 17% increase in the number of Mississippi women going out of state for abortions.<sup>214</sup> The plaintiffs' expert testified that the Mississippi mandatory waiting period was responsible for these results.<sup>215</sup> In holding this evidence insufficient to support an undue burden conclusion, the court said that the Mississippi study's "most significant shortcoming, however, is that it failed to adequately control for the persuasive effect of the law."<sup>216</sup> The court continued:

Thus, to prove that an abortion regulation poses an undue burden on a woman under *Casey*, it is not enough for a plaintiff to show that the number of abortions declined after the passage of a state abortion regulation because that result is entirely consistent with a state's legitimate interest in persuading a woman to carry her child to term. . . . [T]he district court found that [the study] does not adequately explain the reason for the decline—whether the drop in abortions is attributable to the persuasive effects of the law or the difficulties in making two trips to an abortion facility.<sup>217</sup>

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211. *Id.* at 479.

212. *Id.* Justice Scalia, in his *Casey* dissent, is critical of the undue burden standard because it "may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively 'express[ing] a preference for childbirth over abortion.'" *Planned Parenthood v. Casey*, 505 U.S. 833, 992-93 (1992) (Scalia, J., concurring in part and dissenting in part) (quoting the majority opinion). *See also* Silverstein *supra* note 12, at 108-10 (arguing that the undue burden standard is inadequate because of its unintelligible "distinction between encouraging childbirth and hindering abortion").

213. *Karlin*, 188 F.3d at 482. The court adds the further important specification that the question is not whether the regulation would significantly restrict a majority of women seeking abortion, but rather, whether the regulation would significantly restrict the group of women to whom the regulation applies. *Id.* at 481.

214. *Id.* at 486.

215. *Id.* at 486-87.

216. *Id.* at 487.

217. *Id.* Put a slightly different way, "the Mississippi Study failed to prove that the drop in abortions in Mississippi is causally attributable to any unconstitutional effect of that state's

Finally, the court concluded that the purpose of the statute was not improper because there was no evidence that it was calculated to hinder rather than inform a woman's free choice.<sup>218</sup> Further, the court averred that a statute might be constitutional even if enacted with the purpose of interfering with a woman's right to abortion if it does not have the actual effect of interfering with that right, so long as the regulation was reasonably related to the state's interest in promoting childbirth over abortion.<sup>219</sup>

### 3. Parental Consent Statutes

Yet another area in which undue burden challenges have failed is parental consent statutes. The Supreme Court, in its *Bellotti* decision of 1979, established that while a minor has a right to an abortion, a minor's decision is "unique in many respects."<sup>220</sup> Specifically, there are three reasons the "constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."<sup>221</sup> Thus, states "validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."<sup>222</sup> As a result, the Court allowed parental consent statutes so long as they include a judicial bypass provision allowing a minor to avoid the parental consent requirement in certain situations.<sup>223</sup>

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mandatory waiting period." *Id.* at 488. A more recent Seventh Circuit decision has reaffirmed this holding on similar reasoning. In *A Woman's Choice-East Side Women's Clinic v. Newman*, the court said that a decrease in abortion as a result of such a statute may show that "presenting the information in person is critical to its persuasive effect" and that a similar statute may not even have the same result in a different state. 305 F.3d 684, 690, 692 (7th Cir. 2002). The court also said that an undue burden might exist if many women who strongly wanted an abortion have been blocked by increased cost in time and money, but that it would not be an undue burden (and is an equally plausible explanation for the decrease) if the decrease represents a percentage of all women who are "on the fence between ending pregnancy and carrying the pregnancy to term, so that even a modest cost tips the scales." *Id.* at 691.

218. *Karlin*, 188 F.3d at 493.

219. *Id.* at 494-95 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

[O]ur reading of *Mazurek* suggests that a state abortion regulation will survive an impermissible purpose challenge if it is a reasonable measure designed to further the state's legitimate interest in protecting either the life of the fetus or the health of the mother; provided that it cannot be shown that the legislature deliberately intended the regulation to operate as a substantial obstacle to women seeking abortions.

*Id.* at 494.

220. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

221. *Id.* at 634.

222. *Id.* at 635.

