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Abuse and Neglect of the Unborn: Can the State Intervene

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* This article makes continual reference to unborn children. Various terms are used to describe the unborn, such as unborn child, fetus, and unborn. It can be said that referring to a fetus as a child carries with it an appeal to the emotional attachment felt by adults toward young children and babies. If this is so, it is not the intent of the author to capitalize on the phenomenon. Various terms are used in an effort to enhance readability, not to inject an emotional appeal in favor of the author's position.

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I. INTRODUCTION

This article attempts to answer the formidable question: When, if ever, can the state intervene in the life of a pregnant woman to curtail abuse or neglect of her unborn child? There is no clear answer to this difficult socio-legal question. Opinion varies from never to as often as need be to protect the fetus. Both extremes are eschewed here in favor of the thesis that intervention is legally permissible, but only in a narrow range of cases.

The article begins with discussion of the legal status of the unborn child and the state's interest in the unborn. It then moves to a description of state statutes on abuse and neglect. The argument is made that these statutes should be interpreted to provide protection for the unborn. This discussion is followed by analysis of the substantial body of law concerning court ordered medical care for children over parental objection. Development of this topic is relevant because state intervention to protect the unborn will often take the form of court imposed medical or surgical care. Nonmedical care forms of prenatal abuse and neglect are also discussed. The focus of the article then shifts to discussion of the rights of the parties involved in prenatal neglect cases — the rights of parents, the specific interests of the pregnant woman, paternal rights, and the rights of the unborn child. The article concludes with the argument that when the varying interests are balanced, the scale tips, in some cases, toward state intervention to protect viable fetal life from abuse or neglect.

II. Legal Status of the Unborn Child

To set the stage for discussion of the question posed above, this section briefly outlines areas of substantive law concerning the unborn. It is interesting to note that the law has been concerned with the unborn child for centuries. This is especially so in the fields of property and inheritance, tort, criminal law, and guardianship.

A. *Property and Inheritance*

The unborn enjoyed certain "rights" as long ago as the Roman Empire. Under Roman law the fetus was deemed born if it was in its interest to do so.[1] For example, so long as it was born alive, the fetus "took the status of the father and could inherit equally with other children."[2] English common law was quite similar in its treatment of the unborn. Blackstone wrote in his *Commentaries* that

> [a]n 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.[3]

In a footnote accompanying this passage, Blackstone states that "[e]very legitimate infant *in ventre de sa mere* is considered as born for all beneficial purposes."[4] It is apparent that early law was designed not so much to extend legal rights to the unborn as to fulfill the dispositional intentions of propertied individuals. While

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1. Curran, *An Historical Perspective on the Law of Personality and Status with Special Regard to the Human Fetus and the Rights of Women*, 61 Milbank Memorial Fund Q./Health and Society 58, 59 (1983). Professor Curran describes Roman law as follows:

> The human fetus was not regarded as a legal subject but as merely a part of a woman's body. The fetus had the potential to become a person and the law adopted the "fiction" . . . that the unborn person be deemed born whenever it was in the interest to do so. This fiction could be maintained, however, only if the fetus was later born alive and survived to be recognized as a juristic person.
>
> The most important applications of this law took place when the father died before the birth of the child. The child nevertheless took the status of the father and could inherit equally with other children. . . .

Id. at 59-60.

The concept of the fetus "as merely a part of a woman's body" is reflected in the 1884 decision Dietrich v. Northhampton, 138 Mass. 14, 52 Am. Rep. 242 (1884), where the Massachusetts Supreme Judicial Court held there could be no recovery for tortiously inflicted injury to a fetus. *See infra* notes 11-22 and accompanying text.

2. Curran, *supra* note 1, at 60.

3. 1 W. Blackstone, Commentaries *130 (footnotes omitted).

4. *Id.* at *130 n.(13).

the focus was not squarely on the interests of the fetus, there is no question that the common law recognized and enforced legal rights relating to the unborn.[5]

In the United States, early cases dealing with the unborn followed the English common law.[6] The English fiction that the fetus born alive was deemed born while in utero retained its viability. The American development is succinctly summarized in *In re Holthausen's Will*:[7]

> It has been the uniform and unvarying decision of all common law courts in respect to estate matters for at least the past two hundred years that a child *in ventre sa mere* is "born" and "alive" for all purposes for his benefit.[8]

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5. For a discussion of the law of inheritance relating to the unborn, see generally Lenow, *The Fetus as a Patient: Emerging Rights as Person?*, 9 AM. J.L. & MEDICINE 1, 3-4 (1983)("Fetal rights were first recognized in property law. At common law a fetus, from the time of conception, could be named an heir to a decedent's estate. The unborn child's property rights, however, only vested upon live birth. . . ."); Parness & Pritchard, *To Be Or Not To Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 264-67 (1982); Shaw & Damme, *Legal Status of the Fetus*, in GENETICS AND THE LAW 4 (A. Milunsky & G. Annas eds. 1976); Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW 349, 351-54 (1971).

The 1798 English Chancery case of *Thellusson v. Woodford* 31 Eng. Rep. 117 (Ch. 1798) asked the question "Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons." *Id.* at 164. In response to the assertion that the fetus was a non-entity, the court quipped:

> Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. . . . He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.

Id. at 163. This early opinion demonstrates that property law has long recognized the unborn child as a person entitled to the law's protection.

6. Note, *supra* note 5, at 352. A nineteenth century treatise on American law states that

> [a]n infant in *ventre sa mere*, is a child in its mother's womb, and for the benefit of the child the civil law reputes an infant in its mother's womb in the same condition as if born . . . . It is also well settled, both in England and in this country, that an infant in *ventre sa mere* is deemed to be *in esse*, or in being, for the purpose of taking a remainder, or any other estate or interest which is for his benefit, whether by dissent, devise, or under the statute of distribution.
>
> . . . .
>
> [B]y the law of England, a child in *ventre sa mere* may be vouched; is capable of taking; the mother may detain charters in its behalf; a bill may be brought in its behalf; a court of equity will grant an injunction in its favor to stay waste; and the destruction of the child is murder.

R. TYLER, COMMENTARIES ON THE LAW OF INFANCY §§ 151, at 223-24; 153, at 225 (1868). *See also* P. BINGHAM, THE LAW OF INFANCY AND COVERTURE 104-06 (1849); G. FIELD, THE LEGAL RELATIONS OF INFANTS, PARENT AND CHILD, GUARDIAN AND WARD (1849).

7. 175 Misc. 1022, 26 N.Y.S.2d 140 (Sup. Ct. 1941).

8. *Id.* at 1024, 26 N.Y.S.2d at 143.

The common law tradition of the "rights" of the unborn was codified in the Uniform Probate Code, which states that "[r]elatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."[9]

In the law of property and inheritance, the unborn child has long been recognized as a person. While its rights are certainly not conterminous with those of individuals already born, they are substantial and of ancient origin.

B. *Tort*

Tort law relating to the unborn has changed remarkably during the past hundred years.[10] A century ago, Justice Oliver Wendell Holmes, while sitting on the Massachusetts Supreme Judicial Court, authored the famous opinion in *Dietrich v. Inhabitants of Northampton.*[11] A pregnant woman slipped and fell "upon a defect in a highway of the defendant town."[12] The fall resulted in a miscarriage of her four to five month old fetus, who died moments after birth. The child's administrator brought a wrongful death action against the town. In denying recovery, Justice Holmes wrote that "as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by"[13] the mother. The *Dietrich* decision became the foundation for a general rule denying recovery for

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9. UNIFORM PROBATE CODE § 2-108 (1969). *See* 26A C.J.S. *Descent & Distribution* § 29 (1956) which summarizes the law as follows:

> Both at common law and under the statutes of the different states, posthumous children take as heirs and distributees, an infant being deemed *in esse* for the purpose of taking an estate for its benefit, from the time of conception, provided it is born alive, and after such a period of foetal existence that its continuance in life may be reasonably expected, or is born within such a period of time as to indicate that it was conceived before the death of intestate, [sic] it being essential, under some statutes, that the child be born within ten months after the death of the intestate.

Id. (footnotes omitted). *See also* Roe v. Wade, 410 U.S. 113, 162 (1973) ("unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property").

10. *See* Morrison, *Torts Involving the Unborn—A Limited Cosmology*, 31 BAYLOR L. REV. 131, 131-41 (1979); Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1404-13; Comment, *Legal Duty to the Unborn Plaintiff: Is There a Limit?* 6 FORDHAM URB. L.J. 217 (1977). *See also* Beal, *"Can I Sue Mommy?": An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325 (1984); Goichman & Hirsh, *The Expanding Rights of the Fetus: An Evolution Not a Revolution*, 30 MED. TRIAL TECH. Q. 212 (1983).

11. 138 Mass. 14, 52 Am. Rep. 242 (1884).

12. 138 Mass. at 14, 52 Am. Rep. at 242.

13. 138 Mass. at 17, 52 Am. Rep. at 245.

injury to an unborn child.[14]

With little dissent,[15] the *Dietrich* Rule went unchallenged until 1946, when the United States District Court for the District of Columbia decided the seminal case of *Bonbrest v. Kotz*.[16] In *Bonbrest*, a viable fetus was injured through the alleged negligence of two physicians.[17] Relying in part on *Dietrich*, the doctors moved for summary judgment. The court denied the motion and held that when direct tortious injury is inflicted on a viable fetus later born alive, the child may then recover. The court placed decisive emphasis on the fact that the fetus was viable at the time of injury,[18] reasoning that viability was a precondition to recovery in such cases. *Bonbrest* is generally regarded as a repudiation of Justice Holmes' time-honored denial of a cause of action for prenatal injuries,[19] and since the decision "there has been an all but universal

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14. For a discussion of the *Dietrich* rule see Morrison, *supra* note 10, at 134-41; Robertson, *supra* note 10, at 1404-13.

English common law did not recognize a cause of action for prenatal tortious injury. Morrison, *supra* note 10, at 133-34 states that

> [w]hile the common law generally recognized the property rights of the unborn, and the unborn were often protected under the criminal law, there appears to have been no concomitant civil recognition of their rights as victims of personal injury or death. Though at least one English court went so far as to write that children en ventre sa mere "are entitled to all the privileges of other persons," it does not appear that any case of the English common law ever allowed a civil recovery for personal, rather than property, injury to the unborn. This failure of the common law to report even a single case permitting a recovery for prenatal injury was later used as a proof that the common law had rejected the notion, for surely facts raising the question must have presented themselves at some time to the common law for consideration.

Id. (footnotes omitted).

15. In 1900 the Illinois Supreme Court decided Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900), *overruled*, Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953). The court relied on the *Dietrich* rule to deny a cause of action for prenatal tortious injury. Justice Carroll L. Boggs dissented. He would have allowed a cause of action for tortious injury to a viable fetus. His dissenting opinion is discussed in detail in Morrison, *supra* note 10, at 136-37; Robertson, *supra* note 10, at 1404-09. Most scholarly comment disagreed with the *Dietrich* rule. *See* authorities cited at W. PROSSER, LAW OF TORTS 336 n.22 (4th ed. 1971).

16. 65 F. Supp. 138 (D.D.C. 1946). The case is discussed in Morrison, *supra* note 10, at 138-41; Robertson, *supra* note 10, at 1411-12. *See also* HANDLING PREGNANCY & BIRTH CASES, 345-46 (W. Winborne ed. 1983) [hereinafter cited as HANDLING PREGNANCY & BIRTH CASES], where it is stated that "in *Bonbrest* . . . a court for the first time recognized a common law right of action for prenatal injuries. The *Bonbrest* decision . . . reasoned that an infant should be recognized as having a legal existence separate from its mother's at such time as it was capable of sustaining life separate from her."

17. The infant's father brought action against two physicians for alleged medical malpractice in connection with the child birth. 65 F. Supp. at 139.

18. *Id.* at 140.

19. *See* Morrison, *supra* note 10, at 138-41; HANDLING PREGNANCY & BIRTH CASES, *supra* note 16, at 346. *See also* Renslow v. Mennonite Hospital, 67 Ill.2d 348, 350, 367 N.E.2d 1250, 1252 (1977).

change in the rule"[20] denying recovery for pre-birth injury. The Reporter of the Second Restatement of Torts observed that "[t]here now appears to be no American jurisdiction with a decision still standing refusing recovery."[21] Dean Prosser wrote that

> [b]eginning with [*Bonbrest*], a rapid series of cases, many of them expressly overruling prior holdings, have brought about what was up till that time the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts.[22]

While *Bonbrest* limited recovery to injuries to a viable fetus, more recent opinions reject viability as a cutoff point for liability because it is an irrational dividing line.[23] Damages are now awarded for injury suffered at any point during gestation.[24] The Second Restatement adopts this position, and states that "[o]ne who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive."[25]

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20. RESTATEMENT (SECOND) OF TORTS § 869 comment a. (1977).

21. *Id.* § 869 Reporter's Note, at 79.

22. W. PROSSER, LAW OF TORTS 336 (4th ed. 1971).

23. *See, e.g.*, Renslow v. Mennonite Hospital, 67 Ill.2d 348, 367 N.E.2d 1250 (1977). *See also* Morrison, *supra* note 10, at 141-44; Robertson, *supra* note 10, at 1414-20; HANDLING PREGNANCY & BIRTH CASES, *supra* note 16, at 347-48. The RESTATEMENT (SECOND) OF TORTS § 869 rejects viability as a cut off for liability, reading as follows:

> *Harm to Unborn Child*
>
> (1) One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive.
>
> (2) If the child is not born alive, there is no liability unless the applicable wrongful death statute so provides.

Id. The comments explain the viability rule as follows:

> The rule stated in Subsection (1) is not limited to unborn children who are "viable" at the time of the original injury, that is, capable of independent life, if only in an incubator. If the tortious conduct and the legal causation of the harm can be satisfactorily established, there may be recovery for any injury occurring at any time after conception. It is obvious, however, that in the present state of medical knowledge of embryology, as we approach the beginning of pregnancy medical testimony in proof of a causal connection becomes increasingly uncertain and tends to become mere conjecture. For that reason a court may properly require more in the way of convincing evidence of causation when the injury is claimed to have occurred during the early weeks of pregnancy than when it comes later. This is not a matter of viability, nor is there any fixed and definite line to be drawn at any particular state of development of the foetus.

RESTATEMENT (SECOND) OF TORTS § 869, comment d. For discussion of the requirement of live birth, see Robertson, *supra* note 10, at 1420-34.

24. It has been held that an injured fetus later born alive may recover for wrongful acts occurring even prior to conception. *See* Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978); Renslow v. Mennonite Hospital, 67 Ill.2d 348, 367 N.E.2d 1250 (1977); Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973); Robertson, *supra* note 10, at 1435-39.

25. RESTATEMENT (SECOND) OF TORTS § 869(1) (1977).

The developments in tort law reflect a growing social awareness of the individuality of the unborn child. Since the later-born fetus must bear the burden of another's wrongful act to the same extent as an individual injured following birth, it seems just and rational to apply similar rules of civil liability in both cases.[26]

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26. The field of tort law relating to the unborn is changing rapidly. The brief textual outline is not intended to cover all developments. Parness & Pritchard, *supra* note 5, at 270-71 summarize the principle areas of development as follows:

> [T]hree general types of tort claims can be distinguished on the basis of the harm to the unborn that results from the tortious action. Survival and wrongful death actions may exist where the harm resulting from a tort is that the fetus is not born alive. A wrongful life action may exist where the resulting harm is that the fetus is born. Finally, a standard or traditional common law tort action may exist where the child, though born, is injured or unhealthy.

Id. (footnotes omitted)

For discussion of prenatal wrongful death see HANDLING PREGNANCY & BIRTH CASES, *supra* note 16, at 350-61; Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639 (1980); Lenow, *supra* note 5, at 5-8; Shaw & Damme, *supra* 5, at 4-5; Morrison, *supra* note 10, at 144-53; Parness & Pritchard, *supra* note 5, at 272-75; Robertson, *supra* note 10, at 1420-34. *See also* Presley v. Newport Hospital, 117 R.I. 177, 365 A.2d 748 (1976) (case containing excellent history of development of tort law). See the excellent concurring opinion of Judge Lottinger in Danos v. St. Pierre, 383 So.2d 1019, 1031 (La. Ct. App. 1980) (Lottinger, J., concurring), a case recognizing a cause of action for wrongful death of a fetus, where the judge states:

> The anomalies which exist under the present state of the law are reason enough to allow the action sued for here. Under existing jurisprudence, a fetus injured or deformed by the act of a tortfeasor can sue for its prenatal injuries if it emerges from the womb alive. If it lives for 10 days or 10 minutes or even 10 seconds outside the womb, its survivors can sue not only for the fetus' prenatal injuries and post-birth suffering but also for their own damages suffered as a result of the child's wrongful death. But under the law as it stands today, a nine-month-old fetus which emerges stillborn because of a tortfeasor's negligence is considered a nonentity, a nothing, a mass of lifeless matter for which no wrongful death recovery whatsoever is allowed. This anomalous state of affairs, carried on in modern times by the legal fiction of antiquity, can no longer be justified.

Id. The torts of wrongful birth and wrongful life are sometimes confused with each other. Morrison, *supra* note 10, at 161-62 describes the difference:

> "Wrongful birth" refers to suits brought by parents for damages related to the birth and/or rearing of an unwanted or defective child, which but for the defendant's wrongful conduct would never have been born. In "wrongful life" the plaintiff is the infant who is born because of the defendant's wrongful conduct. The plaintiff contends that rather than having been born defective, it would have been better to have never been born at all, *i.e.*, the utter void of nonexistence would be preferable to defective life. (footnotes omitted).

Id. For discussion of wrongful life see HANDLING PREGNANCY & BIRTH CASES, *supra* note 16, at 393-419; Parness & Pritchard, *supra* note 5, at 275-81; Morrison, *supra* note 10, at 161-63; Robertson, *supra* note 10, at 1439-55; Comment, *The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View*, 31 U.C.L.A. L. REV. 473 (1983).

For discussion of wrongful birth see HANDLING PREGNANCY & BIRTH CASES, *supra* note 16, at 372-93; Morrison, *supra* note 10, at 153-61.

C. *Criminal Law*

Killing a fetus has long been subject to criminal sanction.[27] The issue arises in the contexts of criminal abortion and injury to the woman resulting in fetal death. The common law of abortion placed great emphasis on whether the fetus was quick,[28] and whether it was born alive prior to death. In an oft-quoted passage, Sir Edward Coke stated that:

> [i]f a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprison, and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder . . . .[29]

Professors Perkins and Boyce reiterate the common law by stating that "it was a common-law misdemeanor to administer any drug or medicine or to perform an operation on a woman pregnant with a quick child for the purpose of causing a miscarriage."[30] The crime was elevated to murder if the child was born alive but subsequently died of its prenatal injuries.[31] Another commentator points out that if the fetus was not quick at the time of injury, "killing the fetus while still within the womb, or causing its death after birth alive was not, at common law, an indictable offense . . . . It was not a crime at all."[32]

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27. *See* Parness & Pritchard, *supra* note 5, at 267.

28. The term "quick" is defined as "[t]he signs of life felt by the mother as a result of the fetal movements, usually noted first in the fourth or fifth month of pregnancy." STEADMAN'S MEDICAL DICTIONARY, FIFTH UNABRIDGED LAWYERS' EDITION 1183 (1982). *See* Roe v. Wade, 410 U.S. 113, 132, 134 (1973). *See also* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L. FORUM 411, 419-22 (1968). The author presents a thorough historical overview of the law of abortion and related matters.

29. 3 COKE, INSTITUTES *5 (1648).

30. R. PERKINS & R. BOYCE, CRIMINAL LAW 188 (3d ed. 1982).

31. *Id.* at 50.

32. Means, *supra* note 28, at 420, describes the early law of abortion as follows:

> Both the early and the mature manifestations of the English common law distinguish between abortion in early pregnancy and abortion later in pregnancy. The latter was regarded as murder by the early common law, as it was by canon law. By Coke's time, the common law regarded abortion as murder only if the foetus is (1) quickened, (2) born alive, (3) lives for a brief interval, and (4) then dies. If, however, a *quickened* foetus is killed *in* the womb and then stillborn, the offense was "a great misprision." American courts usually convert Coke's "misprision" into "misdemeanor" in articulating the degree of the offense of abortion after quickening. . . .
>
> As Coke's language indicates, and as decisions afterwards made clear, an abortion *before* quickening, with the woman's consent, whether killing the foetus while still within the womb, or causing its death after birth alive was not, at common law, an indictable offense, either in her or in the abortionist. It was not a crime at all. Such

English abortion law changed substantially with passage of Lord Ellenborough's Act in 1803.[33] The Act criminalized both pre- and post-quickening abortions and has been described as follows:

> This Act largely abolished the common law rule, but it retained a distinction between the quickened and the unquickened child in determining the severity of the punishment. The law condemned the willful, malicious, and unlawful use of any medical substance with the intent to induce an abortion, without regard to whether the attempt was successful, or whether the mother died as a result. Parliament recognized a justifiable interest in protecting the life of the unborn child; and the statute made abortion ("willfully and maliciously") a *felony* in every case, but punishable by death only if the medical substance was administered after quickening.[34]

Thus, it became a crime to abort a fetus at any time during gestation. The level of punishment increased at quickening, but the nature of the wrong was the same from conception onward.

Early American abortion decisions followed the English law with its emphasis on quickening.[35] Beginning in Connecticut in 1821,[36] however, legislatures and courts[37] undertook the process of greater criminalization of abortion, and by 1967 "every state and the District of Columbia had a statute making abortion a crime unless it was necessary to save the life of the mother."[38] The cut-off point at quickening was abandoned. During the 1960's, the pendulum began to swing toward more liberal abortion laws,[39] and with its 1973 decision in *Roe v. Wade*[40] the Supreme Court established a constitutional basis for the right to abortion. While the Court did not utilize the concept of quickening to determine the point at which

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> an abortion after quickening, on the other hand, was a misprision or misdemeanor on the part of the abortionist, and perhaps of the woman as well, whether she consented or not, if foetal death occurred *in utero*; if the injured baby died after live birth, it was murder.

Id. See also Lenow, *supra* note 5, at 4-5; Parness & Pritchard, *supra* note 5, at 267-70; Note, *supra* note 5, at 362-69.

33. 43 GEO. III, Ch. 58 (1803).

34. Note, *supra* note 5, at 363.

35. *Id. See* Means, *supra* note 28, at 426-28.

