
Judicial Intervention in Pregnancy

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The authors postulate that judicial intervention in pregnancy is one of the means by which control is legally exercised on women's bodies and lives. Despite the recommendations of the Royal Commission on New Reproductive Technologies, which rejected proposals for intervention, and the fact that the movement to recognize fetal "rights" has been stronger in the United States than in Canada, the authors suggest that these proposals nevertheless pose a subsisting threat to women. Women's *Charter* rights, notably their right to equality, are especially compromised.

To illustrate the extent and nature of the threat, the authors canvass the proposals for intervention in pregnancy put forward in academic writings, certain express statutory provisions, and through the judicial interpretation of child welfare legislation. These proposals are all the more worrisome to the extent that they include the imposition of broad civil and criminal liability on women for their conduct during pregnancy.

The authors suggest that the difference between the position of the Royal Commission and of many courts on the one hand, and that of proponents of these interventions on the other hand, lies in their respective approaches to the debate over the recognition of fetal "rights", a recognition which would result in the creation of maternal-fetal conflict. In Canada, however, fetal rights have not been judicially recognized and any claims against a woman's body on behalf of a fetus would have to be based on the power of the state.

Les auteurs postulent que l'intervention judiciaire dans la grossesse est un moyen d'exercer un contrôle sur le corps et la vie des femmes. Malgré les recommandations de la Commission royale sur les nouvelles techniques de reproduction, qui a rejeté les propositions favorisant l'intervention, et malgré le fait que le mouvement pour la reconnaissance des "droits" du fœtus est plus puissant aux États-Unis qu'au Canada, les auteurs maintiennent que ces propositions posent une menace persistante pour les femmes. Les droits protégés par la *Charte*, notamment le droit à l'égalité, sont particulièrement compromis.

Afin d'illustrer l'étendue et la nature de ce danger, les auteurs passent en revue les propositions avancées dans des écrits académiques, certaines provisions législatives et par l'intermédiaire de l'interprétation juridique des lois protégeant les enfants. Ces propositions sont encore plus inquiétantes dans la mesure où elles comprennent l'imposition d'une large responsabilité civile et criminelle sur les femmes pour leur conduite pendant la grossesse.

Les auteurs suggèrent que la différence entre la position de la Commission royale et de plusieurs cours d'une part, et celle des partisans de ces interventions d'autre part, réside dans leur approche au débat portant sur la reconnaissance des "droits" du fœtus, une reconnaissance qui aboutirait à la création d'un conflit mère-fœtus. Au Canada, cependant, les droits du fœtus ne sont pas reconnus judiciairement et toute revendication sur le corps d'une femme de la part du fœtus devra s'appuyer sur le pouvoir étatique.

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Introduction

In December 1993, the Royal Commission on New Reproductive Technologies released its report, *Proceed With Care*.¹ The mandate of the Royal Commission was exceptionally broad and the resulting report suitably lengthy. It would not be difficult for even a significant topic to be lost in this two-tome collection. Chapter 30 of this report, entitled "Judicial Intervention in Pregnancy and Birth,"² may not receive the attention it deserves.³ This chapter deals with whether legal controls should dictate how pregnant women manage their pregnancies and deliver their children.⁴ In the United States, there have been many cases of women forced to undergo caesarean sections or subjected to criminal sanctions or civil liability for their conduct during pregnancy.⁵ At this time, the myriad forms of intervention into pregnancy attempted in Canada have been largely unsuccessful and, while the number of cases which have sanctioned prenatal invasions may appear small, the threat they pose to women is real, existing, and systematic. The issues raised by legal interventions into pregnancy have ominous and far-reaching consequences for all women and, for that reason, were considered as a separate topic by the Royal Commission.⁶

In some respects it is not obvious why a Royal Commission on new reproductive technologies would be asked to examine the extent to which legal controls should be placed on pregnant women. After all, some of the proposed controls bear no relation to the emergence or use of new technologies and certain calls to regulate pregnant women are in no way tied to recent scientific innovations. There are, however, important connections between reproductive technologies and proposals to control the conduct of

¹ Canada, Royal Commission on New Reproductive Technologies, *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services, 1993) [hereinafter *Report*].

² *Ibid.* at 949.

³ While the topic of judicial intervention in pregnancy was expressly included in the Commission's mandate, it began as a little-known component of a much larger project.

⁴ Attempts to regulate the conduct of women who carry their fetuses to term are best approached as only one of the many ways in which the state asserts an interest in human reproduction. Attempts to impose regulations during pregnancy illustrate how legal controls on women span the entire biological process of procreation, from sexual intercourse through to pregnancy management and birth.

⁵ We should not be overconfident that this is an American problem. Judicial intervention, legislation, mental health considerations, and academic literature in Canada all mirror the American position, albeit to a lesser extent. While American law differs in significant respects from Canadian law, the case studies, examples, and proposals from the United States are nevertheless relevant and provide part of the background and context of the Commission's deliberations.

⁶ Not all of the proposed interventions studied by the Commission are "judicial". The chapter considers claims that legislative standards should be changed to create new criminal penalties and tort liabilities for women's conduct which may harm the fetuses they carry; the introduction or use of child protection powers to apprehend a fetus thought to be in need of protection, both after birth and while *in utero*; and the forced medical treatment of the pregnant woman for the sake of the fetus, even over her express objections, and including such dramatic and physically violent interventions as mandatory caesarean sections.

pregnant women: both issues involve women's equality and physical integrity and raise questions about the relationship between pregnant women and the fetuses they carry. In addition, certain technologies may be used in ways which encourage or result in the judicial management of women's pregnancies.

An issue as fundamental as the legal treatment of pregnant women is likely to raise many difficult questions and thus reveal whatever divergent viewpoints and competing philosophies existed among the Commissioners. As the *Report* discloses, judicial intervention in pregnancy was one of the six topics on which a dissenting opinion was written. It is interesting to note, however, that the majority shows little uncertainty or equivocation. Its recommendations are found in a succinct chapter, which contains bright line standards designed to promote and protect the rights of women and to clearly outline what the law should be in the future. This issue also challenged the Commissioners in their use of the ethical principles established as part of their overall framework for decision-making and in the extent to which they incorporated the *Charter*⁷ rights of women into their analysis.

A primary purpose of this paper is to explain some of the background to the majority's conclusions. Following an outline of the Commissioners' three recommendations in Chapter 30, most of the remaining text focuses on an explanation and analysis of why the Commission so strongly rejected the imposition of medical treatment, the creation of new child welfare obligations, criminal law liabilities, and novel civil responsibilities as appropriate means of promoting the health of women and children. To properly assess its recommendations, we adopt a critical review of the origin, nature, magnitude, and animus of suggested interventions in pregnancy and explore the extent to which certain people are prepared to go to promote their view of fetal health. These proposed interventions are a threat to women in both Canada and in the United States, and illustrate how women's constitutional rights in reproduction-related matters may be subordinated or even ignored. We argue that the majority position is most consistent with the constitutional rights of women: it embraced a more holistic approach to the relationship between women and their fetuses by refusing to redefine certain forms of the woman's conduct as giving rise to a "maternal-fetal conflict".⁸ Therefore, the majority recognized that women are full rights-bearers who do not relinquish the general ability to determine the course of their medical treatment by the mere fact of their pregnancy. We thus provide an assessment of the equality implications of these proposals to explain why the Commission concluded that interventions in pregnancy are improper in a post-*Charter* Canada and should not be permitted.

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁸ Under this paradigm it is suggested that the construed conflict can only be resolved by recognizing "fetal rights" and creating new legal responsibilities for pregnant women. This paradigm has significant implications for all pregnancy-related issues and the legislative proposals derived under it would impact upon almost every aspect of a pregnant woman's life.

I. The Commission's Recommendations

The Commission made three recommendations on judicial intervention in pregnancy which give some indication of the range of issues involved. They read:

273. Judicial intervention in pregnancy and birth not be permissible. Specifically, the Commission recommends that

- a) medical treatment never be imposed upon a pregnant woman against her wishes;
- b) the criminal law, or any other law, never be used to confine or imprison a pregnant woman in the interests of her fetus;
- c) the conduct of a pregnant woman in relation to her fetus not be criminalized;
- d) child welfare or other legislation never be used to control a woman's behaviour during pregnancy or birth; and
- e) civil liability never be imposed upon a woman for harm done to her fetus during pregnancy.

274. Unwanted medical treatment and other interferences, or threatened interferences, with the physical autonomy of pregnant women be recognized explicitly under the *Criminal Code* as criminal assault.

275. All provinces/territories ensure that they have in place

- a) information and education programs directed to pregnant women so that they do not inadvertently put a fetus at risk;
- b) outreach and culturally appropriate support services for pregnant women and young women in potentially vulnerable groups; and
- c) counselling, rehabilitation, outreach, and support services designed specifically to meet the needs of pregnant women with drug/alcohol addictions.⁹

These conclusions reject state-sanctioned interventions in pregnancy and birth, and recognize the need to ensure support for women and their fetuses without interfering with the equality interests and physical autonomy of pregnant women. In fact, recommendation 275 received the support of all Commissioners.

II. The Coerced Medical Treatment of Pregnant Women and "Child" Abuse

As recommendation 273 provides, the majority of the Commissioners expressly rejected claims to assimilate the position of an unborn fetus to that of a born child and refused to create and impose special legal obligations on pregnant women. They stated that medical treatment should "never" be imposed upon a pregnant woman against her wishes and that child welfare or other legislation should "never" be used to control a woman's behaviour during pregnancy or birth.

⁹ Report, *supra* note 1 at 964-65.

In order to understand the Commission's position, the origin, nature, and extent of legal restrictions on the conduct of pregnant women which have been proposed, and in some cases implemented in Canada, must be explored. Legal restrictions have been outlined in academic writing, expressly delineated in certain provincial child welfare legislation and indirectly recognized by some courts which have read existing child welfare legislation to support the mandatory medical treatment of pregnant women. These restrictions seek to control the conduct of women during their pregnancies and therefore *directly* affect the physical integrity of pregnant women. They are premised on the view that the threatened damage to the fetus is of sufficient severity to be prevented by prescriptive means, rather than subsequently redressed through punishment or compensation. These restrictions imply that, after assessing the balance of convenience and weighing rights and interests, the claim of the fetus to the right to certain conduct or treatment is sufficiently strong to justify curtailment of the woman's freedoms.

A. Academic Writing

Perhaps the most common argument for legal restrictions is that the government's wide powers concerning child abuse both can, and should, be invoked to prevent "prenatal abuse". The combined force of the state's *parens patriae* jurisdiction and its police power is cited to support an extensive and invasive array of legal controls. The fetus is labelled and treated as an "unborn child" and its needs, vulnerabilities, and susceptibilities are equated with those of existing children.

In Canada, Dr. Keyserlingk is a leading proponent of such a position; however, his analysis and the scope and content of the sweeping state interventions he proposes represent an extreme position within the Canadian literature. He suggests that "[i]n most respects but one, the transfer from the protection of the womb to the protection of the crib and nursery, there is unbroken continuity between the unborn and the child."¹⁰ He argues that the general legal obligations which parents owe to their children should be imposed, with equal rigour but with necessary modifications, upon pregnant women and the fetuses they carry. In employing the child abuse paradigm, he proposes an incredible number of wide-ranging restraints on pregnant women.¹¹

Addiction to drugs, alcohol, or cigarettes, inadequate maternal diet, exposure to infectious disease, and the failure to have adequate prenatal medical checkups are cited as examples of conduct which could injure the fetus and therefore requires some form

¹⁰ E.W. Keyserlingk, "The Unborn Child's Right to Prenatal Care (Part I)" (1982) 3 Health L. Can. 10 at 18 [hereinafter "Unborn (Part I)"].

¹¹ *Ibid.*; E.W. Keyserlingk, "The Unborn Child's Right to Prenatal Care (Part II)" (1982) 3 Health L. Can. 31 [hereinafter "Unborn (Part II)"]; E.W. Keyserlingk, *The Unborn Child's Right to Prenatal Care: A Comparative Law Perspective* (Montreal: Quebec Research Center of Private and Comparative Law, 1983) [hereinafter *The Unborn Child's Right*]. The arguments in both publications are essentially the same.

of state intervention.¹² In order to enforce the obligations he creates, Keyserlingk argues that provincial legislation, such as the Quebec *Youth Protection Act*,¹³ should apply, by analogy, to protect "unborn children".¹⁴

If there is the appearance of neglect, Keyserlingk supports placing a "homemaker" in the home of the pregnant woman to supervise her conduct.¹⁵ He also supports the following court-ordered "prenatal protective mechanisms" if the fetus is found to be "in need of protection": injunctions against certain acts or decisions of the pregnant woman; appointment of guardians for the fetus; granting legal custody to a child welfare service to officially supervise the woman's conduct; and removing an abusive husband from proximity to his wife if his conduct poses a serious risk to the unborn child.¹⁶ Furthermore, as part of the fetus' alleged right to be born healthy and to receive "prenatal care", state powers should be used to regulate the medical care of pregnant women, outlining which procedures could be lawfully undertaken or imposed.¹⁷

According to this proposal, a woman could be forced to submit to prenatal care when a procedure may be necessary for the health or survival of the fetus and it poses a relatively small health risk to her.¹⁸ To accept this principle would not merely create a new obligation for pregnant women, but it would also introduce a unique duty to rescue owed by pregnant women to the fetuses they carry.¹⁹ Keyserlingk also proposes

¹² "Unborn (Part I)", *ibid.* at 16.

¹³ R.S.Q. 1977, c. P-34, para. 1(f).

¹⁴ "Unborn (Part II)", *supra* note 11 at 33.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ See also J.A. Robertson, "Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth" (1983) 69 Virginia L. Rev. 405 at 444 [hereinafter "Procreative Liberty"]. But see also J. Gallagher, "Prenatal Invasions & Interventions: What's Wrong With Fetal Rights" (1987) 10 Harv. Women's L.J. 9 at 13-14 [hereinafter "Prenatal Invasions"], who argues that the woman's decision must be honoured in all cases because "[t]he individual and societal costs of placing the power of decision making anywhere but with the pregnant woman are all simply too great."

¹⁹ These obligations are unique because they force women to assume medical risks and forfeit their legal autonomy in a manner not required of competent men or non-pregnant women. They are also unique because they involve an obligation to rescue which places positive obligations on the woman to act, and in a way so as to benefit her fetus. This is inconsistent with and foreign to the Anglo-American legal tradition that one need not act to save another. Even though the principle against rescue is being eroded and has been cogently criticized, other serious problems with forced treatment remain (see E.J. Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale L.J. 247, who argues that there should be a duty to make an "easy" rescue. See also the judgment of Justice Wilson in *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, 51 D.L.R. (4th) 321, where she questions the continued relevance of the distinction between misfeasance and nonfeasance). It is perhaps best to see the issue of duty from the equality standpoint. For example, in the American Case of *McFall v. Shimp*, 127 Pittsburgh Leg. J. 14 (1978), the Court refused to order one cousin to "donate" the 21 ounces of bone marrow necessary to double his cousin's chances of surviving a plastic anaemia because legal tradition did not allow one person's body to be invaded or appropriated for the use of another. There is therefore an equality argument that the rights of preg-

that a woman could be forced to take certain medication, undergo blood transfusions, and suffer surgical intervention. Another author even suggests that an anorexic woman could be force-fed if a danger to the fetus was clearly established.²⁰ The line of reasoning advanced by Keyserlingk is also invoked to support the imposition of court-ordered caesarean sections,²¹ even though they involve major surgery and pose a substantial health risk to the woman, one which greatly exceeds the risk of vaginal birth.²²

Although Keyserlingk makes some notional concession to women's rights, little weight is actually given to the woman's interests. His interventionist views are not widely shared, however, and most work in this area is highly critical of his approach because he does not fully appreciate nor adequately discuss the far-reaching and radical implications of his proposals.²³ A chief complaint is that he is, stereotypically and improperly, treating women as nothing more than fetal "incubators" or simply as a means to an end.²⁴ As a result, his proposals have met with only limited statutory support and sparse, if not marginal, judicial endorsement. Nevertheless, this position, epitomized in Canada by Keyserlingk's writing, is a concrete and effective warning of the dire implications for women if the legal status of the fetus and the child are assimilated in the

nant women would be selectively and disparately burdened by legal obligations to submit to major and risky surgery to benefit their fetuses. See N.K. Rhoden, "The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans" (1986) 74 California L. Rev. 1951 at 1969 [hereinafter "Judge in Delivery Room"], who comments that to "compel major surgery for the fetus's sake is an imposition unparalleled in American law, and unjustified according to equal protection doctrine." See also "Prenatal Invasions", *ibid.* at 24-25, where Gallagher argues that a woman cannot be controlled for the sake of her fetus. In addition, even if a duty to rescue is imposed, it is unlikely to require the rescuer to submit to medical treatment as invasive and risky as a caesarean section.