223. *Id.* at 643-44. The minor is entitled to a proceeding to show "either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this

In its undue burden analysis of a North Carolina parental consent statute, the Fourth Circuit found a preliminary injunction of the statute improper because there was not a “clear showing of irreparable injury which is neither remote nor speculative, but actual and imminent.”<sup>224</sup> The court also found a lack of a causal link between the Act and the alleged injuries to minors, noting that the delays in obtaining an abortion could be caused by the actions of minors rather than by the provisions of the Act.<sup>225</sup> The court observed that:

Merely recounting the trauma and risks involved in teen pregnancy . . . is not sufficient to preliminarily enjoin enforcement of a parental consent statute . . . . The Court agrees that young pregnant minors have a need for . . . support. . . . But in no case have the Appellants tied these needs to a harm directly caused by the Act.<sup>226</sup>

Similarly, the Sixth Circuit recognized that a State may not erect a procedural hurdle designed simply to make it more difficult to obtain an abortion. However, it held a requirement that a minor appeal a judicial bypass decision within twenty-four hours was not an undue burden even though the statute might pose some hardship for some women seeking an appeal.<sup>227</sup> In response to the dissent’s claim that some minors would be precluded from effectively pursuing a judicial bypass, the majority said:

[E]very added procedure will necessarily cause some hardship, yet not every procedural obstacle to an abortion creates an undue burden. In addition, *any* procedure will, in conjunction with *some* conceivable set of circumstances, prevent some minor from effectively pursuing a judicial bypass . . . . and the fact that some minors will be practically precluded . . . from pursuing a judicial bypass does not mean that the procedure is unconstitutional.<sup>228</sup>

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decision independently, the desired abortion would be in her best interests.” The proceedings must also insure the anonymity of the minor and proceed expeditiously. *Id.*

224. *Manning v. Hunt*, 119 F.3d 254, 264 (4th Cir. 1997) (internal quotations omitted). Plaintiffs argued that the Act posed an undue burden based on six different aspects of the Act, including language dealing with expediency and various procedural requirements for the minor. *Id.* at 258.

225. *Id.* at 265.

226. *Id.*

227. *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 462 (6th Cir. 1999). Planned Parenthood argued that the provision impermissibly shifts the burden of acting expeditiously to the pregnant minor. *Id.*

228. *Id.* at 463 n.3. For other examples of circuit court decisions dealing with parental consent statutes, see *Planned Parenthood v. Lawall*, 307 F.3d 783 (9th Cir. 2002) (holding that Arizona’s judicial bypass provision satisfied the Supreme Court requirements and was not an undue burden); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995) (striking down a South Dakota abortion regulation because, *inter alia*, the parental notification provision did not include a judicial bypass option); *Barnes v. Mississippi*, 992 F.2d 1335, 1340 (5th Cir. 1993) (upholding as constitutional a Mississippi statute’s parental consent requirement

#### 4. Additional Regulations

In addition to these three main areas of undue burden litigation, some circuits have applied the analysis in other areas. For example, the Eighth Circuit held constitutional a Missouri statute preventing abortion service providers from receiving state family planning funds.<sup>229</sup> The court said the statute was “intended to effectuate the State’s constitutionally permissible decision to favor childbirth over abortion, and any effects limiting women’s access to abortion services are strictly incidental” and thus not an undue burden.<sup>230</sup> In *Mazurek v. Armstrong*, the Supreme Court upheld a Montana statute restricting performance of abortions to licensed physicians.<sup>231</sup> The Court said even assuming that a legislative *purpose* to interfere with the right to abortion without the *effect* of interfering could invalidate the law, there was no basis for finding an illegitimate legislative purpose in this case.<sup>232</sup>

In *Greenville Women’s Clinic v. Bryant*, the Fourth Circuit upheld a South Carolina statute establishing licensure and operational requirements for physicians’ offices and medical clinics performing five or more first trimester abortions per month.<sup>233</sup> The court below found that the regulation served no legitimate state interest, and even if it did, it constituted an undue burden because of increased costs, delays in the ability to get abortions, decreased availability of abortion clinics, increased travel distances to clinics, and unlimited inspections of clinics and compromises to patient confidentiality.<sup>234</sup> In reversing this decision, the court said a facial challenge to a statute can succeed only based on expert predictions rather than on actual data as applied to South Carolina patients.<sup>235</sup> “Such anticipation, however, is generally not an appropriate basis on which to strike down statutes and regulations.”<sup>236</sup> The court then concluded there was no evidence that the statute was an undue burden, and “[o]nly when the increased cost of abortion is prohibitive, essentially depriving women of the choice to have an abortion, has the Court invalidated regulations because they impose financial burdens.”<sup>237</sup> Finally, the

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requiring the consent of two parents, even though the two-parent requirement would “incrementally increase the burden on the minor’s exercise of her right to get an abortion”).

229. *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458 (8th Cir. 1999).

230. *Id.* at 465.

231. 520 U.S. 968 (1997).

232. *Id.* at 972. “We do not assume unconstitutional legislative intent even when statutes produce harmful results; much less do we assume it when the results are harmless.” *Id.* (citation omitted).