36. Note, *supra* note 5, at 364.

37. Means, *supra* note 28, at 426-27.

38. Note, *supra* note 5, at 365. *See* MODEL PENAL CODE § 230.3 at 426 Comment. *See also* Roe v. Wade, 410 U.S. 113, 139 (1973) ("By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.").

39. Roe v. Wade, 410 U.S. 113, 139-40, 154-55 (1973). The liberalization was supported by the Model Penal Code provisions on abortion. MODEL PENAL CODE § 230.3 and Comment (1980).

40. 410 U.S. 113 (1973).

the state could prohibit abortion, it employed the somewhat related concept of viability.[41] Thus, in a way, the law has come full circle, with early abortion screened from criminalization, and late term abortion a crime.

Turning from the issue of abortion to that of criminal law, we find the common law rule that "there [was] no homicide of any grade unless the deceased had been born alive."[42] This rule has been retained by most states and adopted by the Model Penal Code, which defines "homicide" as "causing the death of another human being,"[43] and defines "human being" as "a person who has been born and is alive."[44] While the Model Penal Code approach

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41. Viability is defined as "[c]apability of living; the state of being viable; usually connotes a fetus that has reached 500 g in weight and 20 gestational weeks." STEDMAN'S MEDICAL DICTIONARY FIFTH UNABRIDGED LAWYERS' EDITION 1556 (1982). The concept of viability plays an important role in the law of unborn. *See infra* text accompanying notes 357-61. *See also* Morrison, *supra* note 10, at 141-44; Robertson, *supra* note 10, at 1414-20. "The period of viability varies with each pregnancy and the determination of whether a particular fetus is viable is a matter of judgment by the attending physician." HANDLING PREGNANCY & BIRTH CASES, *supra* note 16, at 276. *See generally id.* at 275-78; Glantz, *The Legal Aspects of Fetal Viability* in GENETICS AND THE LAW 29 (A. Milunsky & G. Annas eds. 1976); Lenow, *supra* note 5, at 10-15.

42. PERKINS & BOYCE, *supra* note 30, at 50 (footnote omitted).

43. MODEL PENAL CODE § 210.1(1) (1980).

44. *Id.* § 210.0(1). Comment 4. (c) to Section 210.1 of the Code addressed the issue of killing of unborn children:

> Section 210.0(1) defines the term "human being" to mean a person "who has been born and is alive." The effect of this language is to continue the common-law rule limiting criminal homicide to the killing of one who has been born alive. Several modern statutes follow the Model Code in making this limitation explicit. Others are silent on the point, but absent express statement to the contrary, they too may be expected to carry forward the common-law approach.
>
> The significance of the definition of "human being" is that it excludes from criminal homicide the killing of a fetus. This exclusion is warranted in order to avoid entanglement of abortion in the law of homicide. Section 230.3 of the Model Code deals with abortion as a separate offense. Although that provision is more permissive than most prior legislation, its precise terms have been superseded by subsequent constitutional developments. Specifically, the Supreme Court has declared that a woman acting in consultation with her physician has a constitutional right to abort her fetus during the first trimester of pregnancy. During the last phase of pregnancy, on the other hand, a state may regulate or proscribe abortion except where it is necessary to the mother's health.
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> Although there may remain a role for the penal law in the field of abortion, there is at least a continuing necessity to avoid enmeshing this quite distinct problem in the law of homicide. Failure to do so would invite at least two kinds of difficulties. First, application of the law of homicide to abortion of a viable fetus would run the risk of overriding legislative acceptance of certain justifications for abortion that are inapplicable to homicide. Criminal homicide, for example, recognizes no general exception for killing a person with genetic defects. Yet a state might well choose to permit abortion at any stage of pregnancy if there is medical evidence that the child would be born severely handicapped. The second danger concerns grading. Even where a

predominates, it is not unanimously endorsed. California, for example, has a statute which defines murder as "the unlawful killing of a human being, *or a fetus,* with malice aforethought."[45] Opinions differ widely on whether killing an infant in *ventre sa mere* should be criminalized. The ultimate resolution of the issue is undecided.

The law of tort and crimes protect unborn children later born alive.[46] This similarity of focus is supported by sound policy. The fact that an injury producing act occurs before birth does not lessen the pain and suffering of the later born victim.[47] If anything, the wrong is greater in the case of prenatal injury, for the victim must bear the scars of another's wrongful act for a longer time than one injured later in life. The interests of society are served by deterring such acts whenever they occur. Recognition of the fetus as a person entitled to the protection of the criminal and civil law fosters these interests.

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state decides to continue criminal penalties for certain abortions, it is highly doubtful that the offense merits sanctions of the magnitude of those applicable to intentional homicide. Thus, defining "human being" to exclude a fetus serves the valuable function of maintaining abortion as an area of distinct criminological concern not covered by the law of homicide.

In one context only is this judgment open to serious challenge. Abortion is accomplished with the woman's consent. Whatever one's evaluation of that practice, it seems useful to distinguish abortion from the intentional killing of a fetus without the mother's consent. As a matter of policy, it may be thought appropriate to punish such conduct as murder. The issue was raised in Keeler v. Superior Court, where an estranged husband announced his intention to kill his wife's boy and kicked her in the abdomen. As a consequence of that assault, the child was delivered stillborn. The Supreme Court of California adhered to the common-law definition of "human being" and refused to allow prosecution for murder. The legislature disagreed and subsequently amended the statute to define murder as "the unlawful killing of a human being, or a fetus. . . ." The legislature was careful, as it should have been, to integrate this provision with the existing California abortion law by precluding application of the homicide statute in cases where abortion was legally authorized, in certain cases where death of a fetus was caused by a licensed physician, and in cases where the mother consented.

Id. (footnote omitted).

45. CAL. PENAL CODE § 187(a) (1984 cum. pocket part). *See* Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (decided prior to statutory amendment including unborn within homicide statute); People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830, 835 (1977) ("Section 187 gives all persons of common intelligence ample warning that an assault on a pregnant woman without her consent for the purpose of killing her unborn child can constitute the crime of murder."); People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976) (interpreting § 187(a) to apply only to viable fetuses).

46. *See* Morrison, *supra* note 10, at 144-52.

47. *Id.* at 147-48.

D. *Guardianship of the Unborn*

Blackstone wrote that under the common law "[a]n infant *in ventre sa mere* . . . may have a guardian assigned to it . . . ."[48] The same rule applied in America during the nineteenth century.[49] For example, as an adjunct to his paternal authority, a father could petition the court to appoint a testamentary guardian for his unborn child.[50] The authority of courts to appoint representatives to protect fetal interests is now firmly established. Courts of general equitable jurisdiction are imbued with ample power to appoint guardians and guardians ad litem for unborn children in a variety of circumstances.[51]

E. *Summary*

The legal system extends protection and rights to persons. The substantive areas discussed above recognize a limited legal personhood in the unborn child. The public policy considerations which accord such personhood and protection to the unborn should extend as well to protection from serious abuse or neglect. The difficult question is not whether the unborn deserve protection from abuse and neglect, but rather, how the shield of the law should be employed.[52]

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

The preceding discussion touched on whether the fetus is a person entitled to legal protection. Considerable confusion surrounds the issue. Apart from the law, the answer depends on who is asked. To the surgeon performing intrauterine surgery, both mother and fetus are patients.[53] Philosophers do not agree on a definition of

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48. 1 W. Blackstone, Commentaries *130.

49. *See* G. Field, The Legal Relation of Infants, Parent and Child, Guardian and Ward § 59, at 63 (1888).

50. R. Tyler, Commentaries on the Law of Infancy 249 (1868).

51. *See* Handling Pregnancy & Birth Cases, *supra* note 16, at 367-68; Note, *supra* note 5, at 360-62. *See also* Taft v. Taft, 446 N.E.2d 395, 395-96 (Mass. 1983) (guardian ad litem appointed for unborn child).

52. *See* Baron, *The Concept of Person in the Law* in Defining Human Life 122 (M. Shaw & A. Doudera eds. 1983). *See infra* note 57.

53. *See generally* Barclay, McCormick, Sidbury, Michejda & Hodgen, *The Ethics of In Utero Surgery*, 246 J. A.M.A. 1550 (1981); Clewell, Johnson, Meier, Newkirk, Zide, Hendee, Bowes, Hect, O'Keefe, Henry, & Shikes, *A Surgical Approach to the Treatment of Fetal Hydrocephalus*, 306 N. England J. Med. 1320 (1982) [hereinafter cited as Clewell]; Gilmore, *Is the Fetus a Patient?*, 128 Canadian Med. Ass'n. J. 1472 (1983) (answering

personhood. Professor Wikler, writing tongue-in-cheek, states that "[s]ome view all products of conception as persons; others deny this status to fetuses but extend it to some animals. One philosopher has denied that there are any persons at all."[54] Theologians are similarly diverse in their conclusions. For their part, judges decline to grapple with the philosophical and religious aspects of personhood. Over the years they have ascribed limited legal personhood to the unborn. On the other hand, in one area of law, judges hold that the fetus is not a person. In *Roe v. Wade*, the Supreme Court stated "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[55] This statement must be placed in context, however, because its seeming clarity has caused serious confusion. The statement is narrow. It pertains only to the word "person" as it appears in the fourteenth amendment. It does *not* imply that the unborn are non-persons in other legal contexts. For example, *Roe* does nothing to weaken the large body of existing law protecting the unborn, and denial of fourteenth amendment personhood does not deprive the states of power to grant legal recognition to the unborn in non-fourteenth amendment situations. Unfortunately, *Roe* is sometimes misunderstood as an all-pervasive statement of "non-personhood" of the unborn. This misunderstanding leads some to conclude that states are powerless to protect the fetus. When properly understood, the case does not impede such efforts. The correct interpretation of *Roe* is summarized by Parness and Pritchard:

> By holding that a fetus is not a person under the fourteenth amendment, the Supreme Court did not prohibit lawmakers from extending to the unborn the benefits of personhood in other cases. In fact, the Court noted that the state has an "important and legitimate interest in protecting the potentiality of human life." The failure to understand the *Roe* decision has led not only to courts mistakenly denying the unborn non-fourteenth amendment protections to which the unborn are entitled, but also to the public failing to comprehend the discretion remaining to American lawmakers in characterizing personhood.[56]

"yes"); Lenow, *supra* note 5, at 15-19.

54. Wikler, *Concepts of Personhood: A Philosophical Perspective* in DEFINING HUMAN LIFE 12 (M. Shaw & A. Doudera eds. 1983). *See* Roth, *Personhood, Property Rights, and the Permissibility of Abortion*, 2 L. & PHILOSOPHY 163 (1983); Milby, *The New Biology and the Question of Personhood: Implications for Abortion*, 9 AM. J.L. & MED. 31 (1983); Slovanko, *When Does Life Really Begin?* 2 MED. & L. 81 (1983).

55. 410 U.S. at 158.

56. Parness & Pritchard, *supra* note 5, at 258 (footnote omitted). *See* Note, *The Fetus Under Section 1983: Still Struggling for Recognition*, 34 SYRACUSE L. REV. 1029 (1983); Note, *Fetal Rights: Defining "Person" Under 42 U.S.C. § 1983*, 1983 U. ILL. L. REV. 347

State action to protect the unborn from abuse and neglect does not run afoul of *Roe*. The unborn have long enjoyed limited recognition as persons, and the trend is toward greater acknowledgment; therefore, protection from prenatal abuse and neglect should not be viewed as novel or precedent-challenging. On the contrary, it is entirely consistent with the movement in the law. For example, the public policy supporting protection from tortious injury surely extends as well to protection from abusive injury. If anything, policy considerations favoring the latter are more compelling due to the reprehensible character of intentional abuse.[57]

(1983); Comment, *The Legality of Fetal Protection Policies Under Title VII: Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982)*, 34 SYRACUSE L. REV. 1131 (1983).

57. In an excellent article titled *The Concept of Person in the Law*, Professor Charles H. Baron describes how the law has granted limited personhood to the fetus. He writes that

> [w]hen we move to the issue of the status of the unborn, we find the law generally evidencing . . . flexibility and pragmatism in ascribing personhood. For some purposes, the fetus is a person. For some, it is not. The stage at which it is granted personhood varies from one area of the law to another. Thus, the common law of crimes did not recognize the killing of an unborn child as homicide, and the rule in the majority of American jurisdictions continues to be "that there is no homicide of any grade unless the deceased had been born alive." Inducing an abortion was, at common law, a separate crime of only misdemeanor status. It could be committed only upon a fetus which was "quick," that is, one that had already displayed independent movement within the mother—a phenomenon which generally begins somewhere between the sixteenth and eighteenth week of pregnancy. At the opposite extreme is the treatment accorded the fetus by the law of property. For purposes of the law of inheritance of real property, a child has been considered to be a person eligible to inherit at the moment he or she is conceived, although this property interest has been held subject to defeasance if the child has not subsequently been born alive. How can this apparent inconsistency in the law be justified? The justification is a function of the different social policies being advanced by different areas of the law. Prime among the goals of the laws of inheritance is fulfillment of the presumed intentions of the testator. Thus, where a will or the laws of inheritance specify that property shall be inherited by one's child or children, it is presumed that the deceased would have wanted any of his children born subsequent to his death to inherit, even if he did not know of the child's impending existence at the time that he died. In order to assure this consequence, the law confers on the child at the time of conception a type of personhood in which the inheritance can vest if the parent dies prior to birth. On the other hand, the criminal law has different goals. Basic to these is preserving the public peace by publicly punishing those who threaten that peace with acts that society considers to be blameworthy. Clearly, treatment afforded the unborn by the common law of crimes reflects a judgment that the society of the time considered the killing of a fetus to be less blameworthy than the killing of a man, and the killing of a fetus that had not yet displayed a separate personality within the mother to be less blameworthy than the killing of one which had.

Baron, *supra* note 52, at 128 (footnote omitted). Professor Baron writes that the movement in tort law toward acceptance of recovery for fetal injury illustrates the pragmatic and policy-based approach of the legal system. *Id.* at 129-30. He continues by remarking "that the law has been largely willing to confer personhood upon the unborn when solid policy considerations have suggested that course." *Id.* at 130.

The foregoing sections reveal that the unborn child has a long if chequered history of recognition as a person entitled to legal protection. The focus of the following section shifts to a discussion of the state's interest in the prenatal person.

IV. State Interests in the Unborn

The state has legitimate interests in children, and while "the child is not the mere creature of the State,"[58] there are circumstances where governmental intervention on their behalf is appropriate. Three substantial state interests in the unborn child are discussed in this section.

A. *State Interest in Protecting Potential Life*

In *Roe v. Wade* the Court balanced the woman's privacy right to abort her pregnancy against three state interests: safeguarding maternal health, maintaining medical standards, and protecting potential life.[59] *Roe* held that the state has an "important and legitimate interest in protecting the potentiality of human life."[60] The interest exists throughout pregnancy, grows "in substantiality as the woman approaches term,"[61] and becomes compelling at the point of viability.[62] Following viability, the interest in potential life is of sufficient strength that the state "may go so far as to pro-

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Professor Baron's insight into the reasons for legal protection of the unborn apply with great force to the argument that the fetus should be deemed a person entitled to protection from abuse and neglect. Public policy is unequivocally opposed to child abuse and neglect. Strong policy reasons exist for preventing acts which will cause children to be born with serious, permanent disabilities. Granting personhood status to the unborn so that the law can protect them from abuse and neglect is consistent with legal developments in other substantive areas of law, and with sound public policy.

See also King, *The Juridicial Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 Mich. L. Rev. 1647, 1664-72 (1979).

58. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

59. 410 U.S. at 154, 162.

60. *Id.* at 162.

61. *Id.* at 162-63. *See* Parness & Pritchard, *supra* note 5, at 261.

62. 410 U.S. at 163-64. The *Roe* Court provided the following rationale for this determination:

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

Id.

scribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[63] While the fetus is not a "person" entitled to fourteenth amendment protection, *Roe* makes clear that the state has substantial authority to protect fetal life.[64]

The state's interest in viable fetal life permits it to forbid abortion,[65] an act designed to extinguish life. It follows from this that the state is empowered to proscribe other acts calculated or likely to lead to the same result. Furthermore, since the interest in preservation of fetal life authorizes intervention to prevent destructive acts, it should also authorize limited compulsion of action which is necessary to preserve fetal life. Since a failure to act can as surely lead to frustration of the state's interest as an affirmative act, the underlying interest must reach both cases.[66]

The state interest in potential life is at its clearest in cases of fetal death. This was the scenario the Supreme Court addressed when it articulated the interest. It is important to point out, however, that nothing in *Roe* limits the state's interest to cases of fetal death. The interest is generic, and pertains to the general well-be-

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63. *Id.*

64. Post-*Roe* cases elucidate the meaning of the state interest in the potentiality of fetal life. In Maher v. Roe, 432 U.S. 464 (1977), the Court upheld a Connecticut regulation which precluded use of Medicaid funds to pay for nontherapeutic abortions for poor women. Writing for the majority, Justice Powell stated that the "State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth,' " *Id.* at 478, an interest closely related to its "direct interest in protecting the fetus. . . ." *Id.* at 478 n.11. In Harris v. McRae, 478 U.S. 297, 325 (1980), the Court upheld the so-called Hyde Amendment, which denies federal Medicaid funding "for certain medically necessary abortions. . . ." *Id.* at 301. The Court found "that the Hyde Amendment, by encouraging childbirth . . . is rationally related to the legitimate governmental objective of protecting potential life." *Id.* at 325.

The "state interest in protecting the fetus" is not confined to the context of abortion. *See* Burns v. Alcala, 420 U.S. 575 (1975). The extent of the interest can be understood by comparing it to the state interest in youth, an interest extending to all aspects of protecting children and fostering their growth and development. *See infra* Section IV.B. The interests in youth and potential youth should be conterminous, so that the state may intervene in compelling cases to protect children. An expansive interpretation of the interest in fetal life serves the interests of society as a whole, in addition to extending protection to the completely vulnerable and helpless unborn child.

65. 410 U.S. at 163-64. *See* Parness & Pritchard, *supra* note 5, at 287-88.

66. A brief author's note is appropriate at this juncture. It should be apparent that I favor an expansive interpretation of the "state interest in protecting the fetus." Maher v. Roe, 432 U.S. 464, 478 n.11 (1977). At the same time, the article is not intended to take issue with the Supreme Court's abortion decisions. Nor is it about the abortion issue. *Roe v. Wade* is dealt with because it has an impact on the state's authority to protect the fetus from abuse and neglect, not because the author disagrees with the Court's analysis or holding.

ing of the potential child.[67] Since the state may proscribe acts leading to fetal death, and may, as a result, require birth, its interest in potential life should extend to protection of the quality of life. The state's "important and legitimate interest in protecting the potentiality of human life"[68] would be severely undermined if it could require birth but do nothing to ensure that the life it saved was worth living.[69] To this end, the state should have limited authority to curtail acts leading to fetal injury or disfigurement that would disable the child. Defining the state's interest in potential life in these terms is consistent with the public policy underlying the interest and society's goal of prevention of death and disability.

The state interest in fetal life is substantial and far-reaching; however, it is difficult to define it with precision or clearly describe its limits. The few reported cases discussing the interest indicate a trend toward greater protection of the unborn. In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,[70] for example, the New Jersey Supreme Court ordered a woman to submit to a blood transfusion required to save the life of her viable fetus. The woman did not seek the death of her unborn child. Rather, her religious beliefs precluded the use of blood. The court stated, that "[w]e are satisfied that the unborn child is entitled to the law's protection."[71] The "protection" afforded was based on the state's interest in preservation of fetal life. In a later case, *Jefferson v. Griffin Spalding County Hospital Authority*,[72] the Georgia Supreme Court upheld a trial court's order that a woman nine months pregnant submit to delivery by cesarean section to save the life of her child. The woman wanted the child, but refused surgery on religious grounds. Quoting the lower court with approval, the supreme court held that "the State has an interest in the life of this unborn, living

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67. *See supra* note 64.

68. 410 U.S. at 162.

69. *See infra* note 323.

70. 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

71. *Id.* at 538. The court's order did not have to be carried out since the pregnant woman left the hospital against medical advice. It is interesting to note that the few cases dealing with court ordered medical care of unborn children have been brief in length and analysis. The *Raleigh Fitkin* and *Jefferson* cases are per curiam opinions. The *Taft* case contains an interesting and useful—although brief—analysis. The courts have yet to grapple with the issues in all their depth and complexity.

72. 247 Ga. 86, 274 S.E.2d 457 (1981). The *Jefferson* case generated substantial commentary. *See, e.g.*, Lenow, *supra* note 5, at 21-22; Note, *Jefferson v. Griffin Spalding County Hospital Authority: Court-Ordered Surgery to Protect the Life of an Unborn Child*, 9 AM. J.L. & MED. 83 (1983). *See also* Comment, *The Fetal Patient and the Unwilling Mother: A Standard for Judicial Intervention*, 14 PAC. L.J. 1065 (1983).

human being."[73] The "interest" was strong enough to support involuntary surgical care. Unfortunately, the court declined to offer an in-depth analysis of the "interest." In a third case, *Taft v. Taft*,[74] the Massachusetts Supreme Judicial Court addressed the question of involuntary medical care required to preserve fetal life. Mr. Taft sued his wife, seeking an order that she undergo an operation to "hold her pregnancy."[75] The lower court issued the order over the woman's religious objection.[76] The Supreme Judicial Court vacated the order because the record did "not show circumstances so compelling as to justify curtailing the wife's constitutional rights."[77] Significantly, however, the court left open the possibility for state intervention in future cases:

> We do not decide whether, in some situations, there would be justification for ordering a wife to submit to medical treatment in order to assist in carrying a child to term. Perhaps the State's interest, in some circumstances, might be sufficiently compelling . . . to justify such a restriction on a person's constitutional right of privacy.[78]

These cases, which elevate the state interest in potential life over the mother's fundamental rights, emphasize the slowly emerging trend toward greater state protection of fetal life in contexts other than abortion.[79] Though the outer limits of the state's interest remain ill-defined, the underlying policies point toward expanded protection of fetal life.

B. *The General State Interest in Youth*

In a 1978 decision, the Massachusetts Supreme Judicial Court affirmed a lower court order requiring the parents of a young leukemia victim to continue a protracted course of chemotherapy.[80] The court supported its holding with the observation that "the

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73. 247 Ga. at 89, 274 S.E.2d at 460.

74. 446 N.E.2d 395 (Mass. 1983).

75. *Id.* The woman had given birth to four children. Three "children were born after the wife had an operation, known as a 'purse string' operation, which involved suturing so that 'the cervix [would] hold the pregnancy.' " *Id.* at 396. One child was born premature because the operation was not performed. The child died.

