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The Impact of Medical Technology on the Pregnant Woman's Right to Privacy

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In the context of the bicentennial of the Constitution and science's relationship to society, it has been argued that "the advance of science and technology in the West has changed not only the relation of man to nature but of man to man."[1] This seemingly immodest statement may soon prove an understatement. In the arena of human reproduction, the marriage of science and technology in medicine may change not only the relationship of man to nature and man to man, but more significantly, the very concept of what it means to be human. This, in turn, will directly affect how we define the "rights" this "new human" may properly claim.

This article begins to explore developing reproductive medical technology with a view toward examining the way it might change our concept of humanness, and how this change might be accommodated, encouraged, or truncated by the relationship between the government and its pregnant citizens as defined by the United States Constitution and the "right to privacy." This review is especially appropriate in the context of honoring Justice Harry Blackmun, and I hope he will find in this discussion much he is responsible for, and much with which he can agree.

THE CONSTITUTION AT THE BEGINNING OF LIFE

Modifications in the mode of human reproduction have long been viewed as science fiction and have occasioned both fear and amazement. In Orwell's *1984*,[2] for example, AID (artificial insemination by donor) is mandatory, and sexual pleasure and the family

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[1] Piel, *Natural Philosophy in the Constitution*, 233 SCIENCE 1056, 1057 (1986).

[2] G. ORWELL, 1984 (1949).

are destroyed to help maintain the tension necessary in a society dedicated to perpetual warfare. In Huxley's *Brave New World*,[3] destruction of the family is also critical, but it is accomplished by sexual gratification and freedom. Reproduction becomes the exclusive domain of the state: embryos are produced and monitored in state-run "hatcheries" using artificial uteruses.

More recent post nuclear war views of methods of reproduction have been pessimistic. Margaret Atwood pictures most women as sterile and sees fertile women forced to act as surrogate wives to bear children for the sterile wives of the wealthy. In her *Handmaid's Tale*,[4] these surrogate wives are "two-legged wombs . . . ambulatory chalices."[5] In Paul Theroux's *O-Zone*,[6] AID clinics gradually evolve to provide anonymous but "natural" sex for sperm transmission, and finally degenerate into anonymous sex parlors where providing the opportunity for sex, rather than reproduction, is their primary function.

We may, of course, avoid all of these futures. But the centrality of the family, and its formation based on the sexual reproduction by husband and wife, assure us that major changes in modes of reproduction will not only challenge traditional assumptions about the nature of the family and kinship relations, but will likely lead to major changes in our social structure as well.

The Supreme Court has yet to consider constitutional issues in the context of human reproduction by noncoital reproductive technologies that permit reproduction without sexual intercourse.[7] Nonetheless, past cases dealing with sterilization, contraception and abortion provide significant clues as to how an individual's constitutional right to privacy is likely to be viewed in the event of government prohibition or regulation of these technologies.

In general, constitutional interpretation has depended heavily on prevailing social and scientific views, as well as on advances in technology. The sterilization cases decided prior to World War II reflect the values in the eugenics movement of the early 1900's. Later, they reflect newly available medical alternatives to sterilization and a more sophisticated view of genetics. Likewise, contracep-

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[3] A. HUXLEY, BRAVE NEW WORLD (1931). *See also* A. HUXLEY, BRAVE NEW WORLD REVISITED at 26 (1958).

[4] M. ATWOOD, THE HANDMAID'S TALE (1986).

[5] *Id.*

[6] P. THEROUX, O-ZONE. (1986).

[7] These technologies include AID, IVF, the use of frozen embryos, surrogate embryo transfer (SET), gamete intrafallopian transfer (GIFT), and more extreme possibilities such as cross-species fertilization, total extracorporeal gestation, and cloning. *See* Elias & Annas, *Social Policy Considerations in Noncoital Reproduction*, 255 JAMA 62 (1986).

tion and abortion were made part of a pregnant woman's right to privacy only after safe and effective techniques had been developed by the medical profession. And the state's interest in regulating abortion for maternal health has been determined exclusively by reference to the safety of the technology itself. The existence of new medical technology does not determine the outcome of these constitutional issues. Nonetheless, technological advances in the field of reproduction have had a prominent impact on the shape and substance of constitutional interpretation.

Sterilization and the "Right to Procreate"

The most notorious case involving human reproduction, *Buck v. Bell*,[8] was decided by the Supreme Court in 1927. In that case the Court upheld a Virginia statute that permitted, among other things, the involuntary sterilization of the "feeble-minded."[9] Justice Oliver Wendell Holmes wrote for the Court:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . Three generations of imbeciles are enough.[10]

This case capped three decades of the eugenics movement in the United States and was heavily influenced by it. It suggested constitutional support for a movement to limit the right to procreate to those with sufficiently high I.Q.s.

Fifteen years later, in *Skinner v. Oklahoma*,[11] the Court struck down an Oklahoma statute that provided for the compulsory sterilization of "habitual criminals." The law applied to larceny, but specifically exempted persons convicted of embezzlement.[12] The eugenics movement had fallen into disfavor, and the Court began to examine the rights of the individual.