233. 222 F.3d 157 (4th Cir. 2000).

234. *Id.* at 163.

235. *Id.* at 164.

236. *Id.*

237. *Id.* at 167. The estimated increase in cost as a result of the licensing requirements in this case was \$23-\$75 per abortion. *Id.* at 170.



court commented that *Casey* had replaced the *Roe* strict scrutiny standard with the undue burden standard, which asks “not whether [the standard] serves a compelling state interest, but whether it ‘serves a *valid* purpose.’”<sup>238</sup>

#### 5. Summary of Post-*Casey* Undue Burden Jurisprudence

One need only look to the courts’ language since *Casey* to see that the undue burden test has not been favorable to abortion regulation challenges. In the only two areas in which the courts have found an undue burden—partial birth and spousal consent statutes—the records were replete with evidence that the statute would cause large-scale prevention of legal abortions. In all decisions upholding the regulations, terms such as “proscription,” “prevention,” and “significant” reverberate as the effects required before a regulation will be declared unconstitutional. Courts have required a significant showing of significant and direct prevention of abortion to strike down a regulation and have upheld statutes causing some financial and logistical obstacles to abortion. Courts also have distinguished “ancillary” regulations from regulations that directly impact access to abortion, indicating that ancillary regulations are constitutional absent a clear showing of undue burden so long as they bear a rational relation to the state’s interest in protecting potential life. We now turn to the application of these principles to fetal guardian appointments in court proceedings involving minors seeking judicial bypasses and incompetent mothers whose decision regarding the pregnancy is in the hands of a guardian.

#### D. Guardians in Abortion-Related Court Proceedings

##### 1. Minors Seeking Judicial Bypass of Parental Consent Requirements

###### a. Case Law

The Florida Supreme Court considered the question of a guardian in the context of a minor seeking a judicial bypass for a first trimester abortion.<sup>239</sup>

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238. *Bryant*, 222 F.3d at 173 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992)). See also Justice Rehnquist’s dissent in *Casey*: “*Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to ‘strict scrutiny’ and could be justified only in the light of ‘compelling state interests.’ The joint opinion rejects that view.” *Casey*, 505 U.S. at 954 (Rehnquist, C.J., dissenting) (quoting *Roe v. Wade*, 410 U.S. 113, 162-64 (1973)).

239. *In re T.W.*, 551 So. 2d 1186, 1189 (Fla. 1989). For criticism of the judicial bypass system, see Jennifer Blasdel, *Mother, May I?: Ramifications For Parental Involvement Laws For Minors Seeking Abortion Services*, 10 AM. U. J. GENDER SOC. POL’Y & L. 287, 288-93 (2002) (arguing that bypass proceedings burden minors’ health and compromise minors’ rights to confidential medical care); see also J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18

The guardian ad litem for the fetus argued at the trial court hearing that the judicial bypass portion of the statute was unconstitutionally vague and parental consent must therefore be required in every instance where a minor seeks an abortion.<sup>240</sup> The trial court declared the bypass provision unconstitutionally vague, but did so in favor of the minor and granted the bypass.<sup>241</sup> The guardian ad litem then filed several unsuccessful motions to block the abortion, the minor obtained an abortion, and the guardian ad litem appealed to the Florida Supreme Court.<sup>242</sup> With no rationale and no citation to precedent, the court summarily condemned the appointment of the guardian for the fetus: “Preliminarily, we find that the appointment of a guardian ad litem for the fetus was clearly improper.”<sup>243</sup>

The Alabama Supreme Court gave no analysis of the propriety of appointing a guardian in general, limiting its discussion to whether a nonviable fetus has a right to appeal a judicial bypass order through its guardian ad litem.<sup>244</sup> As Helen Silverstein points out, the court’s opinion rejected the right of the guardian to appeal but did not reject or confirm the decision of the trial court to appoint the guardian in the first place.<sup>245</sup> According to Silverstein, with four justices indicating that trial courts may appoint guardians ad litem in waiver hearings and five justices remaining silent on the point, trial courts in Alabama now have discretion to appoint guardians in these proceedings.<sup>246</sup> In concurrence and dissent, several justices took up the argument the majority had refused to address, suggesting that the trial court did have the authority to appoint a guardian under a court procedure rule requiring a guardian “when the interest of an infant unborn or unconceived is before the court.”<sup>247</sup> One justice

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BERKELEY WOMEN’S L.J. 61, 173 (2003) (reporting that minors describe going to the bypass hearing as “frightening, nerve-wracking, and humiliating”).

240. *T.W.*, 551 So. 2d at 1189.

241. *Id.*

242. *Id.*

243. *Id.* at 1190.