²⁰ The same author also posits that pregnant women at risk should be liable for a failure to undergo prenatal tests and foresees mandatory screening of the fetus backed up with criminal penalties ("Procreative Liberty", *supra* note 18 at 450).

²¹ The forced medical treatment of pregnant women is often equated, although improperly, with cases where courts have allowed medical care to children over parental objection (see J.E.B. Myers, "Abuse and Neglect of the Unborn: Can the State Intervene?" (1984) 23 Duquesne L. Rev. 1 at 32ff [hereinafter "Abuse and Neglect"]).

²² D.B. Petitti, "Maternal Morality and Morbidity in Cesarean Section" (1985) 28 Clinical Obstetrics & Gynecology 763, describes the risks associated with caesarean sections:

Cesarean section is a major operative procedure. As such, it is associated with injuries that do not occur in vaginal deliveries. The list of these injuries is long and includes injuries to the ureter, bladder, and bowel; injuries to blood vessels; and lacerations of the cervix, vagina, and broad ligaments. Cesarean section also increases the risk of postpartum hemorrhage, pulmonary embolism, paralytic ileus, and endometritis, urinary tract infections, and other infections. Hysterectomy as a result of hemorrhage or infection occurs after cesarean section, and postcesarean infection may compromise future fertility (*ibid.* at 765, as cited by I. Grant, "Foreed Obstetrical Intervention: A Charter Analysis" (1989) 39 U.T.L.J. 217 at note 74, p. 252).

²³ See e.g. W.W. Watters *et al.*, "Response To Edward W. Keyserlingk's Article: The Unborn Child's Right to Prenatal Care" (1983) 4 Health L. Can. 32; E.W. Keyserlingk, "Clarifying The Right To Prenatal Care: A Reply To A Response" (1983) 4 Health L. Can. 35 [hereinafter "Clarifying the Right"].

²⁴ Watters *et al.*, *ibid.* at 32.

manner he advocates. It is precisely this form of intervention which the Commission expressly rejects in recommendation 273.

B. Express Statutory Provisions

Certain laws in Canada contain provisions which conflict with the Commission's recommendations. Express provisions which control the conduct of pregnant women have been enacted in New Brunswick²⁵ and in the Yukon.²⁶ The New Brunswick *Family Services Act* is the only provincial child welfare law which expressly defines "child" to include an "unborn child".²⁷ While there is some ambiguity in the term "unborn child", it would appear that the legislative intention was to confer the statutory rights of the child on the fetus.²⁸ Theoretically, this definition allows the state to use its wide powers to intervene in the lives of children and parents in favour of the fetus and thus to control the conduct of pregnant women.²⁹ While there is only one reported case under the New Brunswick child welfare legislation, the province's express statutory jurisdiction over fetuses may have been a factor in unreported cases. In the reported case, the Minister sought a six month supervisory order with respect to the respondent and her fetus as well as guardianship of the child.³⁰ Justice Boisvert granted the order on the basis of what he believed was the pregnant woman's "irresponsible behaviour".³¹

²⁵ *Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1 [hereinafter *Family Services Act*].

²⁶ *Children's Act*, R.S.Y.T. 1986, c. 22, s. 133.

²⁷ *Family Services Act*, *supra* note 25, s. 1:

"child" means a person actually or apparently under the age of majority, unless otherwise specified or prescribed in this Act or the regulations, and includes

- (a) an unborn child;
- (b) a stillborn child; ...

"Child" has been most frequently defined as a person under the age of 18 years (see *Child Welfare Act*, S.A. 1984, c. C-8.1, para. 1(1)(d); *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 3(1); *Children's Act*, *ibid.*, s. 104; *Youth Protection Act*, *supra* note 13).

²⁸ It is interesting to note that when the definition of child was changed in 1980, the Hansard Debates reveal that this amendment was never discussed or explained by the Tory Minister or questioned by any member of the Liberal opposition (see *Journal of Debates of the Legislative Assembly of the Province of New Brunswick*, vol. xv (10 July 1980) at 6588ff).

²⁹ In the *Family Services Act*, if the Minister has received information from any person that a child has been neglected or abandoned, he or she can investigate the situation and take the necessary steps, such as: ordering the pregnant woman to undergo fetal surgery or a caesarean section; placing the child under protective care; or arranging for medical examination and treatment of the child.

³⁰ See *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) v. A.D.* (1990), 109 N.B.R. (2d) 192, 273 A.P.R. 192 (Q.B.) [hereinafter *A.D.* cited to N.B.R.].

³¹ *Ibid.* The court noted that several custody/supervisory orders had been made in relation to the woman's other "born" children, and that she had no "normal" mother-child bond with her children (for example, she did not exhibit a "joyful reaction" when she saw them after a separation (*ibid.* at 194-95)). The woman was ordered to be attended to by a public health nurse, to consult a physician on a regular basis, to meet with a social worker to identify her plans for her unborn child, and to give birth at a hospital (*ibid.* at 197).

Boisvert J. noted, however: "I must specify that the respondent has not argued that there has been a violation of the *Canadian Charter of Rights and Freedoms*."³² This is an interesting and perhaps fatal omission because one of the main reasons for which the Commission adopted recommendation 273 was to ensure that the *Charter* rights of women were recognized and given full effect. Specifically, the Royal Commission stated:

Like other women and men, pregnant women therefore have a constitutional right to refuse unwanted medical treatment or control that threatens their bodily integrity or interferes with their ability to make independent decisions about their medical care.³³

The provision in the Yukon *Children's Act* is far more limited in scope than is the one in the New Brunswick Act. It provides narrowly prescribed powers to the Director of Children, which can only be exercised if a pregnant woman has a substance abuse problem. The provision reads:

134(1) Where the Director has reasonable and probable grounds to believe and does believe that a foetus is being subjected to a serious risk of suffering from foetal alcohol syndrome or other congenital injury attributable to the pregnant woman subjecting herself during pregnancy to addictive or intoxicating substances, the Director may apply to a judge for an order requiring the woman to participate in such reasonable supervision or counselling as the order specifies in respect of her use of addictive or intoxicating substances.³⁴

The powers of the Director are limited by the requirement of reasonable and probable grounds for the operative belief and the necessity of going before the court to obtain an order. These limits may reflect the government's professed goal of enacting legislation which was "as close as we can possibly get to protecting the right of the fetus without infringing on the right of the individual who is carrying the fetus."³⁵ In light of *Charter* jurisprudence and the Commission's analysis, it is highly debatable whether this provision achieves that goal.³⁶

³² *Ibid.* at 194.

³³ *Report, supra* note 1 at 955.

³⁴ S.Y. 1984, c. 2, s. 134. This section generated very little discussion or debate when it was introduced in 1984. Supporters claimed that its aim was to prevent the "prenatal abuse of the unborn child" but argued that its purpose was educational rather than coercive (Yukon Legislative Assembly (16 April 1984) at 269).

³⁵ Yukon Legislative Assembly, *ibid.*

³⁶ See *Joe v. Yukon Territories (Director of Family and Children's Services)* (1986), 5 B.C.L.R. (2d) 267 (Y.T.S.C.), a preliminary but inconclusive case. Justice Maddison held that subsection 134(1) violated the woman's right to life, liberty, and security of the person under section 7 of the *Charter* because there was no accepted definition of fetal alcohol syndrome. The Court held that it would have ordered a new trial solely on the grounds that the trial judge took judicial notice of what fetal alcohol syndrome was and refused to hear expert evidence. Since the Crown had failed to raise section 1 of the *Charter* at the trial, Justice Maddison held that failure to raise it should result in the Crown losing the appeal. Although this judgement is not entirely satisfactory in that it does not

C. *Judicial Interpretation of Child Protection Legislation for the Born Alive Child*

In Canada, the claim that child protection provisions implicitly include the fetus has arisen in two factually and legally diverse circumstances. In the first type of case, the court is asked to consider evidence of what happened to the fetus as proof that the child, once born, was in need of the state's protection. This type of case will be considered in this section. The second type of case involves the attempt to use child protection provisions to coerce the medical treatment of pregnant women, and will be discussed in the next section.

The first reported Canadian case endorsing an inquiry into "prenatal abuse" involved the apprehension of a four-day-old baby born with fetal alcohol syndrome. The judge in *Re Children's Aid Society for the District of Kenora and J.L.*³⁷ held that what happened to the fetus was relevant evidence in a post-birth wardship hearing. He stated:

[T]he child was a child in need of protection prior to birth, at birth and on [the date of apprehension] ... by reason of the physical abuse of the child by the mother in her excessive consumption of alcohol during pregnancy, which conduct endangered the health of J.L., and further, by her neglecting or refusing to obtain proper remedial care or treatment for the child's health, when it was recommended by a legally qualified practitioner.³⁸

Relying on *Kenora* as authority, the British Columbia Supreme Court subsequently held that a drug-addicted child was born abused in *Superintendent of Family and Child Service v. M.(B.)*³⁹ The Court stated that a child can qualify as abused during the gesta-

conclude whether such legislation can or cannot be saved by section 1, it outlines that legislation imposing this onus on women can be held to offend section 7 of the *Charter*.

³⁷ (1981), 134 D.L.R. (3d) 249, [1982] W.D.F.L. 390 (Ont. Prov. Ct.) [hereinafter *Kenora* cited to D.L.R.]. The child was found to be in need of protection and therefore made a ward of the court.

³⁸ *Ibid.* at 252. This statement alone shows a lack of understanding on the part of the judiciary in holding that a woman who is addicted to alcohol, which is often classified as a disease, had *wilfully* inflicted this syndrome upon her child. It operates to impute a level of moral culpability that the woman probably did not have. Judge Bradley found that there had been prenatal abuse and relied on the views of Judge David Steinberg who argues that language in the *Child Welfare Act*, S.O. 1978, c. 85, para. 6(2)(g), could be construed to apply to a child *en ventre sa mère* (D.M. Steinberg, *Family Law in the Family Courts*, vol. 1, 2d ed. (Toronto: Carswell, 1981) at 112).

³⁹ (1982), 28 R.F.L. (2d) 278, (*sub nom. Re Superintendent of Family and Child Services and MacDonald*) 135 D.L.R. (3d) 330 (B.C.S.C.) [hereinafter *M.(B.)*]. The mother, Ms. MacDonald, was undergoing methadone maintenance therapy, when, halfway through her pregnancy, she consulted a physician who told her that it was too late in the pregnancy to discontinue the treatment without injury to the fetus. The child was born with an addiction to methadone. At trial, Judge Collings found that the child was not in need of protection as it had not yet left the hospital. It is interesting to note that in this case, Ms. MacDonald was a member of the First Nations. This is significant in the face of the American study which reveals the high incidence of judicial intervention in the cases of minority women. It is also noteworthy that in this case and the prior case, *Kenora*, the

tion period and reversed the trial judge's holding that the child must first be placed with its parents after birth to meet the statutory test of being in need of protection.⁴⁰ Despite the finding that the child was in need of protection, the child was allowed to remain with its mother, subject to strict conditions of supervision by the provincial authorities.⁴¹ The Court of Appeal later upheld another order made by Proudfoot J. granting permanent custody to the Superintendent of Family and Child Services following the apprehension of the child from its mother.

There is a risk that the significance of prenatal treatment could be exaggerated, because its relevance was expressly addressed in the cases. Placed in its proper perspective, it becomes clear that the woman's conduct during pregnancy was not a primary or determinative consideration.⁴² In both cases, the court canvassed, evaluated, and attached great weight to the child's living conditions after birth and any actual threat they could pose to the child's safety.⁴³

It is factually and legally significant that both these cases involved applications to apprehend a child who was already born. In both cases, the woman's substance abuse during pregnancy was used as evidence of her past abuse of the fetus, a factor in determining the child's existing need for protection and proof of anticipated deprivation or prospective neglect. Even though there was a real risk the probative value ascribed to the pregnant woman's dependency would be exaggerated,⁴⁴ and severe legal consequences were attached to her activities, in both cases the court did not directly mandate her conduct. This first type of child protection case does not go beyond the use of established legal principles, which allow a born child to assert certain property or tort law claims, in a different area of the law.⁴⁵ While these cases may appear to greatly extend

courts commented that the relationships between the parents were marked by male violence. See also another pregnancy case, *Ackerman v. McGoldrick*, [1990] B.C.J. No. 2832 (Prov. Ct.) (QL).

⁴⁰ However, prenatal conduct and anticipated deprivation were not the only factors in the decision. In fact, the Court spent a lot of time discussing the threat to a drug-addicted baby from living with a stepfather with little patience and his own drug addiction (*M.(B.)*, *ibid.* at 285-86). It is interesting to note that the Court employed the standard of the best interest of the child and not the more exacting one of a child in need of protection. The judge explained the choice of this standard because, where there is the risk of injury, a "much lower test would be applicable" (*ibid.* at 287). The best interest standard was also used in *Kenora*.

⁴¹ Supervision included homemaker services seven days a week; daily visits by a social worker; and visits from the community health nurse three times a week for a six month period (*ibid.*).

⁴² In *Kenora*, *supra* note 37 at 252, the Court stated that "[t]he finding with respect to the child being a child in need of protection prior to birth is not essential to the finding that the child was in need of protection at the time of apprehension."

⁴³ See *ibid.* See also *Re Rabbitt and Child Welfare Branch, Department of Social Services of Alberta* (1981), 11 A.C.W.S. (2d) 228 (Alta. Q.B.); *M.(B.)*, *supra* note 39 at 285-86.

⁴⁴ See "Judge in Delivery Room", *supra* note 19 at note 75, p. 1962, where Rhoden argues that maternal substance abuse "cannot be probative of anything except the fact of addiction." She says there is no evidence that addiction alone renders a woman an unfit parent.

⁴⁵ For an overview, see K.M. Weiler & K. Catton, "The Unborn Child in Canadian Law" (1976) 14 Osgoode Hall L.J. 643. The rule in property law was based on the parents' presumed desire to provide for children conceived but not yet born at the time of their death. The tort law principle,

existing jurisprudence, the courts' conclusions really did nothing more than implement the "born alive rule" and acknowledge that the fetus had an *in utero* existence when it was called upon to determine if a child, once born, was in need of protection.

D. The Coerced Medical Treatment of Pregnant Women

In the second type of case, however, child welfare authorities have tried to use these same powers to apprehend an unborn fetus.⁴⁶ This type of case raises different issues because any apprehension order made in relation to the fetus directly affects the pregnant woman.

The first case to extend child protection legislation to an unborn fetus occurred in Ontario.⁴⁷ The first application to apprehend the unborn fetus was based on the mother's refusal to submit to a full medical examination to determine whether the fetus was at risk.⁴⁸ Kirkland J. invoked the *Kenora* case to support his conclusion that, at least in theory, a child "en ventre sa mère" could be found to be in need of protection. On the facts before him, he nevertheless concluded that the evidence was insufficient to demonstrate that this fetus was in need of protection at the time of the hearing.

Two days later, in *C.A.S., Belleville v. T.(L.)*,⁴⁹ the provincial authorities made a second application, introducing new evidence and joining a claim for custody of the fetus with a mental health warrant against the pregnant woman. The same judge concluded that the fetus was in need of protection because there was "a possibility that this child will not be born alive or that the child, although born alive, would be born with certain health defects."⁵⁰ He made the fetus a ward of the state for a period of three months⁵¹ and he also granted the application requesting an involuntary assessment under the provincial *Mental Health Act*.⁵² He found reasonable cause to believe that the woman was suffering from a mental disorder and that her conduct was likely to result in serious bodily harm to herself or to "others". The judge was prepared to include a fetus within the term "other" under the *Mental Health Act* because, in a previous para-

which looked to the period prior to birth to allow a cause of action for prenatal injuries, sought to compensate those born alive who suffered loss.

⁴⁶ In Canada, attempts to mandate the medical treatment of pregnant women have been treated under the rubric of child protection legislation, whereas in the United States, coerced medical treatment is usually effected by the use of court orders.

⁴⁷ *Re Children's Aid Society of Belleville v. Unborn Child of L.T. and G.K.* (30 March 1987), Belleville 10/87 (Ont. Prov. Ct.).

⁴⁸ S. Tateishi, "Apprehending the Fetus *En Ventre Sa Mère*: A Study in Judicial Sleight of Hand" (1989) 53 Sask. L. Rev. 113 at 121.

⁴⁹ (1987), 59 O.R. (2d) 204, 7 R.F.L. (3d) 191 (Prov. Ct.) [hereinafter *Belleville* cited to R.F.L.].

⁵⁰ *Ibid.* at 192. The judge did not accept the argument that these problems were "economically based". He based this finding on the medical evidence of a vaginal discharge and abdominal pain (which she denied), her "erratic" conduct (she slept in a garage one night and sat in a puddle), and because her refusal to seek, maintain, or accept medical assistance was not "conducive to the safe and healthy delivery of the child" (*ibid.* at 193).

⁵¹ *Ibid.* at 195-96.