The Court ruled that the statute violated the equal protection clause of the fourteenth amendment. In addition, the Court also affirmed the fundamental "value of reproductive autonomy over a majoritarian decision in favor of sterilization."[13] In the Court's words:

> We are dealing here with legislation which involves one of

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[8] 274 U.S. 200 (1927).
[9] *Id.* at 205.
[10] *Id.* at 207 (1927).
[11] 316 U.S. 535, 541 (1942).
[12] *Id.* at 536-37.
[13] *Id.* at 541.

> the basic civil rights of man. *Marriage and procreation are fundamental to the very existence and survival of the race.* The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.[14]

Buck v. Bell has never been explicitly overturned. In light of *Skinner* and subsequent cases, however, the vast majority of commentators believe it is no longer good law and that, at the very least, the Court would require a high level of procedural protection before any involuntary sterilization would be permitted.[15]

CONTRACEPTION, ABORTION AND THE "RIGHT NOT TO PROCREATE"

Contraception and abortion have been both highly regulated and outlawed altogether.[16] The changing mores of society and the womens rights movement undoubtedly had a major impact on the Court's changing views of these medical technologies. But the development of an effective oral contraceptive, and of a safe and effective means of first trimester abortion (suction aspiration), contributed more to change the Court's views than has generally been recognized. For example, the Supreme Court's leading decision on contraception, which enunciated the "right to privacy" for the first time in the reproduction context,[17] was rendered shortly after oral contraception (introduced in 1960) became popular in the United States.

In *Griswold v. Connecticut*,[18] a Connecticut statute that forbade the use of contraceptives was struck down as an unconstitutional violation of the "zones of privacy" that surround sexual relations in marriage.[19] Seven years later, in *Eisenstadt v. Baird*,[20]the Court determined that it was the sexual relationship and the potential to produce a child that was critical, not the marriage itself. A statute that applied only to prohibit nonmarried individuals from using contraception was thus unconstitutional as well:

> If the right to privacy means anything, it is the right of the

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[14] *Id.* (emphasis added).

[15] *See e.g., In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); Baron, *Involuntary Sterilization of the Mentally Retarded* in GENETICS AND THE LAW (A. Milunsky & G. Annas eds. 1976).

[16] Roe v. Wade, 410 U.S. 113, 138-41 (1973).

[17] Griswold v. Connecticut, 381 U.S. 479 (1965).

[18] *Id.*

[19] *Id.* at 484. The statute had been upheld as a valid exercise of the state's police powers (to "preserve and protect the public morals") as recently as 1940. State v. Nelson, 126 Conn. 412, 425 (1940).

[20] 405 U.S. 438 (1972).

> individual, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[21]

The final series of cases deal with abortion. *Roe v. Wade*,[22] perhaps more than any other decision in history, was framed by a series of scientific and medical determinations adopted by the Court. This was presaged in the rationale for determining that the right to privacy was broad enough to encompass abortion. To justify this conclusion, the Court relied almost exclusively on the medical and psychological harm the state would impose upon a woman by denying her this choice:

> Specific and direct harm *medically diagnosable* even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a *distressful life* and future. *Psychological harm* may be imminent. Mental and physical health may be taxed by child care . . . All of these factors *the woman and her responsible physician* will consider in consultation.[23]

Even more important was the role assigned to medicine and technology in sketching the potentially compelling state interests involved. As far as the state's interest in protecting human life (i.e. fetal life), this became compelling not at conception, quickening, or birth, but rather at "viability." According to the Court, "viability" was chosen for only one reason:

> *Physicians and their scientific colleagues* have regarded [quickening] with less interest and *have tended to focus* either upon conception or upon live birth or *upon the interim point at which the fetus becomes "viable"*, that is, potentially able to live outside the mother's womb, albeit it *with artificial aid*.[24]

The viability standard was adopted on the strength of citing no more than an entry in a medical dictionary and another in an obstetrics text. *Why* this standard should have legal significance was never explained or logically justified by the Court, prompting one commentator to exclaim that the court had substituted a "definition for syllogism."[25]

The Court's discussion of the state's interest in protecting the health of pregnant woman is even more impressive in terms of bow-

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[21] *Id.* at 453.

[22] 410 U.S. 113 (1973).

[23] *Id.* at 153 (emphasis added).

[24] *Id.* at 160 (emphasis added).

[25] Ely, *The Wages of Crying Wolf: A Commentary on Roe v. Wade*, 82 YALE L.J. 920, 924 (1973).

ing to the imperative of medical technology. The point in pregnancy at which the state's interest in regulating abortion to protect the woman became compelling was to be determined "in the light of present medical knowledge."[26] On this basis, the Court put it at "approximately the end of the first trimester," because until that time, maternal "mortality in abortion may be less than mortality in normal childbirth."[27] In the past, abortion had always placed the woman's life "in serious jeopardy; [but] . . . [m]odern medical techniques have altered this situation."[28] This conclusion is based on five studies from the medical literature, cited by the Court in footnote 44 of the opinion. The articles primarily focus on the development and safety record of dilation and evacuation or "vacuum aspiration," and dilation and curettage abortions performed during the first trimester. Thus, it is fair to conclude that the state's interest in regulating abortion was determined by the medical profession (and its development and use of safe methods of abortion).