244. *In re Anonymous*, 720 So. 2d 497, 498 (Ala. 1998) (holding that the guardian ad litem did not have statutory authority to appeal an order granting the waiver of parental consent to have an abortion because the legislature did not provide such a right).

245. Silverstein, *supra* note 12, at 85.

246. *Id.* at 86. In fact, Silverstein’s research shows that at least two judges in Alabama trial courts appoint such guardians as a matter of routine. *Id.* Also of note in this case was the guardian’s tactics in examining the minor at the hearing. The guardian questioned her about her familiarity with certain Bible scripture and asked whether she was aware that, by choosing abortion, she would be “snuffing out” the life of her child. *Id.* at 70. In addition, the guardian used words like “kill” to describe abortion and the waiver lasted nearly four hours (compared to a normal proceeding that ordinarily lasts 30 minutes). *Id.* at 82-83. Because Silverstein sees this line of questioning as a somewhat isolated type of activity by a guardian, she still concludes that the appointments pass constitutional muster. *Id.* at 88-89.

247. *Anonymous*, 720 So. 2d at 499 n.2 (quoting ALA. R. CIV. P. 17(c)).

argued that because Alabama required such an appointment under the rule in divorce proceedings, a similar interpretation should apply here.<sup>248</sup>

b. Guardians for Fetuses?

Helena Silverstein's analysis of this issue in Alabama courts is the only significant treatment to date and provides a touchstone for this analysis. Silverstein argues that appointing guardians ad litem in judicial bypass proceedings does pass constitutional muster, but she views this conclusion as "reveal[ing] serious shortcomings in *Casey*."<sup>249</sup> Under *Casey*, Silverstein admits, a regulation will be an undue burden only if it has "the purpose or effect of stopping women from obtaining safe abortions. That women would confront considerable challenges . . . is not sufficient to find the measure constitutionally flawed."<sup>250</sup> Further, "[w]e can fairly surmise, then, that the joint opinion establishes that states may hinder abortion, at least insofar as the encouragement of childbirth constitutes a hindrance to abortion . . . . This, then, is what undue burden means: Regulations that fall short of stopping abortion and do not entail health risks are permissible, regardless of their otherwise burdensome qualities."<sup>251</sup>

Silverstein, then, though opposing guardianship appointments, finds them constitutionally permissible under *Casey*. This conclusion undoubtedly is supported by the post-*Casey* cases discussed above. The guardian has no power to prevent, proscribe, or make the procurement of abortion for minors effectively illegal. Even the most anti-abortion guardian under the supervision of the most anti-abortion judge, such as the one in Alabama that Silverstein discusses, can attempt only to persuade the minor to choose childbirth over abortion, a purpose explicitly condoned in *Casey* and its progeny.<sup>252</sup> The

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248. *Id.* at 502 (Hooper, C.J., concurring in part and dissenting in part).

249. Silverstein, *supra* note 12, at 108-10. Interestingly, Silverstein suggests that the same constitutional argument justifying guardians for fetuses in judicial bypass proceedings theoretically justifies requiring a competent adult woman to discuss her abortion decision with a guardian who speaks for the fetus. In Silverstein's view, such a requirement would certainly "strik[e] at the heart of liberty," but could be justified under the "permissive character" of the undue burden standard. *Id.* at 108-10. "If states may, consistent with the undue burden test, require that a woman—minor or adult—be questioned by an agent of the fetus, then there is something fundamentally wrong with that test." *Id.* at 110. The problem, in part, is the lack of a principled distinction between encouraging childbirth and hindering abortion, and thus "the notion of 'substantial obstacle' becomes a euphemism for those regulations that prevent abortion or pose substantial health risks for women." *Id.* A discussion of whether Silverstein is right about this extension to adult women under *Casey* is outside of the scope of this Comment.

250. *Id.* at 96.

251. *Id.* at 96-97.

252. Silverstein reaches her conclusion on constitutionality even though some guardians have used tactics that are improper in her view and even though the avowed aim of guardians who

guardian as an officer of the court simply has no power to accomplish the prevention of abortion required to fail the undue burden test.