⁵² R.S.O. 1980, c. 262, s. 10(1), as am. by S.O. 1986, c. 64, para. 33(a).

graph, he included a fetus within the term "child" under the province's child protection legislation.⁵³

However, not all courts have taken the position that it is appropriate to use child welfare legislation to apprehend an unborn fetus. *Re A. (in utero)*⁵⁴ involved an application for custody of a fetus and for an order that the pregnant woman receive prenatal care. The Children's Aid Society proceeded by an *ex parte* motion and used the pregnant woman's past parenting inadequacies and troubles with the criminal law as evidence. Judge Steinberg nevertheless concluded that there was nothing within Ontario's *Act Respecting the Protection and Well-Being of Children and their Families*⁵⁵ which gave the fetus a right to protection, and that any state interest in protecting the fetus should be expressed by the legislature rather than by the judiciary.⁵⁶

In a subsequent case, the child care authorities went even further when they sought a prebirth apprehension order to require a pregnant woman to deliver by caesarean section. The case of *Re Baby R*⁵⁷ merits close analysis because it is the only such reported case in Canada.⁵⁸ The case is typical of the factual and legal situations which may arise in the pregnancy and prebirth context and illustrates the numerous dangerous and disturbing features of this latest attempt to manufacture pro-fetal jurisprudence.

⁵³ A similar conclusion was reached in *In the Matter of the Family Relations Act; R.S.B.C. 1979 Chapter 121 and amendments*, [1994] B.C.J. No. 485 (Prov. Ct.) (QL), decided under the *British Columbia Family Relations Act*, R.S.B.C. 1979, c. 121. See also *Re Unborn Child "H"* (1979), 38 N.S.R. (2d) 432, (*sub nom. Re Simms and H*) 106 D.L.R. (3d) 435 (Fam. Ct.), where the Court allowed an anti-abortion crusader to be appointed a guardian *ad litem* for a fetus because use of the term "child" in the province's *Children's Services Act*, S.N.S. 1976, c. 8, was interpreted to include a fetus. In referring to this case, B.M. Dickens, "Artificial Reproduction and Child Custody" (1987) 66 Can. Bar Rev. 49 at 57, notes that "[t]here are many legal obstacles to confident acceptance" of this interpretation.

⁵⁴ (1990), 28 R.F.L. (3d) 288, 72 D.L.R. (4th) 722 (Ont. Unif. Fam. Ct.).

⁵⁵ S.O. 1984, c. 55.

⁵⁶ See, however, J. Oliver, "State Intervention During Pregnancy and Childbirth: The Newest Challenge to Women's Reproductive Freedom" (1993-94) 2:3 Health L. Rev. 3 at 7, where she states: "These cases illustrate the apparent readiness of Canadian courts to make orders compelling pregnant women to undergo treatment and surgery for the benefit of the fetus if provinces amend their child welfare statutes to include the protection of a fetus." Any such state action would be obliged to conform to women's *Charter* rights.

⁵⁷ (1988), 15 R.F.L. (3d) 225, 53 D.L.R. (4th) 69 (B.C.S.C.) [hereinafter *Baby R* cited to R.F.L.]. There are two annotations of this case in (1987) 15 R.F.L. (3d): D. Majury at 225 and D.W. Phillips at 228. See also T.B. Dawson, "*Re Baby R*: A Comment on Fetal Apprehension" (1990) 4 C.J.W.L. 265 [hereinafter "Fetal Apprehension"].

⁵⁸ The nature of coerced obstetrical interventions makes it difficult to accurately estimate the true incidence of their occurrence. Often they are not reported and sometimes merely the threat of proceedings forces the woman to change her mind. *Children Aid Society of Niagara Region v. W. (C.A.)*, [1987] O.J. No. 1838 (Prov. Ct.) (QL), is an example which highlights the coercive potential of threats.

In *Re Baby R*, the province's Superintendent of Children issued an apprehension order which simultaneously told the doctor to do what was medically necessary for the fetus and expressly stated that there was no authorization for any medical procedure to be performed on the pregnant woman. The prebirth apprehension order was never used because the woman "consented" to the surgery at the door of the operating room and before she was apprised of the apprehension order. Nonetheless, the order had tremendous legal significance as it was used to take physical custody of the child at birth. As a result, the mother was never given custody and, in subsequent proceedings, the child was made a permanent ward of the state.

Justice MacDonnell of the British Columbia Supreme Court held that a fetus was not a "child" within the terms of the *Family and Child Service Act*⁵⁹ and that the superintendent therefore had no jurisdiction to make a prebirth apprehension order.⁶⁰ The question of statutory interpretation was thus placed into its broader factual and legal context. The judge noted that the relevant legislation gave the superintendent "awesome" powers, which did not exist at common law and which could only be granted by statute. He stated that the apprehension of a live child was a "drastic step" and implied that the apprehension of a fetus would therefore be even more exceptional.⁶¹ He noted that legislation which restricts the rights of citizens must receive a strict interpretation and concluded:

For the apprehension of a child to be effective there must be a measure of control over the body of the mother. Should it be lawful in this case to apprehend an unborn child hours before birth, then it would logically follow that an apprehension could take place a month or more before term. Such powers to interfere with the rights of women, if granted and if lawful, must be done by specific legislation and anything less will not do.⁶²

⁵⁹ S.B.C. 1980, c. 11, s. 1.

⁶⁰ He construed the term "child" by reference to the Act as a whole and, in light of its history and purpose, compared it with a provision in another Act which expressly stated that a "child" includes a child not yet born, considered the criminal law definition of a "human being", and relied on Canadian and English cases which establish that legal rights vest at birth (*Baby R*, *supra* note 57 at 234ff). He relied on *K. v. K.* (1933), 41 Man. R. 504, [1933] 3 W.W.R. 351 (K.B.), where the Court awarded custody of a fetus to the mother, but only if the fetus was subsequently born alive. See also *Solowan v. Solowan*, [1953] 8 W.W.R. 288 (Alta. S.C.); *Dehler v. Ottawa Civic Hospital* (1979), 25 O.R. (2d) 748, 101 D.L.R. (3d) 686 (H.C.J.), *aff'd* (1980), 29 O.R. (2d) 677, 117 D.L.R. (3d) 512 (C.A.); *Medhurst v. Medhurst* (1984), 46 O.R. (2d) 263, 38 R.F.L. (2d) 225 (H.C.J.). MacDonnell J. also cited two English cases: *Paton v. British Pregnancy Advisory Service* (1978), [1979] Q.B. 276, [1978] 2 All E.R. 987; and the remarkably similar case of *Re F (in utero)*, [1988] 2 W.L.R. 1288, [1988] 2 All E.R. 193 (C.A.).

⁶¹ *Baby R*, *ibid.* at 233. For an articulation of this argument see J. Kahn, "Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus — Is this a Mother's Crime?" (1987) 53 Brooklyn L.R. 807 at 840, who argues that "where a pregnant woman's actions are unlawful and undeniably detrimental to her fetus [drug and alcohol addiction], the state may regulate a woman's pregnancy only to the extent of taking temporary custody of the *postnatal* child."

⁶² *Baby R*, *ibid.* at 237. The reference to "if lawful" raises questions of whether even an express grant would be constitutional.

Therefore, the authorities could not take custody of an unborn fetus, even one in the process of being born.⁶³ The case did not, however, deal with the constitutionality of statutes authorizing prebirth apprehensions of fetuses.

In *Re Baby R*, Justice MacDonnell also expressly recognized that prebirth apprehensions directly and fundamentally involve women and women's rights.⁶⁴ His analysis is to be preferred to the lower court judge's rather incredible claim that there was no need to determine whether this apprehension order violated the rights of the woman because "[t]he purpose of the apprehension was to ensure proper medical attention for the baby."⁶⁵ Failing to appreciate that pregnant women are the direct targets of prebirth apprehensions is as absurd as the Superintendent's order authorizing a caesarean section for the sake of the fetus yet denying that the order imposed surgery on an unconsenting patient.⁶⁶ The contradictory components of this double-barrelled order clearly illustrate the dangers of treating the unborn fetus as a separate patient with independent legal rights. The biological reality of complete fetal dependence cannot be neutralized

⁶³ There are, however, American authors who believe that child abuse statutes should be applied to the unborn, even if the legislators did not so intend (see e.g. "Abuse and Neglect", *supra* note 21 at 26; J.A. Robertson, "The Right to Procreate and In Utero Fetal Therapy" (1982) 3 J. Legal Medicine 333 at 357 [hereinafter "The Right to Procreate"]). Cases where American courts have held child abuse statutes to apply to the unborn include: *Department of Social Services v. Felicia B.*, 543 N.Y.S.2d 637 (Fam. Ct. 1989); *Re Ruiz*, 500 N.E.2d 935 (Ohio Ct. C.P. 1986); *Re Smith*, 492 N.Y.S.2d 331 (Fam. Ct. 1985). *Contra: Welch v. Kentucky*, No. 90-CA-1189-MR (Ky. Ct. App., 7 February 1992) [hereinafter *Welch*]; *State v. Gray*, 584 N.E.2d 710 (Ohio Sup. Ct. 1992) [hereinafter *Gray*].

⁶⁴ For the argument that the fetus is protected at the expense of the woman, see D.E. Johnsen, "The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection" (1986) 95 Yale L.J. 559 [hereinafter "Creation of Fetal Rights"]. She claims that granting rights to fetuses infringes women's constitutional rights to equality, conflicts with women's autonomy, and "reinforces the tradition of disadvantaging women on the basis of their reproductive capacity" (*ibid.* at 624). Other authors also reject the forced medical treatment of pregnant women (see e.g. "Prenatal Invasions", *supra* note 18; Rhoden, *supra* note 19; M. Jackman, "The Canadian Charter as a Barrier to Unwanted Medical Treatment of Pregnant Women in the Interests of the Foetus" (1993) 14 Health L. Can. 49; J.E. Hanigsberg, "Power and Procreation: State Interference in Pregnancy" (1991) 23 Ottawa L. Rev. 35; T.B. Dawson, "A Feminist Response to 'Unborn Child Abuse: Contemporary Legal Solution'" (1991) 9:2 Can. J. Fam. L. 157 [hereinafter "A Feminist Response"]; Grant, *supra* note 22). For the other authors who accept the idea in principle, the debate concerns the appropriate circumstances for state intervention. Most such authors consider the same list of factors but evaluate them differently (see e.g. A.M. Noble-Allgire, "Court-Ordered Cesarean Sections: A Judicial Standard for Resolving the Conflict Between Fetal Interests and Maternal Rights" (1989) 10 J. Legal Medicine 211). See also P.L. Hallisey, "The Fetal Patient and the Unwilling Mother: A Standard for Judicial Intervention" (1982-83) 14 Pacific L.J. 1065, who proposes a standard which grants the mother specific authority to refuse recommended fetal therapy that would prolong or salvage a life of low quality, or that would provide anything less than a "clear benefit" to the fetus. See also "Clarifying the Right", *supra* note 23 at 36ff.

⁶⁵ *Re R* (1987), 9 R.F.L. (3d) 415 at 420 (B.C. Prov. Ct.).

⁶⁶ At least in some of the American cases, there exists the recognition that the medical treatment is done to the mother (see *Jefferson v. Griffin Spalding County Hospital*, 274 S.E.2d 457 (Ga. Sup. Ct. 1981) [hereinafter *Jefferson*]).

through abstraction nor ignored by the use of a clever verbal formulation.

Many factors in this case support the wisdom of both the British Columbia Supreme Court's conclusion that child protection legislation cannot be used indirectly to control the conduct of pregnant women and the Royal Commission's position that such interventions should not merely be forbidden, but should also be criminalized as a deprivation of the pregnant woman's physical inviolability and autonomy. Certain features of the *Re Baby R* case are similar to the more numerous attempts at forced interventions in the United States and provide reasons for the Commission's and Canadian courts' reluctance to endorse any form of pregnancy-related intervention.⁶⁷ The similarities between American jurisprudence and *Re Baby R* suggest that many of the complaints levelled against the use of court-ordered caesarean sections in the United States are also applicable to the use of similar powers by child care workers or courts in Canada.⁶⁸ For example, it took less than three hours to obtain the apprehension order in *Re Baby R*. This is consistent with American studies which show that eighty-eight per cent of court orders for caesarean sections were obtained in six hours and nineteen per cent were obtained in less than one hour, sometimes by phone.⁶⁹ Often, the emergency nature of forced interventions means that the time available to make a decision on such an important matter will be extremely short and the decision-maker often has no time to adequately deliberate or to review and analyze existing precedent. This increases the chances of a misapplication of controlling legal principles and a derogation from constitutional rights.⁷⁰

⁶⁷ There are also numerous similarities to the *Belleville* case in American jurisprudence. We should not adopt the rather divided American jurisprudence on court-ordered medical treatment of pregnant women. First, there has been no determinative examination of these orders by the United States Supreme Court from a constitutional perspective and too many courts are unthinking in their acceptance of forced medical treatment for pregnant women. Second, the American cases, basing themselves on *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973), often draw distinctions based on viability where post-viability interventions are seen to be more acceptable, because the state has the power to proscribe abortion at that stage of fetal development. Viability does not have the same legal significance in the Canadian system. Third, in the United States, petitioners for intervention into pregnancy have relied on the court's *parens patriae* jurisdiction, as well as on statutory authority, whereas, in Canada, there have only been attempts to invoke child protection legislation.

⁶⁸ V.E.B. Kolder, J. Gallagher & M.T. Parsons, "Court-ordered Obstetrical Interventions" (1987) 316 *New England J. Medicine* 1192. See also L.C. Ikemoto, "Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women" (1992) 59 *Tennessee L. Rev.* 487 at 489 [hereinafter "Furthering the Inquiry"], who notes that "[m]ost cases simply go unreported. But according to cases described in other medical articles and law reporters, the trend of performing cesarean surgeries, blood transfusions, and other therapies against the woman's will continue."

⁶⁹ Kolder, Gallagher & Parsons, *ibid.* at 1193.

⁷⁰ The emergent nature of prebirth apprehensions means that they share certain parallels with the abortion injunction cases. However, the haste of the proceedings cannot justify the absence of fundamental legal protections. If anything, it raises the larger issue of whether the child care authorities or courts ought to have any role to play at all (see G.J. Annas, "Forced Cesarean: The Most Unkindest Cut of All" (1982) 12:3 *Hastings Center Report* 16 [hereinafter "Forced Cesarean"]). Note that, even if a lawyer for the woman can be found, research time will be limited because the woman is usually already in labour. K. Jost, "Mother Versus Child" (1989) 75 *A.B.A.J.* 84 at 86, reports that,

Another interesting feature of the *Re Baby R* case involves the allegations of mental incompetency against a patient who has refused recommended medical care. The British Columbia *Mental Health Act*, by authorizing nonconsensual medical treatment, provides an alternative to the child protection legislation.⁷¹ In the *Belleville* case, the child care authorities in British Columbia considered twinning an allegation of fetal abuse with one of mental incompetency in order to make a stronger case for intervention.⁷² Even when allegations concerning the woman's mental health do not lead to involuntary psychiatric assessment, supervision, or detainment, child care authorities may nevertheless suggest that the woman be treated with a certain degree of suspicion. Putting her mental capacity in issue may serve an ideological function: if the woman can be presented as unstable, mandating her medical treatment becomes more defensible under established legal doctrines. The problem is one of an individual case of incompetency and not a complete, categorized reversal of the general rules of informed consent for pregnant women. It is thus easier to claim that substitutional consent is an exception and a recognized legal response to mental incompetency in individual cases.

Allegations of mental incompetency are acute and frightening when the evidence upon which they are based implicitly equates the woman's refusal of medical care with mental incompetency.⁷³ In short, this reasoning would hold that a pregnant woman is unstable if she does not follow the doctor's orders. Such a conclusion would be based on the following string of value judgments: a pregnant woman who has not had an abortion must want the fetus delivered in the safest possible means; health care professionals are best equipped to evaluate and determine what is the safest means; a reasonable woman would, therefore, submit to whatever surgery is recommended for the sake of her fetus. Added to this thinking process is the widespread belief that the mother-child relationship is a paradigmatic example of benevolence,⁷⁴ under which a competent woman would not risk the health of her fetus for her own selfish reasons.

in the American cases, there is rarely balanced evidence, and the cases are characterized by terse, conclusion-oriented judgments, where two pages is considered long.

⁷¹ R.S.B.C. 1979, c. 256.

⁷² In *Baby R*, *supra* note 57 at 229, such a joint submission was not pursued because the hospital's psychiatric unit found no signs of mental illness and refused to take the necessary legal action.

⁷³ See "Furthering the Inquiry", *supra* note 68 at 502-503, where Ikemoto reports that "[w]hen women refuse they are often characterized as stubborn, guilty, and irrational, even when the court specifically finds them to be clearly competent."