In her dissent in a case decided a decade later, Justice Sandra O'Connor noted that the state's interest in regulation will *continue* to be decided by medical technology because the time period during which the woman and her physician are free to make the abortion decision will expand as the safety of existing or new abortion techniques improves.[29] This has in fact already happened, as abortion can now be safely performed as an office procedure for the first 16 weeks of pregnancy.[30]

The point is that medical technology itself is driving the decisions of the Court in defining large areas of the state's role in human reproduction. Justice O'Connor has criticized the Court's apparent "science court" approach in these matters, noting that *Roe v. Wade* is on a "collision course" with itself as medicine makes abortions safer.[31] Her point, however, seems misplaced. The Court's decisions *must* be influenced by science and technology, because the Court must deal with the real world. The real world changes as science, technology and medicine develop and test new methods of sterilization, contraception, abortion and procreation.

Issues concerning rights to use a technology on the part of individuals, and rights to regulate a technology on the part of the government, do not even arise until the technology at issue is

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[26] Roe v. Wade, 410 U.S. at 163.

[27] *Id.*

[28] *Id.* at 149.

[29] Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting).

[30] *Id.* at 437.

[31] *Id.* at 458 (O'Connor, J., dissenting).

developed and made available. Although we cannot know how the Court will react to technologies not yet developed, or to new technologies just becoming available, we can hazard some reasonable guesses based on the Court's treatment of sterilization, abortion and procreation. A reasonable way to start is by examining how the Court might react to various legislative controls over *in vitro* fertilization (IVF), including the use of frozen embryos.

Physician-philosopher Leon Kass has properly noted that in developing new ways to reproduce, we are considering

> not merely new ways of beginning individual human lives but also . . . new ways of life and new ways of viewing life and the nature of man. Man is defined partly by his origins and his lineage; to be bound up with parents, siblings, ancestors, and descendants is part of what we mean by human. By tampering with and confounding these origins and linkages, *we are involved in nothing less than creating a new conception of what it means to be human.*[32]

In this regard, IVF, confined to married couples using their own gametes, actually raises fewer confounding questions than any of the new reproductive technologies.[33] IVF was originally developed as a method to bypass diseased fallopian tubes by removing ova from the ovaries by a surgical procedure, combining the ova with sperm from the woman's husband in a petri dish, and, after fertilization and a number of cell divisions, transferring the embryo into the woman's uterus for implantation.[34] Used within marriage, IVF presents only one major constitutional issue: can the government prohibit the use of IVF on the basis that it involves potential harm to the extracorporeal embryo? The answer to this question seems to be no, based primarily on the *Roe v. Wade* analysis, that the embryo itself is not "viable" (unless placed into a host uterus). The embryo is not a person and it has no rights as such. Nor can any interests it has overcome the rights of its "parents" to decide to use or not to use it to procreate. A more interesting question is whether the parents could object to a statute requiring that any "left over" or spare embryos (i.e. ones created but not transferred to the woman) be frozen and "donated" to couples unable to produce their own embryos. The claim on the part of the state would be that this use would protect the embryos' "right to life," and the state's inter-

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[32] L. KASS, TOWARD A MORE NATURAL SCIENCE: BIOLOGY AND HUMAN AFFAIRS 48 (1985)(emphasis added).

[33] S. ELIAS & G. ANNAS, REPRODUCTIVE GENETICS AND THE LAW 224 (1987).

[34] Annas & Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199 (1983).

est in fetal life.[35] The counter-claim would be that an early-stage embryo has no more "right to life" than a sperm or egg (i.e. none). Thus, any interests the parents might have in not having their genetic child reared outside of their family would take precedence, assuming that such a result could be psychologically harmful to them. Whether the state could constitutionally forbid experimentation on spare embryos would depend upon how society views the embryo, what protections can be afforded it, and the purposes and importance of the experiment.[36]

SURROGACY

Couples may want to freeze spare embryos for other purposes, such as for use in another cycle. The use of frozen embryos, of course, raises many other possibilities that the state may want to regulate or forbid. For example, the embryo could be transferred not to the wife, but to a "surrogate mother," who could be hired to gestate the embryo for the couple. In this instance, IVF (with the surrogate) would be used not to bypass fallopian tube disease, but to permit the couple to avoid pregnancy altogether and still have a child composed of their genes. The line of cases discussed so far holds that a married couple (and arguably heterosexual unmarried couple) must be free from state interference in making a decision to bear or beget a child.[37] In addition, a pregnant woman and her physician must be in a position to make an abortion decision without state interference, at least prior to the point at which abortion becomes more dangerous than childbirth for the woman. Fetuses can be protected from their mothers by the state only after viability, and then only in ways that do not harm the mother herself.[38]

Use of a surrogate, however, introduces a third, unrelated, party into the process of procreation. The state might have a stronger interest in protecting this person from possible exploitation. For example, the Constitution would probably prohibit a woman from irrevocably waiving or alienating her right to abort the fetus by promising never to have an abortion, because specific enforcement of this contract would be so highly intrusive to the personhood of the woman.[39]

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[35] Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 So. CAL. L. REV. 939, 977 (1986).