76. The woman was a "born again Christian." She believed " 'that Jesus Christ will help her and is confident and convinced that no harm will come to her baby. She is sincere in her beliefs.' " 446 N.E.2d at 396 (quoting the trial court opinion).

77. *Id.* at 397 (footnote omitted).

78. *Id.* at 397.

79. *See* Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961) (juvenile court had jurisdiction over unborn child to order mother to submit child to blood transfusions immediately after birth).

80. Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978).

State has a long-standing interest in protecting the welfare of children living within its borders."[81] It drew this principle from *Prince v. Massachusetts*,[82] where the supreme court described "the interests of society to protect the welfare of children."[83] In sweeping language, the *Prince* court wrote that "the state's assertion of authority to that end . . . is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent . . . citizens."[84] The state interest in protection of children should embrace the unborn. Extending the interest into the womb will foster enhanced protection for all children, and will permit this important interest to work in tandem with the interest in potential human life.

C. *State Interest in Preservation of Life*

The state has an interest in preserving life.[85] The importance of the interest was underscored by the New Jersey Supreme Court in its landmark decision in *In re Quinlan*,[86] in which it was stated that "the interest of the state in the preservation of life . . . has an undoubted constitutional foundation."[87] In the context of the unborn, this interest is closely analogous to the interest in the "potentiality of human life."[88] Both are concerned with continuation of life and state action to prevent its termination. Their cumulative effect strengthens the case for intervention to prevent fetal abuse and neglect.

V. Sources of State Authority to Protect Children

State interests in children are not self-executing. To assert its interests, the state draws upon the *parens patriae* authority and the police power.

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81. *Id.* at 754, 379 N.E.2d at 1066.

82. 321 U.S. 158 (1944).

83. *Id.* at 165.

84. *Id.*

85. *See* Commissioner of Correction v. Myers, 379 Mass. 255, 262, 399 N.E.2d 452, 456 (1979); Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 741, 370 N.E.2d 417, 425 (1977).

86. 70 N.J. 10, 355 A.2d 647, 651-52, *cert. denied*, 429 U.S. 922 (1976).

87. *Id.* at 19, 355 A.2d at 651-52 (footnote omitted).

88. 410 U.S. at 162.

A. *Parens Patriae*

"The parens patriae power . . . is the state's limited paternalistic power to protect or promote the welfare of certain individuals, like young children . . . who lack the capacity to act in their own best interests."[89] The doctrine has ancient roots, traceable to Roman law.[90] In England, it developed gradually, expanding from an initial focus on preservation of property rights to a broad-based source of governmental authority and responsibility to care for those unable to care for themselves.[91] According to Blackstone, the Crown became "the general guardian of all infants, idiots, and lunatics."[92]

In America, "the 'parens patriae' function of the king passed to the States."[93] It has been "defined in this country as the inherent power and authority of a Legislature of a state to provide protection of the persons and property of persons *non sui juris*."[94] The authority was given an expansive interpretation in the 1890 Supreme Court case of *Mormon Church v. United States*,[95] where the Court stated that

> [t]his prerogative of *parens patriae* is inherent in the supreme power of

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89. *Development in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1199 (1980). *See* Keiter, *Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459, 498-501 (1982); Myers, *Involuntary Civil Commitment of the Mentally Ill: A System in Need of Change*, 29 VILL. L. REV. 368 (1984); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-21 (1974).

90. Myers, *supra* note 89, at 380-81.

91. *Id.* at 383-87. For analysis of the historical development of the parens patriae power see Cogan, *Juvenile Law Before and After the Entrance of "Parens Patriae,"* 22 S.C.L. REV. 147 (1970); Rendleman, *Parens Patriae: From Chancery to Juvenile Court*, 23 S.C.L. REV. 205 (1971).

92. 1 W. BLACKSTONE, COMMENTARIES *41.

93. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972). *See* 67A C.J.S. *Parens Patriae* § 159:

> The words "parens patriae," meaning "father of his country," were applied originally to the king. Since, on this country's achieving its independence, the prerogatives of the crown devolved on the people of the states, the state, as a sovereign, is the parens patriae.
>
> The doctrine of parens patriae expresses the inherent power and authority of the state to provide protection of the person and property of a person non sui juris, and under the doctrine the state has the sovereign power of guardianship over persons of disability, and in the execution of the doctrine the legislature is possessed of inherent power to provide protection to persons non sui juris and to make and enforce such rules and regulations as it deems proper for the management of their property.

Id. (footnotes omitted). *See also* Myers, *supra* note 89, at 384.

94. McIntosh v. Dill, 86 Okla. 1, 12, 205 P.2d 917, 925 (1922).

95. 136 U.S. 1, (1890).

> every State . . . . [I]t is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.[96]

Pursuant to *parens patriae* authority, states enact statutes governing guardianship, civil commitment of the mentally ill, juvenile courts, and child abuse and neglect.

There is no doubt that *parens patriae* authority extends to protection of children.[97] The Supreme Court stated in *Prince v. Massachusetts* that

> [a]cting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways . . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare.[98]

When adults threaten "harm to the physical or mental health of the child,"[99] the state may step in. What is more, it has been stated that in addition to the authority to act, the *parens patriae* power imposes a positive duty to do so.[100] As stated in a California case, "[u]nder the doctrine of *parens patriae*, the state has a right, indeed, a duty, to protect children."[101] This broad source of governmental authority gives the state ample power to prevent child abuse and neglect. The authority extends to unborn children in whose welfare the state has a compelling interest.

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96. *Id.* at 57. *See also* Warner Bros. Pictures v. Brodel, 179 P.2d 57, 64 (Cal. Ct. App. 1947), *rev'd*, 192 P.2d 949 (1948). Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 221 (1975) ("the individual's well-being is the sole justification for the exercise of the state's authority as *parens patriae*."); La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 BUFFALO L. REV. 499, 504-06 (1981).

97. *See* State v. Perricone, 37 N.J. 463, 475, 181 A.2d 751, 758 (1962) (acting as *parens patriae*, the state has a "right and duty to care for a child and protect him from neglect, abuse and fraud during his minority.").

98. 321 U.S. at 166-67. *See* Jehovah's Witnesses v. King County Hospital, 278 F. Supp. 488 (W.D. Wash. 1967).

99. On the authority of the state to protect children, see generally Roe v. Conn, 417 F. Supp. 769, 778 (M.D. Ala. 1976); In re Clark, 185 N.E.2d 128 (1962); Fawkes v. Fawkes, 360 So.2d 719, 720 (Ala. Ct. App. 1970); Morrison v. State, 252 S.W.2d 97, 102 (Kan. Ct. App. 1952); In re Hudson, 13 Wash. 2d 673, 678-79, 126 P.2d 765, 777 (1942). For a discussion of *In re Hudson*, see *infra* text accompanying notes 159-67.

100. In re Weberlist, 360 N.Y.S.2d 783, 786 (N.Y. Sup. Ct. 1974) ("The rationale of parens patriae is that the State must intervene in order to protect an individual who is not able to make decisions in his own interest.").

101. In re Phillip B., 92 Cal. App. 3d 796, 156 Cal. Rptr. 48, 51 (1979). For a discussion of the *Phillip B.* case, see *infra* text accompanying notes 213-33.

B. *Police Power*

The police power is the state's broad authority "both to prevent its citizens from harming one another and to promote all aspects of the public welfare."[102] Through this power the state may foster the "public health, safety, morals, or general welfare."[103] Laws prohibiting abuse and neglect of children are based on this expansive authority as well as the *parens patriae* power. When these sources of sovereign authority combine, they form a formidable defense for children.

VI. State Statutes on Child Abuse and Neglect

A. *State Statutes on Abuse and Neglect*

Every state has statutes prohibiting child abuse and neglect.[104] It is surprising to learn that these laws are of relatively recent origin. It was not until 1875 that the first formal organization came into existence to address issues of abuse.[105] From that time until 1962, progress was halting and irregular. Finally, in 1962, C. Henry Kempe, M.D. and his colleagues published their seminal article describing the battered child syndrome.[106] With its publication, a movement toward statutory prohibition of abuse exploded across the United States.[107]

Definitions of child abuse vary from state to state;[108] however,

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102. *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1198-99 (1980).

103. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). *See* Cusack Co. v. City of Chicago, 244 U.S. 526, 530 (1917); Jacobson v. Massachusetts, 197 U.S. 11, 30 (1905).

104. For a listing of the statutes see S. Katz, M. McGrath & R. Howe, Child Neglect Laws in America (1976).

105. III Children & Youth in America, 1933-1973, pts. 1-4, 849 (R. Bremner ed. 1974). See *id.* at 849-89 for an overview discussion of child abuse in America. *See also* Radbill, *Children in a World of Violence: A History of Child Abuse* in The Battered Child Syndrome 3, 16 (C. Kempe & R. Helfer eds. 1980).

106. Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered Child Syndrome*, 181 J. A.M.A. 17 (1962).

107. *See generally* M. Freeman, The Rights and Wrongs of Children 104-46 (1983); Child Abuse *passim* (G. Gerbner, C. Ross & E. Zigler eds. 1980); The Battered Child (C. Kempe & R. Helfer eds. 1980); Child Abuse (K. Oates ed. 1982); Child Abuse: An Annotated Bibliography (D. Wells ed. 1980).

108. *See, e.g.*, Ala. Code § 26-14-1 (1983 Cum. Supp.) (harm or threatened harm, whether physical or mental, to a child's health or welfare); Cal. Penal Code § 11165 (West 1984) (nonaccidental injury; unjust punishment); Mich. Comp. Laws Ann. § 722.622 (West 1983-84) (harm or threatened harm to a child's health or welfare through nonaccidental means by person responsible for health and welfare).

most are framed in terms of nonaccidental physical or mental injury or sexual abuse. Standards promulgated by the Institute of Judicial Administration of the American Bar Association (IJA/ABA) are illustrative.[109] They authorize state intervention when "a child has suffered, or there is a substantial risk that a child will imminently suffer, a physical harm, inflicted nonaccidently . . . which causes, or creates a substantial risk of causing disfigurement, impairment of bodily function, or other serious physical injury."[110] Intervention is also sanctioned to prevent serious emotional damage[111] and sexual abuse.[112]

Definitions of neglect often overlap abuse; however, neglect is a broader concept, covering intentional and unintentional situations harmful to the child.[113] Failure to provide necessary medical care can constitute neglect. Rhode Island, for example, defines a neglected child as "a child whose physical or mental health or welfare is harmed or threatened with harm when his parent . . . [f]ails to

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109. INSTITUTE OF JUDICIAL ADMINISTRATION AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO ABUSE AND NEGLECT (1981) [hereinafter cited as ABA STANDARDS].

110. *Id.* at 16, Standard 2.1 A. The ABA STANDARDS restrict the scope of state intervention into the family. The goals of the Standards are:

> to allow intervention only where there is reason to believe that coercive intervention will in fact benefit the child, given the knowledge available about children's needs and the means of helping children, and taking into consideration the resources likely to be available to help children; to insure that when intervention occurs, every effort is made to keep children with their parents, or if this is impossible, to provide them with a stable living situation conducive to their well-being; to insure that procedures are followed which facilitate making appropriate decisions; and to insure that all decisionmakers are held accountable for their actions.

Id. at 3. For authorities favoring limited state intervention on behalf of children, see J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973); Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645 (1977); Wald, *State Intervention on Behalf of "Neglected Children": A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975) (Professor Wald is one of the Commissioners responsible for drafting the ABA STANDARDS) [hereinafter cited as Wald]; Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974).

111. ABA STANDARDS, *supra* note 109, at 16, Standard 2.1 C.

112. *Id.* at 2.1 D.

113. *See, e.g.*, IOWA CODE § 232.2 (1983) (neglect includes abandonment, failure to provide proper care, and injurious living conditions); MINN. STAT. § 260.015 (1982); N.C. GEN. STAT. § 7A-517 (1982). Professor Wald observes that:

> State statutes establishing juvenile court jurisdiction often make separate reference to dependency, neglect, and abuse. In "dependency" cases, a parent, through no fault of his own, is unable to care for a child. "Neglect" and "abuse" generally both involve "fault" on the part of the parents; "abuse" usually refers to willful injuries to the child, while "neglect" refers to inadequate parental care.

Wald, *supra* note 110, at 985 n.5.

supply . . . medical care."[114] The IJA/ABA Standards are to the same effect, permitting intervention when "a child is in need of medical treatment . . . and his/her parents are unwilling to provide or consent"[115] to care.

There is a lively debate regarding the appropriate reach of state power to intervene in family privacy to stop abuse and neglect;[116] however, no one argues for complete abolition of such authority. Properly circumscribed with substantive and procedural safeguards, limited state authority is necessary and appropriate.

B. *State Child Abuse and Neglect Laws Apply to the Unborn*

Several cases discuss whether child abuse and neglect statutes extend to the unborn. Though the cases reach differing results, policy considerations support the argument for such extension.

1. *Cases Interpreting Abuse and Neglect Statutes*

Abuse and neglect statutes are drafted to include children under a certain age, usually eighteen.[117] The only limitation expressed in the statutes is at the upper end of the age range. Nothing limits them to children who have been born, and nothing in their nature precludes a construction including the unborn. It must be admitted, however, that legislators probably were not thinking of unborn children when they passed such statutes. With this in mind, more than one court has concluded that the unborn are not protected.[118] For example, in *Matter of Dittrick Infant*,[119] the Michigan Court

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114. R.I. GEN. LAWS § 40-11-2(2)(d)(1983 Supp.).

115. ABA STANDARDS, *supra* note 109, at 17, Standard 2.1 E. The Standards allow court intervention when:

> a child is in need of medical treatment to cure, alleviate, or prevent him/her from suffering serious physical harm which may result in death, disfigurement, or substantial impairment of bodily functions, and his/her parents are unwilling to provide or consent to the medical treatment.

Id.

116. *Compare* Goldstein, *supra* note 110, Wald, *supra* note 110, *and* Uviller, *Save Them from Their Saviors: The Constitutional Rights of the Family* in CHILD ABUSE 147 (G. Gerbner, C. Ross & E. Zigler eds. 1980) *with* S. KATZ, WHEN PARENTS FAIL (1971) *and* the dissenting views of Commissioner Justine Wise Polier in ABA STANDARDS, *supra* note 109, at 200-02.

117. *See, e.g.*, ME. REV. STAT. ANN. tit. 15, § 3003(1964). *See* N.J. REV. STAT. § 30:4C-11 (West 1981). This section expressly includes unborn children. *See also* M. PAULSEN & C. WHITEBREAD, JUVENILE LAW AND PROCEDURE 40-43 (1978).

118. Matter of Steven S., 126 Cal. App. 3d 23, 178 Cal. Rptr. 525, 527-28 (1981). *See also* Reyes v. Superior Court, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977) (fetus not within protection of child endangering statute).

119. 80 Mich. App. 219, 263 N.W.2d 37 (1977).

of Appeals held that the state juvenile code did not apply to the unborn.[120] The parental rights of the Dittricks were terminated in 1976 for physical and sexual abuse.[121] While the 1976 case was pending, the mother became pregnant a second time. Prior to birth of the second child, the probate court, acting pursuant to the juvenile statutes, "issued an order directing the . . . Department of Social Services [to] take temporary custody of the [unborn] child."[122] The order issued forty-five days prior to birth. On appeal the parents argued successfully that the juvenile code did not extend to the unborn. The statute granted jurisdiction over children below seventeen years of age.[123] While the court recognized "that the word 'child' could be read as applying even to unborn persons,"[124] it concluded "that the legislature did not intend application of these provisions to unborn children."[125] The rationale for this conclusion was that when the statute was read in conjunction with other provisions it seemed limited to children who had been born.[126] The *Dittrick* case is unfortunate. Its holding is based on an understandable but unnecessarily restrictive interpretation of the statutes — an interpretation which completely ignores compelling public policy reasons for extending the protection of abuse and neglect statutes to the unborn. The court recognized the wisdom of extending the statutes, stating that legislative amendment would be desirable; however, it declined to take the necessary step on its own.[127]

Several courts, however, have recognized the applicability of juvenile codes to the unborn. In *Hoener v. Bertinato*,[128] for example, a New Jersey juvenile court judge held that parents neglected their unborn child when they refused to give consent to a blood transfu-

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120. *Id.* at 223, 263 N.W.2d at 37.

121. *Id.* at 221, 263 N.W.2d at 38.

122. *Id.*

123. *Id.* at 223, 263 N.W.2d at 39.

124. *Id.*

125. *Id.*

126. *Id.* It is noteworthy that the Supreme Court utilized a similar analysis to support its conclusion that the fetus is not a person within the meaning of the fourteenth amendment. *See* Roe v. Wade, 410 U.S. 113, 157-58 (1973).

127. 80 Mich. App. at 211, 263 N.W.2d at 39. In states where judicial opinion has excluded the unborn from the protection of child abuse and neglect statutes, advocates can argue that the inherent *parens patriae* authority of courts of general equitable jurisdiction is sufficient to extend the necessary protection. *See supra* notes 89-101 and accompanying text.

128. 67 N.J. Super. 517, 171 A.2d 140 (1961).

sion that had to be administered immediately following birth.[129] Like the statute interpreted in *Dittrick*, the New Jersey provision granted jurisdiction over persons below a specified age;[130] however, contrary to *Dittrick*, the New Jersey court stated that "nothing in any of [the statutory] provisions . . . would preclude their applicability to an unborn child."[131] The court held that it had statutory and inherent *parens patriae* jurisdiction over the unborn child. The decision saved the child's life, and it stands as a well-reasoned precedent substantiating the position that abuse and neglect statutes can and should be interpreted to embrace the unborn. In an unreported Colorado juvenile court case,[132] a pregnant woman refused to undergo a cesarean section needed to save her full term fetus. A court hearing was conducted in her hospital room. The court held that the child was entitled to the protection of the juvenile code, and that the fetus was a neglected and dependent child. It ordered the woman to undergo cesarean section. After the court's order, the patient became more cooperative and submitted to the procedure.[133] In *Jefferson v. Griffin Spalding County Hospital Authority*[134] the Georgia Supreme Court affirmed a juvenile court opinion that a viable fetus was "entitled to the protection of the Juvenile Court Code of Georgia."[135] Finally, in *Matter of Baby X*,[136] the Michigan Court of Appeals held that prenatal conduct causing post partum injury could constitute child abuse within the

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129. The mother and father of the unborn child were Jehovah's Witnesses. They were "good and devoted parents, except in their refusal to consent to the transfusion." *Id.* at 519, 171 A.2d at 142.

130. *Id.* ("Children under 18 years of age who appear before the juvenile and domestic relations court in any capacity shall be deemed to be wards of the court and protected accordingly.").

131. *Id.* at 144.

132. *See* Bowes & Selgestad, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 OBSTETRICS & GYNECOLOGY 209 (1981). *See also* Annas, *Forced Cesareans: The Most Unkindest Cut of All*, 12 THE HASTINGS CENTER REPORT 16 (June, 1982); Lieberman, Mazor, Chaim, & Cohen, *The Fetal Right to Live*, 53 OBSTETRICS & GYNECOLOGY 515 (1979).

133. Information concerning this case may be obtained by writing to Dr. Donald C. Bross, Legal Counsel, C. Henry Kempe National Center for Prevention and Treatment of Child Abuse and Neglect, 1205 Oneida St., Denver, Colorado 80330.

134. 247 Ga. 86, 274 S.E.2d 457 (1981). *See* Comment, *Family Law—Court-Ordered Surgery for the Protection of a Viable Fetus—Jefferson v. Griffin Spalding County Hospital Authority*, 247 Ga. 86, 274 S.E.2d 457 (1981), 5 W. NEW ENGLAND L. REV. 125, 139-41 (1982); Note, *Jefferson v. Griffin Spalding County Hospital Authority: Court-Ordered Surgery to Protect the Life of an Unborn Child*, 9 AM. J.L. & MED. 84 (1983).

135. 247 Ga. at 88, 274 S.E.2d at 459. For a discussion of the *Jefferson* case, see *infra* text accompanying notes 389-93. *See also*, Taft v. Taft, 446 N.E.2d 395 (Mass. 1983).

136. 97 Mich. App. 111, 293 N.W.2d 736 (1980). *See* note 393, *infra*.

meaning of the juvenile code.[137]

The foregoing cases constitute persuasive authority for extension of abuse and neglect statutes to the unborn.[138] While legislative amendment is desirable to remove uncertainty, it is not necessary for attainment of the desired goal. Furthermore, the aim is supported by strong considerations of public policy.

2. *State Interests in the Unborn Support Statutory Construction to Extend Coverage*

The important state interests in preservation of life, the potentiality of life, and child welfare lend resolute support to the argument that child abuse and neglect statutes should include unborn children. In reality, this is the only way to give meaningful effect to those interests. An interest stripped of a method of enforcement is a feckless thing. Nowhere in law are significant state interests unaccompanied by a means of implementation. This is certainly true where the state seeks to prevent death or serious bodily injury. The only reasonable mechanism to implement state interests in the unborn is through existing abuse and neglect statutes.[139] Since these statutes can be construed to include the unborn, protection of legitimate state interests calls for such an interpretation. The law should follow the course charted by *Bertinato*. Doing so will nourish important state interests, and extend long overdue legal protection to the unborn.

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137. 97 Mich. App. at 115-16, 293 N.W.2d at 739. *See* Baby Boy Santos, 71 Misc.2d 789, 336 N.Y.S.2d 817 (Fam. Ct. N.Y. 1972).

138. In Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964), the New Jersey Supreme Court ordered a pregnant woman to submit to a blood transfusion necessary to save her life and the life of her fetus. The court held that "the unborn child was entitled to the law's protection." 42 N.J. at 422, 201 A.2d at 538.

139. It can be argued that adequate protection for the unborn can be achieved through use of inherent *parens patriae* power, and that it is unnecessary to resort to arguably inapplicable juvenile court codes. While courts of general equitable jurisdiction possess sufficient *parens patriae* authority to order necessary intervention, use of juvenile court statutes and concepts—developed over years of practice—will establish workable definitions of abuse and neglect. Furthermore, reliance on principles of juvenile court jurisprudence makes it possible to utilize standards and procedures which are tested and familiar to bench and bar. Finally, it is submitted that public policy strongly favors judicial construction of juvenile court statutes to include the unborn.