Even if a guardian's presence had the effect of hindering some minors from succeeding in their judicial bypass efforts, regulations that merely cause some hardship are not invalid.<sup>253</sup> In fact, "every added procedure will necessarily cause some hardship" and such hardship is rarely sufficient to invalidate the regulation.<sup>254</sup> Indeed, no such body of evidence exists to support an undue burden conclusion with respect to guardians. Furthermore, as evidenced in *Karlin v. Foust* and *Memphis Planned Parenthood, Inc. v. Sundquist*, even a substantial decrease in the granting of judicial bypasses would implicate guardian appointments only if there is an additional showing that the decrease is causally related to an unconstitutional element of the guardian's activities. Without such a showing, the decrease may be causally related to the constitutionally legitimate persuasive power of the guardian.<sup>255</sup> In addition, even if a substantial number of courts began to deny judicial bypasses *and* the decrease could be causally linked to the presence of the guardian, a plaintiff still would have to show that a significant number of minors were then unable to obtain an abortion through parental consent. Denial of a judicial bypass is not denial of an abortion; it simply means parental consent is required. Finally, if there is a decrease in minors seeking judicial bypass in the first place, implicating the guardian in this decrease would require evidence that minors' knowledge of the presence of a guardian in the proceeding was the cause of the chilling effect rather than some other difficult element of teenage pregnancy.<sup>256</sup>

The arguments above indicate reasons why a successful constitutional challenge to guardianship appointments would be nearly impossible to mount. There is also a significant positive reason to appoint a guardian to protect the State's interest in potential life—to ensure that the laws promulgated by the state's legislature are administered fairly and impartially. In minor judicial bypass proceedings, the State has passed a parental consent law allowing a judicial bypass only on a specific, Supreme Court-mandated showing of the

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represent fetuses is, through their questioning and calling of witnesses, to convince the minor to carry the fetus to term. *Id.* at 88; *see supra* note 243.

253. Note as well language in cases that have even indicated that an improper purpose will not sustain a challenge in the absence of an improper effect. *Karlin v. Foust*, 188 F.3d 446, 494 (7th Cir. 1999).

254. *Memphis Planned Parenthood v. Sundquist*, 175 F.3d 456, 463 n.3 (6th Cir. 1999).

255. *See* discussion *supra* text accompanying notes 180-93.

256. *Manning v. Hunt*, 119 F.3d 254, 265 (4th Cir. 1999) (noting that the trauma and risks involved in teenage pregnancy are not sufficient to strike down a parental consent statute). *See Ehrlich, supra* note 237, at 186-87 for a description of teen anxiety in facing bypass proceedings without guardians. That this anxiety already exists would make a showing that a guardian was the cause of a significant chilling effect very difficult.

minor's decision-making maturity or that the abortion is in the best interests of the minor. This determination involves offering evidence and examining the minor. A guardian's role in challenging evidence, offering counter evidence and examining the minor would aid the court in making a proper determination. This ensures that the proceeding is not simply a rubber stamp on the minor's desire to avoid seeking parental consent. The appointment of a guardian surely bears a rational relation to these goals of protecting the State's interest in the fetus and in the just administration of the laws of its legislature. The appointment of a guardian for fetuses in this context does not pose an undue burden on a minor's right to choose an abortion. Further, it is a legitimate mechanism to protect the State's interest in the life of the fetus and to encourage childbirth over abortion.

## 2. Mentally Incompetent Mothers and the Abortion Choice

### a. Case law

The final section of this Comment will discuss the propriety of appointing guardians in proceedings involving a mother's alleged incompetence. *In re D.K.* involved a schizophrenic woman who was pregnant with a non-viable fetus.<sup>257</sup> A court-appointed guardian for the fetus obtained a court order restraining hospital personnel from treating the mother with medication harmful to the fetus and restraining her from consenting to or requesting an abortion.<sup>258</sup> The guardian filed an additional suit seeking to declare D.K. legally incompetent, but before a decision could be reached on the issue, D.K. was discharged from the hospital.<sup>259</sup> Immediately thereafter, D.K. moved to dismiss the incompetency action and in doing so challenged the right of the fetus to be represented and the standing of its guardian to file a complaint on its behalf.<sup>260</sup>

In holding the appointment of the guardian for the fetus improper, the New Jersey Superior Court found support in *Roe* for the proposition that "it is the mother who controls the fetus, until viability occurs, not the reverse."<sup>261</sup> Thus, the appointment of a guardian for a fetus, prior to viability, is improper because "the unborn have never been recognized in the law as persons in the whole sense and . . . during the first trimester of pregnancy a decision may be reached and effectuated to abort the fetus, free of any interference by the

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257. *In re D.K.*, 497 A.2d 1298, 1300 (N.J. Sup. Ct. Ch. Div. 1985).

258. *Id.*

259. *Id.* at 1301.