[36] *Id.*; Annas, *The Ethics of Embryo Research: Not as Easy as it Sounds*, 14 L., MED. & HEALTH CARE 138 (1986).

[37] *See e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

[38] *See* Roe v. Wade, *supra* note 22.

[39] Note, *Rumpelstilskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986). Even the lower court judge in the *Baby M.* case recognized that a woman could

One unanswered, critical question is whether it should make any difference if the surrogate is carrying a child that was produced using her own egg as opposed to a child that is not genetically related to her at all. Although it would seem that in the latter circumstance one could view the woman simply as an "incubator" for the embryo, one cannot do this without dehumanizing her. As the Court noted in *Planned Parenthood of Missouri v. Danforth*,[40] the pregnant woman has more at stake in her pregnancy than her husband does — even if, as Justice White argued in dissent — she is carrying the *only* child her husband may ever have.[41] This is because a woman's body, not an inert incubator, is involved, and she is the one who is undergoing *all* the physical risks, in addition to at least as many psychological risks as the genetic father. Because she has more at stake, personally and immediately, only she should have the right to decide about an abortion. In Justice Blackmun's words, "Since it is the woman who physically bears the child and who is directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[42] Moreover, even she should not be able to alienate that right — because to do so puts her in the position of an "incubator," at best a slave, at worse a simple container. Such dehumanization, even if done "voluntarily," cannot be constitutionally enforced by the state because of the intense impact of pregnancy on the personhood of the pregnant woman. An analogous argument suggests that between the genetic and gestational mother, the latter has a higher claim to be considered the presumptive rearing mother, regardless of any prior contractual agreement to waive or alienate her right to rear the child. In this regard it should be noted that the technology of embryo transfer (ET), the ability to transfer an embryo to the uterus of a woman not genetically related to it, has forced us to ask a question unique in legal history: (as between the genetic and gestational mother) who is the mother of the child? More specifically, does the child's genetic mother or the mother who bore the child have legal rights and responsibilities to rear the child? Society has not yet answered this question, but it would seem that based on the comparative contributions and risks taken, and to insure that the child has a protector who can be unequivocally identified and will be present at birth, the traditional legal rule should continue: the gestational mother

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not irrevocably waive her right to terminate her pregnancy under the United States Constitution because judicial enforcement of such an agreement would be an intolerable burden on the woman. 217 N.J. Super. 313, 525 A.2d 1128 (1987).

[40] Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976).

[41] *Id.* at 93 (White, J., dissenting).

[42] *Id.* at 71.

should be considered the legal mother for all purposes, and this presumption should be irrebuttable and unalterable by prior contract.[43]

The state has a much stronger interest in regulating commerce than it has in regulating human reproduction. Thus, although a general ban on the use of surrogacy might be successfully challenged (as interfering with a couple's constitutional right to procreate without a compelling state interest), a ban on commercial surrogacy or the buying and selling of human embryos would likely survive constitutional challenge. This ban could be based both on society's general distaste for the selling of children, involuntary servitude, or embryo selling, and also on the potential harms such practices have to all of the participants, including the surrogate and the resulting child, and the harms to society as a whole for sanctioning such a practice.[44] On the other hand, it has been persuasively argued that *all* surrogacy, paid and unpaid, should be banned because it is ironically self-deceptive, that it appears to empower women, but actually "reinforces oppressive gender roles."[45] The ultimate decision on this issue depends upon whether the Court will view the human embryo as a commodity, and thus properly an article of commerce, or whether the Court will afford it a higher value and thus protect it from abuse and exploitation, similar to the way we now protect human organs, parks and certain species of wildlife.

CONSTITUTIONAL ISSUES WHEN THE INTERESTS OF A PREGNANT WOMAN CONFLICT WITH THOSE OF THE FETUS: MATERNAL-FETAL CONFLICTS

FETAL SURGERY

One of the major consequences of antenatal diagnosis of the fetus has been to view the fetus as a patient, often termed the doctor's "second patient." The ability to intervene to actually treat the fetus, however, is very limited. In fact, most current methods can only diagnose specific diseases or defects, and the only "treatment" is the termination of the pregnancy. Obviously, this is usually done not for the sake of the fetus (unless the condition is so devastating that the fetus would be better off not existing), but for the family. Because of a woman's right to abortion, she has the constitutional right to terminate the pregnancy because her fetus is abnormal, or, prior to viability, for any other reason.

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[43] Annas, *Making Babies Without Sex: The Law and The Profits*, 74 AM. J. PUB. HEALTH 1415 (1984); ELIAS & ANNAS, *supra* note 7.

[44] *Id. See also* In the Matter of Baby M., 537 A.2d 1227 (N.J. 1988).

[45] Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1930 (1987).

In the future, it will likely be possible to treat the affected fetus for many conditions. Treatment of the fetus will involve the cooperation of the pregnant woman, and might even put her own life or health in danger. How should courts deal with the competing rights of the fetus and the pregnant woman when treatment could lead to a normal birth, but the pregnant woman prefers to terminate the pregnancy, or to carry the affected fetus to term untreated?