⁷⁴ The phrase is taken from P. King, "Should Mom be Constrained in the Best Interest of the Fetus" (1989) 13 *Nova L. Rev.* 393 at 395 [hereinafter "Should Mom be Constrained"]. L.C. Ikemoto, "The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law" (1992) 53 *Ohio State L.J.* 1205 [hereinafter "Code of Perfect Pregnancy"], also states:

[J]udges have joined doctors in the delivery room to referee the conflict. Underlying the court's balancing-test language is a set of assumptions — that a normal woman would do anything for the sake of her unborn child even if it endangered her own life; that there must be something wrong with the woman who refuses consent; that doctors and lawyers who call for intervention speak with authority and know better than the woman who refuses consent to cesarean surgery (*ibid.* at 1245-46).

Generally, a patient's decisions concerning medical treatment receive a great deal of legal protection because they involve individual liberty, personal beliefs, private value judgments, and cultural differences. Cases involving the forced medical treatment of pregnant women, however, show very little deference to the decisions of these women concerning their health care.⁷⁵ Rarely is there even an attempt to understand the decision from the perspective of the woman involved. Sometimes, the woman's own reasons for refusing the surgery are not even sought, given, or explained,⁷⁶ and if provided, they are often trivialized.⁷⁷ This observation is consistent with one writer's opinion that "[t]he view that women who refuse cesarean sections are in some way

⁷⁵ See "Judge in Delivery Room", *supra* note 19 at note 275, p. 2006, where Rhoden describes how individuals from certain places, like Jamaica, Haiti, and Africa, have cultural reservations about cesarean section delivery. For cases involving the refusal on religious grounds of medical treatment by pregnant women, see *Raleigh Fitkin — Paul Morgan Memorial Hospital v. Anderson*, 201 A.2d 537 (N.J. Sup. Ct. 1964), in which the Court ordered blood transfusions over the objections of a pregnant Jehovah's Witness woman to save the life of the fetus. See also *Re Jamaica Hospital*, 491 N.Y.S.2d 898 (Sup. Ct. 1985); *Crouse Irving Memorial Hospital Inc. v. Paddock*, 485 N.Y.S.2d 443 (Sup. Ct. 1985). See also *Re Madyun*, 114 Daily Washington L. Rptr. 2233 (D.C. Sup. Ct. 1986), in which a caesarian section was performed on a Muslim woman. In that case, the Court held that there was a compelling state interest in the circumstances of the case, which outweighed the woman's right to refuse the operation on religious grounds.

⁷⁶ Even when the wishes of the women are expressed, they may be redefined as ambiguous or unclear, to leave the small opening necessary to introduce the thin edge of the wedge of paternalism. See *Re A.C.*, 533 A.2d 611 (D.C. Cir. 1987), petition for re-hearing granted 539 A.2d 203 (D.C. Cir. 1988), rev'd 573 A.2d 1235 (D.C. Cir. 1990), where the District Court of Columbia ordered a caesarean section to be performed on a dying woman in a failed attempt to "save" her 26-week-old fetus. The trial judge, who convened an emergency hearing at the hospital, said that he did not clearly know what Angela's present views were, but he did not go down the hall and ask her. The Court of Appeal ultimately held that, where a pregnant patient with a viable fetus is near death, the question of what medical treatment she should receive is to be decided by the patient on behalf of herself and the fetus, unless she is incompetent or otherwise unable to give informed consent, in which case her decision is to be ascertained via "substituted judgement". The Court distinguished cases where the pregnant woman's decision to refuse treatment creates a "maternal-fetal conflict". In this case, because the operation endangered the life of A.C., her decision was paramount. Her right to bodily integrity was not diminished because she was dying (*ibid.* at 1243, 1247). For case comments, see M. Phillips, "Maternal Rights v. Fetal Rights: Court-Ordered Cesareans" (1991) 56 Missouri L. Rev. 411-14; M. Diamond, "Echoes from Darkness: The Case of Angela C." (1990) 51 U. Pitt. L. Rev. 1061. For a critique, see G.J. Annas, "She's Going to Die: The Case of Angela C" (1988) 18:1 Hastings Center Report 23; Noble-Allgire, *supra* note 64; E.E. Drigotas, "Forced Cesarean Sections: Do the Ends Justify the Means" (1991) 70 N.C. L. Rev. 297 at 307-308; B.A. Leavine, "Court-Ordered Cesareans: Can a Pregnant Woman Refuse?" (1992) 29 Houston L. Rev. 185 at 193.

⁷⁷ See Kolder, Gallagher & Parsons, *supra* note 68, where they report that the women are often labelled as irrational. See also T.B. Mackenzie & T.C. Nagel, "When a Pregnant Woman Endangers Her Fetus" (1986) 16:1 Hastings Center Report 24. But see the analysis provided by B.K. Rothman, Commentary (1986) 16:1 Hastings Center Report 25, where she concludes: "A more appropriate and ultimately more useful perspective is to see the pregnant woman as a biological and social unit. ... [Her physician] might consider what *her* needs are — social and economic as well as medical — and how he might help her to meet those, rather than calling on the courts to control her."

willfully abusing their fetuses seems prevalent and deeply held, at least by some male obstetricians and judges.”⁷⁸

Failure to acknowledge a pregnant woman’s individual motivation or group affiliation may also help explain American studies which showed that caesarean sections performed pursuant to court order are disproportionately directed to low-income and minority women.⁷⁹ One study indicated that eighty-eight per cent of cases in which court-ordered obstetrical procedures were sought involved Black, Hispanic, or Asian women. Forty-four per cent were unmarried, and twenty-four per cent did not speak English as their primary language. All the women were treated in a teaching-hospital clinic or were receiving public assistance.⁸⁰ In such cases of racism and multiple disadvantages, it is especially difficult for the voices of women to be heard and for their decisions to be respected as determinative.⁸¹

Normally, as in *Re Baby R*, the apprehension process will be set in motion by the woman’s doctor. This is problematic for many reasons. First, it is highly likely that the decision-maker, whether a child care worker or a court, will receive only one version of the medical evidence.⁸² The child care worker’s mandate to focus on the best interest and needs of the child, when no equivalent agent is charged with respecting the rights, interest, or needs of the pregnant woman, may skew what information is presented and accepted as relevant.⁸³ Furthermore, even if it were institutionally possible to make submissions on behalf of the woman, she might not be afforded a realistic opportunity to accumulate and submit whatever contrary evidence may exist or to obtain a second medical opinion.⁸⁴ These cases involve contests between what are constructed to be the competing interests of a woman and of her fetus. The absence of balanced medical evidence is problematic because it results in derogation from the accepted safeguards which normally apply under an adversarial model. In other contexts, such important determinations would normally be addressed only after a full inquiry, where both parties to the dispute have been adequately represented, where both sides of the argument

⁷⁸ “Forced Cesarean”, *supra* note 70 at 16.

⁷⁹ While these statistics reflect the further victimization of the disadvantaged, it may also be the case that these women are not as easily persuaded by the doctor’s entreaties (see J.A. Daniels, “Court-Ordered Cesareans: A Growing Concern for Indigent Women” (1988) 21 Clearinghouse Rev. 1064; L. Nsiah-Jefferson, “Reproductive Laws, Women of Color, and Low-Income Women” in N. Taub & S. Cohen, eds., *Reproductive Laws for the 1990s* (New Jersey: Humana Press, 1989) 23).

⁸⁰ Kolder, Gallagher & Parsons, *supra* note 68 at 1193.

⁸¹ In the Canadian context, at least four out of the six reported cases referred to in this section have involved aboriginal women or women of colour (see Jackman, *supra* note 64 at 54; “A Feminist Response”, *supra* note 64 at 170ff).

⁸² “Forced Cesarean”, *supra* note 70.

⁸³ See Grant, *supra* note 22 at 229, who argues that, among their faults, child protection acts do not provide a constitutionally acceptable mechanism for apprehending a fetus because “[t]here is no requirement that the woman be informed immediately of the apprehension; there is no provision allowing the pregnant woman to make submissions on her own behalf ... ; and there is no reference to her having a right to consult legal counsel.”

⁸⁴ “Forced Cesarean”, *supra* note 70.

have been fully canvassed, and where scrupulous attention has been given to procedural rights.

Second, there may be a tendency to defer to the professional judgment of doctors.⁸⁵ This is problematic because the medical diagnosis, even if confirmed by other doctors, may be inaccurate or outdated.⁸⁶ In the United States, some women under court order to deliver by caesarean section nevertheless gave birth vaginally to healthy babies.⁸⁷ Studies also show that doctors are conservative decision-makers and proceed on a worst-case-scenario basis.⁸⁸ Therefore, even if one accepts that the woman can be forced to act to save the fetus (and we do not), there is a real risk that doctors can overestimate the danger to the fetus, and thereby require women to submit to unnecessary medical treatment.

There may also be a tendency to believe that the situation is especially serious if a doctor intervenes and overrides the express wishes of the patient.⁸⁹ As a general rule, doctors do not involve the legal system in the practice of medicine. In addition, the prospect of a physician applying for a court order to mandate medical treatment threat-

⁸⁵ See "Should Mom be Constrained", *supra* note 74 at 404; "Code of Perfect Pregnancy", *supra* note 74 at 1237-38; H.E. Berkman, "A Discussion of Medical Malpractice and Caesarian Section" (1991) 70 Oregon L. Rev. 629. She reports:

The United States has the highest cesarean section rate in the world. The rate has increased from 5.5% in 1970 to 24.7% in 1988. Since 1988, the rate has stabilized, but stabilized at a level where nearly *one in four* babies are delivered by cesarean section. ... In 1987 the Public Citizen Health Research Group called cesarean section the most unnecessary surgical procedure performed. However, some physicians say that fear of medical malpractice suits is the primary factor behind the high percentage of caesarean sections (*ibid.* at 629 [references omitted]).

Berkman, *ibid.* at 637, also notes that financial factors play an important role: "Caesarian sections cost at least twice as much as vaginal births. Physicians therefore make substantially more money by performing a cesarean". For a discussion of the increase in the number of caesareans being performed, see G.S. Berkowitz *et al.*, "Effective Physician Characteristics on the Caesarean Birth Rate" (1989) 61 *Obstetrics & Gynecology* 146; H.I. Marieskind, "Caesarean Section in the United States: Has It Changed Since 1979?" (1989) 16 *Birth* 196; R.B. Porreco *et al.*, "Commentaries: The Caesarean Section Rate Is 25 Percent and Rising: Why? What Can Be Done About It?" (1989) 16 *Birth* 118.

⁸⁶ The fallibility of medical diagnosis and the limits to current technologies are pointed out in Rothman, *supra* note 77.

⁸⁷ See *e.g.* Jefferson, *supra* note 66. In the Provincial Court judgment in *Re R*, *supra* note 65 at 416, the judge merely accepted the medical evidence at face value.

⁸⁸ See N. Rhoden, "Informed Consent in Obstetrics: Some Special Problems" (1987) 23 *New England L. Rev.* 67 [hereinafter "Informed Consent"], where she explains that physicians faced with uncertainty and potential legal liability tend to adopt a maximum treatment or last hope strategy. The effect of this, combined with the emergent nature of these cases, means that judges will be tempted to reallocate decision-making to the physician.

⁸⁹ For an interesting example of the role of the physician, see *Kenora*, *supra* note 37, where the doctor wrote to the child care authorities about the mother's alcoholism halfway through her pregnancy. See also *M.(B.)*, *supra* note 39.

ens the trust at the base of the traditional doctor-patient relationship.⁹⁰ While the trust factor may inhibit certain physicians, others may be pursuing their own private agendas and using medicine to intervene in a woman's pregnancy as a form of social control.⁹¹ Doctors may also be motivated by the legal shelter provided by an apprehension or court order: they insulate the doctor's activities by providing the "consent" necessary to the intervention.⁹² The doctor's desire to secure personal and professional protection against liability suits may influence his or her decision to invite the state into the delivery room.

Furthermore, an American study indicates that there is an alarmingly high level of support among physicians for the mandated medical treatment of pregnant women.⁹³ In one study, a full forty-six per cent of doctors who head fellowship programs in maternal-fetal medicine thought that mothers who refused medical advice and thereby endangered the life of the fetus should be detained in hospitals or other facilities to ensure compliance, and forty-seven per cent believed that the precedent set by the American courts in cases requiring emergency caesarean sections should be extended to include other procedures that are potentially life-saving for the fetus, such as intrauterine transfusion.⁹⁴

The decision in *Re Baby R* and the recommendations of the Royal Commission may help curb disingenuous attempts to use child protection statutes to compel medical treatment of pregnant women. Although the province's bid to seek custody of the fetus and to mandate the woman's medical treatment was unsuccessful, the case does stand as a warning against prenatal invasions. When intervention starts with mandated surgical intervention and encompasses a procedure as personally invasive and medically dangerous as a caesarean section, it is sensible to be alarmist. Even though the decision does not bind other provinces or preclude the creation of express statutory powers

⁹⁰ The possibility of coercion exists because of the real imbalance of power.

⁹¹ Even absent an apprehension order, doctors can exert undue pressure and many even use the threat of legal intervention to secure compliance (see "Informed Consent", *supra* note 88). See H.L. Hirsh, "Mother v. Fetus: The Dilemma" (1989) 17 *Legal Aspects of Medical Practice* 1 at 8, where the author claims that while the doctor's role is to be an informant, counsellor, and persuader, he asserts, without citing any authority, that "the responsibility of the physician, after using all means of explanation and communication, is to inform an intransigent patient that she may be committing a felony." The absence of any real legal grounds on which to base this warning transform it into an improper means of intimidation. The potential for coercion by doctors is particularly troublesome because it indicates that, even in the absence of overt state intervention, there will be insufficient protection of the woman's integrity, autonomy, and equality.

⁹² In our view, there is often too much concern for the doctor's dilemma and not sufficient value placed on the physical integrity and autonomy of the woman (see *e.g.* E.-H.W. Kluge, "There ought to be a law" (1987) 29 *B.C. Medical J.* 62 [hereinafter "There ought to be a law"]).

⁹³ Kolder, Gallagher & Parsons, *supra* note 68.

⁹⁴ R. Hubbard, "Legal and Policy Implications of Recent Advances in Prenatal Diagnosis and Fetal Therapy" (1982) 7 *Women's Rights L. Rep.* 201 at 217, states that "[w]hen physicians and judges become guardians of 'fetal rights', mothers and fetuses lose, because their respective 'rights' cannot be sorted out any better than their respective biology."

similar to the ones claimed in this case,⁹⁵ the strong reasoning in *Re Baby R* is backed by plentiful precedent and sound policy.⁹⁶ The Royal Commission accepts the reasoning and result in *Re Baby R* by stating that attempts to encroach on the autonomy of pregnant women will not be tolerated:

A woman has the right to make her own choices, whether they are good or bad, because it is the woman whose body and health are affected, the woman who must live with her decision, and the woman who must bear the consequences of that decision for the rest of her life. In this respect, pregnant women are no different from any other responsible individual; to treat pregnant women differently from other women and men, or to impose a different standard of behaviour on them, is neither morally nor legally defensible.⁹⁷

Both as a result of jurisprudential propriety and the strength of the Royal Commission's recommendations, it is most unlikely that Canadian courts, especially the Supreme Court of Canada, will permit provincial authorities to reinterpret existing child protection legislation to augment their jurisdiction in a manner so obviously contrary to the rights and interests of women. To transform the province's jurisdiction over children into a mandate to intervene in a woman's pregnancy would do more than accord a fresh and elevated status to the fetus: it would allow representatives of the state to effectively apprehend the woman and mandate the course of her medical treatment by formally seeking custody of her fetus. In this regard, the existing case law in Canada indicates that the more the authorities have sought to strain and extend their existing powers, the more clearly such extension has been refused.

There are relatively few express provisions which target the conduct of pregnant women and the indirect attempt to read general criminal prohibitions and child protection legislation as including the fetus has not met with success. Nonetheless, these cases should be addressed seriously because of their practical and ideological significance. Proposals to increase the supervision of pregnant women do not give due consideration to the women's rights. These women, objectified and treated as nothing

⁹⁵ A clear statement from the English Court of Appeal promises to stymie any future attempt to use the court's jurisdiction to make a fetus a ward of the court. See *Re F (in utero)*, *supra* note 60, where the Court held that since a fetus at whatever stage of its development had no existence independent of its mother, the Court could not exercise the rights, powers, and duties of a parent over the fetus without controlling the mother's actions, and that the Court could not extend its wardship jurisdiction over minors to a jurisdiction over a mother for the protection of an unborn child, which had no legal rights or existence, and therefore, it could not make the fetus a ward of the court. See, however, *Re S. (Adult: Refusal of Treatment)*, [1992] 3 W.L.R. 806 (Fam. Div.), in which the application of a health authority was granted for a declaration authorizing an emergency caesarean on Mrs. S., who refused such an operation on religious grounds. For case comments, see D. Morgan, "Whatever happened to consent?" (1992) 142 New L.J. 1448; K. Stern, "Court-Ordered Caesarean Sections: In Whose Interests?" (1993) 56 Modern L. Rev. 238.

⁹⁶ But any express statutory intervention into a woman's pregnancy could be challenged under the *Charter*.

