PROPOSITION 26: THE COST TO ALL WOMEN

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INTRODUCTION

Much attention has been paid to how laws and proposed amendments to state constitutions—that are based on the theory that a fertilized egg, embryo, and fetus may be treated as if it is separate and legally independent from the woman—threaten a woman's right to terminate a pregnancy or to use certain methods of birth control. It is undeniable that such laws are proposed by groups motivated, in great part, by their political agenda to recriminalize abortion. It is equally true, however, that these measures are about more than abortion and birth control. Such laws granting full legal personhood to eggs, embryos, and fetuses, would, under the guise of adding one group to the constitutional population, subtract another: the women who carry and sustain them often at risk to their life and health.

It is this same legal theory of fetal separatism that is presented by Mississippi's Proposition 26. This proposition seeks to alter the Mississippi Constitution by redefining "person" to include "every human being from the moment of fertilization, cloning or functional equivalent thereof."[1] The measure seeks to bestow legal rights upon fertilized eggs, embryos, and fetuses that, given the simple geography of the situation, could not only be used as a basis for the recriminalization of abortion but also to support any number of interventions by outsiders on the pregnant woman herself. Such interventions could be based on any perceived risk to the fetus or the desire to hold women criminally and civilly

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[1] *See* Miss. Initiative 26 (2011) (proposed MISS. CONST. art. III, § 33), *available at* http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Definition%20of%20Person-PW%20Revised.pdf.

responsible for their pregnancy outcomes. The undeniable effect of such measures is to denaturalize pregnant women, removing from them the constitutional and statutory protections afforded to full moral and legal persons.[2]

Already throughout the United States the argument that fertilized eggs, embryos, and fetuses may be treated as if they are separate and legally independent of the women who carry them has been used in a variety of factual contexts to deprive pregnant women of their status as full constitutional persons.

I. FETAL SEPARATISM DEPRIVES PREGNANT WOMEN OF THEIR RIGHTS TO LIBERTY, MEDICAL DECISION-MAKING, AND DUE PROCESS

Constitutional law ensures that persons—including pregnant women—have the right to make their own healthcare decisions. Yet it is clear that if fertilized eggs, embryos, and fetuses are treated as if they are separate persons with rights adverse to the woman herself, pregnant women could lose these constitutionally protected rights.

Harvest Rider was twenty-three years old and approximately thirty-nine weeks pregnant when a doctor, with whom she had consulted, came to believe that her fetus was very small for its

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[2] CYNTHIA R. DANIELS, AT WOMEN'S EXPENSE: STATE POWER AND THE POLICIES OF FETAL RIGHTS 2-3 (1993) ("As the fetus is animated and personified in public culture, the power of the state to regulate the behavior of women—both pregnant and potentially pregnant—is strengthened. Women's rights as citizens are potentially made contingent by fetal rights. They can be revoked or qualified by the state's higher interest in the fetus."); Martha A. Field, *Controlling the Woman to Protect the Fetus,* 17 LAW MED. & HEALTH CARE 114 (1989); Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After* Webster, 138 U. PA. L. REV. 179 (1989); *see also* Stallman v. Youngquist, 531 N.E.2d 355, 359-61 (Ill. 1988) (refusing to recognize the tort of maternal prenatal negligence, holding that granting fetuses legal rights in this manner "would involve an unprecedented intrusion into the privacy and autonomy of the [state's female] citizens"); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 280 (2005) (noting that during the Court's deliberation on *Roe v. Wade,* Justice Stewart insisted that the Court rule explicitly on the question of fetal personhood, recognizing that creating a competition between the fetus and women and "[w]eighing two sets of rights would be dangerous"); Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights,* 10 HARV. WOMEN'S L.J. 9 (1987).

gestational age and therefore at risk.[3] The doctor advised Ms. Rider to go to the hospital immediately and explained that he wanted to induce labor.

Ms. Rider, not convinced of this medical advice, obtained a second ultrasound. After consulting with a second doctor, her midwife, and family, she concluded that the doctor's proposed interventions were unnecessary.[4] She decided to continue her plan to give birth at home, vaginally, with the assistance of her midwife.[5]

The doctor disagreed with her decision, and the medical center where he worked filed a petition in the local circuit court seeking protective custody of Ms. Rider's fetus.[6] The court, relying solely on a single affidavit by Ms. Rider's doctor asserting that "the fetus was in real and immediate danger,"[7] ordered that, "the viable fetus of Harvest Rider be detained . . . by the Ashland County Sheriff's Department to be transported to the Memorial Medical Center, Inc. Hospital for further testing and necessary medical treatment."[8]

According to Ms. Rider, the police came to her house that evening to take custody of her fetus.[9] She was escorted to the hospital where she was forced to spend the night.[10] A police officer was also posted outside of her door to prevent her from leaving.[11]

The next morning, Ms. Rider was brought to a court hearing, appointed a public defender, and questioned by a judge.[12] According to Ms. Rider's midwife, Ms. Rider was allowed to go home, but kept under the court's jurisdiction and ordered to

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[3] Affidavit in Support of the Request for Protective Custody Order at 1, *In re* Viable Fetus of Rider, No. 96-JC-008 (Wis. Cir. Ct. Feb. 26, 1996).