The current state of the art is very primitive and highly experimental. Fewer than 100 cases of hydrocephalus have been treated by surgical decompression, with results that have been described as "not encouraging." Even fewer fetuses have had surgery for urinary tract obstruction, with somewhat better results. Other potential areas for the development of fetal surgery include diaphragmatic hernia, spina bifida, gastroschisis, and allogenic bone transplants.[46]

The fact that these procedures are currently highly invasive and experimental means that they *cannot* be performed without the woman's informed consent and that she is under no obligation to give such consent. But assume the procedures are perfected and that they not only become "standard medical procedures" but that they can be performed with little or no risk to the pregnant woman. Under such circumstances, will the pregnant woman be afforded the same constitutional right to refuse to have her fetus operated on while it is still inside her?

"Forced Cesarean-Section" Cases

There have been approximately two dozen court-ordered "forced" cesarean sections in the United States.[47] Most have involved poor women, racial minorities, and foreigners, and only two of these cases have reached an appellate court level.

The first appellate case, *Jefferson v. Griffen Spaulding County Hospital Authority*,[48] involved a Georgia woman who was due to deliver her child in about four days and had previously notified the hospital that it was her religious belief that the Lord had healed her body and that whatever happened to the child was the Lord's will. Both the hospital and a public agency sought an order requiring her to submit to a cesarean section. The odds that the child would die if a vaginal birth was attempted were put at 99% to 100% by the physician. The court granted the petition, on the basis that the

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[46] S. Elias & G. J. Annas, *supra* note 33, at 243-50.

[47] Kolder, Gallagher & Parsons, *Court-Ordered Obstetric Interventions*, 316 New Eng. J. Med. 1192 (1987); *see* Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 Cal. L. Rev. 1951 (1986).

[48] 247 Ga. 86, 274 S.E.2d 457 (1981). *See* G. Annas, Judging Medicine 119-25 (1988).

> state has an interest in the life of this unborn, living human being [and] the intrusion involved . . . is outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live.[49]

The parents immediately petitioned the Georgia state court to stay the order. On the evening of the day of the hearing, the court denied their motion, with a two-sentence conclusory opinion.[50] A few days later, the woman uneventfully delivered a healthy baby without surgical intervention.

The other appellate case is from Washington, D.C.[51] "Angela C." was a 28 year old terminally ill married woman. Her physicians determined that she would die very soon, but she and they agreed to a course of chemotherapy and radiation treatment to try to get her to 28 weeks gestation, when the fetus would have a much better chance to be born healthy. Hospital lawyers, however, called in a Superior Court judge and asked him to determine what action to take. At an emergency hearing held at the hospital, it was determined that while the patient had not consented to the immediate removal of her fetus by cesarean section, immediate removal would be best for the fetus, but it might accelerate Angela C.'s own demise. The court ordered the cesarean section performed to try to save the fetus.[52] A telephone appeal for a stay was unsuccessful. The fetus was delivered, but died shortly thereafter. The mother died two days later.[53] About six months later the appeals court explained in writing its refusal to grant a stay.[54]

In re A.C. reads more like a sympathy card than a judicial opinion. Its first paragraph ends with the following sentence: "Condolences are extended to those who lost the mother and child."[55] The court acknowledges that its opinion might "reasonably" be seen as "self-justifying" and then goes on to rationalize the denial of the stay.[56]

The opinion rests on a number of false assumptions. The most serious error is the statement that "as a matter of law, the right of a woman to an abortion is different and distinct from her obligations to the fetus once she has decided not to timely terminate her preg-

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[49] Jefferson, 247 Ga. at 89, 247 S.E.2d 457 at 460.
[50] *Id.*
[51] *In re* A.C., 533 A.2d 611 (D.C. App. 1987), *vacated*, 529 A.2d 203 (D.C. App. 1988).
[52] 533 A.2d at 613.
[53] *Id.* at 612
[54] *Id.* at 611.
[55] *Id.*
[56] *Id.* at 613.

nancy."[57] This is incorrect as both a factual and legal matter. Angela C. never "decided not to timely terminate her pregnancy," and because of her fetus' affect on her health, under *Roe v. Wade* she could have authorized her pregnancy to be terminated, to protect her health, at any time prior to her death. Nothing in *Roe v. Wade* requires a woman to put her own life or health in jeopardy to protect her fetus, even her viable fetus.

The second basis on which the opinion rests is that a parent cannot refuse treatment necessary to save the life of a child (true),[58] and therefore a pregnant woman cannot refuse treatment necessary to save the life of her fetus (false).[59] The child must be treated because parents have obligations to act in the "best interests" of their children (as defined by child neglect laws), and treatment in no way compromises the bodily integrity of the parents. Fetuses, however, are not independent persons, and cannot be treated without invading the mother's body. There are no "fetal neglect" statutes, and it is unlikely that any could be written specifically enough to withstand constitutional scrutiny. Treating the fetus against the will of the mother requires us to degrade and dehumanize the mother and treat her as an inert container. This may be acceptable once the mother is dead (since her interests in bodily integrity die with her), but is never acceptable when the mother is alive. The court seemed to understand this intellectually, and thus ultimately justified its opinion on the grounds that Angela C. was as good as dead, and had no "good health" to be "sacrificed." "The cesarean section would not significantly affect A.C.'s condition because she had, at best, two days of sedated life . . . ."[60]

But this reasoning will not do. It would, for example, permit the involuntary removal of vital organs prior to death if needed to "save a life." But if the child had already been born, it is unlikely that any court would compel the child's mother to undergo major surgery (e.g., a kidney "donation") no matter how dire the potential consequences of refusal to the child. And no court would require the father of a child to undergo surgery, even to save the child's life. The ultimate rationale may be purely sexist: cesarean sections can never be done on males, and these male judges are simply unable to identify with pregnant women.[61]

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[57] *Id.* at 614.