3. *Interpreting Child Abuse Statutes to Include the Unborn is Consistent with Developments in Tort Law*

Tort law extends substantial protection to the fetus.[140] While compensatory damages may be some consolation for injury or death of an unborn child, an after-the-fact remedy pales in comparison to the importance of *prevention* of threatened harm. The only effective means to achieve prevention is through use of abuse and neglect laws. Such use will bring this area of child protection into harmony with advances in tort law. The two fields should work in tandem to safeguard children.

4. *Scientific Advances in Ability to Treat the Unborn Favor Extension of Abuse and Neglect Statutes*

Recent years have witnessed remarkable advances in prenatal medicine and fetal surgery.[141] As medical science achieves greater

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140. *See supra* discussion at notes 10-26 and accompanying text.

141. In a leading treatise on obstetrics, Professors Pritchard and MacDonald state that

> [h]appily, we have entered an era in which the fetus can be rightfully considered and treated as our second patient. In this edition, we have sought to do just that. Fetal diagnosis and therapy have now emerged as legitimate tools the obstetrician must possess . . . . We are of the view that it is the most exciting of times to be an obstetrician. Who would have dreamed—even a few years ago—that we could serve the fetus as physician?

J. PRITCHARD & P. MACDONALD, WILLIAMS OBSTETRICS vii (16th ed. 1980). For background reading on medicine's ability to diagnose and treat the unborn, see generally, Bader & Weitzman, *Fetal Alcohol Syndrome*, 60 AM. J. OPTOMETRY & PHYSIOLOGICAL OPTICS 542 (1983); Barclay, *supra* note 53; Bowers & Selgestad, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 OBSTETRICS & GYNECOLOGY 209 (1981); Clewell, *supra* note 53; Depp, Sabbagha, Brown, Tamura & Reedy, *Fetal Surgery for Hydrocephalus: Successful In Utero Ventriculoamniotic Shunt for Dandy-Walker Syndrome*, 61 OBSTETRICS & GYNECOLOGY 710 (1983); Gilmore, *supra* note 53; Finnegan, *In Utero Opiate Dependence and Sudden Infant Death Syndrome*, 6 CLINICS IN PERINATOLOGY 163 (1979); Harris & Srinivasan, *Infants in Drug-Dependent Mothers*, 18 SEMINARS IN ROENTGENOLOGY 79 (1983); Lenow, *supra* note 5; Lifschitz, Wilson, O'Brian, Smith & Desomond, *Fetal and Postnatal Growth of Children Born to Narcotic-Dependent Women*, 102 J. PEDIATRICS 686 (1983); Mackenzie, Collins & Popkin, *A Case of Fetal Abuse?*, 52 AM. J. ORTHOPSYCHIATRY 699 (1982); Redwine & Petres, *Fetal Surgery—Past, Present, and Future*, 10 CLINICS IN PERINATOLOGY 399 (1983); Ruddick & Wilcox, *Operating on the Fetus*, 12 THE HASTINGS CENTER REPORT 10 (1982); Stanage, Gregg & Massa, *Fetal Alcohol Syndrome—Intrauterine Child Abuse*, 36 S.D. J. MED. 35 (1983).

The fetus who is a subject of federally funded research receives protection under federal regulations governing research with human subjects. *See* 45 C.F.R. §§ 46.201 to 46.211. (1983).

A new procedure known as chorionic villus biopsy permits diagnois of certain fetal abnormalities as early as the sixth week of pregnancy. The procedure is not yet generally available, yet is a good example of the rapidly expanding field of prenatal medicine. *See* Holz-

ability to treat unborn children, demand for such care will grow. At the same time, cases will occur where parents unjustifiably refuse to consent to care. Interpreting child abuse and neglect statutes to include the unborn will enable courts to override parental objection in appropriate cases. In an age when medicine can treat and cure the unborn child, society will not tolerate a complete vacuum of authority to provide care in compelling cases.[142]

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greve, Hogge & Golbus, *Chorion Villi Sampling (CVS) For Prenatal Diagnosis Of Genetic Disorders: First Results and Future Research*, 17 EUROPEAN J. OBSTETRICS & GYNECOLOGY & REPRODUCTIVE BIOLOGY 121 (1984).

142. *See* Lipson, *Contamination of the Foetal Environment—A Form of Prenatal Abuse* in CHILD ABUSE 42 (K. Oates ed. 1982). Doctor Lipson describes numerous agents which may affect the fetus, causing birth defects or fetal death. He lists: prescribed drugs, alcohol, narcotics, smoking, infection, heat, vitamin deficiency, vitamin excess, metabolic diseases (phenylketonuria and diabetes), and irradiation. Of particular significance because of its high incidence rate is fetal alcohol syndrome. Doctor Lipson describes the problem:

> Despite references in Greek mythology, the Bible and literature that alcohol could be dangerous to the foetus it was only since Lemoine, from France in 1968 and Jones and Smith from the United States in 1973 described their studies that it has been accepted that alcohol can have an adverse effect on the foetus. These children are born with a variety of major and minor malformations including congenital heart disease, cleft palate, mental retardation and cerebral palsy. They are small at birth, grow relatively poorly and have a peculiar facial appearance due to relatively small facial bones, nose and eyes. The incidence of severely affected babies is said to be about two per 1000 live births. The incidence of moderately or mildly affected babies is not known. The difficulties in retrospectively ascertaining the amount of alcohol actually consumed during a pregnancy are great particularly when intake is usually underestimated and even denied. Some studies based on interviews during and after pregnancy have indicated that three standard drinks per day constitute a significant risk to the foetus. Acute intoxications or binges particularly early in pregnancy may be important in outcome. Inherent differences in metabolism and tolerance despite prior experience with alcohol, could identify an at-risk group of women who are particularly sensitive to the detrimental effects of alcohol.
>
> Alcohol abuse is commonly associated with abuse of other drugs such as barbituates, narcotics and smoking. Although alcohol consumption by itself is associated with the foetal alcohol syndrome the additive or potentiating effects of other drugs may be important.

Id. at 43 (footnote omitted). *See also* Milunsky, *Fetal Abnormalities: Detection, Counseling, and Dilemmas* in DEFINING HUMAN LIFE 62 (M. Shaw & A. Doudera eds. 1983).

In an informative article, Doctor Mitchell S. Golbus, M.D., describes advances in fetal diagnosis and treatment. The following excerpt from Dr. Golbus' article should provide useful background:

> The medical approach to a disease or group of disorders routinely has three stages: recognizing that the disease state exists, developing methods for diagnosing the disorder; and finding a prophylaxis or therapy for the condition. The recognition that birth defects exist dates from antiquity, but advancement to the second stage, that of considering the fetus as a patient and prenatally diagnosing congenital defects, began only 15 years ago. The third stage, treatment of the fetus in utero, is only beginning now.
>
> FETOSCOPY

VII. Failure To Provide Prenatal Medical Care as Child Abuse or Neglect

When parents refuse consent to medical care which is essential

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As the name implies, the objective of prenatal diagnosis is to determine whether a fetus believed to be at risk for a particular birth defect is actually affected. The most direct method of examining the patient is to look at him or her through a small bore fiberoptic endoscope which can be inserted transabdominally into the uterus under local anesthesia . . . .

The major use of fetoscopy has been for obtaining samples of fetal tissues other than amniotic fluid constituents . . . . This area of prenatal diagnosis is expected to expand over the next decade.

FETAL THERAPY

The ultimate goal for prenatal diagnosis is treatment of the affected fetus to correct the defect. For many disorders it is unlikely that effective corrective or preventive therapy will be developed in the foreseeable future. Furthermore, in at least some metabolic disorders, irreversible fetal damage may have occurred by the time the prenatal diagnosis is made. However, therapeutic alternatives for the management of a number of fetal disorders which can be recognized in utero may be outlined. Since experience with the fetus as a patient is still quite limited, such alternatives must be considered tentative—the basis for further investigation and refinement.

Most correctable malformations which can be diagnosed in utero are best managed by appropriate medical or surgical therapy after delivery at term. The full-term infant is better able to tolerate surgery and anesthesia than is the prematurely delivered infant. Examples of abnormalities in this category include the narrowing or absence of part of the gastrointestinal tract, a small spina bifida, or a cleft palate. Prenatal diagnosis may be important because many of these anomalies are associated with an excess of amniotic fluid which may initiate premature labor. Therapy for the excess amniotic fluid or premature labor may allow the fetus to remain in utero longer and to be born at term. Additionally, the delivery can be planned so that the necessary neonatologists, anesthesiologists and pediatric surgeons are available.

There is a subset of fetal anomalies which require correction ex utero as soon as possible after the diagnosis is made. For these, the risk of prematurity must be weighed against risk of continued gestation. Elective premature delivery for immediate correction may be preferable to continued gestation for such disorders as hydrocephalus or for moderately severe Rh isoimmunization . . . .

Another subset of fetal disorders may influence the mode of delivery and require that a cesarean section be performed. One indication for cesarean delivery is an anomoly such that the fetus could not fit through the maternal pelvis during vaginal delivery (e.g., conjoined twins or a fetus with a large hydrocephalus). Occasionally, an elective cesarean section may be indicated for a malformation requiring immediate surgical correction in a sterile environment . . . .

IN UTERO INTERVENTION

There is a subset of fetal deficiency states which may be alleviated by in utero treatment. These are conditions in which something vital to fetal well-being is not present in sufficient quantity, and supplementation of the missing element would constitute medical therapy. The simplest method of supplying the fetus is to give the missing element to the mother for transportation across the placenta to the fetus . . . .

Some substances, however, do not cross the placenta and cannot be delivered to the fetus by the mother. In such cases, the deficient substance must be placed in the amniotic sac where the fetus, who continually swallows the amniotic fluid, will ingest

to prevent serious fetal injury or death, state authorities may seek to intervene in the belief that refusal constitutes child neglect or abuse. Such cases will arise with increasing frequency as medical technology advances. As judges struggle with the intractable issues presented by such cases, they may draw substantial guidance from the well developed body of law dealing with state initiated medical

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it; alternatively the fetus must be given a shot in the buttocks . . . .

Even more complicated is the delivery of cells, such as red blood cells, to the fetus. In Rh isoimmunization, the maternal antibodies destroy fetal red blood cells and the fetus may die of profound anemia. Thus, it is accepted practice to treat severe cases by transfusing the fetus in utero. The technique is to place a needle transabdominally into the fetal abdominal cavity and transfer the needed cells directly to the fetal peritoneal cavity . . . .

The list of substances which can be given therapeutically to the in utero fetus is certain to grow . . . .

SURGICAL FETAL THERAPY

The complement of medical therapy is, of course, surgical therapy. Correcting an anatomic malformation will be more difficult than providing a missing substrate, hormone or medication to the fetus. The prenatally diagnosable anatomic malformations which warrant consideration for surgical therapy are those which interfere with fetal development and which, if alleviated, would allow normal fetal development to proceed. The first malformations being considered are hydronephrosis secondary to an obstruction, diaphragmatic hernia, and hydrocephalus.

Urinary Tract Obstruction

Obstructive fetal urinary tract malformations are being recognized with increasing frequency because fluid-filled masses are particularly easy to detect by sonography . . . .

It has been observed that failure to take action often leads to the delivery at term of an infant who has neither sufficient functioning kidney tissue nor lung capacity to survive. Therefore, the philosophy has developed that it may be advisable to relieve the obstruction at the earliest possible time. The concept is that continued obstruction will result in a kidney whose development is so impaired as to prevent survival, while relief of the obstruction may allow sufficient development to support postnatal life as well as "catch-up" development during early childhood.

There are several alternatives for decompressing an obstructed fetal urinary tract.

Hydrocephalus

Hydrocephalus of prenatal origin occurs in 0.2 percent of all deliveries. It represents a failure of normal cerebrospinal fluid dynamics so that this fluid accumulates in the ventricles, causing them to enlarge and cause pressure atrophy of the brain. Prenatal hydrocephalus represents a subset of childhood hydrocephalus, with a significantly poorer outlook. Between one-half and two-thirds of affected fetuses are stillborn. Only one-quarter of liveborn hydrocephalic neonates survive infancy untreated . . . .

[I]t is clear that for optimal treatment of progressive prenatal hydrocephalus, in utero drainage of the ventricles may be required. Waiting until after a term delivery to treat may critically delay therapy. Two approaches to solving this problem have been tried recently: one group performed six weekly needle aspirations of the dilated ventricles of a fetus with hydrocephalus; a second group treated fetuses with prenatal hydrocephalus by placing a polyethylene shunt that could drain ventricular cerebrospinal fluid into the amniotic sac . . . .

Golbus, *Advances in Fetal Diagnosis and Therapy* in DEFINING HUMAN LIFE 73, 73-81 (M. Shaw & A. Doudera eds. 1983). *See also* authorities cited *supra* note 141.

care for children whose parents refuse consent. This section describes this important body of law.

A. *Parents Have a Duty to Provide Medical Care for Their Children*

It is well settled that parents have a duty to support and maintain their children. In his Commentaries, Blackstone describes the duty in terms which remain accurate:

> The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect *right* of receiving maintenance from their parents.[143]

Even in Blackstone's time — not an age solicitous toward children[144] — proper "maintenance" is referred to as a "right" of childhood. The term includes food, clothing, shelter, and education. Subsequent authorities add necessary medical care.[145] In *Mitchell v. Davis*,[146] for example, the Texas Court of Civil Appeals stated that "[m]edicines, medical treatment and attention, are in a like category with food, lodging and education as necessaries from parent to child, for which the former is held legally responsible."[147] The Arizona Supreme Court wrote that "a parent must provide a child [with necessaries, including] a place to live, clothing, an education, attention, and medical care as may be required."[148] When parents fail to provide essential medical care for a child, the state may intervene to do so. The basis for intervention is usually an allegation of parental neglect.[149]

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143. I. W. BLACKSTONE, COMMENTARIES *447 (emphasis in original).

144. Blackstone lived from 1723 to 1780. *See generally* THE HISTORY OF CHILDHOOD 303-75 (L. deMause ed. 1947); C. DICKENS, OLIVER TWIST (1838); C. DICKENS, THE OLD CURIOSITY SHOP (1841); C. DICKENS, NICHOLAS NICKLEBY (1839). Charles Dickens lived from 1812 to 1870. His compelling descriptions of cruelty toward children at the hands of parents, the state, employers, and educators capture the essence of our legacy of maltreatment. *See also* G. PAYNE, THE CHILD IN HUMAN PROGRESS 312-40 (1916).

145. *See* Comment, Parens Patriae—*A Revised Judicial Approach in Medical-Religious Conflicts in Michigan*, 1981 DET. C. L. REV. 83, 85-88 (1981).

146. 205 S.W.2d 812 (Tex. Civ. App. 1947).

147. *Id.* at 813-14.

148. Appeal in Cochise County, 133 Ariz. 157, 160, 650 P.2d 459, 462 (1982) (In Banc.).

149. Many states include failure to provide necessary medical care within the defini-

B. *State Authority to Provide Medical Care Over Parental Objection — Historical Development*

An unbroken line of authority holds that in appropriate cases the state may intervene in the family to provide necessary medical care over parental objection. The early decisions speak of parental neglect of the duty to provide maintenance, including medical care. Cases decided after enactment of juvenile codes continue to find neglect, but do so in terms of statutory definitions.

In 1880, the Pennsylvania Supreme Court decided *Heinemann's Appeal.*[150] The parent before the court refused to call a physician when his wife and three of his children were stricken with diphtheria, which led to death. Fearing for two remaining children, the maternal grandmother sought guardianship. The court upheld the guardianship, and remarked that the deceased children had been "shamefully neglected as regards [their] medical treatment."[151] An English case decided in 1883 provides further insight into nineteenth century thought. In *In re Agar-Ellis*[152] the Master of the Rolls questioned whether equity could interfere with the custody rights of an abusive father:

> I am not prepared to say that the patience of the Court, in the case of its ward, might not be exhausted . . . by cruelty to a great extent, or pitiless spitefullness to a great extent. I am not prepared to say the Court would not interfere in such a case, although no Court has yet decided it, but the Court could not interfere on such grounds as that except in the utmost need and in the most extreme case.[153]

Lord Justice Cotton agreed, stating he "would in no way limit the hand of the Court or say that where there are cases of cruelty to a child the Court would not interfere."[154] While intervention was uncommon during the nineteenth century, courts possessed inherent authority to protect and provide maintenance for neglected and abused children.

In the 1933 case *In re Vasko*,[155] the Appellate Division of the New York Supreme Court discussed "the right of the state . . . to

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tion of child neglect. *See, e.g.*, ALASKA STAT. § 47.17.070 (1983); FLA. STAT. § 827.05 (1983).

150. 96 Pa. 112 (1880). For discussion of the power of a court of equity to remove custody of children from their parents, see 3 J. Pomery, *Equity Jurisprudence* 329-31 (1883).

151. *Id.* at 115.

152. 24 Law Rep. 317 (Ch. 1883).

153. *Id.* at 328.

154. *Id.* at 334.

155. 238 App. Div. 128, 263 N.Y.S. 552 (N.Y. App. Div. 1933).

assume the discharge of duties of parents or guardians in matters involving the life, health, and physical welfare of their children . . . when it appears [they] have become derelict in their duty and failed to perform it."[156] The parents in *Vasko* refused to consent to an operation needed to save their child's life.[157] Overriding their objection, the court observed that the state's "beneficence extends also to conservation of the health of children, their physical well-being, as well as to the preservation of their lives. If parents or guardians neglect their duty in respect to any one of those obligations, the state in its wisdom, through its laws, intervenes."[158]

In 1942 the Washington Supreme Court handed down *In re Hudson*.[159] The majority opinion takes a narrow view of state authority. The dissent points the way toward the contemporary judicial attitude. The Hudson child suffered from a horribly deformed and enlarged arm. "The offending arm is ten times the size of the other arm . . . . [It] is nearly as large as the body."[160] Surgeons recommended amputation; however, the operation entailed substantial risk, and the parents refused to consent.[161] The majority began by asserting that in cases of neglect, depravity, or failure to provide essential care, courts of general equitable jurisdiction have ample authority to protect children and, if necessary, remove them from parental custody.[162] However, such intervention can only oc-

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156. *Id.* at 553 (case decided on basis of statute).

157. The child was two. She had a malignancy in one eye which threatened to "follow the optic nerve into the brain," causing death. *Id.* at 555. "The parents arbitrarily refused to permit the operation, on the ground . . . that [they] 'would rather have the child as she is now.' 'God gave [them] the baby and God can do what he wants.' " *Id.*

158. *Id.* at 553-54.

159. 13 Wash. 2d 673, 126 P.2d 765 (1942).

160. 13 Wash. 2d at 714, 126 P.2d at 784 (Simpson, J., dissenting).

161. 13 Wash. 2d at 677, 126 P.2d at 768-69.

162. *Id.* at 697, 126 P.2d at 775. The court discussed development of the inherent *parens patriae* authority of courts of equity to remove children from unfit parents:

> The justification for the power to take a child away from depraved parents derives from the old chancery jurisdiction, exercised as *parens patriae*, which in former times was invoked chiefly for children with property or in connection with matrimonial decrees. While this ancient chancery doctrine is today turned to wider service on behalf of infants suffering from poverty, vice and neglect, this power is not unlimited.
>
> "As long as parents properly exercise their duty, under their natural rights, to rear, educate and control their children their right to do so may not be interfered with solely because some other person or some other institution might be better deemed for the purpose."
>
> We agree with counsel for respondent court that the superior courts of this state are courts of general jurisdiction and have power to hear and determine all matters legal and equitable in all proceedings known to the common law except in so far as those have been expressly denied; that the jurisdiction of a court of equity over the

cur in the presence of neglect or unfitness.[163] The majority held that if parents are otherwise responsible and morally fit, their refusal to consent to medical care cannot constitute unfitness or neglect.[164] In other words, a "parent who is of excellent character and morally fit cannot be deprived of custody"[165] even though he or she deprives a child of essential medical care. The court's opinion reflects extraordinary deference to parental judgment and decision-making, placing beyond governmental reach decisions leading to serious harm.

In his dissenting opinion, Justice Simpson pointed out the *non sequitur* underlying the majority opinion.[166] It simply does not follow that refusal to provide medical care cannot constitute neglect. Summarizing his position, he wrote that

> [i]n actions relative to the custody of the child the courts do not recognize any legal right in the parent which will militate against the best interests of the child . . . .
>
> [T]he parent-child-state legal relationship imposes certain duties on the parent. All of these aim at one objective — the welfare of the child . . . . When the right to custody conflicts with the duty to consider the child's welfare, the latter outweighs the former . . . . When this duty is breached, the state as parens patriae, has the power to invade the right of custody for the purpose of compelling the performance of parental obligations.
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> . . . .
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> [I]t is my belief that since the essence of all children's laws is to insure the well-being of the child, any parental action which would jeopardize this objective . . . constitutes such a violation of duty as to forfeit the right of custody.[167]

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persons, as well as the property, of infants has long been recognized and that the right of the state to exercise guardianship over a child does not depend on a statute asserting that power.

Unquestionably, if a parent by neglect shows that he or she is unwilling or unable to provide that care to which his or her minor children are entitled, a court of equity, in the absence of statutory authorization, may remove those children from the custody of their parent and place them in the custody of a proper person as legal guardian of those children; in fact, statutory regulations as to the custody and care of infants will not affect the jurisdiction of a court of equity over infants.

Id. at 702, 126 P.2d at 777 (citations omitted). While the court found inherent power to protect children, it could find very few cases dealing with medical care over parental objection. What authority existed at that time indicated doubt whether the authority existed at common law to require medical care. *See id.* at 705-06, 126 P.2d at 779-81. *See also*, In re Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (Dom. Rel. Ct. 1941); In re Vasko, 238 App. Div. 128, 263 N.Y.S. 552 (N.Y. App. Div. 1933).

163. *See supra* note 162.

164. 13 Wash. 2d at 712, 126 P.2d at 778.

165. *Id.* at 729, 126 P.2d at 790 (Simpson, J., dissenting).