⁹⁷ *Report*, *supra* note 1 at 956.

more than fetal “incubators”⁹⁸ and “ambulatory chalices,”⁹⁹ are denied the benefit of the fundamental canon of moral philosophy — that individuals must be respected and valued in, of and for themselves.

These ominous proposals also have far-reaching implications for the equality rights of women. They suggest that pregnant women constitute a special category of individuals who do not share in the basic rights enjoyed by others.¹⁰⁰ The rationale proffered for this categorical deprivation of the rights of pregnant women is not convincing and rests on the creation of fetal rights and the construction of maternal-fetal “conflicts” where none existed before.

III. Criminal Liability for Women’s Conduct During Pregnancy

The Commissioners were also called upon to deal with proposals which advocate that women be held criminally liable for conduct which could injure their fetuses.¹⁰¹ They clearly rejected any call to criminalize “fetal abuse” by either endorsing a new express legislative provision or by extending existing crimes against “persons” to include the fetus.¹⁰²

A. Direct Attempts to Criminalize Women’s Conduct During Pregnancy

The federal government has jurisdiction over criminal law¹⁰³ and, while it has used its power to outline certain specific criminal offences which deal with intentionally

⁹⁸ Watters *et al.*, *supra* note 23 at 32.

⁹⁹ M. Atwood, *The Handmaid’s Tale* (Toronto: McClelland & Stewart, 1985). See also D. Johnsen, “A New Threat to Pregnant Women’s Autonomy” (1987) 17:4 *Hastings Center Report* 33 at 36 [hereinafter “A New Threat”], who argues that the state should not “attempt to transform a pregnant woman into an ideal baby-making machine.”

¹⁰⁰ *Quaere* whether the courts would order that the conduct of potential fathers be monitored on the basis that narcotics affect their sperm? (see *Report, supra* note 1 at 312, 317).

¹⁰¹ Throughout this paper, we have tried to retain the focus on the pregnant woman. We have tried to find a single word which conveys a woman-first orientation in pregnancy and have been unsuccessful. We therefore speak of criminalizing the woman’s conduct instead of employing such terms as “fetal abuse”. In our view, it is important not to uncritically adopt the many examples of terminology which adopt a fetus-first orientation and which invoke the emotional appeal associated with the mother-child bond. For example, the term “prenatal” focuses attention on the fetus because its meaning of “existing or occurring before birth” obviously relates to the fetus as subject, because the woman is already born. See also J.E. Haningsberg, *supra* note 64 at 39.

¹⁰² For a review of Canadian and American authors who seek various forms of criminal liability, see “Procreative Liberty”, *supra* note 18; “The Right to Procreate”, *supra* note 63; J.A. Robertson, “‘Fetal Abuse’: Should we recognize it as a crime?” (1989) 75 *A.B.A.J.* 38; “Abuse and Neglect”, *supra* note 21; J. Parness & S. Pritchard, “To Be or Not to Be: Protecting the Potentiality of Life” (1982) 51 *U. Cincinnati L. Rev.* 257; *The Unborn Child’s Right, supra* note 11; A. Dorczak, “Unborn Child Abuse: Contemplating Legal Solution” (1991) 9:2 *Can. J. Fam. L.* 133. In the British context, see P.R. Glazebrook, “What Care Must be Taken of an Unborn Baby?” (1993) 52 *Cambridge L.J.* 20.

¹⁰³ *Constitution Act, 1867* (U.K.), 30 & 31 *Vict.*, c. 3, s. 91(27).

causing death during various stages of the gestational and birthing process, there is no express criminalization of conduct which may be harmful to a fetus.¹⁰⁴

However, there have been proposals by the Law Reform Commission of Canada to expressly criminalize the conduct of pregnant women in Working Paper 58 entitled *Crimes Against the Foetus*.¹⁰⁵ The Law Reform Commission's proposal of a new crime, causing fetal harm or destruction, is a radical departure from existing law and is not a restatement of a recognized principle.¹⁰⁶ In reality, the proposed crime against the fetus involves a major rethinking and recasting of existing criminal prohibitions and

¹⁰⁴ There are express prohibitions against killing during the act of birth under the *Criminal Code*, R.S.C. 1985, c. C-46, such as section 238, neglecting to obtain reasonable assistance in childbirth, or section 243, infanticide. By the express terms of the statute all these offences can be committed by the pregnant woman and some can also be committed by third parties. Most of these offences require a high level of criminal intent. For example, a woman who fails to obtain reasonable assistance during childbirth would only commit a criminal offence under section 242 if she intends by her actions that the child shall not live. These express birth-related criminal prohibitions have rarely been used to punish women, especially in recent years, and they do not cover or contemplate all of the various ways in which a fetus may be injured. For an historical perspective, see C.B. Backhouse, "Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada" (1983) 3 Windsor Y.B. Access Just. 61. See *R. v. Jacobs* (1952), 105 C.C.C. 291 (Ont. Co. Ct.) — woman acquitted because her act was not "wilful"; *R. v. Smith* (1976), 32 C.C.C. (2d) 224, 3 C.R. 259 (Nfld. Dist. Ct.) — woman acquitted because her act was not "wilful"; *R. v. Szola* (1977), 33 C.C.C. (2d) 572 (Ont. C.A.) — woman convicted, sentence reduced to conditional discharge from one year in jail; *R. v. Dupont*, [1981] C.S.P. 1055 (Que. Sup. Ct.) — woman acquitted because her act was not "wilful"; *R. v. Bourne* (1938), [1939] 1 K.B. 687, [1938] 3 All E.R. 615 (H.C.J.); *R. v. Bryan* (1959), 123 C.C.C. 160, [1959] O.W.N. 105 (Ont. C.A.) — woman acquitted, as death occurred too long after birth (eight hours); *R. v. Tutty* (1986), 73 N.S.R. (2d) 387, 176 A.P.R. 387 (S.C.T.D.).

¹⁰⁵ Law Reform Commission of Canada, *Crimes Against the Foetus* (Working Paper 58) (Ottawa: Law Reform Commission of Canada, 1989) [hereinafter *Crimes Against the Foetus*]. (Note that only one out of five commissioners was a woman: Judge Michele Rivet.) For a synopsis of the case against criminalization in the American context, see Note, "Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of 'Fetal Abuse'" (1988) 101 Harv. L. Rev. 994 [hereinafter "Maternal Rights"], where the authors evaluate the constitutionality of possible paradigms of fetal abuse statutes.

¹⁰⁶ The Law Reform Commissioners also suggested that their recommendation is consistent with the approach adopted by certain American states. The Commission asserted that, at the time, Illinois, Indiana, and Iowa had passed general "feticide" type statutes which restrict the unlawful killing of the fetus (*Crimes Against the Foetus, ibid.* at 51). With the exception of Minnesota, these provisions do not fully support the claims made by the Commission. In Illinois, the feticide provision does not apply to the pregnant woman and requires that the third party must intend to cause death or know such acts would kill or cause great bodily harm (see Ill. Ann. Stat. ch. 38, § 9-1.2 (Smith-Hurd Supp. 1987)). In Indiana and Iowa the crime of feticide is limited to prohibiting a second trimester abortion. Although the name is different, the feticide provision involves intentionally terminated pregnancies (see respectively Ind. Code § 35-42-1-6 (1982); Iowa Code Ann. § 707.7 (West Supp. 1985)). The Minnesota statute most resembles the Commission's proposals (see Minn. Stat. Ann. § 607.266ff (West Supp. 1987)).

signifies a profound paradigm shift in favour of the fetus.¹⁰⁷ Its scope is significantly broader than that of existing prohibitions, both in relation to the persons targeted (because it expressly engages the liability of the pregnant woman) and the conduct prohibited (because it extends liability beyond fetal destruction to include criminal responsibility for serious harm).

The express crime proposed by the Law Reform Commission of Canada would create two separate offences depending on who caused the destruction or serious harm to the fetus. Harm caused by a third person would be criminalized as long as it met the less exacting standard of criminal recklessness or negligence.¹⁰⁸ In contrast, the criminal liability of the pregnant woman would only be triggered when she “purposely” harmed the fetus.¹⁰⁹

¹⁰⁷ Much of the similarity which exists between the proposal of the Law Reform Commission and pro-fetus law journal articles is explained by the fact that the man who wrote in support of a fetus’ right to prenatal care (Keyserlingk) was also appointed as the Coordinator of the Law Reform Commission’s Protection of Life Project and the Commission’s Foetus Status working group. Nevertheless, the prohibition suggested by the Law Reform Commission of Canada does not go as far as do the proposals of some North American writers. Some writers believe that criminal liability should extend to harm caused intentionally and/or negligently and should encompass the failure to receive prenatal care, not complying with doctor’s orders, and using drugs, alcohol or tobacco during pregnancy (see e.g. “Procreative Liberty”, *supra* note 18 at 443). For a discussion and critique, see M. McNulty, “The Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to their Fetuses” (1987-88) 16 Rev. L. & Soc. Change 277 at 278. The author argues against criminalization because it would create legal inequities to low income and minority women, laws which are ineffective to improve prenatal care or deter drug use and that are unconstitutional violations of due process, liberty, and equal protection guarantees. Like many others, she argues that legislation should concentrate on improving prenatal health care rather than criminalizing women’s conduct.

¹⁰⁸ For a critique, see National Association of Women and the Law, *A Response to Crimes Against the Fetus, the Law Reform Commission of Canada’s Working Paper* (Ottawa: National Association of Women and the Law, 1989); M.L. McConnell, “Capricious, Whimsical, and Aborting Women: Abortion as a Medical Criminal Issue (Again)” (1989-90) 3 C.J.W.L. 661; S. Noonan, “Protection of the Foetus: Denial of the Woman” (1989-90) 3 C.J.W.L. 667. For an analysis of the criminal negligence standard of *mens rea*, see *R. v. Creighton*, [1993] 3 S.C.R. 3, 23 C.R. (4th) 189. See also *R. v. Naglik*, [1993] 3 S.C.R. 122, 23 C.R. (4th) 335, in which *R. v. Creighton* was applied to the charge of failing to provide necessities of life.

¹⁰⁹ The Law Reform Commissioners explained their decision not to criminalize the woman’s “negligent” conduct:

In the first place, because of the unique relationship between mother and foetus, use here of criminal law would — unfairly in our view — impose special burdens on her over and above those falling on all other parties. Second, criminal law enforcement would involve intolerable restrictions on the mother’s own autonomy, e.g., monitoring the way she eats, drinks, smokes and so on. Third, such monitoring and restrictions could well cause marital and familial disruption. Finally, at a time when pregnant women’s civil liability for foetal injuries is far from resolved, it would be premature to impose on them the still more onerous burden of criminal liability (*Crimes Against the Foetus, supra* note 105 at 52).

But note that the Commissioners do not reject the idea of criminalizing negligent conduct outright. They merely suggest that it should not be done “at this point”.

The true breadth of the prohibition concerning maternal conduct depends on how the term "purposely" is to be interpreted.¹¹⁰ While it requires more than negligence or inadvertence, it is not clear what level of intent is required or whether the requisite purpose must attach to the impugned act or to the resultant harm.¹¹¹

The Royal Commission on New Reproductive Technologies rejected this proposal because, while the Law Reform Commission of Canada may have acknowledged the *Charter* rights of women in a perfunctory manner, the focus of the Law Reform Commission was on a myopic concept of fetal "rights", which did not yet exist.¹¹² The Royal Commission on New Reproductive Technologies was not convinced that criminal liability would deter or rehabilitate pregnant women whose behaviour contravened the proposed law.¹¹³ The Royal Commission also rejected attempts to indirectly criminalize women's conduct by reading existing criminal prohibitions as covering the relationship between a woman and her fetus. Therefore, the Commission followed the conclusion of most courts which have held that general *Criminal Code* prohibitions against the intentional or negligent infliction of physical harm or death do not extend to a fetus.¹¹⁴

B. *Judicial Interpretation of Criminal Prohibitions*

The courts have taken a different approach to the interpretation of criminal prohibitions than they have for child welfare provisions. Under long established legal principles, criminal sanctions receive a strict interpretation and the *Criminal Code* expressly defines a "human being" as someone who has completely proceeded, in a liv-

¹¹⁰ An example of the possible interpretation of "purposely" is found in *Kenora*, *supra* note 37, where Bradley J. reasoned that the mother wilfully continued to drink alcohol and failed to acknowledge her addiction.

¹¹¹ In fact, the level of anti-woman feeling engendered by this debate has led some people to call for the mandatory sterilization of women addicted to drugs (see S. Boyer, "Time to Sterilize Addicted Mothers" *Blue Bell, Pa. Observer* (6 September 1989) 1 as cited in K. Moss, "Substance Abuse During Pregnancy" (1990) 13 *Harv. Women's L.J.* 278 at note 53, p. 286 [hereinafter "Substance Abuse"]). For an example of arguments made in favour of criminalization, see B. Shelley, "Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?" (1988) 92 *Dickinson L. Rev.* 691. But see C.R. Burton, "Fetal Drug or Alcohol Addiction Syndrome: A Case of Prenatal Child Abuse?" (1989) 25 *Willamette L. Rev.* 223. For further critiques of the criminalization of substance abuse by pregnant women, see Note, "Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy" (1990) 103 *Harv. L. Rev.* 1325 [hereinafter "Rethinking (M)otherhood"]; "A Feminist Response", *supra* note 64.

¹¹² On the practical level, the Law Reform Commission's recommendations have been ignored and indeed the failed legislation in Bill C-43 signalled an explication of recommendations and orientation (see Bill C-43, *An Act Respecting Abortion*, 2nd Sess., 34th Parl., 1989).

¹¹³ *Report*, *supra* note 1 at 958.

¹¹⁴ See especially *Criminal Code*, *supra* note 104, Part VIII — Offences Against the Person and Reputation.

ing state, from the body of its mother — whether or not it has breathed, has independent circulation, or the navel string is severed.¹¹⁵

In addition, in *R. v. Sullivan*, a strongly worded and well reasoned decision of the Supreme Court of Canada, the Court held that a fetus in the process of being born is not a “person” for the purposes of a prohibition against criminal negligence causing the death of a person.¹¹⁶ This case involved a home birth assisted by two midwives who were unable to complete the delivery. The delivery was effected by a physician after the woman had been transported to a hospital, but by that time the child had asphyxiated in the birth canal. The Crown alleged that the midwives’ actions amounted to criminal negligence because their incompetence showed a wanton and reckless disregard for the lives or safety of other “persons”.¹¹⁷ Two separate charges were laid against the midwives: criminal negligence causing the death of the fetus¹¹⁸ and criminal negligence causing bodily harm to the mother.¹¹⁹ Both charges required that the prohibited criminal negligence be inflicted on a “person”. Thus, the primary issue was whether the fetus was a “person” for the purposes of the relevant section in the *Criminal Code*. The midwives argued that the terms “human being” and “person” were equivalent, that both were defined by and premised upon live birth, and that both should therefore be read the same way. In their view, a baby which was born dead could not be a “human being” as defined in the *Criminal Code* and could not, therefore, be a “person” either.

The Court of Appeal held that the term “person” was to be interpreted by reference to the *Code*’s definition of a “human being”. In doing so it expressly rejected one case to the contrary as “in error” and reaffirmed the widespread acceptance of the “born alive rule”.¹²⁰ The Court concluded that even a fetus in the process of being born lacked the necessary individuality to qualify as an independent legal “person” and held that, as a matter of law, a child in the birth canal remains part of the mother.¹²¹ The Court relied upon numerous sources to support its conclusion: common law and statutory provi-

¹¹⁵ *Ibid.*, s. 223(1). According to this statutory definition, before a fetus can be a human being, it must be born alive. However, the relationship between this definition of “human being” and the use of the term “person” or “child” in other prohibitions in the *Criminal Code* is problematic. The legal obligations a woman owes to the fetus she carries will in part depend upon the interrelationship between these provisions because if a fetus is a “person”, the woman may also be criminally liable for conduct which is not expressly prohibited in the specific birth-related offences.

¹¹⁶ [1991] 1 S.C.R. 489, 3 C.R. (4th) 277 [hereinafter *Sullivan* cited to S.C.R.]. For a comment see S.N. Frost, Case Comment on *R. v. Sullivan* (1989-90) 3 C.J.W.L. 563; L. Smith, “An Equality approach to Reproductive Choice: *R. v. Sullivan*” (1991) 4 Yale J. L. & Feminism 93; M. Shaffer, “*R. v. Sullivan and Lemay*: A Case Comment” (1991) 36 McGill L.J. 1369.

¹¹⁷ Criminal negligence is defined in the *Criminal Code*, *supra* note 104, s. 219.

¹¹⁸ *Ibid.*, s. 220.

¹¹⁹ *Ibid.*, s. 221.

¹²⁰ The case was *R. v. Marsh* (1979), 31 C.R. (3d) 363, 2 C.C.C. (3d) 1 (B.C. Co. Ct.) [hereinafter *Marsh*]. It involved a charge of criminal negligence causing death to a “person” where a fetus in the process of being born suffered a cerebral hemorrhage and was born dead.