[58] *Id.* at 616.

[59] *Id.* at 616-17. The court actually wound up forcing Angela C. to have an abortion prior to her death, since her fetus was not viable.

[60] *Id.* at 616.

[61] Annas, *She's Going to Die: The Case of Angela C.*, 18 HASTINGS CENTER REP. 23 (Feb. 1988).

Jefferson is not much better. In addition to misinterpreting *Roe v. Wade*, it also relied on *Raleigh-Fitkin-Paul Morgan Memorial Hospital v. Anderson*,[62] which involved a woman who was approximately eight months pregnant. Physicians believed that some time before giving birth, she would hemorrhage severely and that both she and her fetus would die if she did not submit to blood transfusions. She refused blood transfusions because she was a Jehovah's Witness. The trial court upheld her refusal, and the hospital appealed to the New Jersey Supreme Court. In the meantime, the woman had left the hospital against medical advice and the case became moot. Nevertheless, the court determined that the fetus was "entitled to the law's protection" and that blood transfusions could be administered to the woman "if necessary to save her life or the life of her child, as the physician in charge at the time may determine."[63]

Raleigh-Fitkin is of limited value. First, no one was forced to do anything as a result of the opinion; that is, no transfusion was actually performed, and no police were dispatched to apprehend the woman and return her to the hospital. Second, it was a one-page opinion, with little policy discussion. Third, the extent of bodily invasion involved in a blood transfusion is much less than that involved in a cesarean section, which is major abdominal surgery. Fourth, the case was decided eight years before the same New Jersey court decided the case of Karen Ann Quinlan,[64] which first applied the right to privacy to medical treatment refusals.[65]

Griswold and *Roe* represent situations in which medical advances were used by the United States Supreme Court to enhance the liberty rights of women. The forced-cesarean cases, on the other hand, illustrate the potential "dark side" of technology. Here medical advances, including ultrasound, fetal monitoring, safer cesarean sections, and neonatal intensive care units were used not to enhance the rights of pregnant women, but instead to provide an excuse to ignore them, by concentrating exclusively on the potential child. The lesson these cases teach is that technology untempered by human rights can lead to brutal dehumanization of pregnant women.

The position the Court will take on whether it is proper to force a woman to consent to interventions like fetal surgery for the sake of her fetus will depend on how the Court views the reasonableness of

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[62] 42 N.J. 421, 201 A.2d 537 (1964).

[63] *Id.* at 423, 201 A.2d at 538.

[64] Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

[65] *Id.* at 662-64. *See also* Annas, *Forced Cesareans: The Most Unkindest Cut of All*, 12 HASTINGS CENTER REP. 16 (June 1982).

the intervention. This, in turn, will be primarily determined by how the medical profession views these procedures (e.g., as "heroic" or routine), their success rates, and by the precise risks to the woman forced to undergo the procedure. Where surgery involves general anesthesia or actual physical invasion of a woman's body it is unlikely that the Court would force a woman to undergo such a procedure, and could not do so without treating the woman as a mere container.[66]

The "waiver" argument posits that the right to abortion is alienable; once a woman alienates it by deciding to carry the fetus to term, she has an affirmative obligation to consent to any reasonable medical or surgical intervention to help her fetus be as healthy as possible. This, however, seems much more a moral construct of what society hopes the "ideal mother" would do than a legal obligation to be enforced through the courts. The waiver argument seems misplaced for at least two reasons. First, such a waiver never in fact

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[66] A legally analogous situation occurs when a court authorizes a "search and seizure" of a substance that is inside the body of a criminal suspect. In the most famous "search and seizure" case, the U.S. Supreme Court ruled that having a physician take blood in a hospital to determine whether an individual is under the influence of alcohol is "reasonable" under the fourth amendment protection against unjustified searches and seizures because of the strong interest the community had in fairly and accurately determining guilt or innocence, the inability of determining intoxication by other means, and the very minor invasion of the body involved in drawing blood which, "for most people involves virtually no risk, trauma, or pain." Schmerber v. California, 384 U.S. 757, 771 (1966). In an earlier case the Court found a search unreasonable when police broke into a suspect's room, attempted to extract narcotics capsules he had put in his mouth, and then rushed him to the hospital and insisted that an emetic, be administered to induce vomiting. This violated the suspect's interests in "human dignity." Rochin v. California, 342 U.S. 165, 174 (1952). Even closer to the cesarean section cases is a case in which the Court upheld a lower court ruling that it would be unreasonable under the fourth amendment to order surgery to remove a bullet from an accused armed robber who shot his victim and was in turn shot by him. The Court held, consistent with *Schmerber* and *Rochin,* that the interests of the accused had to be balanced against the interests of the state. The accused's primary interests were in maintaining "personal privacy and bodily integrity." Removal of the bullet would require, among other things, general anesthesia. In the Court's words:

> When conduced with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive. In such a case, the surgeon is carrying out the patient's own will concerning the patient's body and the patient's right to privacy is therefore preserved. In this case, however. . .the Commonwealth proposes to *take control of respondent's body,* to "drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness" and then to search beneath his skin for evidence of a crime. *This kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin.* Winston v. Lee, 470 U.S. 753, 765 (1985)(quoting Lee v. Winston, 717 F.2d 888, 901)(emphasis added).