260. *Id.*

261. *Id.* at 1302. "If the mother is incompetent control must be exercised through a guardian."  
*Id.*

state.”<sup>262</sup> In addition, court rules provided for appointment of a guardian ad litem for a minor, but not a fetus, and thus the appointment stood outside the statutory authority of the court.<sup>263</sup> Finally, the lower court lacked *in personam* jurisdiction for the purpose of appointing a guardian because the fetus was not a person.<sup>264</sup>

A New York appellate court considered the case of Nancy Klein, who was seventeen weeks pregnant and a comatose patient in a hospital as a result of brain damage.<sup>265</sup> At the same time Klein’s husband applied to be her temporary guardian, the court denied the petition of a stranger to be guardian of the non-viable fetus.<sup>266</sup> Echoing the reasoning in *In re D.K.*, the appellate court upheld the denial of the application for guardianship of the fetus “because a non-viable fetus, i.e., one less than 24 weeks old, is not a legally recognized ‘person’ for the purposes of proceedings such as these [and] [t]he State has no compelling interest in the protection of the fetus prior to viability.”<sup>267</sup>

A Florida appellate court considered the involuntary commitment of a pregnant mother suffering from severe psychosis.<sup>268</sup> The trial court had appointed an attorney ad litem for the fetus, who favored termination of the pregnancy because it would be in the best interest of the fetus and the mother.<sup>269</sup> The court sought authority to terminate the pregnancy and put on evidence showing the severe effects of the psychosis and the danger that normal childbirth would pose to the mother and child.<sup>270</sup> The trial court authorized termination of the pregnancy, but the appellate court reversed on procedural grounds.<sup>271</sup> The court did not comment on the propriety of appointing a guardian for the fetus.

*In re Jane A.* considered whether, under the doctrine of substituted judgment, a mentally incompetent person would choose to terminate her eighteen-and-a-half week pregnancy.<sup>272</sup> As an initial matter, the court of appeals noted with approval that the Probate Court judge was “conscientious in

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262. *D.K.*, 497 A.2d at 1302 (quoting *Rothenberger v. Doe*, 374 A.2d 57, 58 (N.J. Sup. Ct. Ch. Div. 1977)) (internal quotations omitted) (also holding that the appointment of a guardian for the fetus was improper).

263. *Id.*

264. *Id.* at 1303.

265. *In re Klein*, 538 N.Y.S.2d 274, 275 (N.Y. App. Div. 1989).

266. *Id.*

267. *Id.*

268. *Lefebvre v. N. Broward Hosp. Dist.*, 566 So. 2d 568, 569 (Fla. Dist. Ct. App. 1990). Without lithium to control her psychosis, the mother was violent, abusive and uncontrollable and that use of lithium would result in severe damage to the fetus. *Id.*

269. *Id.* at 570.

270. *Id.* at 569-70.

271. *Id.* at 570-71.

272. *In re Jane A.*, 629 N.E.2d 1337, 1338 (Mass. App. Ct. 1994).

appointing persons who would examine the question from various points of view” including a guardian ad litem “to oppose a determination that [the ward], if competent, would choose to have an abortion.”<sup>273</sup> Because there would possibly be adverse consequences with both childbirth and abortion, the trial court said “we cannot presuppose that [the ward], if competent, would disregard the fetus as an important factor in her decision’ . . . [thus] the ward’s ‘decision, if competent, would be not to consent to an abortion.’”<sup>274</sup> After a reexamination of the record revealed a significantly greater danger to the mother if she proceeded with the pregnancy, the court of appeals reversed. This led to the conclusion that were she competent, she would have chosen to terminate her pregnancy.<sup>275</sup>

In the most recent case at the time of this writing, a Florida appellate court held the appointment of a guardian for a viable fetus improper.<sup>276</sup> The case involved a twenty-two-year-old woman who was pregnant as a result of sexual battery and was suffering from severe mental retardation, cerebral palsy, autism and a seizure disorder.<sup>277</sup> According to the court, the absence of the term “fetus” in the state’s guardianship statute and the clear inclusion of the term by the Florida legislature in statutes designed to protect fetuses meant the statute did not extend to fetuses.<sup>278</sup> In addition, the term “ward” in the Florida statutes “means a *person* for whom a guardian has been appointed” and “[i]t follows that a fetus must be considered a ‘person’ to be appointed a guardian.”<sup>279</sup> No Florida case or statute had ever determined the fetus to be a person.<sup>280</sup> Further, Florida law provided other safeguards to ensure that any

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273. *Id.* at 1338 n.1 (citing *In re Moe*, 432 N.E.2d 712 (Mass. 1982)). In addition, the judge appointed a temporary guardian with authority concerning medical issues, counsel for Jane, and a guardian ad litem to investigate the substituted judgment question with respect to abortion. *Id.*

274. *Id.* at 1340.

275. *Id.* at 1340-41. Among the evidence that the appellate court considered was Jane’s inconsistent testimony on whether she understood what her pregnancy meant and whether she wanted it to continue. The court also considered expert testimony that continuing the pregnancy could undo the progress Jane had made through years of behavioral therapy and that the probability of harm would be “a thousand fold” greater if she proceeded with the pregnancy instead of terminating it. *Id.* at 1340.

