State-Compelled Fetal Surgery: The Viability Test is Not Viable

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I. INTRODUCTION

Imagine a woman who is in the eighteenth week of her second pregnancy when she begins to feel that something is not quite right. The mother notices that the fetus is very active and believes that the fetus is in pain. The mother goes to her doctor, who performs an ultrasound test. The test reveals that the fetus is suffering from hydrocephalus, a build-up of fluid in the ventricular, normally empty chambers of the brain. This build-up can cause brain damage before birth. If a shunt is not surgically implanted, the fluid build-up can raise intracranial pressure and enlarge the head, making normal passage of the fetus through the birth canal impossible. If the pressure remains elevated, it can destroy white brain matter and cause mental retardation.

The doctor informs the mother that she has four options. The first option is to have an abortion. This is possible because the fetus is not yet determined to be viable. The mother's second option, delivering the baby by cesarean section to avoid trauma to the fetal head, is discouraged because the fetus' lungs are not yet fully developed. This heroic measure would therefore present an unacceptable risk to both the mother and the fetus.

The mother's third option is to let the baby develop, continuing the pregnancy until labor begins spontaneously. If, during birth, the fetal head is too large to pass through the birth canal, a needle

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2. See id. at 61. This scenario was based upon the case study of Sara Hannan who, unlike the woman in the scenario, chose to undergo the procedure to help her fetus. Unfortunately, her baby suffered from problems associated with the hydrocephalus for many years after his birth, despite the efforts to correct the problems in utero.

can be inserted into the cranium and cerebrospinal fluid extracted to reduce the fetus' head size. The advantage of this approach is that it allows the mother to maintain her autonomy and minimizes the physical risks of both the cesarean section option and the fetal surgery option. The drawback to this option is significant: this form of "cephalocentesis almost always results in stillbirth or neonatal death within a few days, due to the rapid decompression of the head or needle-induced hemorrhage."^4

The doctor then informs the mother of her last option, cephalocentesis. A shunt can be placed in the fetus' head in utero, allowing the fluid from the brain to drain into the amniotic fluid. The procedure, which lasts a little over an hour, begins with the doctors making three tiny incisions, approximately the width of a pencil, in the abdomen. Using an ultrasound monitor, the doctors guide a thin-walled needle, about two millimeters in diameter, through the incision and into the amniotic cavity, then through the baby's cranium into the enlarged ventricle. When the needle is in position the stylet inside the needle, similar to the point and cartridge of a ballpoint pen, is withdrawn allowing a catheter to be threaded through the hollow needle. The other end of the catheter is left in the amniotic cavity to allow the fluid to drain from the brain.^5

The doctor then explains that cephalocentesis is not always successful, and sometimes the procedure causes complications. For example, sometimes the fetus removes the shunt, and the procedure must be performed again.^6 The procedure also poses a slight risk to the mother's reproductive system that could affect her ability to bear future children.^7 Furthermore, there is an increased risk of preterm labor, which can be controlled to a great extent with drugs to suppress labor. The risk of preterm labor, however, is reduced if the fetal surgery is performed early in a fetus' gestation.^8

The parents should also weigh the cost of the procedure against the benefits. Doctors are not always able to determine if a fetus will receive a greater benefit from in utero treatment, or whether the hydrocephalus will not advance, allowing the fetus to be treated

^4. Id. at 23.  
^5. See Cheryl Crooks, Healing the Unborn, PARENTS' MAG., June 1988, at 138 (providing a description of the surgery, its complications, and the effects upon the mother who chose to have the surgery performed and upon her son for whom the surgery was performed).  
^6. See id. See also, Colen, supra note 1, at 60 (describing how the doctors were almost forced to give up the second time they performed the procedure because the fetus would not hold still).  
^7. See Crooks, supra note 5, at 140.  
^8. See id.
more effectively after birth.\textsuperscript{9} Furthermore, there is the chance that even with in utero cephalocentesis, further treatments will be required after birth and while the child develops.\textsuperscript{10}

The mother and father listen carefully to the doctors' explanations of the four options. The mother is concerned about the health of her fetus and wants to carry the baby to term. She quickly dismisses the abortion option. The mother has concerns about any invasive procedure. She delivered her prior child by natural childbirth and has a strong belief in holistic medicine. After careful consideration she determines that she is opposed to any invasive procedure, even if it is just the insertion of a needle through a small incision. The mother says that she is aware that this may place her at risk because of the possibility that the fetus' head will be too large to pass through her birth canal, and that she is aware that the baby may be severely mentally retarded, or may even die. She is convinced, however, that she is making the right decision and that through meditation and holistic medicine she can prevent any further complications. She is not opposed to cephalocentesis after the baby is born and the risk of hydrocephalus has been better evaluated. The mother, however, does not want any invasive procedure performed upon her body, including insertion of needles or a cesarean section.\textsuperscript{11}

The issues become more problematic when the above scenario is changed in one important way — when the fetus is twenty-six weeks old instead of eighteen weeks old. Because the fetus is deemed to be viable at approximately twenty-four to twenty-five

\begin{itemize}
  \item \textsuperscript{9} See id.
  \item \textsuperscript{10} See id. at 141.
  \item \textsuperscript{11} See generally Lois Shepherd, Protecting Parents' Freedom To Have Children with Genetic Differences, 1995 U. ILL. L. REV. 761. Shepherd argues that the courts, by interfering with developing fetuses which may have medical problems, such as deafness, label the children-to-be “defective.” Id. at 765. Shepherd asks the question, “Does a child have a right to be born free of genetic disabilities, especially considering how we tend to regard genetic differences as ‘defects.’” Id. at 766 (citing Lewis Cope, 2010: Arthur Caplan Looks at the Future of Medicine Today, STAR TRIB. (Minneapolis-St. Paul), May 17, 1994, at 1E). Should a mother be held liable because she wants her child to be born the way nature or God intended it? Perhaps what society considers “defects” the mother sees as uniqueness. Does the state truly have a compelling interest in guaranteeing that children are born as close to perfect as possible? Shepherd sees the advances of technology on a “collision course” with a greater acceptance of persons with disabilities. “Scientific and medical advances make it increasingly easier to avoid the births of individuals with disabling genetic differences, just as we now are appearing to develop the capacity to accept such differences, and perhaps, even to appreciate them.” Id. at 763 (citing James C. Dugan, Note, The Conflict Between "Disabling" and "Enabling" Paradigms in Law: Sterilization, the Developmentally Disabled, and the Americans with Disabilities Act of 1990, 78 CORNELL L. REV. 507 (1993)).
\end{itemize}
weeks, the considerations and arguments for and against in utero surgery may change significantly within a time period of just a few weeks.

Although the option of fetal surgery has existed for over a decade, there has yet to be a case brought by the state or by a father to compel a woman to undergo fetal surgery. As fetal surgery develops and becomes more accepted, it will be more readily available as a viable option to assist mothers and fetuses. As the procedure becomes more available and less experimental, we can expect to see a case of compelled fetal surgery arise in the courts.

While many have voiced concerns about women refusing to participate in fetal surgery, in reality women have gone to, and continue to go to, extreme measures to protect and insure the health of their unborn babies. At this time fetal surgery or therapy may be used to correct a variety of fetal disorders. Many of these disorders are very serious, such as: correcting obstructive uropathies (blocked renal or urinary tracts); cystic adenomatoid malformation; diaphragmatic hernia; sacrococcygeal teratoma (fetal tumors); abnormal chorionic blood vessels in twins connecting the circulation of the fetuses; heart blocks; obstructive hydrocephalus; pulmonary or aortic valve obstruction; and tracheal

12. Viability was defined as the fetus' potential "to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks), but may occur earlier even at 24 weeks." Roe v. Wade, 410 U.S. 113, 160 (1973).

The 72-minute procedure involved making an incision in the mother's uterus and pulling the left arm and chest of the fetus through the opening. Surgeons then cut open the chest of the fetus surgically removed the malformed lung lobe, put the fetus back in the womb and closed the incision.