166. *Id.*

167. *Id.* at 723-24, 730, 126 P.2d at 788, 790. Justice Simpson observed that

While the sweep of his language is too broad, the logic of Justice Simpson's dissent has carried the day. In the 1973 case *In re CFB*,[168] for example, the court stated that "the concept of 'neglect' does cover a situation where a parent fails and refuses to offer a child necessary medical attention."[169] Similarly, in *Morrison v. State*[170] the court ordered blood transfusions for a twelve day old infant over parental objection. It noted that "[c]ourts of equity . . . have traditionally exercised their power to safeguard and protect the personal rights of infants,"[171] including "the child's life and health."[172] In the recent leading case, *Custody of a Minor*,[173] the Massachusetts Supreme Judicial Court stated that "[o]n a proper showing that parental conduct threatens a child's well-being, the interests of the State and of the individual child may mandate intervention."[174] Finally, in the 1982 decision *Appeal of Cochise County*,[175] the Arizona Supreme Court stated that

> [t]he right of parents to the custody of their children . . . is not absolute . . . . The state has an interest in the welfare and health of their children . . . . If the interest of the state is great enough—that is, if the welfare of the child is seriously jeopardized—the state may act and invade the rights of the parent and the family . . . . If the parent fails to furnish [basic] needs, the state may and should act on behalf of the child.[176]

The law is settled that in appropriate cases the state may inter-

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> [t]he right to the custody of a child is ordinarily in the parents, but it is not an absolute or inalienable right.
>
> . . . .
>
> The state as parens patriae has a superior right of guardianship over all minors within its jurisdiction.

Id. at 723, 126 P.2d at 787.

168. 497 S.W.2d 831 (Mo. Ct. App. 1973).

169. *Id.* at 834. (Child withdrawn from psychiatric care by parent. Held: parents not guilty of neglect under facts of case).

170. 252 S.W.2d 97 (Mo. Ct. App. 1952).

171. *Id.* at 102.

172. *Id.* at 103. The parents in *Morrison* took the position "that a child cannot be 'neglected' within the meaning of the statute merely because its parents fail to provide medical attention." *Id.* at 101. This argument is similar to that espoused by the majority in *In re Hudson*, 13 Wash. 2d 673, 126 P.2d 765 (1942). For a discussion of *Hudson*, see *supra* notes 159-67 and accompanying text. The *Morrison* court rejected the parents' argument, and held that when a child's life was endangered by parental refusal to consent to medical care, the court could declare the child dependent, and order medical care over parental objection. *See infra* notes 177-96 and accompanying text.

173. 373 Mass. 733, 379 N.E.2d 1053 (1978).

174. *Id.* at 749, 379 N.E.2d at 1063 (footnote omitted). For a discussion of this case, see *infra* notes 178-87 and accompanying text.

175. 133 Ariz. 157, 650 P.2d 459 (1982) (In Banc).

176. *Id.* at 161, 650 P.2d at 463.

vene to provide necessary medical care. The Arizona court accurately reflected contemporary judicial thinking when it held that intervention is permissible where parental neglect places a child in serious jeopardy.

C. *Need for Care in Life Threatening and Non-Life Threatening Situations*

It is clear that the state may exercise *parens patriae* authority to require medical care for minors; however, the cases differentiate between treatment needed to save the child's life and treatment that is important but not essential to life.

1. *Treatment Needed to Save the Child's Life*

There are numerous cases ordering life-saving medical care over parental objection. "Courts which have considered the question . . . uniformly have decided that State intervention is appropriate where the medical treatment sought is necessary to save the child's life."[177]

In *Custody of a Minor*,[178] the Massachusetts Supreme Judicial Court addressed the question of "whether the State may intervene when parents decline to administer the only type of medical treatment which . . . could save their child's life."[179] The child was suffering from acute lymphocytic leukemia. His doctors prescribed a protracted course of chemotherapy, which afforded a reasonable possibility of cure. Termination of therapy would lead to death. After following doctor's orders for some time, the parents stopped giving the drugs, and the state sought to reinstate therapy. The court began its analysis by "recognizing that there exists a 'private realm of family life which the state cannot enter.' "[180] Parental rights are fundamental, and must be weighed carefully against competing interests; however, "family autonomy is not absolute, and may be limited where . . . 'it appears that parental decisions will jeopardize the health or safety of [the] child.' "[181] Parental rights "do not clothe parents with life and death authority over their children."[182] Balanced against the parent's rights are the

177. Custody of a Minor, 375 Mass. 733, 747, 379 N.E.2d 1053, 1062 (1978) (footnote omitted) (citing numerous authorities at *id.* 1062 n.8).

178. 375 Mass. 753, 379 N.E.2d 1053 (1978).

179. *Id.* at 737, 379 N.E.2d at 1056.

180. *Id.*

181. *Id.*

182. *Id.* at 748, 379 N.E.2d at 1063.

state's interests in "protecting the welfare of children,"[183] preserving life,[184] and "protecting the ethical integrity of the medical profession."[185] In the court's mind the balance tipped unequivocally in favor of the state. It held that

> [w]here, as here, the child's very life is threatened by a parental decision refusing medical treatment, [the State's interest in the welfare of children] clearly supersede[s] parental prerogatives.
>
> [Furthermore], the State interest in the preservation of life applies with full force.[186]

The Massachusetts court's thoughtful opinion was sensitive to the competing interests; however, the holding is clear that when a child's life hangs in the balance, intervention will be ordered so long as it holds a reasonable probability of success. [187]

The Colorado Supreme Court reached a similar result in *People in the Interest of D.L.E.*,[188] in which the teenage patient had a serious seizure disorder. He refused on religious grounds to take medication, and was supported in his resolve by his mother. His decision placed "his life in imminent danger."[189] The court concluded that the state's *parens patriae* interest in guarding the youth's well-being can override religious objection to medical care. "[A] parent's election against medical treatment for a child is not absolute in a life-endangering situation."[190] Finding the boy neglected, the court ordered therapy.

There are numerous cases of court ordered blood transfusions for children of Jehovah's Witnesses.[191] The decisions consistently

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183. *Id.* at 755, 379 N.E.2d at 1066.

184. *Id.*

185. *Id.*

186. *Id.*

187. The parents eventually fled the jurisdiction rather than submit their son to court ordered, traditional medical care. They went to a clinic in Tijuana, Mexico where the boy received metabolic therapy. He died on October 12, 1979, at the age of three. Note, *Judicial Limitations on Parental Autonomy in the Medical Treatment of Minors*, 59 NEB. L. REV. 1093, 1105 n.63 (1980).

188. 645 P.2d 271 (Colo. 1982) (En Banc). The child had been before the Colorado Supreme Court once before. In an earlier decision, People in the Interest of D.L.E., 614 P.2d 873 (Colo. 1980) (En Banc), the court reversed a juvenile court order that the child was dependent and in need of medical care. The Supreme Court emphasized that its decision not to impose medical care could well have been different if the child's life was endangered. *Id.* at 874. In its later decision the minor's health had deteriorated to the point where medical care was essential to protect his life. 645 P.2d at 273.

189. 645 P.2d at 272.

190. *Id.* at 276.

191. *See, e.g.*, In re Green, 448 Pa. 338, 292 A.2d 387 (1972); Wallace v. Labranz, 411 Ill. 618, 104 N.E.2d 769 (1952); State v. Perricone, 37 N.J. 483, 181 A.2d 751 (1962).

require treatment when it is necessary to save the child's life. One court held that "when a child's right to live and his parents' religious belief collide, the former is paramount, and the religious doctrine must give way."[192] One of the transfusion cases is particularly important to the present inquiry regarding state interests in the unborn. In *Hoener v. Bertinato*,[193] a complaint was filed under the juvenile court act. The child welfare department alleged that the defendant mother was pregnant and likely to deliver in a few days. Unless her baby received a blood transfusion soon after birth, it would die; however, the parents refused on religious grounds to consent to the procedure. The court had "no difficulty in finding that, by their refusal to consent to the blood transfusion, defendants are neglecting to provide the child to be born with proper protection within the meaning of" [194] the law. The *parens patriae* power, as codified by statute, gave the court ample authority to impose medical care in opposition to the parent's genuinely held religious beliefs. Importantly, the court held that it had jurisdiction even though the child was unborn. Finding nothing in the juvenile code precluding its applicability to the unborn,[195] the court held "that the statute is applicable to the instant case even though the child is not yet born . . . . [A]n unborn child's right to life and health is entitled to legal protection."[196] This brief review of cases concerning life saving treatment demonstrates a seamless web of authority. State interests outweigh parental autonomy when a child's life is at stake, and when the proposed treatment will probably be efficacious.

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192. In re Clark, 185 N.E.2d 128, 132 (Ct. Com. Pleas Ohio 1962). This case is one of many in which Jehovah's Witness parents refuse blood for their injured or ill child. The court held it had statutory and inherent equitable authority to order blood transfusions over the parents' religious objection. *Id.* at 130. The court observed, in dicta, that "one doesn't have to work in a family court very long to learn that in countless circumstances a juvenile's rights and interests at many points are at sharp variance with those of his parents." *Id.* at 130.

Refer to note 142, *supra*, where Dr. Mitchell S. Globus discusses the not infrequent need for in utero blood transfusion. As this procedure becomes more common, it can be anticipated that Jehovah's Witnesses will oppose transfusion. When the life of a viable fetus depends on receipt of blood, the stage is set for a controversy over state imposed medical care.

193. 67 N.J. Super. 517, 171 A.2d 140 (1961).

194. 67 N.J. Super. at 518, 171 A.2d at 142.

195. *Id.* at 524, 171 A.2d at 144.

196. *Id.* at 524, 171 A.2d at 144-45. For a discussion of the *Bertinato* case, see *supra* notes 128-31 and accompanying text.

2. *Treatment Not Essential to Save the Child's Life*

When parents refuse consent to medical care which is important to the child's well-being but not essential to life, courts reach differing results. Cases turn on their unique facts. It is important to note, however, that all courts recognize limited state authority to intervene in non-life threatening situations. For example, a New York intermediate appellate court wrote in 1933 that the state's power "extends . . . to conservation of the health of children, their physical well-being, as well as to the preservation of their lives."[197] Some years later, a New York trial judge concluded that the state domestic relations act "clothed this court with the power to . . . order an operation not only in an instance where the life of the child is to be saved but also in instances where the health, the limb, the person or the future of the child is at stake."[198]

In the 1955 decision *In re Seiferth*,[199] a sharply divided Court of Appeals of New York[200] confronted a difficult case in which a fourteen year old boy and his father resisted surgery deemed necessary for the minor's future well-being. The child had a cleft palate and harelip. When the father refused consent to surgical repair, the local health department initiated neglect proceedings in the Children's Court. The trial judge took great pains to ensure that the boy and his father were apprised of the advantages of surgery.[201] In the end, however, the boy decided he did not want the operation. Finding that the surgery was not "emergent,"[202] that it could be successfully performed at a later date, and that the child had "acquired convictions of his own,"[203] the trial judge dismissed the petition. The Court of Appeals affirmed. The majority stated that "[t]he Children's Court has power in drastic situations to direct [an] operation over the objection of parents."[204] It concluded, however, that the more prudent course in the instant case was to defer to the decision of the child, his parent, and the trial judge. Little "would be lost by permitting the lapse of several more years, when the boy may make his own decision to submit to plastic surgery, than might be sacrificed if he were compelled to undergo it now

197. In re Vasko, 238 A.D. 128, 263 N.Y.S. 552, 554 (N.Y. App. Div. 1933).
198. In re Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624, 626-27 (Dom. Rel. Ct. 1941).
199. 309 N.Y. 80, 127 N.E.2d 820 (1955).
200. The court split four to three against court ordered medical care.
201. 309 N.Y. at 84-85, 127 N.E.2d at 822.
202. *Id.* at 85, 127 N.E.2d at 821.
203. *Id.* at 84, 127 N.E.2d at 822.
204. *Id.* at 85, 127 N.E.2d at 823.

against his sincere and frightened antagonism."[205]

In a strident dissent, Judge Fuld decried the majority's decision to "place upon [the child's] shoulders one of the most momentous and far-reaching decisions of his life."[206] He was of the opinion that the court had shirked its responsibility to decide the best course of action for the child.[207] In his opinion, the parent had "neglected in the most egregious way"[208] to do so; therefore, it was incumbent on the court to authorize surgery needed to enhance the child's "chances for a useful and productive life."[209] The dissent placed great emphasis on the quality of life and the importance of "a normal, useful life."[210] For Judge Fuld, the state's power to protect these values should have prevailed.

On reflection, the perception emerges that the *Seiferth* majority reached the appropriate result. Judge Fuld's able dissent verges too closely on unwarranted paternalism. The majority respected the settled judgment of a parent and an adolescent boy capable of reasoned decision-making. The fact that the surgery could be delayed until the child reached majority weighed heavily in the court's judgment. At the same time, the majority observed that "one cannot be certain of being right under these circumstances."[211] In striving to reach the result that would serve the child's best interest, the court looked to a wide array of factors, and balanced them in light of the unique facts of the case. In doing so it retained a degree of skepticism regarding state intervention into matters of family privacy.

The *Seiferth* opinion highlights numerous factors considered in medical care cases. Among the most important are the kind of medical problem involved, whether it is progressive or stable, the procedure necessary to treat it, the likelihood of success, the degree of risk involved, whether it is possible to postpone treatment,

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205. *Id.*

206. *Id.* at 88, 127 N.E.2d at 824 (Fuld, J., dissenting). Judge Fuld stated:

> The boy Martin, twelve years old when this proceeding was begun, fourteen now, has been neglected in the most egregious way. He is afflicted with a massive hare lip and cleft palate which not only grievously detract from his appearance but seriously impede his chances for a useful and productive life.

Id. at 86, 127 N.E.2d at 823.

207. *Id.* at 87, 127 N.E.2d at 823, 824. ("[I]t is the court which has a duty to perform . . . and it should not seek to avoid that duty by foisting upon the boy the ultimate decision to be made.")

208. *Id.* at 86, 127 N.E.2d at 823.

209. *Id.*

210. *Id.*

211. *Id.*

whether psychological injury will befall the child without treatment, the chances for a "normal" life with and without treatment, the age and preference of the child, and the genuinely held religious beliefs of the child and his or her parents.[212]

It is useful to compare the *Seiferth* case, which seems correctly decided, with the more recent decision in *In re Phillip B*,[213] which seems erroneous. California juvenile authorities filed a petition alleging that Phillip was denied the necessities of life because his parents refused consent to heart surgery. Evidence established that while his life was not immediately endangered, his congenital heart defect, if not corrected, would damage the lungs to the point where they would be unable to oxygenate blood, causing death. During the deterioration of the lungs, Phillip would suffer from a progressive loss of energy, leading eventually to a bed-to-chair existence.[214]

In concluding that state intervention was unwarranted, the court emphasized the importance of parental autonomy.[215] "Legal judgments regarding the value of childrearing patterns should be kept to a minimum so long as the child is afforded the best available opportunity to fulfill his potential in society."[216] In balancing the interests, the court weighed several factors, including "the seriousness of the harm the child is suffering,"[217] the opinions of experts regarding the proposed treatment,[218] "the risks involved,"[219] the

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212. Several excellent student articles discuss the factors relevant to medical care cases. The authors suggest standards for decisionmaking. See Note, *Choosing for Children: Adjudicating Medical Care Disputes Between Parents and the State*, 58 N.Y.U. L. REV. 157 (1983); Comment, *Relief for the Neglected Child: Court Ordered Medical Treatment in Non-Emergency Situations*, 22 SANTA CLARA L. REV. 471 (1982); Note, *Judicial Limitations on Parental Autonomy in the Medical Treatment of Minors*, 59 NEB. L. REV. 1093 (1980); Note, *Judicial Power to Order Medical Treatment for Minors Over Objections of their Guardians*, 14 SYRACUSE L. REV. 84 (1962). *See also* Baker, *Court Ordered Non-Emergency Medical Care for Infants*, 18 CLEV.-MAR. L. REV. 296 (1969); Goldstein, *supra* note 110.

213. 92 Cal. App. 3d 796, 156 Cal. Rptr. 48, 51 (1979), *cert. denied*, 455 U.S. 949 (1980). *See generally* Note, *supra* note 212, at 164; Baines, *In re Phillip B.: Unequal Protection for the Retarded?*, 4 AMICUS 128 (1979); Comment, *The Outer Limits of Parental Autonomy: Withholding Medical Treatment for Children*, 42 OHIO ST. L.J. 813, 824-26 (1981).

214. 92 Cal. App. 3d at 800, 156 Cal. Rptr. at 50.

215. *Id.* ("It is fundamental that parental autonomy is constitutionally protected.")

216. *Id.* at 801, 156 Cal. Rep. at 51.

217. *Id.*

218. *Id.*

219. *Id.* The risks inherent in the cardiac surgery needed by Phillip were substantial due to his mental retardation and the advanced stage of his heart disease. *See id.* at 803, 156 Cal. Rptr. at 51-52.

preferences of the child, and the best interests of the child.[220] The seriousness of the harm was evident — a deteriorating condition leading to a restricted, frustrating life, and early death. The doctors opined that surgery was indicated. While the risks were substantial,[221] the potential benefits were great. Since the child was intellectually handicapped,[222] he could not formulate an informed preference regarding surgery, although he could say that childhood activities were fun and that he liked them. Without surgery, he would lose the ability to participate in such activities. The court weighed these and other factors and concluded that the parents' refusal to consent to surgery should be respected. It was no doubt troubled with its decision, since it consigned Phillip to a downhill course leading to the grave. While the court's deference to parental decision-making is understandable, the case is so similar to those in which the child's life is at stake that it seems incorrectly decided.

Seiferth and *Phillip B* occupy opposite ends of the spectrum of decisions denying state authority to provide medical care over parental objection. Why is one right and the other wrong? In *Seiferth* the medical care sought by the state was not essential for a relatively normal, satisfying life. *Phillip B*, on the other hand, forbade care that was essential for the preservation of health and ability to engage in normal boyhood activities. In the long run, Phillip would die without the medical care sought by the state. Keeping in mind the admonition that "[o]ne cannot be certain of being right"[223] in these difficult cases, the distinction between them rests on the fact that one advanced the best interests of the child while the other did not. *Seiferth* enhanced quality of life and avoided possible harm. *Phillip B* relegated a child to a life of increasing disability and decreasing enjoyment. Searching deeply for a sense of justice and humanitarianism, one finds it in the former but not the latter.

As many cases allow intervention in non-life threatening situations as deny it.[224] A leading case is *In re Sampson*,[225] decided in 1970 by the New York Family Court. The fifteen year old child

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220. *Id.*

221. *See supra* note 219.

222. Phillip had Down's Syndrome, an inherited disability causing mental retardation. STEDMAN'S MEDICAL DICTIONARY: FIFTH UNABRIDGED LAWYERS' EDITION 1386 (1982).

223. In re Seiferth, 309 N.Y. 80, 85, 127 N.E.2d 820, 823 (1955).

224. *See, e.g.*, In re Karwath, 199 N.W.2d 147 (Iowa 1972).

225. 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970), *aff'd*, 37 A.D.2d 668, 323 N.Y.S.2d 253 (N.Y. App. Term. 1971), *aff'd*, 29 N.Y.2d 900, 328 N.Y.S.2d 686 (1972).

suffered "from extensive neurofibromatosis or Von Recklinghausin's disease which has caused a massive deformity of the right side of his face and neck."[226] His appearance "can only be described as grotesque and repulsive."[227] His mother consented to corrective plastic surgery, but because she was a Jehovah's Witness, she refused to permit essential blood transfusions. The physicians concurred that surgery was indicated.[228] They also agreed that "insofar as his health and his life is concerned, this is not a necessary operation [since the] disease poses no immediate threat to his life nor has it yet seriously affected his general health."[229] The trial court held that "[i]t is not necessary . . . that a child's life be in danger before this court may act to safeguard his health or general welfare."[230] The court's discretionary power was broad enough to require medical care in appropriate non-life threatening cases.[231] In reaching its decision, the court looked beyond protection of physical health to consideration of the possible psychological and social ramifications of the boy's disability. In this vein the court found that

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226. 317 N.Y.S.2d at 643. Neurofibromatosis causes "small, discrete, pigmented skin lesions . . . that develop in infancy or early childhood, followed by development of multiple slow-growing neurofibromas." STEDMAN'S MEDICAL DICTIONARY: FIFTH UNABRIDGED LAWYERS' EDITION 946 (1982). The reader may recall a recent film titled "The Elephant Man." The character, portrayed by William Hurt, suffered from neurofibromatosis. See film review at 116 TIME 92 (Oct. 6, 1980). *See* SIR F. TREVES, THE ELEPHANT MAN, AND OTHER REMINISCENCES (1923)(1980).

227. 317 N.Y.S.2d at 643.

228. *Id.* at 645.

229. *Id.*

230. *Id.* at 653.

231. *Id.* at 654. The court defined its authority as follows:

> I therefore conclude that this court's authority to deal with the abused, neglected or physically handicapped child is not limited to "drastic situations" or to those which constitute a "present emergency", but that the Court has a "wide discretion" to order medical or surgical care and treatment for an infant even over parental objection, if in the Court's judgment the health, safety or welfare of the child requires it.

Id.

Professor Goldstein disagrees vehemently with the reasoning of the trial court in *Sampson*, accusing Judge Elwyn of unfounded psychologizing and prediction, "blind arrogance", conjury, and false humility. Goldstein, *supra* note 110, at 665-67. These are strong words to be leveled at a judge struggling to balance the competing interests in a difficult case. Evidently Mr. Goldstein would not permit court ordered medical care in non-life threatening cases. *Id.* at 664. With all due respect, the author rejects the Goldstein position. Intervention must be rare in non-life threatening cases; however, to rule it out entirely is to turn a deaf ear to children desperately in need of help. As stated by Justice Sampson in his dissenting opinion in In re Hudson, 13 Wash. 2d 673, 734, 126 P.2d 765, 792 (1942) (Sampson, J., dissenting): "The courts should come to the child's rescue. She has no other friend able to assist her."

> the massive deformity of the entire right side of his face and neck is patently so gross and so disfiguring that it must inevitably exert a most negative effect upon his personality development, his opportunity for education and later employment and upon every phase of his relationship with his peers and others.[232]

Finding that the child had a "right to live and grow up without disfigurement — [a] right to live and grow up with a sound mind in a sound body,"[233] the court held that the mother's refusal to consent to blood transfusions amounted to neglect.

Sampson was affirmed on appeal.[234] At the intermediate appellate level, the mother argued that state intervention should be "permitted only where the life of the child is in danger by a failure to act."[235] The court stated that this "is a much too restricted approach."[236] The Court of Appeals agreed, and held that the "statutory power of the Family Court or like court in neglect proceedings . . . [is not limited] to drastic or mortal circumstances."[237] Courts have "power to direct surgery even in the absence of risk to the physical health or life of the subject . . . ."[238]

The *Sampson* decision is significant for several reasons. First, it was decided by the same court that handed down *Seiferth*. The different outcomes bear witness to the decisive importance of the unique facts of such cases. Second, the case is important for its sanction of judicial inquiry into a broad array of issues, including medical, psychological, and social implications of granting or denying state requested treatment. Finally, the decision leaves no doubt that courts may authorize medical care in non-life threatening situations.