Not only was the burden on the citizen great, the state had other evidence available to make its case, so the search was not "reasonable." *Id.* Analogously, a forced cesarean section is a much more intrusive and dangerous surgical procedure than the bullet removal, and much more demeaning to the patient because it treats her simply as a container. On the other hand, the potential state interest in the life of the fetus (soon-to-be-child) is very high.

takes place. Women do not appear before judges to waive their rights at any time during pregnancy. Second, and more important, women have a constitutional right to bear children if they are physically able to do so. A legal rule that there are no restrictions on a woman's decision to have an abortion, but if she elects childbirth she thereby must surrender her basic rights of bodily integrity and privacy, would be a state-created penalty on her exercise of her right to bear a child.[67] Such a penalty or "infringement" would be unconstitutional.

On the other hand, if the intervention is viewed as trivial, such as requiring the woman to take one pill that had no risks or side effects and would prevent her child from being severely mentally retarded, balancing the interests of the woman with those of the state in preventing mental retardation might permit some state-sanctioned action, the extent of which is unclear. For example, could we force the woman's mouth open and jam the pill down her throat, or put her in jail until she took it voluntarily? Ironically, supervising more trivial interventions, such as diet and smoking, may require more massive privacy invasion than one-time surgery.[68]

The extent of the woman's constitutional right to refuse treatment would likely be technologically-determined and would turn on whether a safe and effective treatment exists and could be delivered in an unintrusive way. If so, future courts may well favor the state's interest in the fetus' life and health over the woman's right to bodily integrity.

Fetal Abuse: The Case of Pamela Monson Stewart

The Stewart case takes us one step further, and raises the issue of "fetal abuse." Could the state constitutionally define a new crime of "fetal abuse" similar to the current crime of "child abuse" and use it to force a pregnant woman to take or refrain from taking certain actions that might be harmful to her fetus?

Reportedly Mrs. Stewart was, because of placenta previa,[69] advised by her physician to refrain from taking drugs, to stay off her feet, to avoid intercourse, and to seek immediate medical attention should she begin to hemorrhage. According to the police, she ignored this advice by having intercourse with her husband and taking

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[67] Johnsen, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 Yale L.J. 599 (1986).

[68] Miller, *Rights in Conflict? The Pregnant Woman vs. The Fetus at Risk*, Mass. Med. 17-18 (Sept. - Oct. 1986).

[69] Placenta previa is the condition in which the placenta is in the lower segment of the uterus, extending to the margin of the internal os of the cervix or partially or completely obstructing the os.

some amphetamines. Mrs. Stewart stayed at home after she first noticed some bleeding and did not go to the hospital until many hours later. Her son was born with massive brain damage, and died six weeks later. Criminal charges were filed under California's child support statute, which includes "unborn children":

> If a parent of a minor child *willfully omits,* without lawful excuse, *to furnish* necessary clothing, food, shelter or *medical attendance, or other remedial care* for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars, or by imprisonment [for one year].[70]

The case was dismissed in early 1987 because the trial judge determined that this statute did not apply to her conduct.[71] But this does not determine how a similar case would be decided under a statute worded differently. The prosecution, for example, alleged that "disobeying instructions" or "failure to follow through on medical advice" should be grounds for criminal action. The danger in this approach is changing the nature of the doctor-patient relationship, and the nature of physician advice. Physicians are neither policemen nor psychics, and medical "advice" is an inherently vague term. To be effective in protecting fetuses, monitoring patient compliance with medical advice would be necessary. This might require confining pregnant women to an environment in which eating, exercise, drug use, and sexual intercourse could be controlled.

Other quandaries arise if child neglect statutes are applied to fetuses. Unlike a child, a fetus is absolutely dependent upon its mother and cannot be "treated" without in some way invading the mother. The "fetal protection" policy enunciated by the Stewart prosecution seems to assume that, like mother and child, mother and fetus are two separate individuals with separate rights. But treating them separately before birth can only be done by favoring one over the other. Favoring the fetus radically devalues the pregnant woman treating her like an inert incubator, or a culture medium for the fetus.

This view makes women unequal; since only they can have children, a fetal neglect statute relegates women to performing one function: childbearing. It is one thing for the physician to view the fetus as a patient; it is another for the state to assume that the fetus' interests are opposed to its mother's, and to require treatment of

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[70] CAL. PENAL CODE § 270 (West 1986)(emphasis added).

[71] Annas, *supra* note 48, at 96. *See also* Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994 (1988).

the fetus by forcing the mother to subrogate her own rights to those of her fetus.