[4] *Id.* at 2.

[5] *Id.*

[6] Request for Temporary Physical Custody Authorization, *In re* Viable Fetus of Rider, No. 96-JC-008 (Wis. Cir. Ct. Feb. 26, 1996).

[7] Affidavit in Support of the Request for Protective Custody Order at 2, *In re* Viable Fetus of Rider, No. 96-JC-008 (Wis. Cir. Ct. Feb. 26, 1996).

[8] Order of Protective Custody, *In re* Viable Fetus of Rider, No. 96-JC-008 (Wis. Cir. Ct. Feb. 26, 1996).

[9] Telephone interview by Farah Diaz-Tello, Legal Fellow, National Advocates for Pregnant Women, with Harvest Rider (April 6, 2010).

[10] *Id.*

[11] *Id.*

[12] *Id.*

submit to a schedule of medical examinations—all in the name of the rights of the fetus.[13]

Ms. Rider went to the first of these examinations.[14] She went into labor the following week, and delivered a healthy baby at home.[15]

When Laura Pemberton found no doctor who would attend her in vaginal birth for her fourth child after a prior cesarean delivery, she planned to give birth at home.[16] After going into labor, Ms. Pemberton worried she was becoming dehydrated.[17] She reasoned that she would go to a hospital for intravenous fluids and then return home. After an obstetrician on call at the hospital, however, learned that Ms. Pemberton was attempting a VBAC, she refused to give the IV that Ms. Pemberton needed—unless she consented to cesarean surgery.[18] Ms. Pemberton refused, and fled the hospital.[19]

While at home, still in active labor, a sheriff came to Ms. Pemberton's door.[20] Doctors from the hospital where Ms. Pemberton checked in believed she was posing a risk to the life of her unborn child by delivering vaginally and were in the process of getting a court order to force her to have cesarean surgery.[21]

The sheriff took Ms. Pemberton into custody, strapped her legs together, and transported her, against her will, back to a hospital.[22] Once in the hospital, she was permitted a "hearing" in her hospital room.[23] Although a lawyer appeared to represent the fetus, no lawyer was appointed for Ms. Pemberton.[24] Despite the

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[13] Telephone Interview by Farah Diaz-Tello, Legal Fellow, National Advocates for Pregnant Women, with Sandra Pera, Certified Prof'l Midwife (Feb. 24, 2010).

[14] *Id.*

[15] *Id.*

[16] Laura Pemberton, Address at National Advocates for Pregnant Women's National Summit to Ensure the Health and Humanity of Pregnant and Birthing Women (January 18-21, 2007) (on file with NAPW), *available at* http://vimeo.com/4895023.

[17] Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247, 1249 (N.D. Fla. 1990).

[18] *Id.*

[19] *See* Pemberton, *supra* note 16.

[20] *Pemberton*, 66 F. Supp. 2d at 1250.

[21] *Id.* at 1249-50.

[22] *See id.* at 1250; Pemberton, *supra* note 16.

[23] *Pemberton*, 66 F. Supp. 2d at 1250.

[24] Pemberton, *supra* note 16.

fact that neither she nor the baby showed any signs of danger, the obstetricians present were convinced that she exposed her fetus to too much risk by continuing to deliver vaginally.[25] The judge agreed.[26] Ms. Pemberton was sedated, and her baby was removed via cesarean surgery against her will.[27]

Each time a pregnant woman is forcibly restrained and ordered by a court to undergo medical exams or surgery she has not consented to, she is being deprived of her right to liberty. In both of these cases, the argument that fetuses may be treated as if they are legally independent of the women who carry them deprived those women of rights to privacy, bodily integrity, medical decision-making, and due process. Fetal separatism, like that embodied in Proposition 26, provides the basis for outsiders to take similar actions whenever they disagree with a pregnant woman's actions, inactions, or medical decisions during pregnancy. Even if a court ultimately finds that there is no legal basis for the intervention, it is often after a woman has been deprived of her constitutional rights and legal personhood.