276. *In re J.D.S.*, 864 So. 2d 534, 539 (Fla. Dist. Ct. App. Jan. 9, 2004).

277. *Id.* at 536.

278. *Id.* at 538.

279. *Id.*

280. *Id.* In a concurrence continuing this discussion of the lack of personhood of the fetus, the concurring justice makes extensive use of *Roe*’s requirement that state regulation of a fundamental right is justified only by a compelling state interest. *Id.* at 541 (Orginger, J., concurring). This reasoning is inexplicable because even under *Roe* a state may proscribe abortion after the third trimester without showing a compelling interest. Only the dissent mentions *Casey*, arguing that the trial court was obligated to determine if the appointment of a guardian for the fetus constituted an undue burden and that in this case it did not. *Id.* at 546 (Pleus, J., dissenting).

decision in favor of abortion made by the mother's guardian would not be capricious or cavalier.<sup>281</sup> By contrast, in the dissent's view, the appointment of a guardian would "greatly assist" the court in protecting its interest in the life of the fetus, and "[w]ithout the appointment of a guardian . . . there will be an inherent conflict of interest in the protection of the ward and the unborn child."<sup>282</sup> The dissent said the denial of a guardian "nullified the only effective mechanism and non-burdensome method by which the State can fulfill its duty."<sup>283</sup>

b. Guardians for Fetuses?

Is it proper to appoint a guardian for a fetus in court proceedings involving an incompetent mother's "choice" about abortion? The first consideration is whether the Florida appellate court and others before it are right when they conclude that a guardian cannot be appointed for a fetus because statutes do not specify fetuses as proper wards. As I have argued above, this argument is a red herring in view of the court's equitable power to appoint guardians.<sup>284</sup> Similarly, the argument that lack of fetal personhood precludes the appointment is belied by the strong State interest in protecting fetal life<sup>285</sup> and by the "rational relation" of a guardianship appointment as a means toward that end.<sup>286</sup> In the *J.D.S.* case, the ACLU of Florida contended that the State does not *need* a guardian to protect its interests in a viable fetus because once a fetus becomes viable Florida law already limits the availability of abortion for all women.<sup>287</sup> According to the brief, Florida law prohibits a woman from having an abortion after the twenty-fourth week of pregnancy unless "termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman" and thus existing law already protects the State's interest.<sup>288</sup> The

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281. *J.D.S.*, 864 So. 2d at 539.

282. *Id.* at 546 (Pleus, J., dissenting).

283. *Id.*

284. See discussion *supra* Part I.

285. All of the cases other than *J.D.S.* that reject guardianship appointments for pre-viable fetuses on non-personhood grounds did so prior to *Casey's* articulation of the undue burden standard.

286. In its brief, the ACLU argued that "As a threshold matter, Florida law only permits the appointment of guardians for 'persons.' A fetus, however, is not a person under the guardianship statutes." Renewed Brief of Amici Curiae ACLU et. al. at 3, *In re J.D.S.*, 864 So. 2d 534 (Fla. Dist. Ct. App. 2004) (No. 5D03-1921). The brief makes the same lack of personhood argument under the United States and Florida Constitutions. *Id.* at 11. See *supra* Part II.B.1.c for detailed criticism of this argument.

287. Renewed Brief of Amici Curiae ACLU et. al. at 18, *J.D.S.* (No. 5D03-1921). This specific contention in the Florida case takes us outside the realm of undue burden analysis momentarily because that standard governs only pre-viability regulations.

288. *Id.* at 19 (quoting FLA. STAT. ch. 390.0111(1)(a) (2003)).



ACLU brief claims that the law applies no differently to J.D.S than to any other woman in Florida.<sup>289</sup>

This argument fails because it does not recognize the fundamental difference between the J.D.S. situation and the situation of any other woman in Florida. The difference is that J.D.S. herself is not making the abortion decision. Instead, a court-appointed guardian woman is making the decision based on a determination of J.D.S's best interests as ward under the law proscribing abortions for viable fetuses except when the mother's life or health are in danger. In this context, the State has a clear interest to ensure that the third-party decisionmaker for the incompetent woman properly assesses the danger to the mother's life and health, which is required in making the determination. Such a third-party determination will involve examination of the medical situation and the risks involved in abortion versus the risks involved in carrying the pregnancy to term. To emphasize this point, one of the *amici curiae* briefs filed in the *J.D.S.* case documents numerous procedural violations that occurred in another Florida case that authorized the abortion of a mentally incompetent woman's fetus.<sup>290</sup> The brief argues that the hearing of evidence and the standard of review used by the judge to determine whether the mother was at sufficient risk to authorize an abortion violated statutory requirements. At the very least, a guardian for the fetus was necessary to "ensure that testimony concerning the health and life risks of the mother because of pregnancy are fully cross-examined to examine competency, veracity and motive."<sup>291</sup> The laws proscribing abortion do not in themselves ensure protection of the State's interest when a third-party decisionmaker makes the determination for the woman. Thus, a State needs a guardian to protect its interest in the life of a viable fetus.