Another problem is more technical: what is "fetal neglect?" Child neglect covers a wide variety of activities, but generally involves failure to provide certain things, like clothing, food, housing or medical attention, to the child. Such laws *do not*, however, require parents to provide "optimal" clothing, food, housing or medical attention to their children, and do not even forbid taking risks with children, such as engaging in dangerous sports, or affirmatively injuring children in the form of punishment to teach them a lesson.[72] Even if we can define fetal neglect, we are left with the inherently sexist application of the law. On the surface at least, it would seem that the primary reason to attempt to make fetal abuse laws stricter than child abuse laws is that such laws can only apply to women. While this type of sex discrimination could survive current equal protection analysis, Sylvia Law has proposed a workable intermediate scrutiny framework for equal protection analysis that would, in fact, protect women and which coercive fetal neglect laws could not survive:

> [L]aws governing reproductive biology should be scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state interest.[73]

Society can never force a woman to take actions for the sake of her fetus without treating her as something less than a competent adult. Education, service provision, and enhanced opportunities seem most likely to improve the plight of fetuses and pregnant women alike.[74] But if we do not follow the road of equal opportunity and provision of reasonable health care, and if sophisticated methods to monitor the health of fetuses are developed, the rights of women could well become subordinate to the welfare of their fetuses. The result would be a return to oppressive gender-based discrimination. This threat would be real in a future society which, like that envisioned by Margaret Atwood in *The Handmaid's Tale*,[75] has a dwindling population and needs every birth possible to maintain itself.

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[72] *Id.*

[73] Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1009 (1984).

[74] ELIAS & ANNAS, *supra* note 33, at 262.

[75] M. ATWOOD, *supra* note 4.

CONCLUSION

Technology's leading historian, Lewis Mumford, has noted that scientific knowledge has a dark side that only social policy and law is powerful enough to attempt to avoid. When "not touched by a sense of values [scientific knowledge] works . . . toward a complete dehumanization of the social order." He continues:

> The plea that each of the sciences must be permitted to go its own way without control should be immediately rebutted by pointing out that they obviously need a little guidance when their applications in war and industry are so plainly disastrous . . . [76]

Reliance on the notion of "values" unfortunately can no longer serve in an age that has cheapened that term to mean, at best, a call for moral relativism, and at worst, a reflection of personal taste. Indeed, it is probably because of our current vacuous notion of values that they are touted as potential saviors from the many dehumanizing technologies devised by the minds of men. Values do nothing to slow the pace of "progress," and offer no threat to the technological imperative. Langdon Winner has persuasively argued that we need much more, something with meaning. He has suggested law, with its focus on human *rights*, as essential. Among other things, he has noted that Moses did not come down from the mountain with "Ten Values" and that the first ten amendments to the Constitution are not called the "Bill of Values."[77]

It is insufficient to note that "scientific and technological advance" has changed "the very conceptions of *human rights*" by transforming the type of lives we lead and changing our view of the human necessities to include things that have traditionally been considered luxuries.[78] We must incorporate technological change into a coherent view of humanness, and identify what rights humans should be able to lay claim to against their government. This will not be an easy task, and the Constitution, and its interpreter, the Court, are necessary, but not sufficient instruments to accomplish it. More than our notion of human rights is being transformed by science and technology: our very notion of what it means to be human is being changed. And this recognition must be followed by mean-

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[76] THE LEWIS MUMFORD READER (D. Miller ed. 1986).

[77] L. WINNER, THE WHALE AND THE REACTOR: A SEARCH FOR LIMITS IN AN AGE OF HIGH TECHNOLOGY 155-63 (1986). *See also* R. DRINAN, CRY OF THE OPPRESSED: THE HISTORY OF THE HUMAN RIGHTS REVOLUTION (1987).

[78] Holton, *The Advance of Science and Its Burdens* in Art and Science, 115 DAEDALUS 75 (No. 3 1986)

ingful dialogue aimed at distilling those characteristics of human life we find essential to give it meaning and worth.

It is inconceivable that all the potential changes in humanness, science and technology can bring us are "good" and are thus to be welcomed as part of the "good life." The advent of the nuclear age sufficiently rebuts this claim. But in medicine, a field which has always been seen as beneficent, we are less likely to be on guard against potentially dangerous threats to human well-being. The challenge to our Bill of Rights and its guardians is to appreciate that technology is more than a tool; that rights are more than values; and that only by safeguarding what we have come to accept as fundamental human *rights* are we likely to enjoy a future as *human* beings, with some coherent concept of what it means to live well on this planet. In any such discussion, the right to privacy is likely to be viewed as a central right of citizens, and as one especially critical to preserving our notions of the mother-child relationship and the personhood of pregnant women in a world of rapidly-expanding medical technology. Justice Blackmun's admonition in *Thornburgh* seems an appropriate note on which to conclude:

> Our cases long have recognized that the Constitution embodies a promise that a certain sphere of individual liberty will be kept largely beyond the reach of government . . . *That promise extends to women as well as to men.*[79]

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[79] Thornburgh v. ACOG, 476 U.S. 747 772 (1986)(emphasis added).