In *Matter of Jensen*,[239] the Oregon Court of Appeals discussed the appropriateness of involuntary surgical care to enhance quality of life. The Jensen child was fifteen months old, and suffered from hydrocephalus.[240] She was described as follows:

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232. 317 N.Y.S.2d at 644.

233. *Id.* at 652 (emphasis omitted).

234. *See supra* note 225.

235. In re Sampson, 37 A.D.2d 668, 323 N.Y.S.2d 253, 255 (N.Y. App. Term. 1971). This argument was raised and rejected in Matter of Jensen, 54 Or. App. 1, 633 P.2d 1302 (Or. Ct. App. 1981); and Morrison v. State, 252 S.W.2d 97, 101 (Mo. Ct. App. 1952).

236. *Id.*

237. In re Sampson, 29 N.Y.2d 900, 328 N.Y.S.2d 686, 687 (1972).

238. *Id. See* Note, *supra* note 212, at 163-64 (describing New York law).

239. 54 Or. App. 1, 633 P.2d 1302 (1981).

240. Hydrocephalus is defined as follows: "1. A condition marked by an excessive accumulation of fluid dilating the cerebral ventricles, thinning the brain, and causing a separation of cranial bones. 2. In infants, an accumulation of fluid in the subarachnoid or subdural

> [T]he child's head has grown at an accelerated rate, and the child is unable to sit up or to hold her head up unaided. The child has symptoms which evidence increasing pressure on the brain, but her life is not in immediate danger. However, if the condition is not treated, there is substantial likelihood of retardation and other problems, and the possibility of the child leading some semblance of normal life would be very small.[241]

If surgery were performed, there was a good chance the child would escape the more severe consequences of her condition;[242] however, the parents objected on religious grounds. The trial court ordered surgery, and the appellate court affirmed, stating that "[t]he difference between providing and not providing indicated medical treatment here, as far as human beings can know, may well be the difference between providing or denying the child an opportunity to enjoy a meaningful life."[243] Under such circumstances, the parent's objections "must yield."[244]

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space." STEDMAN'S MEDICAL DICTIONARY: FIFTH UNABRIDGED LAWYERS' EDITION 663 (1982). *See supra* note 141. *See infra* notes 381-86 and accompanying text.

241. 54 Or. App. at 3, 633 P.2d at 1303.

242. Hydrocephalus can cause physical abnormalities and varying degrees of mental retardation.

243. *Id.* at 6, 633 P.2d at 1305.

244. *Id.* at 8, 633 P.2d at 1306. The court was impressed by the fact that "[t]he risk of post-surgical complications increases the longer surgery is delayed." *Id.* at 4, 633 P.2d at 1304. When time is of the essence, courts are more likely to authorize intervention.

On the issue of parental religious objection to the surgery, the court wrote:

> While the parents' right to provide religious training for their children is constitutionally protected, that right does not include as a necessary adjunct the right to jeopardize their children's health or safety.
>
> The line cannot always be easily drawn between the parental right to provide religious foundation for their children's lives and the right of children either to reject or to be free of unwanted consequences of their parents' faith. Cf. *Wisconsin v. Yoder, supra*. Presumably, no court would prohibit a parent from compelling a recalcitrant six-year old to attend Sunday School; presumably no court would hesitate to enjoin the sacrifice of a child to a volcano god. This case is not at either end of that spectrum. However, we conclude that given the child's inability to make her own choice about the burdens she will sustain as a consequence of her parents' religious belief, this burden the parents would impose on her in the interest of faith exceeds the limits of their asserted religious and related family rights.

Id. at 7, 633 P.2d at 1305-06.

The parents argued that intervention would have been appropriate if the child's life were endangered by withholding medical care. Since their daughter's life was not at risk, they argued that the state's *parens patriae* authority was not strong enough to overcome their right to free exercise of religion. The court rejected their position. It stated:

> While we agree that not all events are equally grave, and that competing claims of First Amendment liberties and the state's *parens patriae* role must obviously be weighed in light of the gravity of the risk against which the state seeks to act, we do not agree that the risk to the child in this case differs significantly in magnitude from an immediate threat to life. The facts as we find them are that the most basic quality of the child's life is endangered by the course the parents wish to follow. Their rights

A third case helps illustrate the approach taken by judges in non-life threatening situations. *Application of Cicero*[245] concerned an infant girl born with a spinal disorder called meningomyelocele.[246] Failure to surgically repair the defect could have led to infection and possibly death. The court found that the "infant's physical condition is in imminent danger of becoming impaired unless the recommended surgery is performed."[247] The court posed the issue as whether "a child born with handicaps [should] be given a reasonable opportunity to live, to grow and hopefully to surmount those handicaps."[248] Answering in the affirmative, the court stated that "where, as here, a child has a reasonable chance to live a useful, fulfilled life, the court will not permit parental inaction to deny that chance."[249]

The cases involving medical care for non-life threatening disorders may not appear to be based on uniformly applied principles of judicial decision-making. The reader comes away with the impression that decisions are made on an ad hoc basis, and that cases cannot be reconciled with each other. However, close analysis reveals a core of basic principles underlying the cases.[250] The most important is the degree of harm the child will suffer without court ordered medical care. The greater the harm, the more likely the court will intervene. When harm approaches threat to life, the court's analysis shifts, and the judge relies on the uniform body of law permitting intervention in life and death cases. Also of importance are the risks involved in the proposed treatment and the likelihood of success. As the degree of risk inherent in treatment increases, judges demonstrate greater deference to parental decision-making.[251] The same is true as the likelihood of successful

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must yield.

Id. at 8, 633 P.2d at 1306. *See* In re Sampson, 37 A.D.2d 668, 323 N.Y.S.2d 686 (1972) (similar argument raised and rejected).

245. 101 Misc. 2d 699, 421 N.Y.S.2d 965 (Sup. Ct. 1979).

246. Meningomyelocele, often called spina bifida, is defined as a protrusion of the membranes and [spinal] cord through a defect in the vertebral column. STEDMAN'S MEDICAL DICTIONARY: FIFTH UNABRIDGED LAWYERS' EDITION 854 (1982). The disorder can cause numerous disabilities, including paralysis. For a description of a child with spina bifida, see Tatro v. Texas, 481 F. Supp. 1224 (N.D. Tex. 1979), *vacated and remanded*, 625 F.2d 557 (5th Cir. 1980), *decision on remand*, 516 F. Supp. 968 (N.D. Tex. 1981), *aff'd*, 703 F.2d 823 (5th Cir. 1983), *modified*, 52 U.S.L.W. 5151 (U.S. June 26, 1984) (No. 83-558).

247. 421 N.Y.S.2d at 967.

248. *Id.*

249. *Id.* at 968.

250. *See* authorities cited *supra* note 212.

251. *See* In re Quinlin, 70 N.J. 10, 40-42, 355 A.2d 647, 664, *cert. denied*, 429 U.S. 922 (1976).

outcome decreases. Courts consider these principles in light of the unique facts and equities of the case. The court ultimately rests its decision on what it perceives as essential to protect the child from harm and foster its best interests.

D. *Religious Belief*

Religious belief is often at the heart of medical care cases. Parents argue that state enforced medical care violates the right to believe and practice religion according to conscience;[252] however, when religion precludes essential medical care, state interests in children usually prevail.[253] This result can be traced to a distinction between freedom to believe in a particular religion and freedom to act pursuant to religious belief. In the 1878 case, *Reynolds v. United States*,[254] the Supreme Court upheld the conviction of an individual whose religious beliefs included the practice of polygamy. Discussing the freedom of religion guaranteed by the Constitution, the Court stated that religious belief is beyond government control, but action "in violation of social duties or subversive of good order"[255] may be prohibited. The distinction between belief and action has direct application in the medical care cases.[256] In *Prince v. Massachusetts*,[257] the Supreme Court stated that "[t]he

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252. *See, e.g.*, Matter of Jensen, 54 Or. App. 1, 633 P.2d 1302 (1981). *See supra* notes 239-44 and accompanying text.

253. *See, e.g., id.* at 1306. *See generally* Annot., 52 A.L.R.3d 1118 (1973).

254. 98 U.S. 145 (1878).

255. *Id.* at 164.

256. *See* In re Appeal of Cochise County Juvenile Action, 133 Ariz. 157, 162-64, 650 P.2d 459, 464-66 (1982) (In Banc); State v. Perricone, 37 N.J. 462, 181 A.2d 751 (1962); Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (Juv. & Dom. Rel. Ct. 1961); Comment, *supra* note 145.

257. 321 U.S. 158 (1944). The Court wrote that

> the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. United States, 98 U.S. 145; Davis v. Beason, 133 U.S. 333. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. People v. Pierson, 176 N.Y. 201, 68 N.E. 243. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

right to practice religion freely does not include liberty to expose the . . . child . . . to ill health or death . . . . Parents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children."[258] The court reiterated this position in *Wisconsin v. Yoder*,[259] when it wrote that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health and safety of the child . . . ."[260]

Courts exhibit extraordinary deference to the right of parents to inculcate religious belief in their children; however, when religion leads to refusal to consent to essential medical care, the court will intervene. "If there is a direct collision of a child's right to good health and a parent's religious beliefs, the parent's rights must give way."[261]

E. *Summary*

Prenatal surgical and medical procedures are now available, and significant new developments can be expected.[262] When parents refuse to consent to treatment required to save the life of the fetus or prevent serious disability, courts will be called on to determine whether their refusal may stand. In deciding such cases, judges can draw substantial guidance from the well developed body of law on medical care over parental objection. The principles enunciated in the case law are applicable to cases involving the unborn, and

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Id. at 166-67 (footnote omitted).

258. *Id.* at 166-67, 170.

259. 406 U.S. 205 (1972).

260. *Id.* at 233-34. *See* People in Interest of D.L.E., 645 P.2d 271 (Colo. 1982) (En Banc), where the court wrote:

> Acting to guard the general interest in the youth's well being, the authority of the state, as *parens patriae*, is not nullified merely because a parent grounds his claim to control the child's course of conduct on religion or conscience . . . . The right to practice religion freely does not include the right or liberty to expose the community or the child to ill health or death.

Id. at 276. *See also* In re Green, 448 Pa. 338, 344, 292 A.2d 387, 390 (1972) ("jurisdictions have uniformly held that the state can order . . . blood transfusions over the parents' religious objections.").

261. In re Appeal in Cochise County Juvenile Action, 133 Ariz. 157, 164, 650 P.2d 459, 465 (1982) (In Banc). *See* Jehovah's Witnesses in Washington v. King County Hosp., 278 F. Supp. 488, 504-05 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598, *rehearing denied*, 391 U.S. 961 (1968); *In re* Sampson, 317 N.Y.S.2d 641, 652 (N.Y. Fam. Ct. 1970); People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, 773-74, *cert. denied*, 344 U.S. 824 (1952); Morrison v. State, 252 S.W.2d 97, 102 (Mo. Ct. App. 1952).

262. *See* authorities cited *supra* notes 141-42.

should serve as an invaluable starting place for analysis. It is apparent, however, that there are important interests involved in prenatal medical care controversies which are not present in cases where the child has been born. Subsequent sections discuss those interests.

VIII. Non-Medical Care Forms of Prenatal Abuse And Neglect

Many maternal behaviors can cause fetal death or disability. For example, maternal heroin addiction can cause addiction in the fetus, with possible permanent injury.[263] Heavy alcohol use can cause a condition known as fetal alcohol syndrome.[264] The syndrome can lead to permanent physical abnormalities and mental retardation.[265] When a woman engages in such activities, there is a statistically significant risk of serious fetal injury.[266] Toward the other end of the spectrum of risk, smoking, social drinking, poor nutrition[267] and inadequate prenatal care have been linked to fetal disa-

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263. *See* Lipson, *Contamination of the Fetal Environment—A Form of Prenatal Abuse* in Child Abuse 42-48 (K. Oates ed. 1982); Harris & Srinivasan, *Infants of Drug-Dependent Mothers*, 18 Seminars in Roentgenology 179 (1983). In the case of In re Baby X, 97 Mich. App. 111, 293 N.W.2d 736 (1980), the court was concerned with an infant whose mother was an addict. The child "began exhibiting symptoms of drug withdrawal . . . [w]ithin 24 hours of birth." *Id.* at 113, 293 N.W.2d at 738. The court affirmed a trial court ruling that the infant was neglected. Significantly, the court held that acts of neglect occurring during gestation could be relied upon to find the child born alive to be neglected. In the court's words, "a newborn suffering narcotic withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child . . . ." *Id.* at 116, 293 N.W.2d at 739.

264. *See* Bader & Weitzman, *Fetal Alcohol Syndrome*, 60 Am. J. Optometry & Physiological Optics 542 (1983); Mackenzie, Collins & Popkin, *A Case of Fetal Abuse?*, 52 Am. J. Orthopsychiatry 699 (1982); Stanage, Gregg & Massa, *Fetal Alcohol Syndrome —Intrauterine Child Abuse*, 36 S.D. J. Med. (1982).

265. *See supra* note 141 and accompanying text.

266. *See* Lipson, *Contamination of the Fetal Environment—A Form of Prenatal Abuse* in Child Abuse 42-48 (K. Oates ed. 1982).

267. A recent California Court of Appeal case addresses the issue of poor prenatal nutrition. People v. Pointer, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984). Defendant mother was convicted of child endangerment. She adhered to a strict diet, and enforced the diet on her young children. The trial court found that she had failed to provide adequate nutrition for her children. As a condition of probation the trial court ordered that the woman not conceive a child during the probationary period. *Id.* at 358. The court's unusual order was entered to protect the public's interest in avoidance of prenatal injury which could result from the mother's dietary habits. The appellate court disapproved of this condition, holding that it was impermissibly overbroad since "less restrictive alternatives are available that would feasibly provide the protections the trial court properly believed necessary." *Id.* at 366. Interestingly, the court's "less restrictive alternatives" included the probability of involuntary prenatal treatment, including an appropriate diet. The court wrote that

bility and mortality.[268]

Nothing in this article is intended to convey the impression that the state is or should be authorized to intervene in a woman's pregnancy to curtail all forms of prenatal activity statistically linked with some degree of risk to the fetus. Such a position is inconsistent with basic constitutional principles. Still, when reliable scientific evidence clearly establishes that maternal conduct carries with it a very high probability of fetal death or serious disability, intervention may be appropriate.[269] It is suggested that as courts decide such cases they will focus primarily on the likelihood and severity of fetal harm[270] and the degree of invasion of protected maternal interests required to effectuate intervention. A delicate balancing will be undertaken, with the outcome in most cases being a decision against intervention.[271]

IX. Parental Rights

Parents have a constitutional right to the care, custody and control of their children.[272] In a 1922 case, *Meyer v. Nebraska*,[273] the

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> [t]he challenged condition was apparently not intended to serve any rehabilitative purpose but rather to protect the public by preventing injury to an unborn child. We believe this salutary purpose can adequately be served by alternative restrictions less subversive of appellant's fundamental right to procreate. Such less onerous conditions might include, for example, the requirement that appellant periodically submit to pregnancy testing; and that upon becoming pregnant she be required to follow an intensive prenatal and neonatal treatment program monitored by both the probation officer and by a supervising physician.

Id. at 365.

268. *See* Lipson, *Contamination of the Fetal Environment—A Form of Prenatal Abuse* in Child Abuse 42-48 (K. Oates ed. 1982).

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

270. *See supra* notes 250-51 and accompanying text.

271. It is the author's thesis that intervention will be the rare exception and not the rule in prenatal abuse and neglect cases.

272. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). For discussion of parental rights, see generally, Stankoski v. Kramer, 455 U.S. 745 (1982); Quilloin v. Walcott, 434 U.S. 246 (1978); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977); Board of Educ. v. LaFleur, 414 U.S. 632 (1974); *In re* J.P., 648 P.2d 1364, 1372 (Utah 1982) ("A parent has a 'fundamental right, protected by the Constitution, to sustain his relationship with his child.' "); Keiter, *Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach*, 66 Minn. L. Rev. 487-501 (1982); Levy, *The Rights of Parents*, 1976 B.Y.U. L. Rev. 693; Wald, *supra* note 110; Note, *Jefferson v. Griffin Spalding County Hospital Authority: Court-Ordered Surgery to Protect the Life of an Unborn Child*, 9 Am. J.L. & Med. 83, 92-94 (1983); Note, *Protected Interests and Fundamental Rights in the Era of Human Genetic Engineering*, 10 San. Fern. V. L. Rev. 119 (1982); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 Stan. L. Rev. 1383, 1384-87 (1974); Note, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 Va. L. Rev. 1051, 1061-64 (1981).

Supreme Court held that the fourteenth amendment protects parental liberty to "establish a home and bring up children."[274] A few years later, in *Pierce v. Society of Sisters*,[275] it wrote that the state could not

> unreasonably interfere . . . with the liberty of parents and guardians to direct the upbringing and education of children under their control.
>
> . . . .
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> The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[276]

The Court summarized the teaching of earlier authorities in its seminal decision in *Prince v. Massachusetts*:[277] "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[278]

While parental autonomy is of utmost importance to society, it is not unlimited. In *Prince* the Court wrote that the "state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare,"[279] and in *Parham v. J.R.*,[280] it held "that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."[281] When parents fail to meet their basic duty to provide for their children, or when they abuse or neglect them, the state may step in to fill the vacuum of responsibility. Within its "wide range" of "constitutional control over parental discretion" a state may take action to protect the unborn from abuse and neglect. The propriety of intervention will be weighed in light of the intrusion on parental and other rights. In a minority of cases, the fundamental constitutional rights of parents will yield when balanced against the interests of the state and the unborn child. This result does nothing to undermine parental autonomy. It merely extends to the unborn the undisputed power of the state to intervene in the family to prevent serious abuse and neglect.

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273. 262 U.S. 390 (1922).
274. *Id.* at 399.
275. 268 U.S. 510 (1925).
276. *Id.* at 534-35.
277. 321 U.S. 158 (1944).
278. *Id.* at 166.
279. *Id.* at 167.
280. 442 U.S. 584 (1979).
281. *Id.* at 603.

X. Rights of the Pregnant Woman

State interference in a woman's pregnancy is a frightening proposition. It is difficult to imagine a more personal and private experience than carrying a child.[282] Yet, the fact that two lives are involved requires analysis of competing interests. This section outlines the rights protecting the pregnant woman from state intervention.[283]

A. *The Right of Privacy*

The roots of the constitutional right of privacy can be traced to the nineteenth century;[284] however, its formulation in Supreme Court decisions is of fairly recent origin. One of the earliest pronouncements is from the dissenting pen of Justice Harlan in *Poe v. Ullman*.[285] Several individuals challenged Connecticut's law against contraceptive use by married couples. The majority declined to reach the merits. Justice Harlan would have struck down the statute.[286] In his judgment it was "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[287] He wrote that "the sweep of the Court's decisions . . . amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character."[288] The right of family privacy is inherent

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282. As a male, I, of course, lack personal knowledge of the experience. I merely hope to articulate the issues involved in abuse and neglect of the unborn. I hope I am not presumptuous in so doing.

283. *See* Lenow, *supra* note 5, at 19-24 (1983).

284. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973). *See also* Union Pacific Ry. v. Botsford, 141 U.S. 250 (1891), where the Court stated that

> [n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "[t]he right to one's person may be said to be a right of complete immunity: to be let alone."

Id. at 251. *See generally* J. Nowak, R. Rotunda & J. Young, Constitutional Law 734-65 (2d ed. 1983); L. Tribe, American Constitutional Law 886-990 (1978); Warren & Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 191 (1890).

285. 367 U.S. 497 (1961).

286. *Id.* at 522 (Harlan, J., dissenting).

287. *Id.* at 539. Justice Harlan observed that the Court had not directly addressed the right of privacy in its decisions up to that time. *Id.*

288. *Id.* at 550. Justice Harlan quotes at length from the dissenting opinion of Justice Brandeis in Olmstead v. United States, 277 U.S. 438 (1928), as follows:

> The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings

in the tradition and fabric of American society; therefore, the constitutional guarantee of due process of law sets limits on the extent the sovereign may intrude into such matters.[289] This is especially so regarding private sexual conduct between wife and husband. While he would have invalidated the Connecticut statute, Justice Harlan made it clear that constitutional privacy does not extend to all privately conducted activity. "[A]dultery, homosexuality, fornication and incest are [not] immune from criminal enquiry, however privately practiced."[290] The home cannot "be made a sanctuary of crime."[291] The limits of the right of privacy are found by examining societal values and determining which private activities are traditionally sanctioned and which proscribed. The state must have compelling reasons to trammel the former.

Four years after it declined to do so in *Poe v. Ullman*, the Supreme Court struck down the Connecticut contraception statute as an unwarranted invasion of privacy. In *Griswold v. Connecticut*[292] the Court stated that the statute impinged on "a relationship lying within the zone of privacy created by several constitutional guarantees."[293] While the Justices did not agree on the textual source of the privacy right,[294] they concurred that intimate family decisions are protected. The right of privacy was clarified in *Eisenstadt v. Baird*,[295] a decision striking down a Massachusetts statute

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> and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id. at 478 (Brandeis, J., dissenting).

289. *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

290. 367 U.S. at 552. Since Justice Harlan's 1961 dissenting opinion, the right of privacy has been employed to strike down statutes which might well have survived his scrutiny. *See, e.g.*, New York v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981) (state statute criminalizing heterosexual sodomy between consenting adults held unconstitutional): Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982) (statute criminalizing homosexual sodomy between consenting adults held unconstitutional). *But see* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd without opinion*, 425 U.S. 901 (1976) (upholding constitutionality of Virginia sodomy statute). *See also* State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (state sodomy statute struck down); State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1976) (state fornication statute held unconstitutional).

291. 367 U.S. at 552.

292. 381 U.S. 479 (1965).

293. *Id.* at 485.

294. For a discussion of the views of the Justices, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 737-39 (2d ed. 1983).

295. 405 U.S. 438 (1972). *Eisenstadt* was decided on equal protection grounds rather than a privacy theory. While the passage quoted in the text is dicta, it remains an excellent

prohibiting sale or distribution of contraceptives to a single person. The Court wrote that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[296] A year after *Eisenstadt*, the Court handed down *Roe v. Wade*,[297] in which it held that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[298] Finally, in the 1977 decision, *Whalen v. Roe*,[299] a unanimous Court summarized the development of the law as follows: "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[300] The "decisions" entitled to protection from governmental control are those "dealing with 'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States' power to substantively regulate conduct.' "[301]

This brief review of the developing law of constitutional privacy leads ineluctably to the conclusion that a pregnant woman has a fundamental right to privacy in decision-making about her pregnancy. In Justice Brandeis' words, she has "the right to be let alone . . . ."[302] Government intrusion into her privacy can be sanctioned only in compelling cases.