Is the appointment, then, an undue burden when pre-viable fetuses are involved? As discussed in the preceding paragraph, the question raises slightly different issues than those raised by minor judicial bypass appointments because in these cases an incompetent woman cannot properly be said to make the choice herself. Because of this, the analysis as to whether the guardian properly informs the woman's choice or is an improper substantial obstacle under *Casey* is somewhat forced. Obviously, the guardian of an incompetent woman faces a more difficult task in seeking an abortion if a guardian for the fetus is present to protect the State's interest. However, there is no evidence that this added challenge would present the kind of preventative or proscriptive bar to abortion that the undue burden jurisprudence requires for

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289. *Id.* at 18-19. It is important to note that in the case of a viable fetus, the state may not only regulate abortion under *Casey* but may even proscribe it.

290. Brief of Amici Curiae Florida Right to Life, Inc. et. al. at 5-10, *In re J.D.S.*, 864 So. 2d 534 (Fla. Dist. Ct. App. 2004) (No. 5D03-1921).

291. *Id.* at 10.

unconstitutionality. The guardian's role as a structural mechanism to protect the potential life of the fetus and even to exert persuasive power in favor of childbirth falls within the allowable ways the State may vindicate its interest. A guardian does not have the ultimate power to "make effectively illegal" the specific abortion sought in a particular case, much less a significant number of common abortion procedures for a significant number of women. In the case of incompetent women, because there is no possibility of a chilling effect on a substantial number within the group of women the regulation would impact, the guardian could hardly be said to "strike at the heart" of the abortion choice. Instead the appointment of a guardian is an "ancillary" regulation that is designed to aid the court in considering the best interests of the fetus as a means to protect the State interest in the fetus, and is not an undue burden on a woman's right to choose. Thus, while different standards and justifications govern the decision in abortion and non-abortion contexts, the necessity of balancing interests in both arenas requires the appointment of guardians for fetuses.

### III. CONCLUSION

The appointment of guardians for fetuses in court proceedings involving a maternal-fetal conflict is an appropriate and necessary mechanism for protection of fetal rights and State interests in non-abortion contexts and for protection of the State's interest in potential fetal life in abortion contexts. A question that this Comment undoubtedly raises, but does not attempt to answer, is whether under the logic of the argument such appointments could be required whenever a competent woman pursues an abortion. Helena Silverstein argues that the inadequacy of *Casey* "to intelligibly distinguish between encouraging childbirth and hindering abortion" could lead to the conclusion that may require a woman—minor or adult—to be questioned by an agent of the fetus.<sup>292</sup> While Silverstein may be right about this, I predict that such a requirement would be found to be an undue burden under current law. Be that as it may, the arguments advanced here are intentionally limited to the types of court proceedings discussed throughout in an effort to advocate proper application of the law in this area as currently written.

Although this Comment argues that the appointment of a guardian for a fetus is not dependent upon statutory authorization, states should rewrite their guardianship statutes to include fetuses in the types of cases discussed here. Hopefully, the Comment has provided sufficient argument to support the

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292. Silverstein, *supra* note 12, at 110; *see also* Renewed Brief of Amici Curiae ACLU et. al. at 18, *In re J.D.S.*, 864 So. 2d 534 (Fla. Dist. Ct. App. 2004) (No. 5D03-1921) (stating that "[i]ndeed, if third parties are allowed to represent the fetus under these circumstances, there is no logical reason they would not seek to do so in the case of a competent pregnant woman considering an abortion or medical treatment detrimental to her fetus.").

legitimacy of such statutes. The appointment of guardians for fetuses is responsive to the fact that states are increasingly recognizing fetal rights that sometimes conflict with a mother's rights, and that in such cases the fetuses' rights must be heard and defended. In abortion cases, the State's interest in potential life must also be protected by the appointment of guardians. Under current law, "the fundamental dilemma" certainly does remain the balancing of the rights of the fetus and the rights of pregnant women.<sup>293</sup> So long as the law creates space in which this balancing must occur, guardians for fetuses ought to play a vital role in this process.

M. TODD PARKER\*

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293. SCHROEDEL, *supra* note 2, at 44-45.

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