Id. See also Marrow Shots Protect Fetus, WASH. POST, Dec. 6, 1995, at A2 (explaining the procedure performed upon a fetus, saving its life, where doctors inject bone marrow taken from the father into the abdominal cavity of the fetus at sixteen, seventeen, and eighteen weeks of gestation). See also Coen, supra note 1; Crooks, supra note 5.
16. Id. at 346.
17. Id. at 347.
18. Id.
19. Id. at 347-48.
20. Id. at 348. See text accompanying supra notes 1-10.
21. Id.
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atresia (airway obstruction). Some are merely cosmetic, such as cleft lip and palate reparation. Although no cases concerning compelled fetal surgery have yet arisen, this Note will discuss the state of the law and its proper expansion in light of developing technology. In Section Two, this Note will examine courts' decisions in the cases most analogous to state-compelled fetal surgery — state-compelled cesarean section. This Note will analyze the two doctrinally opposed state-compelled cesarean section cases of In re A.C. and Jefferson v. Griffin Spalding County Hospital Authority, as well as cases that applied similar reasoning in the realm of forced cesarean sections, fetal therapy, and personal autonomy. In Section Three, this Note will examine the rights to which a mother is entitled. The Note will then analyze the duties courts have determined a mother owed to her unborn baby. The Note will analyze how these rights and duties effect a mother in a case of state-compelled fetal surgery. Finally, in Section Four, this Note will examine why the viability test is illogical and inappropriate in cases of state-compelled fetal surgery.

II. THE FORCED CESAREAN SECTION AND PERSONAL AUTONOMY CASES

The United States Supreme Court has stated that a competent person has a constitutionally protected right to refuse medical treatment. The Court also stated that this right is not absolute and must be balanced against the state's interests. These interests include preserving life, preventing suicide, maintaining the ethical integrity of medical practice, and protecting innocent third parties. In the case of forced cesareans it is these interests, the individual's and the state's, that are balanced. The state's interests

22. Id.
23. Id. at 349. The article notes that the advantage of fetal surgery is that fetuses do not scar, apparently no matter how invasive the procedure. The article also notes, however, that "the theoretical benefits of repair of these nonfatal defects before birth are unproved and do not justify the risks of intervention." Id.
26. Cruzan v. Director, Mo. Dept of Health, 497 U.S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").
27. See, e.g., In re Conroy, 486 A.2d 1209 (N.J. 1985) (citing Satz v. Perlmuter, 362 So. 2d 359 (Fla. 1980)); In re Spring, 399 N.E.2d 452, 456 (Mass. 1979); In re Torres, 357 N.W.2d 332, 339 (Minn. 1984); In re Coyler, 660 P.2d 738, 743 (Wash. 1983)).
in these cases, however, do not include concern for the welfare of the mother as a patient. These cases recognize the state's interest in another patient — the fetus. In the cases where the court has recognized the state's interests in the fetus, the court has overridden the mother's right to refuse medical treatment and ordered that the woman undergo a cesarean. 28

28. See Jefferson, 573 A.2d 1235 (D.C. 1990). Michelle Harrison provides a useful description of a cesarean section, emphasizing the invasiveness of the procedure:

The surgeon takes a scalpel from the nurse and with one strong and definite motion creates a crescent-shaped incision along the woman's public [sic] hairline. As the skin is cut, the subcutaneous tissue bulges upward as though it had been straining to get through all the time. Within moments this fatty tissue, interconnected by thin transparent fibers, becomes dotted and then covered with blood that oozes out of tiny vessels. With scalpel and forceps — delicate tweezers — the surgeon cuts deeper beneath the subcutaneous tissue, to a thick layer of fibrous tissue that holds the abdominal wall in place. Once reached, this fibrous layer is incised and cut along the lines of the original surface incision while the muscles adhering to the tissue are scraped off and pushed out of the way. The uterus is now visible under the peritoneum, a layer of thin tissue looking like Saran Wrap, which covers most of the internal organs and which, when inflamed, produces peritonitis. The peritoneum is lifted away from the uterus and an incision is made in it, leaving the uterus and bladder easily accessible. The bladder is pulled away from the uterus, for the baby will be taken out through an incision in the uterus underneath where the bladder usually lies...

The uterus of the pregnant woman is large, smooth and glistening. Shaped like a huge pear, the top and sides are thick and muscular, the lower end thin and flexible. ...

The obstetrician extends the initial cut either by putting two index fingers into the small incision and ripping the uterus open or by using blunt-ended scissors and cutting in two directions away from the initial incision. If the membranes are still intact, they are now punctured by toothed forceps, and the fluid spills out onto the table. In the normal position, the baby's head is down and under the incision, so the obstetrician places one hand inside the uterus, under the baby's head, and with the other hand exerts pressure on the upper end of the uterus to push the baby through the abdominal incision. The assistant also uses force now to help push the baby out. ...

The rest of the surgery is more difficult for the woman. There is more pain and women often vomit and complain of difficult breathing as we handle their organs and repair the damage. ...

The placenta separates from or is pulled off the inside of the uterus. Then, since the uterine attachments are all at the lower end, near the cervix, the body of the uterus can be brought out of the abdominal cavity and rested on the outside of the woman's abdomen, thus adding both visibility and room in which to work.

With large circular needles and thick thread a combination of running and individual stitches is used to sew closed the hole in the uterus. A drug called pitocin is added to the woman's IV to help the uterus contract and to decrease the bleeding. Small sutures are used to tie and retie bleeding blood vessels. The "gutters," spaces in the abdominal cavity, are cleared of blood and fluid. The uterus is then placed back in the abdominal cavity. The bladder is sewn back onto the surface of the uterus, and then finally the peritoneum is closed.
In the case of *Jefferson v. Griffin Spalding Hospital Authority*, the Supreme Court of Georgia granted the state's petition for temporary custody of the unborn child, providing the state with “full authority to make all decisions, including giving consent to the surgical delivery appertaining to the birth of this child.” The Superior Court of Georgia first noted that the “child” was viable and fully capable of sustaining life independent of the mother, and then framed the issue of the case as “whether this unborn child has any legal right to the protection of the court.” The court noted that to abort a child at this stage in the proceeding would be a criminal offense in Georgia. The court further stated that “[b]ecause the life of defendant and of the unborn child are, at the moment, inseparable, the court deems it appropriate to infringe upon the wishes of the mother to the extent it is necessary to give the child an opportunity to live.”

The court then ordered the defendant to submit to a sonogram. If that sonogram indicated that the placenta privia was still blocking “the child’s passage into this world” then the defendant was ordered to submit to a cesarean section and “related procedures considered necessary by the attending physician to sustain the life of this child.” This decision was based on the court's interpretation of the mother's wishes and the child's viability.

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Now sponges are counted to be sure none have been left inside the abdominal cavity, and then closure of the abdominal wall begins. Muscles overlying the peritoneum are pushed back in place, and are sometimes sewn with loose stitches. Fascia, the thick fibrous layer, is the most important one, since it holds all the abdominal organs inside and keeps them from coming through the incision, especially if the woman coughs or sneezes. Therefore this layer is closed with heavy thread and many individual stitches so that, even if a thread breaks, the stitches won't all come out. The subcutaneous tissue, most of which is fat, is closed in loose stitches that mainly close any air spaces which might become sites for infection. Skin, the final layer, is closed with either silk or nylon thread or metal staples.

A dry bandage is placed over the woman's incision and then taped to her skin. The drapes are removed. A baby has been born.


30.  Id. at 459.
31.  Id. at 458.
32.  See id. (citing GA. CODE ANN. §§ 26-1201, 26-1202 (1980)).
33.  Id. It should be noted that the court's opinion does not even address the religious beliefs of the mother, and her refusal based upon those beliefs. The religious issue is addressed only in the concurring opinion of Justice Smith, where he analogizes the current situation to religion requiring human sacrifices. See id. at 461 (Smith, J., concurring).
34.  Id. at 459-60.
upon the premise that the state has an interest in protecting the lives of unborn, viable children.\textsuperscript{35}

The court in \textit{In re Jamaica Hospital}\textsuperscript{36} took a similar approach. The court recognized the state's interest in protecting life, even potential life, as a compelling interest. By holding that this interest was compelling, the court was able to rule that the state's interest overrode the woman's right to bodily integrity.\textsuperscript{37} The court held that the state's \textit{parens patriae} power overrode the woman's right to refuse treatment. The court overrode the mother's right to bodily integrity even though the eighteen-week-old fetus was not yet viable and, therefore, the state's interest was not compelling under \textit{Roe v. Wade}. The court held that "the state has a \textit{highly significant interest} in protecting the life of a mid-term fetus, which outweighs the patient's right to refuse a blood transfusion on religious grounds."\textsuperscript{38}

Note that the state would not have a compelling interest in the non-viable fetus, nor would it have a "highly significant interest," sufficient to allow it to prevent the mother from having an abortion. It is incongruous to hold that the state has an interest significant enough to overcome the mother's personal privacy, autonomy, and free exercise of religion, and can require the mother to have a cesarean section, but does not have an interest sufficient to require the mother merely to carry the fetus to term.