II. FETAL SEPARATISM DEPRIVES PREGNANT WOMEN FROM THEIR RIGHTS TO PRIVACY AND FAMILY INTEGRITY

In *New Jersey Division of Youth and Family Services v. V.M.*, V.M., while making clear she would consent should it become medically necessary, refused to pre-authorize cesarean surgery.[28] Although she had a successful vaginal birth, New Jersey hospital workers reported her to child welfare authorities for medical neglect of her unborn child.[29] This report led to the removal of the newborn from her parents' custody and her placement in foster care.[30] As a result of a child protection case being opened based

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[25] *Id.* at 1253.

[26] *Id.* at 1250.

[27] *Id.* The district court held that the court-ordered cesarean section and removal of a laboring Ms. Pemberton from her home did not violate Ms. Pemberton's constitutional rights. *Id.* at 1254.

[28] 974 A.2d 448, 453 (N.J. Super. Ct. App. Div. 2009) (per curiam) (Carchman, P.J., concurring).

[29] *Id.* at 449-50.

[30] *Id.* at 452.

upon her decisions around the birth, her parental rights ultimately were terminated.[31]

In South Carolina, Cornelia Whitner was charged with failing to provide proper medical care for her unborn child while she was pregnant.[32] Ms. Whitner had given birth to a healthy baby who tested positive for an illegal drug.[33] As a result, she was arrested and charged with criminal child neglect.[34] The Supreme Court of South Carolina permitted her prosecution, holding that the state's child abuse law could be judicially interpreted to apply to a pregnant woman who risks harm to her viable fetus.[35]

Cases like these make clear that any provision advancing the rights of a fetus may be used as a mechanism for intervening in families' lives. Furthermore, prosecutors and other outsiders, like child welfare authorities, are asserting that pregnant women have legally enforceable duties, obligations, and responsibilities to the fetuses that are viewed as legally separate from themselves.

For example, when Laurie Barker was arrested in New Jersey, the indictment alleged that, while pregnant, Ms. Barker "did cause Baby Girl Barker harm that would make her an abused or neglected child while the said Laurie Barker had a *legal duty or had assumed the responsibility* of caring for said child . . . ."[36] In the Ohio case of *State v. Gray*, a pregnant woman was accused of failing in her "duty of care, protection, or support."[37] Furthermore, in California, in the case of *State v. Reyes*, the prosecutor argued, "This is what the [child abuse] statute absolutely says. . . . She

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[31] *Id.* at 449 (majority opinion).

[32] Whitner v. State, 492 S.E.2d 777, 778-79 (1997), *cert. denied*, 523 U.S. 1145 (1998).

[33] *Id.* at 778-79.

[34] *Id.* at 778.

[35] *Id.* at 779-81.

[36] Indictment at 3, State v. Barker, No. 605-2-96 (N.J. Super. Ct. Law Div. Feb. 26, 1996) (emphasis added).

[37] State v. Gray, 584 N.E.2d 710, 711 (Ohio 1992) (quoting OHIO REV. CODE ANN. § 2919.22(A) (West 2011)); *see also* Brief of The Ohio Public Defender as Amicus Curiae Supporting the Position of Appellee Tammy Gray at 2, State v. Gray, 584 N.E.2d 710 (Ohio 1992) (No. 90-1986), 1991 WL 11240115, at *2 ("The question presented is whether under current Ohio law a pregnant woman owes a duty of care to the fetus she is carrying such that after her child is born she may be criminally prosecuted if her conduct during pregnancy created a risk of physical harm or serious physical harm to the fetus.").

was chargeable with doing everything possible as a matter of law, having the *responsibility* of her pregnancy."[38]

When a pregnant woman is regarded as having such responsibilities, prosecutors, child welfare workers, and judges can interpret any of her actions or inactions as evidence of her intent toward her unborn child. So, not receiving adequate prenatal care, inability to overcome a drug dependency, failure to wear a seatbelt, failure to attain an optimal weight before becoming pregnant, or refusing to preauthorize cesarean surgery could demonstrate a woman's intent to neglect or abuse a fetus and provide the basis for depriving her of her constitutional right to privacy or family integrity.

III. FETAL SEPARATISM HAS BEEN USED TO DEPRIVE PREGNANT WOMEN FROM THEIR RIGHT TO LIFE

Angela Carder was twenty-seven years old and twenty-five weeks pregnant when she became critically ill with a recurrence of cancer.[39] Her initial plan was to begin treatment, including radiation and chemotherapy, as she felt she had been through too much already not to try to prolong her life, regardless of the risks to her fetus.[40]

While Ms. Carder's family and doctors were trying to carry out her wishes, the hospital called an emergency hearing to determine what the hospital "should do in terms of the fetus, whether to intervene . . . and save its life."[41]

At the hearing, one attorney was appointed for Ms. Carder, and two appeared on behalf of her fetus: an attorney to represent the fetus's interest and an attorney for the District of Columbia, who was able to appear as *parens patriae*.[42]

A hospital neonatologist testified that cesarean surgery would save the fetus's life; however, Ms. Carder's doctors objected

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[38] Preliminary Examination at 103-04, State v. Reyes, No. CR 33650 (San Bernardino County Mun. Ct. Jan. 24-26, 1997) (emphasis added).