¹²¹ *R. v. Sullivan* (1988), 31 B.C.L.R. (2d) 145, 65 C.R. (3d) 256 at 271 (B.C.C.A.) [hereinafter *Sullivan* (C.A.) cited to C.R.].

sions in Canada and England which require complete live birth as the test for the law of homicide; the holding of the United States Supreme Court in *Roe v. Wade* that the unborn fetus was not a person for the purposes of the fourteenth amendment of their constitution; and civil cases which tie legal personhood to live birth.¹²² The Supreme Court of Canada held that a fetus is not a person for the purposes of sections 220 and 221 of the *Criminal Code* and strongly affirmed the "born alive rule"¹²³ and acquitted the midwives of criminal negligence causing death to the fetus. This holding foreshadowed, albeit in the criminal context, the Court's conclusion in *Tremblay v. Daigle*¹²⁴ that an unborn fetus had no separate legal rights under the Quebec *Charter of Human Rights and Freedoms*,¹²⁵ the civil law, or the common law.

R. v. Sullivan merely reaffirms the traditional position that legal personhood vests at birth. Although the case deals with the relationship between a fetus, a "human being", and a "person" under criminal law, its reasoning and result can be invoked to prevent the creation of new legal obligations for pregnant women in similar cases. For example, subsection 215(1) of the *Criminal Code* makes it a crime for a parent to fail to provide the necessities of life to a "child" under the age of sixteen years. The term "child" is not expressly defined in a manner that excludes the fetus.¹²⁶ This raises the question as to whether certain conduct on the part of the pregnant woman may be criminal if it falls below the legally imposed norm. The holding in *R. v. Sullivan* suggests that general criminal provisions will not and cannot be extended to indirectly criminalize the conduct of pregnant women which impacts upon their fetuses.

While the "born alive rule" prevents most attempts to indirectly criminalize the conduct of pregnant women, it does not totally preclude criminal charges against pregnant women. If the fetus is born alive and subsequently dies, a "person" and "human being" has come into existence. In *R. v. Prince*,¹²⁷ a case in which a third party stabbed a woman who was six months pregnant, the accused was convicted of attempted murder of the woman and manslaughter of the child, under subsection 223(2) of the *Criminal Code*, because the fetus had been born alive but died a few minutes later. Although there are no reported cases in which section 223(2) has been used against the pregnant woman herself, the provision appears to be sufficiently wide to include activities during pregnancy which result in the death of a born alive child.¹²⁸ A distinction may develop, however, based upon who caused the harm, such that third parties would be in-

¹²² *Ibid.* at 260-67.

¹²³ *Sullivan*, *supra* note 116 at 505-506.

¹²⁴ [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634.

¹²⁵ R.S.Q. c. C-12.

¹²⁶ In different sections, "child" is used in different ways (see *Criminal Code*, *supra* note 104, ss. 223(2), 218).

¹²⁷ [1986] 2 S.C.R. 480, 33 D.L.R. (4th) 724 [hereinafter *Prince*].

¹²⁸ A search of reported cases reveals that only third parties, and not the pregnant woman, have been charged under this section (see *Marsh*, *supra* note 120, involving a physician; *Sullivan*, *supra* note 116, involving midwives; *Prince*, *ibid.*, involving a third party). See also M. Curriden, "Holding Mom Accountable" (1990) 76 A.B.A.J. 50 at 53.

cluded or held to a more exacting standard.¹²⁹

Sentencing is also a means by which a woman's conduct during pregnancy has been indirectly criminalized. In her study and report to the Royal Commission,¹³⁰ Sanda Rodgers explains the case of *R. v. MacKenzie*:¹³¹

In the only case in which the sentence imposed on a woman was specifically varied on account of her pregnancy, Judge Hogg of the Ontario Provincial Court sentenced a young woman to 60 days in prison on a charge of communicating for the purposes of prostitution and of failing to appear. She had pleaded guilty to the charge. The sentence that was imposed was well outside that normally imposed in such matters, and Judge Hogg denied counsel's request that she be allowed to serve her sentence on weekends. The young woman, pregnant, also had a four-year-old child at home. She had primary responsibility for the care of the child and informed the court that she was seeking employment.

...

In the view of the judge, Ms. MacKenzie deserved incarceration, and incarceration provided a more appropriate environment within which to give birth. No apparent attention was paid to the four-year-old child at home.¹³²

Other types of general criminal prohibitions, mostly drug-related offences, have been invoked against pregnant women in the United States.¹³³ For example, a Florida

¹²⁹ See *R. v. Severight* (1993), 154 A.R. 51, 31 C.R. (4th) 45 (Prov. Ct.).

¹³⁰ S. Rodgers, "Juridical Interference with Gestation and Birth" in Research Studies of the Royal Commission on New Reproductive Technologies, *Legal and Ethical Issues in New Reproductive Technologies: Pregnancy and Parenthood*, vol. 4 (Ottawa: Minister of Supply and Services Canada, 1993) 457.

¹³¹ *R. v. MacKenzie* (3 August 1988), file number and district unavailable (Ont. Prov. Ct.), discussed in Dawson, *supra* note 57 at 269-71.

¹³² Rodgers, *supra* note 130 at 45-46.

¹³³ See P.A. Sexton, "Imposing Criminal Sanctions on Pregnant Drug Users: Throwing the Baby Out With the Bath Water" (1993) 32 Washburn L.J. 410 at 410-11. It is undeniable that drug abuse during pregnancy is a problem, but these stories and prosecutions have reinforced the view of bad and abusive mothers and the existence of mother-fetal conflict. See *Cracking Down* (60 Minutes, CBS television broadcast, 27 November 1994) which told the story of how one city and hospital are dealing with this problem. The hospital implemented a policy whereby it administered drug tests to pregnant women and turned the women over to police if they tested positive. The women, when they checked in, had to sign consent forms which said that they would stop using cocaine and that, if they continued, they could be prosecuted. This issue was looked into by Lynn Paltrow, an attorney who works for the Center for Reproductive Law and Policy in New York. She intervened and the hospital has since terminated this policy upon threat of losing federal funding. She noted how this was the only hospital in the area where this policy was in place and its clientele were 90 per cent African-American. Ms. Paltrow has since filed suit against the hospital for six plaintiffs, five of whom are African-Americans. Days or hours after delivery of their babies, these women were taken from their hospital beds, handcuffed, and sent to jail (J. Furio, "Women Fight Civil Rights Abuse in South Carolina" (1994) 5:3 *Ms.* 93).

woman was sentenced to fifteen years for unlawfully providing drugs to a minor.¹³⁴ The prosecutors argued that the wrongful delivery was done through the umbilical cord after the baby had been born alive, but before the cord had been severed (a claim consistent with the "born alive rule").¹³⁵ It is not impossible to imagine similar arguments being raised in Canada under the general prohibition against trafficking in restricted substances contained in the *Narcotic Control Act*.¹³⁶

While convictions for drug trafficking to a fetus have also been overturned,¹³⁷ and women who contested their arrest for drug use during pregnancy were not convicted,¹³⁸ the threat of criminal sanction and state coercion persists. Furthermore, because the

¹³⁴ *Jennifer Johnson v. State*, No. 89-1765 (Fla. Dist. Ct. App. 1989) as cited in "Substance Abuse", *supra* note 111 at 280. D.E. Roberts, "Drug-Addicted Women Who Have Babies" (1990) 26:4 Trial 56, states that about 35 so-called "fetal abuse" cases have been brought nation-wide and that judges have sentenced pregnant drug addicts charged with unrelated crimes to prison sentences as in *United States v. Vaughn*, Crim. No. F 2172-88B (D.C. Sup. Ct. 1988). See P. Marcotte, "Crime & Pregnancy: Prosecutors, New Drug Laws, Torts Pit Mom against Baby" (1989) 75 A.B.A.J. 14.

¹³⁵ "Substance Abuse", *ibid.* at 281ff. There are many grounds of appeal. First, the derivative of cocaine to which the baby was exposed was not within the statutory definition of a controlled substance. Second, there was no proof the drug passed after birth and not before it. The state conceded that the woman could not be prosecuted for conduct that affected the fetus *in utero*. Third, she lacked the requisite criminal intent. Fourth, "delivery" should not be read to include the transfer of chemicals through an umbilical cord and imposing liability through this novel construction would effectively impose an *ex post facto* liability law. Fifth, the conviction violated her autonomy interest in relation to reproduction-related decision-making because the Court's rationale requires a pregnant addict who is unable to overcome her addiction either to have an abortion or face criminal prosecution. It is interesting to note that the accused in this case, in an attempt to obtain the best medical care she could for her fetus, was open with her doctors about her drug use, sought prenatal care and drug treatment, and was cooperative with medical and legal personnel after the birth of her children. In *Johnson v. State*, 578 So.2d 419 (Fla. Dist. Ct. App. 1991), the trial decision was affirmed by a two to one margin. Sharp J., in dissent, supported her interpretation of the legislation with the fact that the legislature had considered and rejected specific statutory provisions authorizing criminal penalties against women who gave birth to drug-affected children. She was impressed by the argument that criminal charges would drive pregnant women to seek abortions or to avoid medical care. The Florida Supreme Court, in *Johnson v. State*, 602 So.2d 1288 (Fla. Sup. Ct. 1992), overturned the convictions against Ms. Johnson. The Supreme Court adopted the dissent of Sharp J. of the District Court of Appeals, noting that criminal statutes were to be strictly construed, and that where ambiguous, interpretation should be resolved in favour of the accused (*ibid.* at 1290). The Court also noted that no other jurisdictions have upheld convictions of pregnant women for delivery of narcotics to the fetus through the umbilical cord (*ibid.* at 1297).

¹³⁶ R.S.C. 1985, c. N-1, s. 4(1) reads: "No person shall traffic in a narcotic or any substance represented or held out by the person to be a narcotic." "Traffic", in the *Narcotic Control Act*, s. 2, is defined as meaning:

- (a) to manufacture, sell, give, administer, transport, send deliver or distribute, or
- (b) to offer to do anything referred to in paragraph (a).

¹³⁷ *Welch*, *supra* note 63; *Gray*, *supra* note 63, as cited in "States Cannot Punish Pregnant Women for 'Fetal Abuse' Courts Say" (1992) 28:5 Trial 11.

¹³⁸ T. Lewin, "Drug Verdict Over Infants is Voided" *The New York Times* (24 July 1992) B6, as cited in "Code of Perfect Pregnancy", *supra* note 74 at 1267-68. See also *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991).

policy objectives behind criminalization are suspect¹³⁹ and because such coercive mechanisms are disproportionately invoked against minority women,¹⁴⁰ the question arises as to the number of women who actually avoid treatment because they fear potential liability.¹⁴¹

Even if the wording of a particular prohibition may allow the assimilation of an unborn fetus to the position of a born child, the court must consider whether the purpose of the provision was to criminalize the conduct of pregnant women. The absence of any specific legislative intention to target pregnant women was a key factor in one well-publicized American case. Pamela Rae Stewart was charged under a section substantially similar to section 215 of our *Criminal Code* but which expressly included the

¹³⁹ "Code of Perfect Pregnancy", *ibid.* However, Kary Moss posits that the welfare of these women and their children is not the "driving force behind the hospital and prosecutorial policy" (K.L. Moss, "Forced Drug or Alcohol Treatment for Pregnant and Postpartum Women: Part of the Solution or Part of the Problem?" (1991) 17 *New Eng. J. Crim. & Civ. Confinement* 1 at 15). She cites as examples the following:

One woman, ... was released four days after having had a caesarean section, although she had a 104 degree temperature and was still in enormous pain from her surgery. Several hours after her release, two policemen arrived at her hotel room and told her she was under arrest for criminal child neglect. They took her to the police precinct where she was released on bond. Although no one asked specifically if she had used cocaine, the officers should have offered her drug treatment if they believed she was an addict. No such offer was made. Police also arrested an African-American woman, who had experienced false labour, while she was still in the hospital. She was handcuffed and led out of the building in her hospital gown. Authorities placed her in jail for three weeks, during which time she delivered her baby. Although she received prenatal care, no drug treatment was provided (*ibid.* at 15).

¹⁴⁰ American researchers have found in a recent study that a higher percentage of white women than African-American women test positive for alcohol and illicit drugs during pregnancy, yet African-American women are approximately ten times more likely to be reported to state officials (I.J. Chasnoff, H.J. Landress & M.E. Barrett, "The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida" (1990) 322 *New Eng. J. Medicine* 1202 at 1204, as cited in D.J. Krauss, "Regulating Women's Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decisions and Women of Color" (1991) 26 *Harv. Civil Rights-Civil Liberties L. Rev.* 523 at 527). For a full discussion of the effects of intervention in pregnancy on women of colour, see Krauss, *ibid.*

¹⁴¹ See W. Chavkin, M.H. Allen & M. Oberman, "Drug Abuse and Pregnancy: Some Questions on Public Policy, Clinical Management, and Maternal and Fetal Rights" (1991) 18 *Birth* 107 at 111, as cited in Sexton, *supra* note 133 at 420, who note that following the filing of criminal charges against 18 women who allegedly consumed illegal drugs during pregnancy, healthcare providers in the state reported "a rise in the number of women giving birth at home, in taxis, and in bathrooms." In Massachusetts, a judge, in refusing to convict a pregnant woman for distributing cocaine to her fetus, noted that prosecution will cause more women to terminate their pregnancies (*Commonwealth v. Pellegrini*, Crim. No. 87970 (Plymouth Sup. Ct., 15 October 1990) as cited in Krauss, *ibid.* at 540). It was reported on *Cracking Down*, *supra* at 133, that both the A.M.A. and the A.N.A. have issued statements agreeing that coercion and prosecution prevents women from seeking prenatal care. See also J. Berrien, "Pregnancy and Drug Use: the Dangerous and Unequal Use of Punitive Measures" (1990) 2 *Yale J. L. & Feminism* 239 at 247.

unborn fetus within its protection.¹⁴² The mother was charged with failure to summon medical treatment when she began to hemorrhage on the date of her delivery, taking illegal drugs during the pregnancy, having sexual intercourse with her husband, and failing to follow doctor's orders.¹⁴³ The Court dismissed the charges because the prohibition was part of a statute which was intended to provide an enforcement mechanism for child support payments. Even though the statute expressly included fetuses and the wording of the provision was arguably wide enough to bear the interpretation contended for, the Court held that the provision could not be used in this alternative and attenuated way.

This case reinforces the conclusion of the Canadian courts and illustrates many of the problems which would result from the criminalization of a woman's conduct during pregnancy. For example, in the course of the hearing, intimate details of the woman's life and pregnancy were revealed and her actions and motives were subjected to intrusive and rigorous public scrutiny. Such a complete and devastating invasion of a person's privacy has equality implications. The case illustrates the extent to which certain public officials sought to apply available sanctions, including imprisonment, and stands as a dramatic example of the Royal Commission's concerns. The Commission rejected an application of general criminal law statutes outside their original purpose and beyond their clear intention.¹⁴⁴

The refusal by Canadian courts to find novel crimes in existing provisions affirms that judicial powers of interpretation, as wide as they may be, cannot replace the legislative function. Furthermore, the Royal Commission on New Reproductive Technologies stated that even legislated crimes should not be imposed.¹⁴⁵ There appears to be a recognition on the part of both courts and the Royal Commission that such crimes can only be applied to the unique circumstances of a totally dependent and physically connected fetus, at the expense of the fully capacitated women. The imposition of fresh legal obligations, especially when supported by criminal law penalties, is properly a matter for express regulation, public debate, adequate forewarning, and ultimately

¹⁴² *People v. Pamela Rae Stewart*, No. M 508197 (San Diego Mun. Ct. 1987). For a discussion see "Substance Abuse", *supra* note 111; Kahn, *supra* note 61. The author argues that granting fetal rights in tort and criminal law results in unacceptable statism and entails a deprivation of a pregnant woman's constitutional rights to privacy, autonomy, and bodily integrity. See also L.A. Schott, "The Pamela Rae Stewart Case and Fetal Harm: Prosecution or Prevention?" (1988) 11 *Harv. Women's L.J.* 227.

¹⁴³ See "A New Threat", *supra* note 99 at 34.

¹⁴⁴ See L. Paltrow, "'Fetal Abuse': Should we recognize it as a crime?" (1989) 75 *A.B.A.J.* 39, who is counsel for the A.C.L.U. Reproductive Freedom Project and argues that recognizing "fetal abuse" moves us toward criminalizing pregnancy itself because no woman can provide the perfect womb. She argues that the threat of criminal liability will constitute a disincentive to providing accurate medical information and, by forcing women away from care, would be counter-productive to the state interest of protecting women's health and fetal well-being. See also R.J. Cook, "Anti Progestin Drugs: Medical and Legal Issues" (1989) 21 *Family Planning Perspective* 267.

¹⁴⁵ *Report*, *supra* note I at 964.