In the case of \textit{Taft v. Taft},\textsuperscript{39} the court examined whether a husband could compel his wife to undergo a "purse string"\textsuperscript{40} operation to prevent her from having a probable miscarriage. The woman had refused the procedure based upon her religious beliefs as


\textsuperscript{36} 491 N.Y.S.2d 898 (Sup. Ct. 1985).

\textsuperscript{37} See id. at 900.

\textsuperscript{38} Id. (emphasis added). Note the importance of the case to the scenario presented. The court did not require that the fetus be viable to provide the state with a compelling interest in protecting the fetus. A court could easily extend this holding to fetal surgery of the type described, because the cephalocentesis arguably involves a minimal amount of intrusion, much like a blood transfusion.

\textsuperscript{39} 446 N.E.2d 395 (Mass. 1983).

\textsuperscript{40} This is a procedure where the cervix is sutured so that it will hold the pregnancy. The mother had undergone this procedure for all of her three prior children. Her fourth pregnancy was terminated due to a miscarriage because the wife refused the procedure. See id. at 396.
a newly "born again Christian." The court does not decide the question of "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." The court does note, however, that the state's interest, in some undefined circumstance, might be sufficiently compelling to "justify such a restriction of the constitutional right of privacy." The court did not state clearly upon which constitutional right, privacy or religion, it was basing its opinion. It appears to be a combination of both. This decision carefully noted the lack of medical data concerning the necessity of the surgery to prevent the death of the mother or the fetus, and of the risks caused by the surgery to both the mother and the unborn child, thereby allowing for the future application of the balancing test, used in other cases, which could compel the mother to undergo medical procedures against her will.

The court in the case of In re A.C. addressed a similar issue in arguably more exigent circumstances. A.C., the mother, was close to death from cancer and was twenty-six and one-half weeks pregnant. Although A.C. was on life support, she was arguably competent to make decisions, and there was testimony that she decided not to consent to the cesarean. The trial court ordered that the cesarean be performed, and a baby girl was delivered. Tragically, the baby girl died after only living two and one-half hours, and the mother died two days later.

The appellate court held that the balancing test applied by the motions division of the district courts was not proper. The majority based its decision on its analysis of the doctrines of informed consent, bodily integrity, due process, substituted judgment and policy considerations. The court held that

41. Id.
42. Id. at 397.
43. Id.
44. See id. The court states that it knows of no case in which a court ordered a pregnant woman to submit to a surgical procedure in order to assist in carrying a non-viable fetus to term. The court then cited Jefferson v. Griffin Spaulding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981), and the case of Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J.) (per curiam) cert. denied, 377 U.S. 985 (1964), both of which required a woman to undergo medical procedures, against her religious beliefs to prevent her unborn child from dying. See id. at 397 n.4.
45. Arguably, the court uses Jefferson v. Griffin Spaulding County Hosp. Auth. and Paul Morgan Memorial Hosp. v. Anderson, to provide some persuasive precedence for the application of such a balancing test. See supra note 44.
47. It is questionable whether, under the viability standards established in Roe v. Wade, the fetus was viable. See supra note 12.
48. See 573 A.2d at 1238.
in virtually all cases the question of what is to be done is to be decided by the patient — the pregnant woman — on behalf of herself and the fetus. If the patient is incompetent or otherwise unable to give an informed consent to a proposed course of medical treatment, then her decision must be ascertained through the procedure known as substituted judgment.\textsuperscript{50}

The court took special note of the case of \textit{McFall v. Shimp},\textsuperscript{51} in which the court refused to order Shimp to donate bone marrow to his cousin even though Shimp's refusal to do so would mean death for McFall. The court would not order Shimp to have his body invaded against his will, stating,

\begin{quote}
The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue. For our law to compel defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.\textsuperscript{52}
\end{quote}

The argument that fetal cases are different because “a woman who ‘has chosen to lend her body to bring [a] child into the world’ has an enhanced duty to assure the welfare of the fetus, sufficient even to require her to undergo caesarean surgery” was dismissed by the court.\textsuperscript{53} The court stated that a fetus cannot have rights superior to those of a person who has already been born.\textsuperscript{54} The court further noted that the right to refuse medical treatment is of constitutional magnitude.\textsuperscript{55}

\textsuperscript{49} \textit{Id. at 1237}. Note that the court carefully differentiates who the patient is — the pregnant woman. This is in direct conflict to the cases discussed \textit{supra} where the court also examined the rights of the fetal patient.

\textsuperscript{50} \textit{Id.}


\textsuperscript{52} \textit{Id. at 91, quoted in In re A.C.}, 573 A.2d 1235, 1244 (D.C. 1990).

\textsuperscript{53} \textit{In re A.C.}, 573 A.2d at 1244 (quoting and discussing John Robertson, \textit{Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth}, 69 VA. L. REV. 405, 456 (1983)).

\textsuperscript{54} \textit{See id. at 1244.

\textsuperscript{55} See id. (citing \textit{In re Bryant}, 542 A.2d 1216, 1218 (D.C. 1988); \textit{In re Boyd}, 403 A.2d 744, 748 (D.C. 1979); \textit{In re Osborne}, 294 A.2d 372 (D.C. 1972). The court also notes that other courts have found constitutional basis for refusing medical treatment. \textit{See, e.g.}, United States v. Charters, 829 F.2d 479, 491 nn.18-19; Bee v. Greaves, 744 F.2d 1387, 1392-93 (10th
The court also relied upon the Supreme Court's decision in *Winston v. Lee.* In *Winston,* a Virginia court ordered a robbery suspect to undergo surgery to remove a bullet from his shoulder for use as evidence of his guilt or innocence. The Supreme Court held that this would violate the defendant's constitutional rights. The Court stated that the main function of the Fourth Amendment is to "protect personal privacy and dignity against unwarranted intrusion by the State," and that these values were "basic to a free society." The Supreme Court also held that this procedure "would be an 'extensive' intrusion on respondent's personal privacy and bodily integrity" and a "virtually total divestment of respondent's ordinary control over surgical probing beneath his skin."

The *A.C.* court also noted that the Supreme Court in *Winston* stated that the Fourth Amendment neither "forbids nor permits all such intrusions . . . ." The court in *In re A.C.* notes that the "state's interest in preserving life must be truly compelling to justify overriding a competent person's right to refuse medical treatment."

In comparison to the petitioner in *Winston,* the woman in the hypothetical would be subjected to three incisions, not one. Although the incisions might not be very deep, the insertion of the instrument to drain the fluid might be quite deep, and probably would be deeper than the proposed incision in *Winston.* Furthermore, in *Winston* the procedure was proposed as part of a search for evidence of a criminal action.

Women may be deterred from becoming pregnant, or maintaining their pregnancy, if they realize that if they allow their fetuses to reach the age of viability the state may invade their bodies to the same or greater degree as a suspected criminal. Many women heavily weigh the many detrimental effects even uncomplicated pregnancies can have on their bodies. Many of these women, especially feminists, may react strongly to the knowledge

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56. 470 U.S. 753 (1985). The court in *In re A.C.* also relied upon *Schmerber v. California,* 384 U.S. 757 (1966); *Rochin v. California,* 342 U.S. 165, 169 (1952); and *Union Pacific Ry. v. Botsford,* 141 U.S. 250 (1891) ("No 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.").

57. *Id.* at 760 (quoting *Schmerber v. California,* 384 U.S. 757, 767 (1966)).

58. *Id.* at 764-765, quoted in *In re A.C.,* 573 A.2d at 1245.

59. *Id.* at 760, quoted in *In re A.C.,* 573 A.2d at 1245.

that one of the possible effects of pregnancy on their bodies could be a state order to undergo invasive medical procedures that the state could not force a criminal, or a charged criminal-defendant, to undergo. These women may refuse to subject themselves to the possibility of state subjugation. The state, if it truly has an interest in the welfare of families and children, should not enforce a policy that could have this type of backlash.

