The Rights of "Unborn Children" and the Value of Pregnant Women

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A quarter century after the "International Year of the Child," we now seem to be in the era of the "Unborn Child." Partly this is because of medical advances: highly refined imaging techniques have made the fetus more visually accessible to parents. In good measure, however, the new era is a product of political shifts. In 2004, President Bush signed into law the Unborn Victims of Violence Act, which makes it a separate federal offense to bring about the death or bodily injury of a "child in utero" while committing certain crimes, and recognizes everything from a zygote to a fetus as an independent "victim" with legal rights distinct from the woman who has been harmed. In 2002, the Department of Health and Human Services adopted new regulations expanding the definition of "child" in the State Children's Health Insurance Program "so that a State may elect to make individuals in the period between conception and birth eligible for coverage." Finally, Senator Brownback and thirty-one cosponsors have proposed the Unborn Child Pain Awareness Act, a scientifically dubious piece of legislation that would require physicians performing the exceedingly rare abortions after twenty weeks to inform pregnant women of "the option of choosing to have anesthesia or other pain-reducing drug or drugs administered directly to the pain-capable unborn child."

The legislative focus on the unborn is aimed at women who choose abortion, but it may also have adverse consequences for women who choose not to have an abortion, and it challenges a central tenet of human rights—namely, that no person can be required to submit to state enforced surgery for the benefit of another.

The historical context of fetal rights legislation should make the most fervent proponents of fetal rights—pregnant women—wary. Often, in the past, expansions of fetal rights have been purchased through the diminution of pregnant women's rights. The fetal "right" to protection from environmental toxins cost pregnant women the right to good jobs: for nearly ten years before the U.S. Supreme Court ruled against such polices in 1991, companies used "fetal protection" policies as a basis for prohibiting fertile women from taking high-paying blue collar jobs that might expose them to lead. The fetal "right" to health and life has cost women their bodily integrity (women have been forced to undergo cesarean sections or blood transfusion), their liberty (women have been imprisoned for risking harm to a fetus through alcohol or drug use), and in some cases their lives (a court-ordered cesarean section probably accelerated the death in 1987 of Angela Carder, who had a recurrance of bone cancer that had metastasized to her lung). The fetal "right" not to be exposed to pharmaceutical agents has cost pregnant women their right to participate in drug trials that held out their only hope of cure from lethal illnesses. The vehicle for these infringements on pregnant women's rights has been third parties' assertions that they, rather than the mother, have the authority to speak for the fetus in securing these newly defined rights. For example, employers have argued for the right to speak for the fetus in determining when a work environment is inappropriate for the fetus. In mandating cesarean section, the courts have apparently concluded that the judiciary is better positioned to speak for the fetus and that a competent but dying mother's wishes to refuse surgery are no longer worthy of consideration. Most recently, a state's attorney has taken up the cudgel for the fetus by charging a woman with murder for her refusal to consent to a cesarean section.

It is within the context of these attempts to wrest the right to speak for the fetus from mothers that legislation that will expand the rights of the fetus—such as the Unborn Victims of Violence Act—must be considered. The act makes the injury or death of a fetus during commission of a crime a federal offense, the punishment for which "is the same as the punishment . . . for that conduct had that injury or death occurred to the unborn child's mother."[1] As written, the law appears unambiguously to immunize pregnant women against legal jeopardy should any act of theirs result in fetal harm: "Nothing in this section shall be construed to permit the prosecution . . . of any woman with respect to her unborn child." But similar statutory guarantees proffered in the past have not been decisive. In 1970 the California Legislature created the crime of "fetal murder" and specifically excluded the conduct of the pregnant woman herself, but women who suffered stillbirths were nevertheless prosecuted under the statute. The prosecutor explained that "The fetal murder law was never intended to protect pregnant women from assault

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by third parties which results in death of the fetus. The purpose was to protect the unborn child from murder."[2]

In Missouri cases, a woman who admitted to smoking marijuana once while pregnant and a pregnant woman who tested positive for cocaine were charged with criminal child endangerment on the basis of a statute that declares the rights of the unborn—yet also includes an explicit exception for the pregnant woman herself in language strikingly similar to that used in the Unborn Victims Act ("nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself"[3]). The state argued that this language did not preclude prosecution of the pregnant women because "the pregnant woman is not in a different position than a third-party who injures the unborn child" and because her drug use "'directly' endangered the unborn child."[4]

Even if the historical record did not contain these examples of a legislative bait and switch, the principles codified by the new federal statute would be worrisome. When laws create parity between harming pregnant women and harming members "of the species Homo sapiens" of any gestational age (as the Unborn Victims of Violence Act specifies), they establish symmetry between the rights of pregnant women and those of fetuses. In so doing, they suggest a need to balance rights when those rights appear to conflict with each other, and potentially to subordinate the rights of the women to those of the fetus. But to take this stance is not merely to elevate the rights of the unborn to parity with those of born individuals. It is in fact to grant them rights previously denied to born individuals: courts have allowed forced surgery to benefit the unborn, but have precluded forced surgery to benefit born persons. In 1978 Robert McFall sought a court order to force his cousin David Shimp, the only known compatible donor, to submit to a transplant. The court declined, explaining: "For our law to compel the 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."[5]

In the past, expansions of fetal rights have often been purchased through diminution of pregnant women's rights, and the vehicle for these infringements has been third parties' assertions that they, rather than the mother, have the authority to speak for the fetus.