Charter challenge.¹⁴⁶

IV. Civil Liability for Women's Conduct During Pregnancy

The Royal Commission also concluded that civil liability should not be imposed on pregnant women for harm done to their fetuses.¹⁴⁷ While established tort principles allow a born alive child to recover for injuries sustained *in utero*,¹⁴⁸ successful actions have all been taken against third party defendants.¹⁴⁹ These cases establish that a fetus

¹⁴⁶ For example, see the comments in the per curiam judgment of the British Columbia Court of Appeal in *Sullivan (C.A.)*, *supra* note 121 at 271.

¹⁴⁷ *Report*, *supra* note 1 at 964. There are, however, no reported cases in Canada in which a child has sued its mother for losses allegedly caused by her conduct during pregnancy. In the United States, there are only two reported cases where a child successfully sued its mother (*Grodin v. Grodin*, 301 N.W.2d 869 (Mich. Ct. App. 1981); *Bonte v. Bonte*, 616 A.2d 464 (N.H. Sup. Ct. 1992), in which the New Hampshire Supreme Court held three to two that because a child born alive may sue a third party for injuries sustained *in utero*, and a child may sue his or her parent in negligence, it follows that a child born alive can maintain a cause of action in tort against his or her mother for the mother's tortious conduct causing prenatal injury. Recently, in *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. Sup. Ct. 1988), the Supreme Court of Illinois "concluded that a pregnant woman's interest in privacy and bodily integrity, as well as the difficulty in establishing a consistent or just standard of "reasonable" prenatal care, militated against recognizing a fetus' right to sue its mother for the unintentional infliction of prenatal injuries" ("Recent Cases" (1990) 103 Harv. L. Rev. 823).

¹⁴⁸ In the United States, several states allow claims for wrongful death by a viable fetus (see *Dorcak*, *supra* note 102 at 142). Moreover, courts in a handful of states have allowed claims for preconception torts committed by third parties which result in injuries to subsequently born children (*Walker v. Rinck*, 604 N.E.2d 591 (Ind. Sup. Ct. 1992); *Renslow v. Mennonite Hospital*, 367 N.E.2d 1250 (Ill. Sup. Ct. 1977); *Bergstresser v. Mitchell*, 577 F.2d 22 (8th Cir. 1978); *Monusko v. Postle*, 437 N.W.2d 367 (Mich. Ct. App. 1989)). For a review of the case law, see *Hegyegs v. Unjian Enterprises Inc.*, 286 Cal. Rptr. 85 (Cal. App. 1991). In this case, the Court held two to one that a cause of action for damages sustained by an infant as a result of the defendant's preconception negligence will lie only where there is a special relationship between the defendant and the infant's mother, giving rise to a duty of care.

¹⁴⁹ These third party suits help reinforce a woman's bodily integrity by providing an additional deterrent to negligent intrusions on her body. They should not be used as precedent for principles which would detract from that integrity (see *Duval v. Séguin* (1972), 2 O.R. 686, 26 D.L.R. (3d) 418 (H.C.J.); *Montreal Tramways Co. v. Léveillé*, [1933] S.C.R. 456, 4 D.L.R. 337; *Steeves v. Fitzsimmons* (1975), 11 O.R. (2d) 387, 66 D.L.R. (3d) 203 (H.C.J.), where the Court stated that the plaintiff must be born alive to recover; *Smith v. Fox* (1922), 53 O.L.R. 54, [1923] 3 D.L.R. 785, (Sup. Ct.); *Garland v. Rowsell* (1990), 73 O.R. (2d) 280 (Dist. Ct.), in which the Court disallowed a claim on behalf of a woman's "child" because it was not yet conceived at the time of the accident; *Arndt v. Smith* (1994), 93 B.C.L.R. (2d) 220, [1994] 8 W.W.R. 568 (B.C.S.C.), where Hutchison J. held that "there is no viable suit in this province for "wrongful life", i.e. a claim by a person born with disabilities asserting that he or she "should not have been born at all." For cases determining whether the fetus qualifies under legislation which confers certain statutory benefits, see *Fitzsimmons v. Royal Insurance Co. of Canada* (1984), 7 D.L.R. (4th) 406, 2 W.W.R. 762 (Alta. C.A.); *Giddings v. Canadian Northern Railway Co.* (1920), 53 D.L.R. 3 at 9, 2 W.W.R. 849 (Sask. C.A.); *Chapman v. Canadian National Railway Co.*, [1943] 52 O.W.N. 47, [1943] 2 D.L.R. 98 (H.C.J.), where the Court held that the term "dependent" in the Ontario *Workmen's Compensation Act*, R.S.O. 1970, c.

can be a foreseeable plaintiff and can be the beneficiary of a duty of care in certain circumstances.¹⁵⁰ Following such reasoning, a fetus would also be a foreseeable plaintiff to the pregnant woman because she ought reasonably to contemplate that her actions could affect it.

Even if the foreseeability test is met, the next question is whether there are policy reasons for not imposing a duty of care.¹⁵¹ The starting point for the public policy analysis must be the unique relationship between a woman and the fetus she carries. However, the complete dependency of the fetus on the pregnant woman has the potential to either support or contradict the recognition and enforcement of a legal duty of care.

Proponents of the imposition of tort liability on the mother¹⁵² believe that all wrongdoers should pay compensation for injuries they cause¹⁵³ and that such a com-

505, included a "child en ventre sa mère" at the time of the injury to the worker; *Seed v. Delvey* (1989), 70 O.R. (2d) 692 (H.C.J.); *Seede v. Camco Inc.* (1985), 50 O.R. (2d) 218, 50 C.P.C. 78 (S.C.), appeal refused (1986), 55 O.R. (2d) 352 m (S.C.C.); *MacIssaac v. Smith* (1987), 58 O.R. (2d) 289, 35 D.L.R. (4th) 451 (H.C.J.), where an application to include a grandchild within the term "dependant" of the *Family Law Reform Act*, R.S.O. 1980, c. 152, who was not conceived or born at the time of the accident was dismissed. *Contra: McCartney v. Andrews*, [1987] O.J. No. 1092 (H.C.J.) (QL).

¹⁵⁰ For articles on the topic, see A. Samuels, "Injuries to Unborn Children" (1974) 12 *Alta. L. Rev.* 266; D.A. Gordon, "The Unborn Plaintiff" (1965) 63 *Michigan L. Rev.* 579; P.A. Lovell & R.H. Griffith-Jones, "'The Sins of the Father' — Tort Liability for Pre-Natal Injuries" (1974) 90 *L.Q. Rev.* 531; P.H. Winfield, "The Unborn Child" (1942) 4 *U.T.L.J.* 278.

¹⁵¹ Foreseeability and proximity are not a sufficient basis on which to impose a legal duty of care. See *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004, [1970] 2 *All E.R.* 294 (H.L.) [hereinafter cited to A.C.], for the proposition that there may be public policy reasons why a duty of care should not be imposed in a given case. On the other hand, a "special relationship" may warrant imposition of a duty of care (*ibid.* at 1037-39).

¹⁵² See *The Unborn Child's Right*, *supra* note 11; "Procreative Liberty", *supra* note 18; H.B. Robertson, "Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries Wrongful Life" (1978) *Duke L.J.* 1401; "Abuse and Neglect", *supra* note 21. For an endorsement of such a tort under American jurisprudence, see R. Beal, "'Can I Sue Mommy?' An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive" (1984) 21 *San Diego L. Rev.* 325. See also M. Shaw, "The Potential Plaintiff: Preconception and Prenatal Torts" in A. Milunsky & G. Annas, eds., *Genetics and the Law II* (New York: Plenum, 1980) 225; M. Shaw, "Conditional Prospective Rights of the Fetus" (1984) 5 *J. Legal Medicine* 63, who argues that parents may be liable for wrongful life claims by their children if they fail to monitor and abort fetuses which might suffer from environmentally or genetically produced abnormalities. For a review of these issues, see B. Dickens, "Wrongful Birth and Life, Wrongful Death Before Birth and Wrongful Law" in S. McLean, ed., *Legal Issues in Human Reproduction* (Aldershot: Gower, 1989) 80. See also S.R. Weinberg, "A Maternal Duty to Protect Fetal Health?" (1983) 58 *Indiana L.J.* 531; Dorczak, *supra* note 102 at 142-45; Glazebrook, *supra* note 102.

¹⁵³ See "Procreative Liberty", *ibid.* at 439-42. See also C.A. Simon, "Parental Liability for Prenatal Injury" (1978) 14 *Columbia J. L. & Soc. Probs.* 47. These authors cite the erosion of the parental immunity doctrine as support for the woman's liability without acknowledging that the woman-fetus relationship is different from the mother-child one because of the fetus' complete physical dependence.

pensatory obligation would encourage women to abide by the "legal duties" they owe their fetuses. Some argue that this tort liability would catch any harm caused to fetuses, whether they are born alive or as a result of a claim for wrongful death.¹⁵⁴

Others, however, suggest that pregnant women should not be stigmatized as wrongdoers and treated as tortfeasors for their conduct during pregnancy.¹⁵⁵ The majority of the Royal Commissioners could not justify restricting the liberty of pregnant women which would follow from the imposition of a duty of care. They agreed with those who claimed that any such duty would be so intrusive, complete, and limiting as to be oppressive.¹⁵⁶ Although civil liability may initially appear less extreme than criminal liability, its potential scope is much broader and the behaviour it encompasses much wider.¹⁵⁷ The invasiveness of tort-based responsibilities is demonstrated by the extent of the liability proposed and the behaviour which has been suggested as negligent, such as:¹⁵⁸ taking non-prescription or illegal drugs; using alcohol or tobacco; not following doctor's orders; taking prescription drugs where the benefit to the woman does not clearly outweigh the potential detriment to the fetus; contracting a disease which may harm the fetus; failing to eat properly; and exposure to workplace hazards.¹⁵⁹

Establishing *when* a tort duty arises also underscores the invasiveness of such a duty. If the goal is to prevent avoidable *in utero* injury, existing medical knowledge suggests that the greatest danger of inducing genital malformations to the fetus is during the first trimester — a time when many women will not even be aware they are pregnant. If one accepts the stereotype that all women desire to have a child at some point in their lives, is it reasonably foreseeable that the way in which a woman treats her body anytime after puberty could ultimately injure a future child? Even if a duty of care only commences after conception, must she actually know she is pregnant, or will the duty start from the time the pregnancy should have been diagnosed by a reasonable

¹⁵⁴ Such an action would give the father the ability to sue the pregnant woman for loss of companionship because the fetus never became his child. An action on behalf of the fetus itself is less likely considering the current state of jurisprudence on wrongful death in Canada (see T.A. Borowski Jr., "No Liability for the Wrongful Death of Unborn Children — The Florida Legislature Refuses to Protect the Unborn" (1988) 16 Florida State L. Rev. 835, who argues for the creation of a statutory wrongful death action in the United States).

¹⁵⁵ See "Rethinking (M)otherhood", *supra* note 111; Hanigsberg, *supra* note 64.

¹⁵⁶ "A New Threat", *supra* note 99.

¹⁵⁷ A tort action would require only that there is a failure to conform to the civil standard of care which ought to have been exercised by a reasonable person. The criminal standard of negligence requires more and often calls for wilfulness. In addition, the burden of proof is different in each case.

¹⁵⁸ According to the Royal Commission, the potential for curtailing women's behaviour is "staggering" (*Report, supra* note 1 at 958).

¹⁵⁹ A great deal has been written recently on the topic of workplace toxicity and pregnant women (see e.g. K. Swinton, "Accommodating Women in the Workplace: Reproductive Hazards and Seniority Systems" (1992) 1 Can. Lab. L.J. 217; C. Peters, "Excluding Women from the Toxic Workplace: Genuine Fetal Protection or Impermissible Discrimination?" (1991) 49 U.T. Fac. L. Rev. 68). For the situation in the United States, see *International Union v. Johnson Controls Inc.*, 499 U.S. 187, 111 S.Ct. 1196, (1991).

woman? As with other determinations involving a duty of care and the standard of reasonable conduct, the focus is on generally accepted norms, rather than on the individual woman. The knowledge a reasonable woman would be deemed to have and the effects of her conduct on the fetus she carries would then become highly relevant inquiries. Accordingly, the woman loses the benefit of a truly individual standard, which would incorporate her personal situation and acknowledge her autonomy.

V. The One Dissenting Opinion

As the foregoing discussion illustrates, the majority of Royal Commissioners rejected many types of intrusive, short-term attempts at regulation which disregard the rights and interests of women; they favoured a comprehensive policy which places fetal health in its larger social context. This approach also allows the complexity of the problems to be addressed, including consideration of discrimination, poverty, substance abuse, and violence. However, not all members of the Commission endorsed these conclusions. While Commissioner Suzanne Rozell Scorsone accepted the need for increased education and service,¹⁶⁰ she argued that judicial intervention may serve the best interests of women.¹⁶¹ Nevertheless, she failed to address the issue of discrimination towards women in the Canadian court system¹⁶² and to explain why pregnant women subjected to judicial intervention are often among the most disadvantaged members of society.¹⁶³

She also argued that women should not be given what she calls "special treatment" for fear of "calling into question the equality of men and women before the law."¹⁶⁴ Her dissent suggested that the majority view endorsed a form of special treatment of women, rather than merely establishing women's equal right to refuse medical treatment.¹⁶⁵ Her argument suggests that she has not fully grasped the approach the Su-

¹⁶⁰ *Report, supra* note 1 at 1064.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* at 1064. The findings outlined in the Report on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) at 261-62, are instructive. The Report states: "These reports emphasize the diversity of women's experience in the justice system and the ways in which women of colour, aboriginal women, lesbians and women with disabilities face multiple discrimination in the law."

¹⁶³ A recent American study shows that of the pregnant women subjected to forced obstetrical intervention, 81 per cent were black, Asian, or Hispanic; 44 per cent were unmarried; 24 per cent had a non-English mother tongue; and all of them were on some form of social assistance (see Grant, *supra* note 22 at note 71, pp. 251-52, quoting from Kolder, Gallagher & Parsons, *supra* note 68 at 1193).

¹⁶⁴ *Report, supra* note 1 at 1064.

¹⁶⁵ Intervention in pregnancy is fundamentally different from other forms of medical or social intervention in that it can only be imposed upon women, and the imposition is based on goals and ideals specifically directed at women. To hold that women are not so different from men in their essence or before the law is also absurd. Laws to protect the fetus and intervention in the name of fetal protection are specifically directed at women and not at men.

preme Court has taken in equality matters. In *Brooks v. Canada Safeway Ltd.*,¹⁶⁶ the Supreme Court established that discrimination on the basis of pregnancy is discrimination on the basis of sex, even though only women have the capacity to become pregnant. Dickson C.J. stated:

That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.¹⁶⁷

Thus, the majority of Commissioners acted upon the Supreme Court's clear recognition that, in relation to pregnancy, women are different from men, and that laws aimed at pregnant women have the potential to be discriminatory.

Commissioner Scorsone argued for an individual assessment of each case and argued that a particular woman's situation should not be influenced by an approach to equality which the woman may not explicitly embrace. Commissioner Scorsone believes such an approach would transform the woman into a means to an end. For her to invoke this language is highly ironic because many argue that it is judicial intervention, not its absence, which forces women into being a means to an end; that is, a woman being treated as a vessel to produce a healthy child.¹⁶⁸ Furthermore, she infers that others, perhaps the fetus, the family, the father, or the woman's partner, should have some say in the resolution of the situation.

The dissenting Commissioner misapplies equality principles and, by requiring a rational and "objective assessment" of the woman's situation, fails to see women as persons with full constitutional rights. Moreover, the majority does not mandate a predetermined policy, but would allow individual women a full range of choice in how they manage their pregnancies. Women are free to defend the rights of their fetus; they are free to undergo a caesarean by choice; and they are free to choose treatments which will assist the birth of a healthy child. The majority simply refused to impose these obligations on women, in the absence of any basis in law or in ethics for one to be forced to undergo medical treatment for the sake of another. Her reasoning is also disconcerting because it suggests that, in many situations, the interests of the fetus are paramount to the rights of the woman. Her proposal therefore undermines the equality and autonomy of women and is inconsistent with the Supreme Court's decision in *Tremblay v. Daigle*.¹⁶⁹

¹⁶⁶ [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321 [hereinafter cited to S.C.R.].

¹⁶⁷ *Ibid.* at 1243-44. See also *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 171, 44 D.L.R. (4th) 385 (Wilson J.).

¹⁶⁸ For a thorough discussion, see "Code of Perfect Pregnancy", *supra* note 74.

¹⁶⁹ For a discussion, see D. Greschner, "Abortion and Democracy for Women: A Critique of *Tremblay v. Daigle*" (1990) 35 McGill L.J. 633.