B. *The Rights of Bodily Integrity and Personal Security*

Closely associated with the right of privacy are the rights of bodily integrity[303] and personal security from unwarranted governmen-

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expression of the importance of the privacy right.

296. *Id.* at 453.

297. 410 U.S. 113 (1973).

298. *Id.* at 153. The Court in *Roe* stated that the constitutional right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty. . . ." *Id.*

299. 429 U.S. 389 (1977).

300. *Id.* at 598-600 (footnote omitted).

301. *Id.* at 600 n.26 (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)).

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

303. *See* Parham v. J.R., 442 U.S. 584, 626 (1979) (Brennan, J., concurring in part and dissenting in part); Note, *The Fetal Patient and the Unwilling Mother: A Standard for Judicial Intervention*, 14 PAC. L.J. 1065, 1072-74 (1983); Note, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1051, 1053-56 (1981). *See also* Soloff, Jewell & Roth, *Civil Commitment and the Rights of the Unborn*, 136 AM. J. PSYCHI-

tal intrusion. In *Ingraham v. Wright*[304] the Court observed that the fourteenth amendment was intended to protect the "right to be free from . . . unjustified intrusions on personal security."[305] Every individual enjoys the basic rights to "autonomy over [his or her] own body,"[306] freedom "from nonconsensual invasion of . . . bodily integrity"[307] and preservation of the inviolabilty of the person.[308] These rights are protected by the fourteenth amendment. They empower a woman to resist governmentally imposed regulation of her conduct during pregnancy. They also form the constitutional underpinning of the right of a competent adult to refuse medical care imposed by the government.[309] Under their protection, a woman may refuse medical or surgical care[310] needed by her unborn child unless her rights are overcome by compellingly strong state interests.

C. *Liberty and Freedom from Bodily Restraint*

The fourteenth amendment protects the fundamental rights to liberty[311] and freedom from unwarranted bodily restraint.[312] State action to curtail a woman's freedom in order to protect her fetus

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ATRY 114 (1979) (schizophrenic woman who denied she was pregnant validly committed to protect her unborn child) [hereinafter cited as Soloff].

304. 430 U.S. 651 (1977) (corporal punishment of school children).

305. *Id.* at 673.

306. Rennie v. Klein, 462 F. Supp. 1131, 1144 (D.N.J. 1978) (concerning refusal of antipsychotic drugs by civilly committed mental patient), *modified and remanded*, 653 F.2d 836 (1981), *vacated and remanded*, 458 U.S. 119 (1982).

307. Superintendent of Belchentown v. Saikewicz, 373 Mass. 728, 739, 370 N.E.2d 417, 424 (1977). *See* Breithaupt v. Abram, 352 U.S. 432, 439 (1957).

308. 373 Mass. at 739, 370 N.E.2d at 424.

309. *See* Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part, rev'd in part, vacated and remanded, sub nom.*, Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded, sub nom.*, Mills v. Rogers, 457 U.S. 291 (1982); Rennie v. Klein, 462 F. Supp. 1131 (D. N.J. 1978) (for procedural history see *supra* note 306) Guardianship of Roe, 421 N.E.2d 40 (Mass. 1981); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); *In re* K.K.B., 609 P.2d 747, 750 (Okla. 1980); Note, *Jefferson v. Griffin Spalding County Hospital Authority: Court-Ordered Surgery to Protect the Life of an Unborn Child*, 9 AM. J.L. & MED. 83, 90-92 (1983); Comment, *Family Law—Court-Ordered Surgery for the Protection of a Viable Fetus*, 5 W. NEW ENG. L. REV. 125, 126-32 (1982).

310. *See* Rennie v. Klein, 653 F.2d 836, 845 (3d Cir. 1981) ("Like most rights, it is not absolute, but is limited by other legitimate governmental concerns and obligations."); Rennie v. Klein, 462 F. Supp. at 1145 ("The constitutional right to refuse treatment cannot be absolute.").

311. U.S. CONST. amend. XIV, § 1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." *Id.*

312. *See* Youngberg v. Romeo, 457 U.S. 307 (1982). Cases of court ordered medical care for an unborn child could implicate the mother's constitutional right to travel. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

runs directly afoul of these rights.

D. *Parental Rights*

As described above,[313] a parent has a fundamental right to the care, custody and control of her child. This right of parental autonomy applies to the expectant mother with as much force as it does to parents of children already born. When this *parental* right is added to the *personal* rights described above, the woman comes under the aegis of constitutional limitations on government interference with her pregnancy. The right of the individual "to be free from unwarranted governmental intrusion in fundamental personal matters"[314] is at its strongest in this context.

XI. Rights of the Unborn Child

Children unquestionably possess legal rights,[315] and while they are not conterminous with those of adults,[316] they are substantial. For example, children are entitled to the protection of the fourteenth amendment.[317] The Supreme Court has said that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[318] In addition to constitutional rights, children are protected by the law of tort, crimes, and inheritance. Because of their special status, they also enjoy an array of "children's laws," such as child labor laws[319] and abuse and neglect statutes.

In *Roe v. Wade* the Supreme Court held that a fetus is not a "person" within the meaning of the fourteenth amendment;[320]

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313. *See supra* note 263-71 and accompanying text.

314. Rogers v. Okin, 478 F. Supp. 1342, 1362 (D. Mass. 1979).

315. Tinker v. Des Moines Ind. Comm. School Dist., 393 U.S. 503, 512-13 (1969); *In re* Gault, 387 U.S. 1, 31-57 (1967). *See generally* M. Freeman, The Rights and Wrongs of Children (1983); The Legal Rights of Children (R. Bremner ed. 1974); *Children and the Law*, 39 Law & Contemp. Probs., *passim* (1975).

316. *See* Keiter, *Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 Minn. L. Rev. 459, 467-68 (1982).

317. *In re* Gault, 387 U.S. 1 (1967).

318. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (minor has constitutional privacy right to consent to abortion; parents may not veto her decision).

319. Child labor laws are an example of statutes designed specially to protect children. For a history of the child labor movement, see W. Trattner, Crusade for the Children (1970) (emphasis on the National Child Labor Committee).

320. 410 U.S. at 158. *See supra* notes 53-57 and accompanying text.

therefore, the unborn child is not entitled to the constitutional rights of privacy, freedom from unwarranted government intrusion, and bodily integrity. Despite its lack of constitutional rights, the unborn child is protected by substantive non-fourteenth amendment law.[321] The most important sources of protection are tort and child abuse and neglect laws.[322] When parents fail to protect their unborn child, the state may employ these substantive provisions in conjunction with its interests in the unborn to intervene on behalf of the fetus. In this respect, the unborn child may be said to possess a right to protection from tortious injury, abuse, and neglect. Put another way, the unborn child possesses a right to gestation undisturbed by wrongful injury, and a right to be born with a sound mind and body,[323] free from parentally inflicted abuse or neglect. Recognition of such rights is consistent with the state's compelling interest in viable fetal life, and with societal interests in prevention of needless harm and protection of health. Furthermore, such rights are consistent with the movement toward greater protection of children and enhanced recognition of children's legal rights as individuals separate and apart from their parents. While the fetus is fundamentally dependent on the woman, as it grows in maturity, and especially when it reaches viability, its independent existence and legally cognizable rights come progressively into focus. A right to gestation free from abuse or neglect which could lead to death or disability should be recognized and protected.[324]

The fetus is incapable of articulating or protecting its interest in freedom from parental abuse or neglect, therefore, it falls to the state, through its *parens patriae* authority, to protect the unborn. When state intervention is contemplated to prevent abuse or neglect, the interests of the fetus will dovetail with those of the state, adding force to the argument in favor of intervention.

XII. Rights of the Father

When the state intervenes in a woman's pregnancy to curtail

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321. *See* Parness & Pritchard, *supra* note 5; notes 53-57 and accompanying text.

322. *See supra* notes 118-38 and accompanying text.

323. *See* Grodin v. Grodin, 102 Mich. App. 396, 400, 301 N.W.2d 869, 870 (1981); Womack v. Buchhorn, 384 Mich. 718, 723, 187 N.W.2d 218, 222 (1971); *In re* Sampson, 317 N.Y.S.2d 641, 652 (N.Y. Fam. Ct. 1970); *In re* Clark, 185 N.E.2d 128, 132 (Ct. Comm. Pleas. Ohio 1962); Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140, 144 (Juv. & Dom. Rel. Ct. N.J. 1961); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497, 503 (1960).

324. The scope of fetal rights is unclear. *See* Robertson, *supra* note 10, at 360; Note, *The Fetal Patient and the Unwilling Mother: A Standard for Judicial Intervention*, 14 Pac. L.J. 1065, 1075 (1983).

abuse or neglect, the question arises whether the father has legal rights which must be considered. In *Planned Parenthood v. Danforth*[325] the Supreme Court acknowledged "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying."[326] Many unwed fathers display similar concern.[327] While the father's interest in the unborn child is real, it is not identical with that of the woman, for it is she "who physically bears the child and who is more directly and immediately affected by the pregnancy."[328] In the face of state intervention, it is she whose personal rights to privacy, liberty, and bodily integrity are directly affected. Clearly, intervention is substantially more intrusive on the rights of the pregnant woman than on those of the father.

Granting the mother's constitutional rights greater status does not decide the rights of the father. At a minimum, he is entitled to the constitutionally protected right of a parent to freedom from unwarranted government intrusion.[329] However, this right is limited in two important respects. First, the state's interest in children and in potential human life overcome parental rights in appropriate circumstances; therefore, the state's interests will sometimes outweigh those of the father. Furthermore, when the mother joins the state in opposition to the father, the combined interests will nearly always prevail. Second, where the state is not involved, and a controversy exists between a mother and father, the woman's greater rights will usually predominate. The clearest example is a woman's decision to abort pre-viable fetus over the father's objection. It is settled that she may do so.[330] The balance of rights and interests may be closer following viability. For example, if a woman eight months pregnant decides to engage in binge

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325. 428 U.S. 52 (1976).

326. *Id.* at 69.

327. On the rights of unwed fathers, see generally Kapp, *The Father's (Lack of) Rights and Responsibilities in the Abortion Decision: An Examination of Legal-Ethical Implications*, 9 OHIO N.U.L. REV. 369 (1982); Weinhaus, *Substantive Rights of the Unwed Father: The Boundaries Are Defined*, 19 J. FAM. L. 445 (1980-81); Comment, *Family Law—Cox v. Hendricks: Rights of an Unwed Father*, 15 CREIGHTON L. REV. 296 (1981); Comment, *The Unwed Father's Parental Rights and Obligations After S.P.B.: A Retreat in Constitutional Protection*, 60 DENVER L.J. 659 (1983); Comment, *Lehr v. Robertson, A Constricted View of the Rights of Putative Fathers*, 4 PACE L. REV. 477 (1984).

328. 428 U.S. at 71.

329. *See supra* notes 272-81 and accompanying text.

330. 428 U.S. at 71. *See* Jones v. Smith, 278 So.2d 339 (Ct. App. Fla. 1973) (father of unborn child could not restrain mother from seeking an abortion).

drinking likely to result in fetal alcohol syndrome, a condition that can cause permanent physical and mental disability,[331] it can be argued that the father's parental rights should be elevated, in some cases, to equal those of the mother.[332] In such instances, a combination of paternal and state interests could tip the scale against the mother and in favor of intervention to curtail her consumption of alcohol.

In summary, the rights of the father are fewer in number and weaker than those of the mother because he does not carry the child within his body. In a contest between father and mother, the outcome will depend in part on the age of the fetus. When the state is aligned with the father in an effort to provide care for a viable fetus or to curtail neglectful maternal conduct, the combination of interests may, in limited circumstances, prevail over those of the woman.

XIII. Balancing the Interests

The time has come to return to the question posed at the outset. When, if ever, can the state intervene in the life of a pregnant woman to curtail abuse or neglect of her unborn child? The answer reveals itself when the competing interests are scrutinized in light of the balancing[333] approach utilized in cases dealing with rights protected by fourteenth amendment substantive due process.[334] The rights enjoyed by the pregnant woman are unquestionably protected by substantive due process.[335] These rights must be balanced against the state's interest in the unborn child.[336] As the degree of state intervention becomes more intrusive on the woman's rights, the state must demonstrate an increasingly strong justification for its action.[337] In most cases of intervention to curtail prenatal abuse and neglect, the degree of intrusion will be such that only

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331. *See* authorities cited *supra* note 141.

332. Following viability, the state may compel the mother to give birth to the fetus. The resulting child will become the personal and financial responsibility of both parents. The father's interests in the child which will be born, and which the mother cannot abort, become very immediate. Since the child will soon be his responsibility, it can be argued that his rights regarding the fetus should increase along with the surety that his responsibilities will accrue.

333. *See Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1166-87, 1193-97 (1980). *See also* Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring); Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978).

334. *See Developments, supra* note 333, at 1193-97.

335. *See supra* notes 282-314 and accompanying text.

336. *See supra* notes 58-88 and accompanying text.

337. *See Developments, supra* note 333, at 1195.

a compelling state interest will justify intervention.[338] What is more, even in cases where the state is able to demonstrate compelling justification for intervention, the court may stay the state's hand if the goal sought by the proposed intervention can be accomplished by means less invasive of protected interests.[339] The difficult task of the court will be to weigh all the relevant interests[340] and make a decision tailored to the unique facts of the case under consideration.[341] While use of the balancing approach does not produce ease of decision-making, it does provide a workable mechanism to reach just results in light of competing interests.

Several important factors align in favor of limited intervention. The state has a compelling interest in the potentiality of viable fetal life.[342] This interest is so powerful that it overcomes the woman's fundamental privacy right to terminate her pregnancy.[343] In effect, the state can compel birth.[344] Unless the health or safety of the mother dictate otherwise,[345] the state may require her to sustain viable fetal life and give birth. Once the child is born, the state's interests in preservation of life and protection from abuse and neglect unquestionably attach. No one denies the state's interests in a nine minute old infant.[346] There is no persuasive logical or legal reason to deny them in a nine month old fetus. To inject meaning into the state's compelling interest in the potentiality of viable fetal life,[347] and to render it consistent with the interests in

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338. Prevention of prenatal abuse or neglect will often require involuntary medical care for the mother or substantial interference with privacy and autonomy. Such interference with basic parental and personal rights can only be justified in compelling cases.

339. *See Developments, supra* note 333, at 1195, where it is stated that "[a]s an intrusion becomes more destructive of a right, it may be outweighed only by increasingly substantial state interests, and the degree of fit demanded between means and ends will increase as well." (footnotes omitted). *See also* People v. Pointer, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984).

340. *Developments, supra* note 333, at 1196.

341. *Id.* at 1197.

342. Roe v. Wade, 410 U.S. 113, 150, 154, 155, 162 (1973).

343. *Id.* at 163-64.

344. *See* authority cited *supra* note 139.

345. 410 U.S. at 164-65.

346. This article does not deal with the controversy over defective newborns. There is lively debate among philosophers, physicians, theologians, legislators, and lawyers regarding who, if anyone, can decide whether a defective newborn child will live. *See* Matter of Weher, 60 N.Y.2d 208, 456 N.E.2d 1186 (1983); Parness & Stevenson, *Let Live and Let Die: Disabled Newborns and Contemporary Law*, 37 U. MIAMI L. REV. 43 (1982). Note, *Defective Newborns and Section 504 of the Rehabilitation Act: Legislation by Administrative Fiat?*, 25 ARIZ. L. REV. 709 (1983).

347. *See supra* notes 59-79 and accompanying text.

youth,[348] preservation of life,[349] and protection from abuse and neglect, the state must be authorized to extend limited protection to the unborn. To have power to require birth, but not to protect the soon-to-be-born from injury which will follow it throughout life is inconsistent with the interests of the state and the child in freedom from preventable injury. Allowing intervention protects and fosters both.

The right of the fetus to be born with a sound mind and body, free from tortious or abusive injury, lends further support to the argument for *parens patriae* intervention.[350] Completely unable to assert its own rights, the fetus depends on its parents for protection. When they fail, the state must step in. In the case of a viable fetus, injured at its mother's hand, the rationale underlying the *parens patriae* authority—protection of those incapable of self-protection—comes squarely into play.[351] Combining the state's interest in and duty to protect children from abuse and neglect with its important interests in the fetus produces a persuasive argument for limited authority to prevent prenatal abuse and neglect. The argument is strengthened further when the father adds his parental interest in the welfare of the fetus[352] to those of the state and child.

Recognition of limited state authority to prevent abuse and neglect of the unborn is consistent with the movement toward greater recognition of children's rights.[353] It is also in line with the increasing knowledge of prenatal life and science's rapidly expanding ability to provide efficacious medical and surgical care for the fetus.[354] Finally, arguments based on humanitarianism speak in favor of opening the door to intervention. When science holds forth relief from needless suffering, disfigurement, or disability, humanity, supported by law, requires action.

Balanced against intervention is the panoply of rights possessed by the mother.[355] Added to this arsenal is a skepticism about the will and ability of government to restrain itself from unwarranted paternalistic intervention in the private lives of citizens.[356] While

348. *See supra* notes 80-84 and accompanying text.
349. *See supra* notes 85-88 and accompanying text.
350. *See supra* notes 323-24 and accompanying text.
351. *See supra* notes 89-101 and accompanying text.
352. *See supra* notes 325-32 and accompanying text.
353. *See supra* notes 315-24 and accompanying text.
354. *See supra* notes 141-42 and accompanying text.
355. *See supra* notes 282-314 and accompanying text.
356. Justice Louis D. Brandeis once observed that the tendency of government offi-

the mother's right to refuse state interference in her pregnancy is strong, it is submitted that when viability is attained, the combined interests of state and child will sometimes outweigh her prerogative.

XIV. Limitations on State Intervention

Because of the importance of the rights at stake, and because the government has a propensity for unwarranted intrusion into areas of protected privacy and decision-making, it is necessary to circumscribe the power of the state.

A. *Intervention is Permissible Only Following Viability*

Under current doctrine, the protected interests of the woman exist at full strength throughout gestation, while those of the state become compelling only at viability.[357] Prior to that time the state

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cials to overreach the limits of appropriate intervention in the private lives of citizens often manifests itself when government is attempting to be beneficent. He wrote: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

357. Roe v. Wade, 410 U.S. 113, 162-63 (1973). *See* King, *The Judicial Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 Mich. L. Rev. 1647 (1979). Professor King argues persuasively for protection of the viable fetus. She states that:

> In my view, the fetus should not be entitled to the same degree of protection at every stage of development. We should distinguish between the legal protection afforded the viable and the previable fetus just as we once distinguished between legal protection furnished before and after birth. . . .
>
> [R]eview of the medical data suggests a number of points in fetal development at which one might recognize a strong claim for significantly increasing the legal protection given a developing human. I would argue that, absent powerful countervailing considerations, the point selected should reflect the fundamental principles underlying the present legal system—principles that warrant revised rules to keep pace with recent medical advances.
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> As I noted earlier, the law has traditionally considered the acquisition of a capacity for independent existence to be the significant point in human development. Traditionally, birth was the point at which the capacity criterion was satisfied. Today viability precedes birth, and therefore birth is no longer the event most appropriately satisfying the capacity criterion. Viability is preferable to birth, because, as we saw earlier, there is no relevant difference between a viable fetus and a newborn. Explicit substitution of viability for birth as the point at which important legal protections vest would not establish a new principle. It would adhere to the traditional principle, invoking a more precise formulation of the standard in response to modern medical information and capabilities. . . .
>
> [S]ociety has never wholly disregarded the interests of those less mature. It has always sought to strike a fair balance and has typically done so at that point in development where the entity shows a significant likelihood of becoming a mature, contributing member. That point has, logically, been the moment at which the entity is ca-

lacks sufficient justification to warrant intrusion into areas of protected privacy. This position is opposed by the stark reality that prenatal abuse and neglect can occur throughout pregnancy. Since fetal damage can be substantial and permanent when injury occurs prior to viability, state authority to intervene should exist throughout the period of vulnerability.[358] It makes little sense to force the

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pable of independent existence—the capacity criterion. The criterion is thus a rational one—it represents a societal commitment to bestowing rights on those likely to contribute to its advancement. It naturally follows the societal instinct for self-perpetuation. It explains the early common law property rule that one had to be alive at the time of a testator's death to inherit; otherwise no one would fulfill the feudal responsibilities. Similarly, modern law gives rights to artificial entities such as corporations only when they are capable of bearing responsibilities.

Thus, the capacity criterion is a rational principle, and the viability standard is a rational application of that principle to the modern world. Yet that should not obscure the arguments in Section IV above: Although principal rights should be bestowed at viability, the previable fetus should still receive some protection. Where the protectable interests of fully mature members do not conflict with those of less mature members, there is no justification for ignoring the latter's claims. The *Roe* opinion was correct in recognizing a state's legitimate interest in protecting the previable fetus. In tort, property, and criminal law, when that interest does not oppose a protected interest of the mature mother, the state should not hesitate to vindicate it.

Id. at 1673, 1676-77.

358. Dr. Donald C. Bross, staff attorney for the National Center for the Prevention & Treatment of Child Abuse & Neglect, Denver, Colorado, takes the position that pre-viability state intervention is sometimes warranted. Bross argues as follows:

A number of legal principles are variations on a common theme: rights not exercised can be lost with the passage of time. Among the definitions of "waiver" provided by Black's Law Dictionary are the following: "The intentional or voluntary relinquishment of a known right . . . or such conduct as warrants an inference of the relinquishment of such right . . . or when one dispenses with the performance of something he is entitled to exact or when in possession of any right, whether conferred by law or contract . . . does or forbears to do something the doing of which or the failure of forebearance to do which is inconsistent with the right. . . . The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege . . . (citation omitted)." Another principle based on the passage of time is "laches," defined as a "question of inequity of permitting a claim to be enforced . . . an inequity founded on some change in the condition or the relations of . . . the parties.