The Unborn Child Pain Awareness Act is yet another example of a law focused on the fetus that devalues pregnant women and children and sets the stage for further erosion of their human rights. It mandates that prior to elective terminations, physicians deliver a precisely worded, though scientifically questionable, monologue that details the purported pain felt by the fetus and allows for fetal pain management. In so doing, it introduces two damaging concepts. First, it makes women and abortion providers a unique class, excluded from the standard medical model in which counseling is provided by a physician who uses professional judgment to determine what a reasonable individual would need in order to make an informed choice about a procedure. Instead, legislators' judgment is substituted for a physician's determination of the appropriate content of counseling.

Second, it elevates the rights of the midtrimester fetus beyond those of term fetuses, as well as those of its born siblings. Congress has never mandated that mothers be told that there may be fetal pain associated with fetal scalp electrodes or forceps deliveries. Nor have doctors been compelled to speak to the pain that accompanies circumcision or, for that matter, numerous medical conditions for which people are prevented from receiving adequate palliative care. Indeed, there is no federal law scripting counseling about the pain that could accompany any procedure to any child, or indeed any person, after birth. Society has generally relied on professionals to exercise medical judgment in crafting the content of counseling, and on medical societies to assure that counseling evolves as science progresses.

While support for fetal rights laws is now *de rigueur* among politicians, there is apparently no similar mandate to address the social issues that truly threaten pregnant women and victimize their fetuses. Although states increasingly are seeking ways to arrest and punish women who won't undergo recommended surgery or who are unable to find drug rehabilitation programs that properly treat pregnant women and families, no means have been found to guarantee paid maternity leave or to proffer more than quite limited employment protections from discrimination for women when they are pregnant. Many of our nation's tax and social security policies, rather than bolstering women's social standing, help to ensure mothers' economic vulnerabil-

ity. Hence, the opposition to the Unborn Victims of Violence Act from some activists must be recognized as the logical consequence of years of having mothers beatified in words and vilified in deeds.

These arguments should not be misconstrued as evidence of a "maternal-fetal" conflict. Unless stripped of their rights, pregnant women will continue to be the most powerful advocates for the wellbeing of unborn children. Clashes between the rights of mothers and their fetuses are used as Trojan horses by those who would undermine the protections written into law by *Roe*. Proponents of the right-to-life agenda recognize that when fetal rights expand, the right to abortion will inevitably contract. Furthermore, the responsibilities of physicians in this environment are clear and are grounded in the principles of professionalism—primacy of patient welfare, patient autonomy, and social justice.[6] Those principles require that patients' needs be placed before any "societal pressures" and that "patients' decisions about their care must be paramount."[7] These words are bright line guideposts for clinicians who may at times feel caught in a balancing act. Whether the counterclaim to a pregnant woman's right to autonomy is a societal demand for drug test results obtained in labor, an administrator's request to get a court order to supersede an informed woman's choice, or a colleague's plea to consider fetal interests more forcefully, these principles remind us that no other concern should dilute physicians' commitment to the pregnant woman.[8]

The argument that women should not lose their civil and human rights upon becoming pregnant is predicated neither on the denial of the concept that an obstetrician has two patients, nor on the acceptance of any set position in the insoluble debate as to when life begins. The courts have provided direction for those dealing with the competing interests of two patients, even if one were to concede that the fetus in this regard is vested with rights equal to that of a born person. A physician who had both Robert McFall (potential marrow recipient) and David Shimp (potential donor) as patients may well have shared the judge's belief that Shimp's refusal to donate his marrow, and thereby to condemn McFall to death, was "morally reprehensible." But the clinician would ultimately have to be guided by the judge's decision to vouchsafe David Shimp's sanctity as an individual. Pregnancy does not diminish that sanctity or elevate the rights of the fetus beyond that of Robert McFall or any other born person. Thus, while the obstetrician's commitment to his "other" patient (the fetus) should be unstinting, it should be so only to a limit set by those, to quote Justice Blackman, "who conceive, bear, support, and raise them."[9] To do otherwise would be to recruit the medical community into complicity with those who would erode the rights of women in the misguided belief that one can champion the health of children by devaluing the rights of their mothers.

1. 18 U.S.C. s.1841(a)(2)(A).

2. *Jaurigue v. California*, Reporter's Transcript, Hearing August 21, 1992, Case No. 18988, Justice Court Cr. No. 23611, Sup. Court of California for the County of San Benito, Honorable Donald Chapman, Judge, p. 2823.

3. *Missouri v. Smith*, Jackson County Circuit Court, No. CR2000-00964 (June 23, 2000).

4. *Missouri v. Smith*, Jackson County Circuit Court, Case No. CR2000-00964, State's Response to Motion to Dismiss the Indictment (Aug 10, 2002) at 2.

5. *McFall v. Shimp*, 10 Pa. D.&C. 3d 90 (Allegheny Cty. 1978).

6. ABIM Foundation, American Board of Internal Medicine, ACP-ASIM Foundation, American College of Physicians-American Society of Internal Medicine, European Federation of Internal Medicine, "Medical Professionalism in the New Millennium: A Physician Charter," *Annals of Internal Medicine* 136, no. 3 (2002): 243-46.

7. Ibid.

8. ACOG Committee on Ethics, "Maternal Decision Making, Ethics, and the Law," *Obstetrics & Gynecology* 106 (2005): 1127-37.

9. *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 197-206 (1991).