The court in In re A.C. also stated that an additional argument for honoring A.C.'s objections to a cesarean was provided by the American Public Health Association in its amicus curiae brief:

Rather than protecting the health of women and children, court-ordered caesareans erode the element of trust that permits a pregnant woman to communicate to her physician — without fear of reprisal — all information relevant to her proper diagnosis and treatment. An even more serious consequence of court-ordered intervention is that it drives women at high risk of complications during pregnancy and childbirth out of the health care system to avoid coerced treatment.61

The court also examined the policy argument of adequate representation, which it believed to be even more compelling than the doctor-patient relationships.62 The court noted that, during the exigent circumstances in which these cases tended to arise, the attorneys for the patient could not expect to be adequately prepared, that procedural flaws were likely to occur, and that the facts were likely to be incomplete, if present at all, for consideration by the court.63

The court also examined the issue of substituted judgment, holding that it was the best procedure to follow in a case such as this one because it most clearly respects the patient's right to bodily integrity. The substituted judgment test is a subjective test requiring a court to determine, as nearly as possible, what the patient would do if the patient were competent.64

61. Id. at 1248. A court footnote refers to a case in which a woman who was court-ordered to undergo a cesarean section went into hiding and gave birth to her child vaginally. Id. at 1264 n.16 (citing Nancy K. Rhoden, The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans, 74 CAL. L. REV. 1951, 1959-69 (1986)).
62. See id.
63. See id. See also Rhoden, supra note 61, at 1959-69.
64. See In re A.C., 573 A.2d at 1249. The importance of the application of the subjective test should not be overlooked. Using substituted judgment, the court does not perform a balancing test, but tries to ascertain what the patient would do. See id. Therefore, if the patient was competent, as in the scenario provided, the court, when following the premise behind the subjective substituted judgment test, should adhere to the patient's wishes.
Although women's rights activists hailed *In re A.C.* as a victory for their movement, the court still left the door open. The court stated that, while the mother's wishes are controlling in virtually all cases, the court did not "foreclose the possibility that a conflicting state interest may be so compelling that the patient's wishes must yield, [while] anticipat[ing] that such cases will be extremely rare and truly exceptional."65 The court in the case of *In re Baby Boy Doe*66 applied the A.C. court's reasoning:

The fact that the state may prohibit post-viability pregnancy terminations does not translate into the proposition that the state may intrude upon the woman's right to remain free from unwanted physical invasion of her person when she chooses to carry her pregnancy to term. . . . [I]t [is] clear that, even in the context of abortion, the state's compelling interest in the potential life of the fetus is insufficient to override the woman's interest in preserving her health.67

The court applied the balancing test, weighing the mother's right to refuse medical care against the four state interests: "the preservation of life, the prevention of suicide, the protection of third parties, and the ethical integrity of the medical profession."68 The court quickly disposed of the state's interest in the preservation of life and the prevention of suicide as irrelevant. The court stated that, "[a]lthough it might be argued that the State has an interest in the preservation of the potential life of the fetus, courts have traditionally examined the refusal of treatment as it impacts upon the preservation of the life of the maker of the decision."69

Agreeing with the reasoning of *In re Dubreuil*,70 the court in *In re Baby Boy Doe* stated that "third parties" refers to family

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65. *Id.* at 1252 (footnote omitted). See generally Tracey E. Spruce, The Sound of Silence: Women's Voices in Medicine and Law (March 4, 1997) (unpublished manuscript, on file with the William & Mary Journal of Women and the Law). Spruce describes how the court failed to tell the story of the mother, A.C. Spruce further states that by not determining what A.C.'s wishes were, the court followed a long line of courts and doctors that do not listen to their patients. *See id.*


67. *Id.* at 334 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)).

68. *Id.*

69. *Id.* The court noted that the cesarean section would have presented a greater risk to the mother. The court included in its findings that the chances of a mother dying during a cesarean section are about 1 in 10,000, while the odds of a mother dying during normal birth are about 1 in 20,000 to 1 in 50,000. *See id.* at 328.

70. 629 So. 2d 819 (Fla. 1993). See also infra note 95 and accompanying text.
members and in particular to, "the children of the person refusing treatment."71 Where an individual's decision to refuse treatment will result in orphaning an already-born child, courts have indicated that this is one factor they might consider.72

The court noted that the final factor of the balancing test, the ethical integrity of the medical profession, weighs in the mother's favor rather than in the State's.73 The court observed that the medical profession strongly upholds the mother's autonomy.74 The court stated that, in keeping with the doctrine of informed consent, the proper action by the medical profession in a situation where the mother refuses medical treatment that may affect her fetus is to "urge her to seek consultation and counseling from a variety of sources."75 The court stated that the actions taken by the medical professionals in In re Baby Boy Doe appeared to be incongruous with the ethical position of the profession.76

III. WHAT ARE THE MOTHER'S RIGHTS AND DUTIES?

A. The Mother's Rights

1. Privacy, Autonomy & Bodily Integrity

A pregnant woman's right to make decisions regarding her health and welfare is well established as part of the common law rights of bodily integrity and self-determination, along with the privacy rights found in the Fourth, Eighth and Thirteenth Amendments to the Constitution.77 This right of privacy was first established in Griswold v. Connecticut.78 The government may only interfere with the fundamental right of privacy if it can establish a compelling interest that cannot be facilitated in a less restrictive manner.79

72. Id. (citing In re Brooks Estate, 205 N.E.2d 435 (Ill. 1965); Wons v. Public Health Trust, 500 So. 2d 679 (Fla. Dist. Ct. App. 1987) approved, certified question answered, 541 So. 2d 96 (Fla. 1989); Winthrop Univ. Hosp. v. Hess, 490 N.Y.S.2d 996 (Sup. Ct. 1985)).
73. See id.
74. See id. at 334-35 (citing Report, Legal Interventions During Pregnancy: Court Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women, 264 JAMA 2663, 2670 (1990)).
75. Id. at 335
76. See id.
77. See Gallagher, supra note 28, at 28.
79. See Gallagher, supra note 28, at 28-29.
Not only has the right of privacy been established for marriage, procreation and abortion, but it has also been established in the context of child development and family life. There is a strong presumption that parents are acting in their child's best interest when they make decisions regarding their child's medical care:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

These cases, highlighting courts' reluctance to examine the decisions made by parents, are strikingly inconsistent with the reasoning of the state-compelled cesarean cases. "Although courts will generally authorize the immediate, lifesaving treatment of children over parental objections, they only reluctantly invade 'the very heart of a family circle[,] ... the most private and most precious responsibility vested in the parents for the care and nurture of their children.'"

*Roe v. Wade* has been used in the arguments of both the women's and fetal right's movements. Those arguing for women's rights rely upon the fact that "Roe makes [it] clear that a woman's life and health outweigh any state interest that may be asserted in the potential life of a viable fetus." Fetal rights advocates rely, however, upon the following passage:

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. ... If the state is

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81. See *Griswold*, 381 U.S. at 491.
86. Id. at 30 & n.110 (quoting *Weber v. Stony Brook Hosp.*, 456 N.E.2d 1186 (N.Y. 1983) (rebuffing efforts of stranger to veto parents' choice of medical treatment for severely ill newborn)).
interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother. 88

Under the viability test, as proposed by *Roe v. Wade*, a mother’s privacy interests outweigh the state’s interest in a non-viable fetus. The state’s interests are not compelling unless the fetus is viable. 89 The invasiveness of the state’s actions in preventing abortions, however, is much higher than the potential for invasiveness proposed in the fetal surgery option in the scenario which began this Note. While the state’s interest in a pre-viable fetus has never been held by the Supreme Court to outweigh a mother’s right to personal autonomy and privacy, the mother’s right to privacy has been recognized to the point of conception and before. 90

It may be argued that the state has an economic interest in trying to guarantee that the healthiest children possible are born within its borders. This argument fails under the pre-viability concern because it is in opposition to the argument opposing abortion. It would be inconsistent for the state to argue for the birth of children that are not wanted by their mothers, therefore posing an economic hardship on the state, while arguing that the state’s economic interest in preventing the cost of malformed children warrants violating a woman’s fundamental right of privacy.

2. Informed Consent

The doctrine of informed consent is strongly rooted in the concept of autonomy and places a duty upon the doctor to reasonably disclose information about a proposed procedure to the patient. 91 This information must include a description of the risks of undergoing and not undergoing the procedure. 92 There are three grounds under which informed consent procedures, or even the patient’s decision to undergo or not undergo the procedure may be

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88. *Id.* at 15 (quoting *Roe v. Wade*, 410 U.S. 113, 163-64 (1973)).
89. *See Roe*, 410 U.S. at 163.
93. *See, e.g.*, *Knopoff, supra* note 91, at 514 n.79 (citing *Truman v. Thomas*, 611 P.2d 902, 906 (Cal. 1980)).
set aside: if the patient is incompetent; if the patient consents or refuses a procedure based upon inadequate information; and for public policy reasons.

In the issue at hand, the third rationale is the only relevant one. The state’s interest in the patient’s health might allow the state to set aside the patient’s decision in order to protect the mother’s life.