Laches is, or is based on, delay attended by or inducing change of condition or relation . . . delay for such time as to constitute acquiescence. . . . (citations omitted)." (Black's Law Dictionary). The notion of waiver or laches is implicit in the language of a federal district court which upheld the right of a woman to abortion, before the *Roe v. Wade* decision:

"The essential requirement of due process is that the woman be given the power to determine within an appropriate period after conception whether or not she wishes to bear a child." (*Abele v. Markel*) In addition to merely waiting until one's right to an abortion becomes physically or legally unenforceable, clear statements or actions to waive the abortion right should be considered as creating a right in the developing fetus to at least minimally adequate prenatal care.

Once a pregnant woman makes clear that she will carry the unborn child to term, an argument can be made that a court should be able to order the woman to maintain

state to sit powerless while a pregnant woman inflicts irreparable injury on her fetus simply because the child is a month or a day

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a medically necessary regimen, or to control exposure of the fetus to damaging drugs and alcohol. Failure to do so would constitute evidence of child neglect at the child's birth. The mother may defy the courts during the first trimester and decide to have an abortion. The child advocate would then be in the position of feeling that when intervention was undertaken, the developing fetus had a right to die rather than to be born at extreme risk for deformities, pain or incapacity of the magnitude associated with adult right-to-die situations.

On the horizon are cases in which intrauterine surgery or transfusions are indicated. Additional discoveries may provide additional examples of parental conduct or neglect clearly risking the health of term fetuses. Until now, the question of parental negligence affecting the early fetus or first and second trimester developing child has been set aside. Presumably, the abortion decisions of the U.S. Supreme Court have made early pregnancy a closed book legally for all except those who take a strong right to life position. In the words of one commentator:

> "To date the law has not adopted a uniform position concerning the legal rights of a fetus. For some purposes, a fetus will be accorded legal protection from the point of conception, entitled to the same damages awarded other persons. For other purposes, the legal status of the fetus will not be recognized until it has achieved viability. *The constitutional right of the woman to control the pregnancy prior to the 'moment' of viability effectively negates any legal interest that could be asserted on behalf of the fetus.* Upon viability, a medical determination, the fetus is entitled to the full protection of the law." (Doudera) (Emphasis added)

It is possible, however, to accept the basic approach of *Roe v. Wade* and yet argue that some child protective actions can be taken judicially to protect even the early fetus.

Protection of First Term Fetuses

As more is learned about the effects of alcohol, narcotics, and other chemicals on the fetus during early pregnancy, concern for these children is likely to increase. In a case presented to the author for consultation, the same woman had had three known pregnancies, all of which led either to spontaneous abortion or neonatal death because of sever, diagnosed complications of fetal alcohol syndrome. When she became pregnant for the fourth time, protective services, medical personnel, and lawyers were presented with the question of whether anything could or should be done to protect the developing fetus during the first trimester. From a child advocacy perspective, it can be argued that the right to an abortion is lost with the passage of time or other acts which make clear that the option to abort will not be exercised. The woman in this case had apparently decided not to go ahead with an abortion. The U.S. Supreme Court decisions on abortion give legal recognition to a natural, physiological process, with the emphasis on *process*. The process of pregnancy leads to birth of a child unless the process is deliberately or spontaneously interrupted. As the process advances, the mother's own health usually will be in greater jeopardy if the pregnancy is completed than if it is interrupted during the late second term.

Bross, *Court-Ordered Intervention on Behalf of Unborn Children* (un-published manuscript).

While there is much to be said for the Bross position, it is felt that the balance of interests under present law cannot accomodate his aruments. Policies supporting maternal privacy prior to viability are simply too strong to be overcome by a waiver or laches argument. *See* Note, Constitutional Limitations on State Intervention in Prenatal Care, 67 Va. L. Rev. 1051, 1066-67 (1981).

shy of viability. Added to this is the fact that tort law has abandoned viability as a line of demarcation for liability because it is an illogical cut off point.[359] The state's role in prevention of abusive injury should not be more limited.

The argument for intervention throughout pregnancy is appealing; however, it should be rejected. *Roe v. Wade*[360] clearly marks viability as the point at which state interests elevate to a level approximately at balance with those of the mother.[361] Prior to that time, the woman's array of fundamental rights is simply too formidable to be overcome. Furthermore, under *Roe*, the woman has the right to abortion prior to viability. This "abortion veto" of proposed intervention is a powerful reason to stay the state's hand. To extend state authority prior to viability may cause an *increase* in abortion, and abortion of the fetus which the state seeks to help is certainly not to be encouraged. Placing the point of permissible intervention at viability harmonizes the rights of the woman and the state. Pre-viability abuse and neglect will occur, but in light of the fundamental rights of the woman, and her ability to frustrate pre-viability intervention, it is wise to withhold the coercive power of the state. As discussed above, the fetus itself has legally protectable interests in freedom from neglect and abuse — interests which exist throughout pregnancy. Should not the state, acting to enforce the unborn child's rights, be authorized to intervene *prior* to viability? For the reasons outlined above, this conclusion should not be reached. The woman's rights should, during this period, control.

B. *A Presumption Against Intervention*

To inhibit unwarranted government intrusion into areas of protected decision-making and privacy, the law should erect a rebuttable presumption against intervention. The state should be re-

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359. *See supra* notes 23-25 and accompanying text.

360. 410 U.S. 113 (1973).

361. *Id.* at 162-64. Permitting state intervention at or after viability poses serious theoretical problems. When does viability occur so that the state can intervene? *See* City of Akron v. Akron Center for Reproductive Health, Inc., 103 S.Ct. 2481, 2506-07 (1983) (O'Connor, J., dissenting). The Supreme Court has stated that in the context of abortion, the determination of viability must be left to the *woman's* attending physician. Colautti v. Franklin, 439 U.S. 379 (1979). *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 747-50 (2d ed. 1983). Does *Colautti* mean that the woman, through her physician, may dictate when the state can step in to curtail abuse and neglect? May the state utilize its own physician to opine that a fetus has reached viability? May the woman be forced to submit to an examination to determine this question? These difficult questions are left to another day.

quired to bear the burden of rebutting the presumption and establishing the need for action by clear and convincing evidence.[362]

C. *Intervention by the Least Invasive Method*

When the state seeks to intervene in the private life of a citizen, it must do so in accordance with the constitutional principle of least restrictive means.[363] The roots of the doctrine are traceable to *Shelton v. Tucker*,[364] a 1960 case in which the Supreme Court addressed the issue of state action affecting first amendment rights. The Court stated that

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[365]

In the context of prevention of prenatal abuse and neglect, "the governmental purpose[s]" are unquestionably "legitimate and substantial;" however, because intervention necessarily invades several fundamental maternal rights,[366] it must be carried out by the least intrusive means.[367] Unnecessary restriction of liberty must be avoided,[368] and techniques which invade bodily integrity eschewed unless alternatives are unavailable.[369] Intervention must be tai-

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362. For discussion of the importance of the clear and convincing level of proof in cases involving important rights, see Santosky v. Kramer, 455 U.S. 745 (1982) (termination of parental rights).

363. *See generally* THE LEAST RESTRICTIVE ALTERNATIVE (R. Turnbull ed. 1981); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 873 (2d ed. 1983); Myers, *supra* note 89 at 400-02. For an interesting analysis of the doctrine of least restrictive means in the context of involuntary civil commitment of the mentally ill, see Gutheil, Appelbaum & Wexler, *The Inappropriateness of "Least Restrictive Alternatives" Analysis for Involuntary Procedures With the Institutionalized Mentally Ill*, 11 J. PSYCHIATRY & L. 7 (1983).

364. 364 U.S. 479 (1960).

365. *Id.* at 488.

366. *See supra* notes 282-314 and accompanying text.

367. As an example, if alleviation of fetal disorder can be accomplished through either a relatively safe oral drug or through surgical intervention, the former intervention is probably more consistent with the least invasion principle. Similarly, if alternative surgical interventions are available and effective, and one entails general anesthesia while the other necessitates only local anesthesia, the later intervention—with its diminished maternal risk—is the least restrictive. The principle of least invasion or restriction should apply to all aspects of the proposed intervention, thereby reducing invasion of bodily integrity, privacy, and other protected interests.

368. *See infra* case example accompanying notes 381-98.

369. *See supra* note 365.

lored to minimize the degree and length of intrusion on protected rights.

D. *Medical Care Cases*

In many instances, prenatal neglect will take the form of denial of medical or surgical care needed in order for the fetus to survive gestation.[370] In other cases medical intervention will be desirable to prevent or repair non-life threatening anomalies. In both situations, the substantial body of law on medical care over parental objection comes into play.[371] The principles deducible from those cases can be applied to involuntary medical care for the fetus so long as it is recognized that an additional set of rights is involved, namely, those of the pregnant woman. Her rights to privacy, freedom, and bodily integrity must be added to the already complex balancing process to determine whether involuntary intervention is warranted.[372]

1. *Life Threatening Cases*

In cases where intervention is necessary to prevent death in utero or soon after birth, numerous factors must be considered. Before intervention should be authorized, the probability of fetal death must be high, and the reliability of the mortality prediction verifiably accurate.[373] The likelihood of successful treatment must be high.[374] The proposed intervention must be closely examined

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370. *See* Bross, *Neglect of the Unborn Child: An Analysis Based on Law in the United States*, 3 CHILD ABUSE & NEGLECT 643 (1979).

371. *See supra* Section VII.

372. *See supra* notes 282-314 and accompanying text.

373. Absolute certainty of diagnostic prediction cannot be achieved, and should not be required; however, before intervention can be authorized, competent medical evidence must clearly demonstrate that there is a high probability the fetus will die unless intervention is authorized. Even when evidence is sufficient on this point, the doctors may be wrong. A good example is *Jefferson v. Griffin Spalding County Hospital Authority*, 247 Ga. 86, 274 S.E.2d 457 (1981). The case is discussed *supra* at notes 72-73 and accompanying text. Mrs. Jefferson was at term, and presented with a condition known as placenta previa. Medical testimony indicated there was a 99% chance of fetal death if normal vaginal delivery were attempted. Cesarean section was recommended, however, Mrs. Jefferson objected on religious grounds. To the surprise of the doctors, "the placenta previa condition slowly corrected itself before labor began, an event almost unheard of by her doctors. A baby girl was delivered in normal childbirth." Note, *Family Law—Court-Ordered Surgery for the Protection of a Viable Fetus*, 5 WESTERN N.E. L. REV. 125, 138 n.89 (1982). While cases like *Jefferson* will occur, the reality of medical error must not be permitted to stand in the way of essential fetal treatment. As medical science progresses, errors in prediction will decrease.

374. *See* authorities cited at note 212, *supra* for standards used in decision-making in medical care cases. *See also supra* note 373 and accompanying text.

from the perspective of the unwilling mother. The risk of maternal morbidity and mortality must be scrutinized. Intervention should not be authorized unless such risks can be reliably quantified so that they can be assessed in their own right and compared to the risk of death and likelihood of successful outcome for the fetus. The invasiveness of the procedure must be assessed, along with an analysis of the amount of time required for successful treatment. As invasiveness and restriction of liberty increase, the propriety of intervention decreases. Also to be considered are the rights of the unborn child[375] and the father.[376] To protect the interests of the fetus, it should be accorded party status and be represented by counsel.[377] When all relevant information is adduced, the court should weigh the competing interests and rights and render a decision that is just and appropriate under the circumstances.

2. *Non-Life Threatening Cases*

Review of the medical care cases in which the child's life is not at risk reveals the central factor considered by the courts is the degree of harm the child will suffer without medical care.[378] The greater the harm, the more likely that intervention will be authorized. The likelihood of successful treatment and the degree of risk are also important factors.[379] When the state seeks to impose involuntary medical care on a pregnant woman to alleviate non-life threatening fetal disease or disorder, the balance of risks and benefits is subtly altered. The state's interest in improving life is important and appropriate, but less compelling than its interest in preservation of life.[380] To justify intervention, the degree and permanence of harm to the fetus must be substantial and certain. At the same time, the acceptable degree of risk and imposition on the mother is less than in life threatening cases. This is not to say that intervention is never appropriate. It simply means that the balance is shifted away from involuntary medical care.

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375. *See supra* Section XI.

376. *See supra* Section XII.

377. Courts have authority to appoint counsel for the unborn. *See supra* note 51.

378. *See supra* notes 250-51 and accompanying text.

379. *See supra* note 251 and accompanying text.

380. The continuation and preservation of life is basic to human nature—founded in instinct as well as social values. The state, acting as *parens patriae*, has ample power to protect the lives of young children incapable of self-protection. The social value in improving life is strong as well; however, it is less compelling than the societal interest in preservation of life itself.

E. *Case Examples*

Application of the principles discussed above to three case examples should be instructive. Mrs. Doe is a twenty-six year old woman approximately twenty-two weeks into her second pregnancy.[381] Her first child was born with hydrocephalus,[382] which caused severe, permanent mental retardation. She has a family history which leads her doctor to fear that the fetus may also develop hydrocephalus. Concerned about this possibility, Mrs. Doe submits to an ultrasound examination, the finding of which is consistent with hydrocephalic development. The physician determines that the fetus is viable; therefore, abortion is not an option. Furthermore, Mrs. Doe wants the child, and her health and safety will not be jeopardized by normal delivery. A repeat ultrasound during the twenty-fourth week indicates progressive worsening of the hydrocephalic condition. The obstetrician, in consultation with her colleagues, concludes that the fetus will probably survive gestation, but will be severely brain damaged unless a shunt procedure is performed in utero. Mrs. Doe and her husband are grief-stricken by their unborn child's prognosis, but inform the doctor that their religious beliefs require them to decline medical intervention entailing physical penetration of the body.

A few minutes later, the phone rings in the office of the hospital's general counsel. A meeting with the medical staff reveals that

> [f]or the patient with hydrocephalus, surgical implantation of a shunting device offers a reasonable hope of permanent relief from the effects of increased intracranial pressure. With current ultrasound techniques, it is possible to make the diagnosis of hydrocephalus confidently in the middle trimester of pregnancy . . . . Unfortunately, because of either transient or persistent elevations of intracranial pressure, many fetuses have such severe brain damage that a shunting procedure after delivery is often of little benefit except to facilitate custodial care.[383]

Testing in Mrs. Doe's case reveals development of progressive hydrocephalus. The certainty of diagnosis is very high, and is confirmed by repeat ultrasound. Further, the physicians concur that there is a ninety-eight percent probability of severe brain damage with resulting mental retardation. Based on Mrs. Doe's history and the condition of her fetus, the doctors conclude that the child will

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381. The basic fact pattern for this case example is derived from Clewell, *supra* note 53. The patient discussed in the Clewell article did not object to surgery.

382. For brief definition of hydrocephalus, *see supra* note 240. *See also* authorities cited as note 141, *supra*.

383. Clewell, *supra* note 53, at 1320.

be profoundly mentally retarded and will require continuous custodial care throughout life.

Implantation of a fetal shunt is done under local anesthesia. A small incision is made in the mother's abdomen. Using a real time scanning device to guide her, the doctor inserts a needle through the incision and into the amniotic cavity. The needle is positioned against the fetal skull, and, with gentle pressure, the skull is penetrated. A miniature shunt is inserted through the needle into the fetus' brain, and is left in place after the needle is withdrawn. The shunt drains excess cerebro-spinal fluid from the brain into the amniotic cavity, thus decreasing intracranial pressure and permitting greater brain growth and development.[384]

The shunt implantation procedure will be relatively safe for Mrs. Doe. Risk of infection is present, of course, but it can be reduced to acceptable levels. Since general anesthesia is unnecessary, its risks are avoided. The physical invasion is minor, with little or no scarring. The procedure is performed in a short period of time, and she can return to relatively normal activity soon thereafter. Finally, there is no effective, less invasive treatment.

As for the fetus, there are several risks involved, including infection, further brain injury, and possible spontaneous abortion. On the other hand, withholding treatment will lead to profound mental retardation and disfigurement of the head. The procedure offers a substantial probability of normal appearance and greater—perhaps normal—neurological development. Finally, the likelihood of successful shunt implantation is quite high.

In this case, the degree of harm inflicted on the unborn child by parental declination of treatment is unquestionably severe and permanent. While the child may live, its quality of life will be minimal, and the expense of providing lifetime custodial care substantial.[385] If the shunt is implanted, there is a high probability that

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384. *See id.* at 1320-21.

385. The enormous cost of caring for a severely handicapped child cannot be ignored. *See* Barclay, *supra* note 53, at 1554. One of the authors, Dr. Maria Michejda, M.D., observed that the cost of caring for children with neural tube defects like hydrocephalus is tremendous:

> In the United States, in 1979 alone, yearly expenses for each child with a neural defect were about $60,000 and the total spending amounted to more than $200 million annually. Estimated costs of $62 million by the March of Dimes Birth Defects Foundation for hospitalization and private physician visits can be added to that staggering figure. In comparison, costs of successful in utero surgery would be limited to antenatal diagnostic tests and the costs similar to that of fetoscopy and a short period of postoperative convalescence for the mother.

Id. at 1554.

the fetus will reap significant benefit. The fetal right to be born with a sound mind and body is directly implicated,[386] and the guardian ad litem should argue in favor of the procedure. The state's interests, including the compelling interest in potential fetal life, are also at work, and will only be satisfied if care is provided. Juxtaposed against the fetal and state interests are those of the mother and father. This fact situation activates the full panoply of maternal rights because a degree of bodily invasion and loss of freedom of movement are required in addition to imposition on parental and privacy interests. Further, genuinely held religious beliefs militate against intervention.

In deciding whether to require the in utero shunt procedure over parental objection, the medical care cases provide guidance. For example, in *Matter of Jensen*[387] the Oregon Court of Appeals ordered a shunt procedure for a fifteen month old infant over her parent's religious objection. The court observed that "[t]he difference between providing and not providing indicated medical treatment here, as far as human beings can know, may well be the difference between providing or denying the child an opportunity to enjoy a meaningful life."[388] The rationale supporting the decision in *Jensen* applies with equal force to the case under discussion. In balancing the interests it seems clear that the rights and interests of the fetus, in conjunction with the compelling interests of the state, should prevail.

The facts of *Jefferson v. Griffin Spalding County Hospital Authority*[389] provide another useful example of prenatal care over parental objection. Mrs. Jefferson was in her thirty-ninth week of pregnancy and expected delivery at any time. Her physician diagnosed complete placenta previa, which is a condition where the placenta is implanted in the lower segment of the uterus, completely obstructing the birth canal.[390] The court found that "[t]here is 99 to 100 percent certainty that the unborn child will die if [Mrs. Jefferson] attempts to have the child by vaginal delivery. There is a 99 to 100 percent chance that the child will live if

386. *See supra* note 323 and accompanying text.

387. 54 Or. App. 1, 633 P.2d 1302 (Or. Ct. App. 1981).

388. 54 Or. App. at 4, 633 P.2d at 1305. *See supra* notes 239-44 and accompanying text.

389. 247 Ga. 86, 274 S.E.2d 457 (1981).

390. STEDMAN'S MEDICAL DICTIONARY: FIFTH UNABRIDGED LAWYER'S EDITION 1091 (1982).

the baby is delivered by Cesarean section . . . ."[391] Further, there was substantial chance of maternal death with natural delivery. Cesarean section was the least invasive procedure available.

The medical care cases dealing with life-saving therapy are apposite to this situation. "Courts which have considered the question . . . uniformly have decided that State intervention is appropriate where the medical treatment sought is necessary to save the child's life."[392] The evidence was clear that fetal death would result unless the surgery was ordered.[393] While maternal risk in cesarean delivery is not inconsequential, the certainty of fetal death outweighed that risk, and the court ordered surgery—a result that seems correct under the circumstances.

The third example is built around neglect in a non-medical care context.[394] Fetal Alcohol Syndrome (FAS) is a condition caused by heavy maternal alcohol consumption during pregnancy:

> FAS occurs in 30% to 45% of infants born to chronic, heavy daily drinkers. Binge drinking and moderate drinking, especially in the first trimester, carry a lower but unspecified risk. No level of consumption (high or low) has been established that allows for prediction of damage to the fetus. Cigarette smoking, use of other drugs, and malnutrition may have additive effects tending to make fetal damage more severe.[395]

Victims of FAS suffer varying degrees of growth deficiency, facial deformity, and mental retardation, all of which can be permanent.[396]

Ms. Roe has been an alcoholic and heavy smoker for fifteen years. She is twenty-six weeks pregnant. At the beginning of her pregnancy she stopped drinking; however, personal problems have caused a resumption in heavy binge drinking about twice a week. Her physician fears that the alcohol consumption will damage the fetus. He is supported in this fear because Ms. Roe has a vitamin deficiency, is a periodic user of non-prescription drugs, and has given birth to a child with FAS. Unfortunately, the doctor has no means to accurately predict the likelihood that the fetus will be damaged. Ms. Roe steadfastly refuses to adhere to the doctor's

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391. 247 Ga. at 88, 274 S.E.2d at 459.

392. Custody of a Minor, 375 Mass. 733, 742, 379 N.E.2d 1053, 1062 (1978) (footnote omitted).

393. *See supra* note 371.

394. This case example is derived in part from Bader & Weitzman, *Fetal Alcohol Syndrome*, 60 AM. J. OPTOMETRY & PHYSIOLOGICAL OPTICS 542 (1983).

395. *Id.*

396. *Id.*

advice.

This case is distinguishable from the two discussed above. The probability and degree of fetal harm are speculative. State intervention to curtail Ms. Roe's behavior would necessarily be highly invasive of her right to personal privacy since the only way to effectively monitor her drinking would be to keep constant watch on her or require her to report regularly to some official. If she refused to cooperate with such a plan, the only alternative would be to deprive her of her liberty[397]—a deprivation which in this case could last nearly a quarter of a year. When the likelihood of injury is speculative or relatively low, and the amount of intrusion on protected interests high, the balance tips away from intervention. Ms. Roe's behavior is unfortunate, but the state should not be empowered to stop it.[398]

XV. Conclusion

Law changes with society. As legal interests arise, the law creates mechanisms to protect them. Developments in scientific knowledge of fetal development continue apace, advances in fetal medicine abound, and the future portends significant additions to the physician's ability to prevent fetal defects and treat the child in utero. Growth in knowledge and practical ability to implement it give rise to an array of legal interests — the child's, the state's, and the parents' — each of which seeks recognition and protection. The time has come for lawyers to join ranks with physicians, ethicists, and others to articulate these interests and establish a framework within which they can be balanced.

397. *See* Soloff, Jewell & Roth, *Civil Commitment and the Rights of the Unborn*, 136 Am. J. Psychiatry 114 (1979).

398. On the dangers of unwarranted paternalistic intervention *see* authorities collected by Myers, *supra* note 89, at 428-30.