[39] *In re* A.C., 533 A.2d 611, 612 (D.C. 1987).

[40] *See generally Id.* at 613 (noting that Angela Carder "expressed a desire to her physicians to be kept as comfortable as possible throughout her pregnancy and to maintain the quality of her life"); Transcript of Proceedings, *In re* A.C., 533 A.2d 611 (D.C. June 16, 1987) (No. 87-609).

[41] *In re A.C.*, 533 A.2d at 612.

[42] *Id.*

to the surgery, as Ms. Carder did not consent to it and they believed it would hasten her death.[43] Despite their objections, the trial court determined that the surgery should be performed.[44]

Ms. Carder's attorney requested an immediate stay and an emergency appeal, which took place by phone.[45] In denying the motion, the court of appeals accepted the idea that the District of Columbia's interest in protecting the life of the fetus outweighed Ms. Carder's right to stay alive for whatever time she had left.[46]

The operation was performed.[47] The fetus was born alive, but survived for a little more than two hours.[48] Angela Carder died two days later, with the cesarean surgery listed as a contributing factor to her death.[49]

Ms. Carder's case makes clear that treating fetuses as if they have separate legal interests from those of the pregnant women carrying them, empower others—hospitals, lawyers, physicians, and courts—to "make the final mortal decision."[50]

As the cases above illustrate, efforts to legally disconnect fetuses from the pregnant women who sustain them and to grant them independent constitutional status would not merely expand membership in the population of constitutional persons, and do not merely threaten the right to abortion or certain forms of birth control—it would remove from pregnant women *their* status as constitutional persons.

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[43] *See, e.g.*, Transcript of Proceedings at 4-5, *In re* A.C., 533 A.2d 611 (D.C. June 16, 1987) (No. 87-609) ("The Hospital has some reservations relative to the medical condition of the woman being held in a non-supportive operating room environment. She was in intensive care prior to this. . . . As I understand the medical testimony, I think uncontroverted, she is in a particularly weakened state. This is in very real terms, likely to end her life, this procedure.").

[44] *In re A.C.*, 533 A.2d at 612-13.

[45] *Id.* at 612.

[46] Transcript of Proceedings at 9, *In re* A.C., 533 A.2d 611 (D.C. June 16, 1987) (No. 87-609).

[47] *In re A.C.*, 533 A.2d at 613.

[48] Certificate of Death of Lindsey Marie Carder, *In re* A.C., 533 A.2d 611 (D.C. July 1, 1988) (No. 87-609) (filed as supplementation of the record by court-appointed attorney for "Carder Fetus").

[49] Certificate of Death of Angela Carder, *In re* A.C., 533 A.2d 611 (D.C. July 1, 1988) (No. 87-609) (filed as supplementation of the record by court-appointed attorney for "Carder Fetus").

[50] *In re A.C.*, 533 A.2d at 612.

Although a number of courts have overwhelmingly refused to treat eggs, embryos, and fetuses as legal persons separate from the pregnant woman, or to hold pregnant women legally accountable to the fetus as if it were separate from her, cases like the ones described in this essay do persist. If Proposition 26 is adopted, women in Mississippi can expect decades of uncertainty about what actions, inactions, or conditions justify state interventions or render women criminally liable, and lengthy and costly legal battles to ensure they remain constitutional persons.

Indeed, right here in Mississippi, prosecutors have brought criminal charges against women who have suffered miscarriages and stillbirths. [51] In one case, a teenager who suffered an unintentional stillbirth was charged with depraved-heart murder.[52] Her case is pending and we hope it will be dismissed. On October 27, 2011, in a 5 to 4 decision, the court decided that it will not determine whether she can be tried in the first instance, but will determine whether the law even applied, only after she has gone to trial.[53]

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[51] *See, e.g.*, Order Dismissing Appeal at 4, Gibbs v. State, No. 2010-IA-0819-SCT (Miss. Oct. 27, 2011) (en banc) (King, J., objecting) (Serial: 172566), *available at* http://courts.ms.gov/Images/Orders/700_61759.pdf (order dismissing interlocutory appeal as improvident).

[52] *Id.* at 3.

[53] *Id.* at 6.