In the introductory scenario, the mother’s health could be affected. If the cephalocentesis is not performed, the fetus’ head may swell to the point that it would be unable to pass through the mother’s birth canal. While the mother’s safety may justify the procedure if the baby’s head were to become lodged at the time of the birth, the procedure would not be justified before any proven threat to the mother could be determined. Until then, the mother has the right to refuse medical treatment. As long as the doctor fully informs her of the risk, her decision would not risk invalidation as “not fully informed.”

The protection of the mother’s life has been justified by the state’s interest in the fate of third parties if the mother was to die. The Appellate Court of Illinois faced the question of whether a court “can balance whatever rights a fetus may have against the rights of a competent woman to refuse medical advice to obtain a cesarean section for the supposed benefit of her fetus.” The court in In re Baby Boy Doe held that “a woman’s competent choice in refusing medical treatment as invasive as a cesarean section during her

94. See, e.g., Khiem v. United States, 612 A.2d 160 (D.C. App. 1992) (affirming decision that defendant charged with murder may be committed and treated to render him competent to stand trial, despite his objections). See also, e.g., D.C. CODE ANN. § 21-2201(a) (1989). Entitled the Health-Care Decisions Act, the purpose of the act is “[T]o affirm the right of all competent adults to control decisions relating to their own health care and to have their rights and intentions in health care matters respected and implemented by others if they become incapable of making or communicating decisions for themselves.” Id., cited in Khiem, 612 A.2d at 169.

95. See, e.g., In re Dubreuil, 629 So. 2d 819, 827 (Fla. 1993) (stating that if the patient refuses to consent to a procedure which could save her life, and her death would result in the total abandonment of her children, the state may override her refusal to consent).

96. The balancing test, applying the state’s interests in: protecting third parties who are dependent on the mother, preventing suicide, and maintaining ethical integrity of the medical profession, only justifies “protecting the patient’s health — never a third party’s.” See Knopoff, supra note 91, at 516 n.88 (citing Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977)). “Therefore, the state could not justify overriding a mother’s refusal to donate an organ to save her child’s life, although it might justify forcing her to accept an organ transplant to save her own.” Id.

97. See Knopoff, supra note 91, at 538-39 (proposing a statute that would specifically state that the informed consent doctrine applies to fetal surgery).

98. But see text accompanying infra notes 118, 119, 123, 126-28.

pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus." The caveat of "invasive" may make this case useless if a case such as the introductory hypothetical were to arise in Illinois. The invasiveness of three small incisions hardly compares to that of a cesarean. The court noted that mothers should not be subject to extreme scrutiny. Every action a mother takes while pregnant affects her unborn child. Although the court noted the invasiveness of the cesarean in its holding, the following statement may have a stronger impact on a fetal surgery case:

[T]he relationship between a pregnant woman and a fetus is unique, and "unlike the relationship between any other plaintiff and defendant. No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world. It is, after all, the whole life of the pregnant woman which impacts upon the development of the fetus. . . . [I]t is the mother's every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman's fault; it is a fact of life."

The court further held that a woman does not have a duty to guarantee the health of her child at birth.

3. Freedom from Servitude

Involuntary servitude is defined as "a state of bondage; the ownership of mankind as chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and

100. Id. at 330 (emphasis added).
101. See supra part I.
102. See supra note 28.
103. See In re Baby Boy Doe, 632 N.E.2d at 331.
104. See id.
105. Id. at 331-32 (quoting Stallman v. Youngquist, 531 N.E.2d 355, 360 (Ill. 1988) (holding that a mother was not liable for unintentional infliction of prenatal injuries because the effect of such a holding would subject a woman's every act while pregnant to state scrutiny, thus violating her right to privacy and bodily integrity)).
106. See id. at 332.
services.” The Thirteenth Amendment, one of the Amendments used to define the Constitutional right to privacy, prohibits this state of being. The due process clause further fortifies the proscription of servitude. A person cannot be held against their will without due process. “Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.”

The procedure of cephalocentesis, though not very invasive, still requires the mother to spend extra time in the hospital and be subjected to monitoring. It may also require that the mother take, against her will, drugs that would help to diminish the risk of premature labor. If a mother is forced to go through the procedure, remain in the hospital, undergo monitoring and take drugs, that woman’s rights have been subordinated, or even waived, on behalf of the fetus and the state. Forced fetal surgery and the corresponding treatments would be analogous to the constraints of slavery or, at the very least, nine months of indentured servitude.

B. The Mother’s Duties and Liabilities

1. Transplant Analogy

In examining a mother’s obligation to undergo invasive procedures to enhance the quality of or save the life of her baby, it is important to understand what the mother’s obligation would be to undergo invasive procedures after the child is born. In cases dealing with bone marrow or organ transplants, the courts have


108. “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST., amend XII, §1, cited in Ouellette, supra note 107, at 955 n.210.


110. See text accompanying supra note 8.

111. See Ouellette, supra note 107, at 955-56.

112. Note the similarity between a bone marrow transplant and the cephalocentesis procedure described in the scenario. Both involve using a large needle to draw out matter. Compare Janet B. Korins, Curran v. Bosze: Toward a Clear Standard for Authorizing Kidney and Bone Marrow Transplants Between Minor Siblings, 16 VT. L. REV. 499, 502 (1992) (describing bone marrow transplant procedure), with supra part I (describing cephalocentesis procedure). The cephalocentesis is arguably more invasive because it would involve small incisions and a greater amount of monitoring after the procedure. See supra notes 6-8 and accompanying text (noting the risks of the cephalocentesis procedure).
absolutely refused to compel transplants if the party from whom the tissue is to be taken has refused the procedure.  

In the case of *In re Guardianship of Pescinski*, the court barred a kidney transplant from an institutionalized mental patient to a younger sister. The court so held because there was no showing of consent by the donor or by any guardian of the donor, there was no showing of benefit to the proposed donor, and the court lacked power to authorize any surgical procedure on a living person.

The Illinois Supreme Court in *Curran v. Bosze* refused to compel twin minors to donate bone marrow to a half-sibling. The court noted that the procedure posed very little risk to the twins, was not very invasive, and that the sibling's life depended on the bone marrow transplant, but nevertheless refused to compel the minors to undergo the procedure, or even a blood test to determine if the twins were compatible donors. Interestingly, the party requesting the court to order the bone marrow harvest of the twins argued that the court should apply the substituted judgment test.

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114. 226 N.W.2d 180 (Wis. 1975).
115. See id. at 181.
116. See id.
118. The Appellate Court of Illinois relied on *Curran* in *In re Baby Boy Doe*, 632 N.E.2d 326, 333 (1994). The court also relied on *In re Pescinski*, 226 N.W.2d 180 (Wis. 1975), stating, If a sibling cannot be forced to donate bone marrow to save a sibling's life, if an incompetent brother cannot be forced to donate a kidney to save the life of his dying sister, then surely a mother cannot be forced to under a cesarean section to benefit her viable fetus.

*In re Baby Boy Doe*, 632 N.E.2d at 333-34 (citation omitted).
119. See *Curran*, 566 N.E.2d at 1322. The substituted judgment test requires the court to look to two sources to determine what the patient would have chosen if she were competent. The first source requires the guardian to “determine if the patient had expressed explicit intent regarding this type of medical treatment prior to becoming incompetent.” Id. at 480 (citing *In re Estate of Longeway*, 133 Ill. 2d 33, 49 (1989)). If the guardian can supply no “clear evidence of such intent,” then the guardian must be guided by the incompetent patient's personal values.

[Even if no prior specific statements were made, in the context of the individual's entire prior mental life, including his or her philosophical, religious and moral views, life goals, values about the purpose of life and the way it should be lived, and attitudes toward sickness, medical procedures, suffering and death, that individual's likely treatment/nontreatment preferences can be discovered. Family members are most familiar with this entire life context.]

Id. at 480-81 (citations omitted). Note the ubiquitousness of the second source for the substituted judgment test. The second source becomes the general views, beliefs, and philosophies of the incompetent patient, therefore, the guardian has almost complete control to advise the court of what she subjectively believes to be the patient's intent. This test relies strongly on the benevolence and objectivity of the family, guardian, or surrogate.
— the same test proposed and approved by the court in *In re A.C.* The court refused to use the substituted judgment test because the test was deemed not applicable to twins who were only three-and-a-half years old. The court decided that the "best interest of the child" test was applicable and ruled that due to the lack of a relationship between the twins and their leukemia-stricken half-brother, and a lack of support from the mother of the twins, the harvesting of bone marrow was not in the best interest of the twins.

Although this case is not as applicable as *McFall v. Shimp*, the cases are especially applicable in situations where the mother is unconscious or otherwise deemed incompetent. If a court applies the substituted judgment test then it will first look to see if the mother made any explicit intentional statement, while still competent, regarding her interest. If the mother has made no such statement then the court will look to the mother's philosophy. It is difficult to imagine a case where the court could say that the mother's philosophy, values, or interests did not encompass the best interest of her fetus. Furthermore, if the guardian is the person who testifies regarding the woman's interests, and the guardian has a strong desire to protect the fetus, then the mother will almost certainly be found to want to save her unborn baby. In addition, if the fetus is viable, and the state has a policy of protecting viable fetuses, then the fetus' interests in its potential life will be given heavy consideration.

Even without an incompetent mother, the transplant analogy is very helpful when applied to the pre-viability versus post-viability bright line. Generally in fetal therapy situations, the earlier in the development of the fetus that a procedure is performed, the greater the benefit to the fetus and the lesser the detriment to both the mother and the fetus. In the introductory scenario, the earlier the mother undergoes the cephalocentesis the lower the risk of

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120. 573 A.2d 1235, 1248 (D.C. 1990). See supra note 64 and accompanying text.
121. See Curran, 566 N.E.2d at 1345.
122. See supra note 51 and accompanying text.
123. Such was the case with *In re A.C.* See text accompanying supra notes 46-65.
124. See supra note 119 and accompanying text (stating the court's determination of sources for the substituted judgment test).
125. This desire could be especially strong if the mother, like A.C., had a terminal illness and the anticipated baby was the only connection the family would have with the terminal mother.
126. See infra part III.B.3 (discussing South Carolina's strong policy regarding fetuses and criminal liability).
premature labor. If the state is able to compel a mother to undergo fetal surgery post-viability, it would be more logical to extend the state's right to compel fetal surgery to pre-viability. The state, however, does not currently have a compelling interest in the pre-viability fetus.

It may be argued that the pre-viability/post-viability determinant of compelling interest is arbitrary and works to the detriment of both the fetus and the mother. In the case of the transplant analogy, however, it is more important to look at the common law duty to aid another in the scenarios of pre- and post-birth. The court in *Jefferson v. Griffin Spalding* held that the state could force a mother to undergo an invasive procedure to aid another "person" at the pre-birth stage of life, even though the fetus' post-birth life was not guaranteed due to the many factors that could still cause the fetus to be stillborn. Yet the court in *McFall v. Shimp* stated:

> For a society which respects the rights of one individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for another member, is revolting to our hard-wrought concepts of jurisprudence. Forcible extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this pretends.

While the fetus is not the "living body tissue" described in the *McFall* court's language, the courts emotional response to the violation of human autonomy is relevant to the scenario presented. If the court could not "sink its teeth into the jugular" of one individual to provide life for another, then the court should not make an exception to "sink its teeth into" the womb of a mother to provide life to her fetus.

127. See text accompanying supra note 8.
129. See generally Rhoden, supra note 61, at 1979 (drawing an analogy between the court's holding in *McFall v. Shimp* and the forced cesarean cases). But see Phelan, supra note 128, at 482-485 (refuting Rhoden's analogy by analogizing the doctor's duty to respond to the fetus in distress to the lifeguard's duty to save a drowning child, even if the mother refuses to save the child).
2. Duty Not To Abandon

A Florida appellate court went a step further in the case of *In re Dubreuil.* In *Dubreuil,* a hospital sought to compel a new mother to undergo blood transfusions which she needed to live. The mother refused the blood transfusions because they were against her religious beliefs. The mother in *Dubreuil* was not pregnant. Her baby was not “held captive” in her womb. She had already given birth by cesarean, but required blood because of complications. The court noted that if the mother died because of her refusal to undergo a blood transfusion, her four children, including the newborn, would be abandoned. The court invoked the state’s *parens patriae* power and ordered the woman to undergo the transfusion.

The Supreme Court of Florida overturned the decision of the lower courts in *Dubreuil.* Its analysis, however, is still disturbing. The Supreme Court of Florida begins its opinion by noting how significant the state’s interest must be if it is to outweigh the patient’s constitutional rights - both to refuse medical treatment, and to follow her religious beliefs. The court then states that the rights of the mother may be subordinated to the state’s interest in the children if there is a showing that the children will indeed be left abandoned, with no family members to provide them with adequate care.

130. 603 So. 2d 538 (Fla. Dist. Ct. App. 1992), jurisdiction accepted, 613 So. 2d 3 (Fla. 1993).
131. See id. at 539.
132. See id. at 540-41.
133. See id. The court in *In re President and Directors of Georgetown College Inc.,* 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964) came to a similar result, ordering life-saving blood transfusions which were against the woman’s religious beliefs in order to prevent her from dying and leaving behind her seven-month-old baby. See id. at 1007. The court based this decision on the law of abandonment, stating that because a mother would not be allowed to abandon a child, the state should not allow the mother “this most ultimate of voluntary abandonments.” Id. at 1008. The court held that, therefore, the state had an interest in preserving the life of the mother. See id.
134. *In re Dubreuil,* 629 So. 2d 819 (Fla. 1993).
135. See id. at 823.
136. See id. at 827 (“Nonetheless, we decline at this time to rule out the possibility that some case not yet before us may present a compelling interest to prevent abandonment.”). What is even more interesting is the dissent’s argument that a mother’s nurturing is desperately needed by the child. See id. at 827 (McDonald, J., dissenting).

Children need and are entitled to have, their mothers; this need is sufficiently great to outweigh one’s free exercise of religious beliefs. . . . I suggest that parenthood, under some circumstances at least, can indeed deprive one of the right to live in accord with one’s own beliefs. Parenthood requires many adjustments and often great sacrifice for the welfare of a person’s children.
The driving force behind the Dubreuil court’s decision may well be the concept of a mother’s duty to her baby. If this duty is so great that it outweighs the constitutional right to freedom of religion, privacy, and personal autonomy, then using this concept of duty to require a mother to undergo fetal surgery is not a big step.\footnote{If a mother's constitutional rights to follow her religious beliefs, to refuse medical care, and to die do not outweigh the state's interest in preventing a child from being abandoned, how do these rights effect a state's interest in compelling fetal surgery? The court's logic is flawed. If a mother may freely choose to “abandon” her baby after birth by placing it for adoption, the court should not be able to deny a mother's constitutional rights in order to prevent her children from being placed for adoption after her death.} If a mother's constitutional rights to follow her religious beliefs, to refuse medical care, and to die do not outweigh the state’s interest in preventing a child from being abandoned, how do these rights effect a state's interest in compelling fetal surgery? The court's logic is flawed. If a mother may freely choose to “abandon” her baby after birth by placing it for adoption, the court should not be able to deny a mother’s constitutional rights in order to prevent her children from being placed for adoption after her death.

Again, the viability test is illogical. Before viability, a mother may “abandon” her baby-to-be by aborting it. After birth, a mother may “abandon” her baby by placing it for adoption. During viability, however, the mother is trapped. By the reasoning of the above cases she has, by carrying the fetus to the twenty-four to twenty-eight week point of gestation, waived her constitutional rights. Her duty is to keep living. She is to take (possibly) any measures necessary not only to ensure the life of her fetus, but to make sure that the baby-to-be’s life and health will be as close to normal, or better than normal, as possible.

3. Criminal Liability

In what are considered ground breaking cases, mothers are now being prosecuted for child neglect, child abuse, and distribution of

\footnote{Nearly every living creature of every species recognizes the duty to nurture its offspring. Their lives are changed in doing so. Humans should not allow religious beliefs, no matter how deeply seated or appropriately held, to neglect this fundamental duty. \textit{Mothers do not abandon the nest.}}. The effects of this reasoning should become immediately clear. Women, when they decide to become mothers, lose their constitutional rights. Those rights are subordinated to what is deemed to be the best interest of the child. What should also be disturbing is the lack of any mention regarding the fathers. Men, apparently, do not give up these constitutional rights when they decide to become fathers. The double edge to this sword is that, if the logic follows, a father’s interests will be subordinated to the mother’s interests in the children because of the mother’s special bond. After all, if the mother’s nurturing nature is so special to the child, a father’s interests could never outweigh that relationship, unless the mother’s relationship with the child does not meet this ideal. At the very least, fathers wishing custody should be appalled by this language.

\footnote{Especially considering the hypothetical presented at the beginning of the paper. True the interests that would be protected in a fetal surgery case would not be the interests of an actual “person,” however, there are not nearly as many constitutional rights to overcome in the hypothetical: only the interests of privacy and personal autonomy.}
drugs to a minor if they ingest illegal drugs while pregnant. South Carolina has stated as a matter of policy that it will prosecute, for child neglect, pregnant women who have ingested illegal drugs.\textsuperscript{138}

In Whitner v. South Carolina, South Carolina’s Supreme Court stated that under South Carolina’s abuse and endangerment statute\textsuperscript{139} “the word ‘child’ . . . includes viable fetuses.”\textsuperscript{140} Whitner pled guilty to criminal child neglect\textsuperscript{141} after cocaine metabolites were discovered in her baby’s blood. She had smoked crack cocaine during the third trimester of her pregnancy. The court noted that the policy of this section of the state code is to prevent children’s problems and the problems of their families.\textsuperscript{142} The court then noted that the effects of child abuse after birth often pale in comparison to the effects while the child is in utero.\textsuperscript{143} Whitner argued that by including a viable fetus in the definition of a person, mothers could be prosecuted for ingesting harmful, yet legal, substances such as alcohol or nicotine.\textsuperscript{144} The court did not agree with Whitner’s conclusion that this result would be “absurd.”\textsuperscript{145} Instead, the court stated that parents may be prosecuted for criminal child neglect if they drink to excess and thus endanger their child.\textsuperscript{146} If prosecuting a pregnant woman for drinking or smoking while pregnant is not considered an absurd result, this court vastly expanded the possibilities for criminal and civil liability when it stated that a viable fetus is a person under child neglect statutes.\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{138} See Sally B. Donnelly, The Postpartum Prosecutor, TIME, Dec. 15, 1997, at 4. The author interviews Charles Condon, South Carolina’s Attorney General. Condon states, “A fetus has inalienable rights that come from God.” Id. Condon also refers to the fetus as “a fellow South Carolinian.” Id.
\item \textsuperscript{139} S.C. CODE ANN. § 20-7-50 (Law Co-op. 1985).
\item \textsuperscript{140} Whitner v. State, 492 S.E.2d 777, 778 (S.C. 1995).
\item \textsuperscript{141} See § 20-7-50. The statute states:
\begin{quote}
Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.
\end{quote}
\item \textsuperscript{142} See § 20-7-20(C).
\item \textsuperscript{143} See Whitner, 492 S.E.2d at 780.
\item \textsuperscript{144} See id. at 781.
\item \textsuperscript{145} See id.
\item \textsuperscript{146} See id. at 781-82.
\item \textsuperscript{147} See id. at 782. Although the Supreme Court does not find this possibility absurd, this issue may be subject to the broad discretion of the state prosecutor. South Carolina Attorney General Condon states, “I would be on a legal slippery slope if I tried to prosecute women who used legal substances.” Donnelly, supra note 138, at 4. Condon has, however, warned
\end{itemize}
The court noted that many other states have overturned the convictions of women who have ingested drugs while pregnant because they were charged under distribution statutes. The court went further, however, and stated that those states' decisions are distinguishable because the states have refused to define a fetus as a person. It is the very extension of the definition of person to include a fetus that allows the court to begin sliding down what even South Carolina State Attorney General Condon refers to as "a legal slippery slope."

In light of the state-compelled cesarean section cases, Condon's statement is illogical. While the state cannot, or will not, require a pregnant woman to stop taking legal, affirmative actions which hurt her fetus — smoking or drinking — the state can compel a woman to undergo incredibly invasive surgery because she has not voluntarily acted to help her fetus. This dichotomy is analogous to the state not recognizing an action for a mother's assault and battery of her child, but requiring a woman to risk her life by jumping in a lake to save a drowning child.

The Florida Supreme Court, in a case very similar to Whitner restricted its definition of "person" to a baby once it is born. This social workers and drug-abuse counselors that they too are subject to prosecution if they fail to report a pregnant woman who is taking drugs. See id. The South Carolina Supreme Court in Whitner notes a number of South Carolina bills that require the reporting of any women who are found to be on drugs, and the mandatory testing of all newborns for drugs. See Whitner, 492 S.E.2d at 781 n.4. The implications of such legislation could be devastating. Women may refuse to receive prenatal care if they discover they will be subject to prosecution. Pregnant women may also refuse to seek drug counseling because of the lack of privilege and possibility of prosecution. Mothers may also go into hiding to give birth to avoid the state's mandatory testing of their babies. Legislation intended to save children could endanger them, possibly more than the mother's initial illegal act.


149. Donnelly, supra note 138, at 4. Hopefully the United States Supreme Court will grant certiorari and block this downward progression. See Crack Mom Asks High Court for Chance To Raise Her Son, DAILY PRESS (Williamsburg, Va.), Mar. 15, 1998, at A14. Whitner, along with two other women who have been convicted under similar circumstances, plan to appeal to the United States Supreme Court. Whitner's attorney states that South Carolina Attorney General Charlie Condon and the Supreme Court of South Carolina have "made up a new crime that the legislature never intended, and every medical group opposes, and that these women could not have known." Id.

150. Johnson v. State, 602 So. 2d 1288 (Fla. 1992). For an indepth look at Johnson and the history of society's view of women's pregnancies, see generally Julia Epstein, The
definition caused the court to narrow its decision to whether the legislature intended the crime of distribution of cocaine to include distribution through an umbilical cord during or after the birthing process.\textsuperscript{151} Again, the court’s analysis hinged on the definition of “person.”\textsuperscript{152} In its coup de grâce, the court declined “the State's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread.”\textsuperscript{153}

Yet again, the viability test has been abused. Those who wish the state to step in and help fetuses by making mothers criminally liable lose their greatest opportunity to help fetuses because of the limits of the viability test. During the first trimester, when the fetus is most vulnerable, the state arguably could not hold a pregnant woman liable for subjecting her fetus to dangerous and illegal drugs because the woman has the right to abort her fetus. Thus the state has lost its greatest window of opportunity to help the baby.\textsuperscript{154}

On the other hand, by imposing criminal liability on pregnant drug users, and on drug counselors for not reporting such an individual, an addicted pregnant woman may be encouraged to avoid prenatal care after viability and to abort before viability.

IV. PRE-VIABILITY VERSUS POST-VIABILITY

The development of a fertilized egg from zygote to blastocyst to embryo to fetus to viable fetus is fascinating.\textsuperscript{155} Just as fascinating, however, is the state’s progression of interest in the fetus as it develops. After only a few cell divisions of the fertilized egg, the blastocysts\textsuperscript{156} in the case of Davis v. Davis were determined to be neither persons nor property, but to “occupy an interim category


151. See id. at 1292 (citing FLA. STAT. ANN. § 893.13(1)(c)1 (West 1989)).

152. See id.

No witness testified in this case that any cocaine derivatives passed from the mother’s womb to the placenta during the sixty-to-ninety seconds after the child was expelled from the birth canal. That is when any “delivery” would have to have taken place under this statute, from one “person” to another “person.”

Id.

153. Id. at 1297.

154. I do not believe that the state’s interest in the fetus should be extended to pre-viability. In fact, I do not believe that the mother’s rights should be subjugated at all. See Part IV.

155. See Davis v. Davis, 842 S.W.2d 588, 593-94 (Tenn. 1992) (citations omitted).

156. The blastocysts were four- to eight-cell entities. See id. at 593.
that entitles them to special respect because of their potential for human life."

At the stages of development before viability the preembryo, embryo, or fetus may be aborted by the mother. Some states appear to have determined that if a mother has the intention of carrying her baby to term, then she has waived her rights to abort the fetus or to maintain her personal autonomy. The state may then presumably intervene, even to the point of denying the woman's rights, in order to protect the unborn baby. For example, the analysis in the case of In re Jamaica Hospital went beyond the barrier of viability to hold that the state had a "highly significant interest" in the life of a previable fetus.

Although Roe held that the state has an interest in protecting the fetus from abortion after viability, some states now claim to have an interest in the fetus sufficient to allow the state to invade the woman's body and perform medical procedures that may endanger the mother.

157. Id. at 597. This is a fascinating case. For possibly the first time, the father was allowed to "abort" the preembryos. The mother and father of the preembryos were divorced and the court had to decide who would receive "custody" of the cryogenically frozen fertilized eggs. The mother wanted to give them away or sell them to other infertile couples. The father wished to destroy them. The court ultimately awarded the pre-embryos to the father for destruction. See id.

159. See text accompanying supra notes 36-38.
161. See supra note 37 and accompanying text.
162. It should be noted that this "highly significant interest" was enough to overcome the mother's First Amendment right to the free exercise of religion, a right that cannot be overcome unless the state has a compelling interest.

For another example of a slip down the slope, see Gallagher, supra note 28, at 45. In 1986 a San Diego woman was arrested and jailed for six days on charges of medical neglect of her fetus because, as the prosecutors alleged, she had disregarded her doctors' instructions and had caused the brain death of her son. Prosecutors charged the mother with ingesting street drugs, having sexual intercourse with her husband, and failing to immediately report to the hospital when she began bleeding. Id. (citing Jennifer Warren, Woman Is Acquitted in Test of Obligation to an Unborn Child, L.A. TIMES, Feb. 27, 1987, at 1). A municipal court judge dismissed the charges, holding that the parental support statue was not intended for those purposes. Id. (citing Doctors Aren't Policemen ..., THE SAN DIEGO TRIB., Feb. 28, 1987, at C-3, col. 1). A state legislator, incensed by the court's decision, introduced legislation extending child-endangerment statutes to fetuses. Id. (citing Daniel C. Carson, Bill Offered Based on Pamela Rae Stewart Baby Case, SAN DIEGO UNION, Mar. 7, 1987, at A-3 col. 1).

163. In essence the state has declared that a mother has the responsibility to rescue her fetus. This rescue may not just be to save the life of the fetus. At some point the state may require the mother to rescue the fetus from possible abnormality. But see supra note 11. See Gallagher, supra note 28, at 34 (citing Robertson, supra note 53, at 456).

In the fetal rights [advocates] view, the general legal rule that individuals have no duty to rescue no longer applies to pregnant women; it yields to a new
The Supreme Court in *Roe v. Wade* established only that the state's interest in the fetus becomes compelling at the point of viability, and that after this point a fetus may be protected by the state from a mother’s right to choose abortion. The Supreme Court did not say that the state’s interest in the fetus becomes so compelling at the point of viability that the state may deny a woman’s rights to autonomy, privacy, informed consent, and religion. By only addressing the issue of abortion and not discussing any other situations either in the holding or in the dicta, the Supreme Court implicitly only extended the state’s interest in the case of abortion.

The Supreme Court’s holding in *Roe v. Wade*, establishing viability as determinative of the level of the state’s interest, is an illogical basis for determining the state’s interest in the future health of the unborn child for three reasons. First, the test, as applied by states in the cesarean section cases, has illogical results. Under the viability test the state may not take any action, no matter how insignificant, before viability to benefit the fetus. The state could not even require the pregnant woman to take folic acid, arguably a very non-invasive measure that may provide a great benefit to the fetus. After viability, however, the state not only may act to benefit the fetus, the state may take drastic measures, such as forcing a cesarean, even if it violates several of the mother’s constitutional rights. This result is illogical because it is during the earliest development of the fetus that the smallest, least invasive changes may do the most good. It is during the first trimester when most of the fetus’ critical development, including that of the major organs, takes place. And yet it is during this very critical period that the state may not act to benefit the fetus.

To counteract this problem, the state could require a pregnant woman to register a certificate of intent. This certificate would

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formulation under which a woman who “has chosen to lend her body to bring the child into the world” assumes a unique and much more expansive duty.

*Id.*


165. See *supra* note 12.

166. But see Patricia A. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 Mich. L. Rev. 1647 (1979) (arguing that the viability test is a practical test for determining when a fetus should be granted legal protection, and that the development of medical technology is inadequate to overcome the logic of the viability criterion).

167. See Phelan, *supra* note 128, at 489 (citation omitted) ("[P]otential viability alone should not determine when the state’s interest becomes compelling. That interest should arise at the point in a woman’s pregnancy when she exercises her reproductive choice and
state that the mother intended to give birth to the baby. Such a certificate probably could not be used to deny a woman the right to an abortion if she changed her mind, but it could allow the state to interfere to benefit the fetus before viability because of the mother's statement that she intends to give birth to her fetus.

A certificate like this would cause several problems. First, requiring a woman to disclose her intention to give birth or abort may violate her right to privacy. Second, such legislation could cause women to refuse to have pregnancy tests performed by doctors because of the required disclosure. A woman could test at home, keep her results hidden, and forego the certificate until she had made a decision. By testing at home and waiting to see a doctor, women and their unborn babies would possibly not receive the prenatal care that would most benefit them. Finally, the certificate would be practically useless. Women could avoid any hassle by claiming that they intended to abort, even if they did not, to prevent any state interference.

The second argument is that it is improper to use the viability test because abortion and fetal surgery are different enough to require application of a higher standard in the case of compelled fetal surgery. The Supreme Court determined that the state can limit a mother's access to abortion after the fetus is viable. This decision grants to the state the right to prevent a woman from taking an affirmative action that kills her unborn, but viable, fetus. This is very different from allowing the state to invade a woman's body. In the case of abortion, the state interest's in the fetus may outweigh the pregnant woman's privacy interest at the point of viability. In the case of compelled fetal surgery, the state's interest in a healthy, or even living, fetus would have to outweigh the mother's rights to personal autonomy, to be free from servitude, and to informed consent. Because of the potential for violation of a gross number of rights by the state in the case of compelled fetal surgery, the viability test should not be the marker used by the
elects not to terminate her pregnancy. Often, this decision is made prior to the time of potential viability.

168. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). Casey may limit the state's ability to force a mother to give up her right to abortion by signing an intent certificate because this waiver would be an unduly burdensome obstacle to a woman's right to obtain an abortion before viability.

169. See David C. Blickenstaff, Comment, Defining the Boundaries of Personal Privacy: Is There a Paternal Interest in Compelling Therapeutic Fetal Surgery, 88 NW. U. L. REV. 1157, 1198-99 (1994) (arguing that although the paternal interest is stronger in the case of fetal surgery than abortion, "the intrusiveness of fetal surgery far exceeds the intrusiveness of infringing on the abortion decision").
courts to determine what action the state may take. What is at issue here is "the ultimate violation of . . . liberty." There is just too much at stake.

Third, the viability test is used by states to claim a compelling interest and thereby require the pregnant mother to rescue her fetus. Abortion is the death of the fetus by the affirmative action of the mother. Death by an affirmative action is very different from death caused by negligence or by inaction. In a criminal case, the defendant may be subjected to medical tests of limited invasiveness to determine if he committed the crime. In a case of negligence, the defendant may not be subjected to invasive medical tests.

The Supreme Court did not intend for the viability test to extend beyond the realm of the affirmative action of abortion. Nor did the Supreme Court intend to require a mother to be forced to rescue her fetus. Although several cases have allowed children to sue for prenatal injuries, those cases are meant to safeguard the fetus and the parents from the extra medical and care costs caused by intentional acts or negligence by allowing the children, upon birth, to sue for compensation. Although this may indeed indicate an erosion of parental immunity, the liability of a mother for acts of negligence does not mean that a mother is required to act affirmatively, or to undergo invasive procedures, to protect her fetus. It's difficult to imagine a case where a court would hold a mother liable for not undergoing (even somewhat) invasive medical treatment to help her children. Just because the mother is pregnant at the time the "child" needs medical care does not mean the state can then force the mother to undergo an invasive medical treatment.

170. Id. at 1199.
171. For example, the defendant may be required to give a semen sample, hair sample, DNA sample, or blood sample.
172. To my knowledge, the only civil case where the court may order a party to a case to undergo an invasive procedure is a suspected father in a paternity suit. There the suspected father may be ordered to undergo a blood test to determine who is the father of the child. This is done due to a policy to provide for children. Paternity testing could be analogized to the situation at hand because in both cases the state is trying to protect the child. The differences between a paternity test and the hypothetical are first, the degree of invasiveness between a blood test and three incisions, and second, the fact that even a viable fetus has not been defined as a "person," and is not subject to protection. See Roe, 410 U.S. at 162.
174. See Robertson, supra note 53, at 439-42.
In applying the doctrine of stare decisis, the judicial system does not always stop to consider whether the application of a test still makes sense. While the viability test may still be valid in the context of abortion, its application in the context of fetal surgery is illogical. If the state has a compelling interest only after the point of viability, and thus cannot act until that point, then the state has missed the opportunity to do the greatest good for the fetus while causing the least amount of trauma to the fetus and the mother. Furthermore, a test used to determine when the state’s interest may subjugate a mother’s privacy interest should not be used to determine when the state may violate a mother’s rights to privacy, personal autonomy, informed consent, freedom from servitude, and possibly religious freedom. Finally, it is not proper to extend the viability test to require a mother to rescue her fetus by invasive medical procedures. For these reasons the viability test set forth in *Roe v. Wade* is inappropriately applied in the scenario of fetal surgery.

**KRISTA L. NEWKIRK**