VI. Rationalizing Intervention: The Creation of Fetal Rights and Constructing Maternal-Fetal Conflicts

The different conclusions arrived at by the Commission's majority and by the dissent can best be explained by whether a rights-conflict model between pregnant women and the fetuses they carry was rejected (majority) or accepted (dissent).¹⁷⁰ Historically, the legal systems in Canada, the United States, and Britain have treated the fetus as part of the pregnant woman and have afforded it no rights as a separate entity.¹⁷¹ Where necessary, a few exceptions to this general principle were created to protect the rights of a born individual, but they did not threaten the legal status of a pregnant woman or jeopardize the full enjoyment of her vested rights.¹⁷² Just as the pregnant woman was the physical custodian and nurturer of the fetus, she was the legal decision-maker and sole rights-bearer. It was assumed that the mother and fetus constituted a unit whose legal interests were co-existent.¹⁷³

In recent years, in what has been described as a "dangerous conceptual move", claims for independent fetal "rights", including constitutional rights, have been made.¹⁷⁴ Proponents of fetal rights contend that these rights should vest *in utero*, generally at the time of conception, and should no longer be contingent on live birth.¹⁷⁵

¹⁷⁰ In her final paragraph, Commissioner Scorsone stated that questions of the existence or non-existence of independent legal or constitutional rights of the fetus are irrelevant to the issue but suggested "[t]he state has been declared by the Supreme Court of Canada to have an interest in the fetus, which means that this interest must have some possibility and venue of exercise" (*Report, supra* note 1 at 1146), even though the position of the Supreme Court of Canada in *R. v. Morgentaler*, *supra* note 167, is clear. She seemed to be arguing that, in general, women are protected from non-consensual intervention so that we should not have to worry about such incidents. A short reading of the case law and analysis in Canada and the United States will show how well this protection from non-consensual intervention is working. In this paragraph, Commissioner Scorsone seemed to have missed the point of the Royal Commission's recommendations.

¹⁷¹ In Canada, see C. Tolton, "Medicolegal Implications of Constitutional Status for the Unborn: 'Ambulatory Chalices' or 'Priorities and Aspirations'" (1988) 47 U.T. Fac. L. Rev. 1; Weiler & Catton, *supra* note 45. We have purposefully refrained from embarking on a detailed consideration of so called "fetal rights" because our chief concern is the all too frequently ignored infringement of the physical integrity and legal rights of the pregnant woman. This is not to deny that the fetus is human and biologically alive, or that in some cases women may make decisions with tragic and sometimes avoidable consequences. But we cannot expect women to be infallible. Our claim is only that, considering all the factors we outline, women are the best decision-makers in the circumstances.

¹⁷² "Creation of Fetal Rights", *supra* note 64.

¹⁷³ McNulty, *supra* note 107 at 280.

¹⁷⁴ "Creation of Fetal Rights", *supra* note 64 at 603. See also D.E. Johnsen, "From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After *Webster*" (1989) 138 U. Pa. L. Rev. 179.

¹⁷⁵ For Canadian examples, see *The Unborn Child's Right*, *supra* note 11; M.C. Schumiatcher, "'I Set Before You Life & Death' (Abortion, Borowski and the Constitution)" (1987) 24 U.W.O. L. Rev. 1; M.C. Schumiatcher, "Chaff from the Charter's Threshing Floor" (1983) 13 Man. L.J. 435; T. Campbell, "Abortion Law in Canada: A Need for Reform" (1977-78) 42 Sask. L. Rev. 221; E.-H.W.

The relationship between a woman and her fetus would become adversarial: both would compete for the control and use of the woman's body.¹⁷⁶ These two full sets of rights are also ordered hierarchically and "balanced" to determine which merits legal ascendancy. To use this type of rights-based analysis is to transform what was once within the woman's domain into a new and redefined form of maternal-fetal conflict.¹⁷⁷

Claims for fetal rights and arguments in favour of the use of a conflict paradigm have been heard for many years in the abortion context. However, those who advocate interventions in pregnancy now want to extend this adversarial approach throughout the entire course of the woman's pregnancy and to all aspects of the woman-fetus relationship. Drawing on the abortion analogy, prenatal controls are presented as restrictions imposed upon pregnant women for the purpose of protecting fetal life.¹⁷⁸ As such, proponents of interventions appear to share many of the same goals, arguments, and strategies as the anti-abortionists. In the constitutional domain, the same governmental interests in fetal life and public morality asserted in relation to the criminalization of abortion are often invoked to support state-imposed restrictions on pregnant women.¹⁷⁹

Kluge, "The Right to Life of Potential Persons" (1977) 3 *Dalhousie L.J.* 837; D. Dehler, "Abortion and the Law" (1968) 16 *Chitty's L.J.* 13; D. O'Leary, ed., *The Issue is Life: A Christian Response to Abortion in Canada* (Burlington: Welch, 1988); G.G. Sweet, ed., *Pro-Life Feminism: Different Voices* (Toronto: Life Cycle Books, 1985); K.M. McCourt & D.J. Love, "Abortion and Section 7 of the Charter: Proposing a Constitutionally Valid Fetal Protection Law" (1989) 18 *Man. L.J.* 365. For American examples, see P.A. King, "The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn" (1979) 77 *Michigan L. Rev.* 1647; "Procreative Liberty", *supra* note 18; "The Right to Procreate", *supra* note 63; Simon, *supra* note 153; Parness & Pritchard, *supra* note 102; J.E. Rice, "Fetal Rights: Defining 'Person' under 42 U.S.C. § 1983" (1983) *U. Ill. L. Rev.* 347; Hal-lisey, *supra* note 64; E.G. Taylor, "Constitutional Limitations on State Intervention in Prenatal Care" (1981) 67 *Va. L. Rev.* 1051.

¹⁷⁶ The adversarial model is especially prevalent in the medical literature where the fetus is sometimes seen as a second patient (Hirsh, *supra* note 91; J.L. Lenow, "The Fetus as a Patient: Emerging Rights as a Person?" (1983) 9 *Am. J. L. & Medicine* 1). But see G. Annas, "Protecting the Liberty of Pregnant Patients" (1987) 316 *New England J. Medicine* 1213; L.J. Nelson & N. Milliken, "Compelled Medical Treatment of Pregnant Women: Life, Liberty and Law in Conflict" (1988) 259 *J.A.M.A.* 1060.

¹⁷⁷ For a critique of the adversarial approach, see S. Rodgers, "Fetal Rights and Maternal Rights: Is There a Conflict?" (1986) 1 *C.J.W.L.* 456; Hubbard, *supra* note 94, where she claims that to pit the rights of the fetus against those of the mother ignores the organic unity and substitutes a false dichotomy for a complex situation; "Rethinking (M)otherhood", *supra* note 111.

¹⁷⁸ For an analysis of the relationship between abortion and prenatal invasions, see D. Mathieu, "Respecting Liberty and Preventing Harm: Limits of State Intervention in Prenatal Choice" (1985) 8 *Harv. J.L. & Pub. Pol'y* 19 at 32ff. This author argues that, by not having an abortion, the woman assumes more onerous obligations which form the basis of the "special relationship" between mother and child. At this time, the mother's responsibilities involve positive duties of aid, as well as negative duties not to cause harm.

¹⁷⁹ Some authors argue that since the state interest in preservation of fetal life authorizes intervention to prevent destructive acts, it should also authorize limited compulsion of action which is necessary to preserve fetal life ("Abuse and Neglect", *supra* note 21 at 18).

Despite these similarities, there are, however, significant differences which suggest that the conflict paradigm used in relation to abortion should not be controlling of, or perhaps even relevant to, these suggested legal controls on pregnant women.¹⁸⁰ In the abortion context, it may be easier to see an inherent and fundamental incompatibility between maternal rights and fetal interests such that a conflict paradigm may sometimes be appropriate (but not a conflict between rights, only a conflict between a woman's rights and the state interest in the fetus). On the other hand, a woman who is prepared to give birth is generally deeply concerned with the fetus' well-being and legal controls on how she manages her pregnancy raise issues which are less inherently or obviously adversarial. The either/or equation of abortion fails to adequately address the social and physiological realities of the pregnant woman and her wholly dependent fetus. Its zero-sum analysis should not be accepted as the intellectual foundation upon which prenatal judicial interventions are assessed. The majority of the Commissioners recognized that the unique relationship between the woman and the fetus must be confronted in a more holistic context. Another significant difference between abortion and prenatal invasions is that, in the abortion context, the fetal interest asserted is the so-called "right" to life. In relation to legal controls on pregnancy, the interest asserted most often concerns fetal health and the enhancement of the child's quality of life, once born.¹⁸¹ The targeted behaviour is not the intentional termination of an unwanted pregnancy, but all aspects of the conduct of the woman during the entire pregnancy.¹⁸²

In addition to their reliance on the conflict paradigm, proponents of intervention argue that fetal rights are increased, not diminished, by the continuing nature of the pregnancy.¹⁸³ In their views, the woman's consent to the continued pregnancy translates any moral obligation she may have towards her fetus into an irrevocable conferral of legally enforceable fetal rights.¹⁸⁴ These legal rights may then be used against the pregnant woman to mandate her conduct.¹⁸⁵ The woman's decision not to abort is interpreted as a waiver of her rights and an estoppel by conduct. Her legal obligations are thereby seen to be augmented and the presence and weight of fetal interests are significantly increased.¹⁸⁶

¹⁸⁰ One consequence of the adversarial conflict paradigm is that it encourages individuals to intervene and advocate for the fetus because it is perceived to be helpless and in need of assistance (see e.g. "There ought to be a law", *supra* note 92). But Kahn, *supra* note 61 at 811, reminds us that society should not mistake the needs of the fetus in certain areas of the law for personal "fetal rights".

¹⁸¹ See McNulty, *supra* note 107, for the state interests asserted in the United States.

¹⁸² Some suggest that the state may have a greater interest in preventing the suffering of those who will be born, than in ensuring that any particular fetus will be born ("Maternal Rights", *supra* note 105 at 997).

¹⁸³ "Procreative Liberty", *supra* note 18 at 450.

¹⁸⁴ There is also debate as to the content of the moral obligation of women to their fetuses (see J.C. Fletcher, "The Fetus as Patient: Ethical Issues" (1981) 246 J.A.M.A. 772; Nelson & Milliken, *supra* note 176).

¹⁸⁵ "Procreative Liberty", *supra* note 18.

¹⁸⁶ This position fails to recognize that women may not truly "agree" to carry a fetus to term. Many social factors may affect the voluntariness of a woman's decision to carry a fetus to term, such that the imputed grant of legal status to the fetus is inappropriate.

There is, however, disagreement concerning the time in which these newly fashioned legal duties arise and the method by which they are triggered. For example, one author stated that maternal obligations would arise once the mother decides not to terminate the pregnancy, but then, in a subsequent footnote, extends these duties to women who are undecided about whether or not to have an abortion.¹⁸⁷ Keyserlingk suggested that fetal rights should vest before the woman positively decides to continue the pregnancy.¹⁸⁸ Speaking at a time when the *Criminal Code* allowed only those abortions necessary to promote the life and health of the woman, he asserted that

the unborn's rights to life, inviolability and prenatal care would arise at the time the parents (or mother) knows [sic] of the pregnancy and would continue to have effect from then to viable birth *until* or *unless the mother decides*, for the exceptional reason allowed in s. 251(4) and s. 221(2), *to undergo a therapeutic abortion*.¹⁸⁹

In legal terms, the fetal rights would vest immediately, subject to the resolutive condition of a woman having a lawful abortion, in contrast to the alternative of suspending their vesting and making them contingent on the woman's decision not to abort. He criticized making the vesting of fetal rights contingent on the woman's decision to continue her pregnancy because he claims that many women are either passive, fatalistic, or unclear about such a decision.

Once again, a consent-based justification is proffered and once again it is inherently flawed: it misunderstands the concepts of consent and waiver; it misinterprets the relevance of statutory provisions;¹⁹⁰ and most significantly, it ignores the fact that women do not always control the circumstances in which they become and remain pregnant. But even accepting its flawed premise, the ideology of consent is often pushed past any logical point.

Some authors argue that because all of a woman's actions have possible repercussions on her ability to carry a fetus, her legal duties ought to arise before she knows she is pregnant or even before she is pregnant.¹⁹¹ Consequently, a woman's consent to sexual intercourse activates the sequence of events which deprive her of her independence and autonomy. By agreeing to sex, if such is the case, she voluntarily and irrevocably loses her ability to manage her pregnancy and waives her right to resist invasions such as coerced medical treatment. Thus, the tentacles of consent are stretched to cover con-

¹⁸⁷ "Procreative Liberty", *supra* note 18 at note 129, p. 447.

¹⁸⁸ "Unborn (Part II)", *supra* note 11 at 33.

¹⁸⁹ *Ibid.* at 39.

¹⁹⁰ There is a crucial distinction between individual rights and instances when the state employs its plenary jurisdiction to protect an "interest" deemed to be sufficiently worthy of protection. Those who benefit from awards under statutory provisions do not necessarily have a claim to enforce these benefits as "rights". Thus, a fetus may be given the benefit of a statutory provision without having full blown "rights" or becoming a legal person.

¹⁹¹ See e.g. *The Unborn Child's Right*, *supra* note 11; "Procreative Liberty", *supra* note 18.

duct engaged in when the woman was not even aware that she was pregnant and when she may have thought she had effective birth control.

In addition to the consent rationale, claims for controls on women's conduct are often supplemented by an argument based on the increasing gestational age of the un-aborted fetus.¹⁹² As the fetus matures, its legal claims are seen to increase, vesting the fetus with virtually absolute rights once labour commences.¹⁹³ Such arguments are heard more often in the United States because of the trimester framework adopted in *Roe v. Wade*. In that case, the United States Supreme Court held that the age and viability of the fetus helped to determine the extent to which state powers could be used to restrict abortions and limit women's constitutional rights. There is no similar jurisprudential development in Canada, but the differences between a seven-week-old fetus and a seven-month-old fetus may nevertheless influence decision-making in this area.

In conclusion, most proposals for new legal liabilities for pregnant women focus predominantly on the fetus, but the woman herself, as well as her vested rights, is not always a prominent part of the picture.¹⁹⁴ Usually, the constitutional implications of these sweeping proposals are not even raised.¹⁹⁵ Other times, they are raised but not analyzed with sufficient rigour.¹⁹⁶ Some authors use convoluted reasoning to justify the disadvantageous legal treatment of pregnant women. For example, the same writer who postulates a broad right to procreate also proposes some of the most sweeping restrictions on women during pregnancy.¹⁹⁷ In his view, there is a categorical distinction between the freedom to procreate and what he refers to as freedom in procreation. This latter category includes decisions concerning how a woman conducts her pregnancy and this freedom is a lesser order interest and bereft of any sort of constitutional protection: "Recognizing the right to procreate, however, does not require protection of every activity or decision related to the *process* of bearing and giving birth."¹⁹⁸

¹⁹² *Ibid.*

¹⁹³ In *R. v. Morgentaler*, *supra* note 167, there are dicta in the judgements of Justices Wilson, *ibid.* at 182-83 and Justice Beetz, *ibid.* at 128, which suggest that the gestational age of the fetus may have a bearing on the existence and strength of the state's interest in the fetus.

¹⁹⁴ For an analysis of women's constitutional rights, see "Creation of Fetal Rights", *supra* note 64. In the Canadian context, see Grant, *supra* note 22; Jackman, *supra* note 64; Hanigsberg, *supra* note 64; Report, *supra* note 1 at 955-57.

¹⁹⁵ See e.g. Beal, *supra* note 152. But see C. Overall, "Mother/Fetus/State Conflicts" (1989) 9:1 Health L. Can. 101.

¹⁹⁶ A good example is "Abuse and Neglect", *supra* note 21 at 55ff, where Myers comments that "state interference in a woman's pregnancy is a frightening proposition" but goes on to say that, because "two lives are involved," a balance of competing interests is required. Thus, even the express recognition of women's rights does not mean they will be accorded their due weight. See e.g. "There ought to be a law", *supra* note 92 at 52, where Kluge postulates that there should be a law requiring women to deliver by caesarean section to prevent the woman's insistence on autonomy from being a "fist" in the "face" of "this fetal person". However, his analysis is criticized as hasty, ill conceived, and a gross oversimplification of a complex moral quandary (see D. Zimmerman, "No easy answer" (1987) 29 B.C. Medical J. 62).

¹⁹⁷ "Procreative Liberty", *supra* note 18.

¹⁹⁸ *Ibid.* at 451.

This movement toward the recognition of "fetal rights" has been most pronounced in the United States. In Canada, although there is some cause for alarm, the Supreme Court has recently preserved women's rights, at least in the abortion context, by reiterating that legal rights vest only at birth.¹⁹⁹ The absence of separate fetal rights means there are no competing rights to "balance" against those of the woman. Therefore, any assertion that the fetus has a claim over the woman's body or that a state-appointed guardian of the fetus can veto her decision-making ability, must be based on the power of the state to regulate women, and not on the independent rights of the fetus.

Conclusion

Proposals for coerced medical treatment and criminal and civil liability would impose new and unique legal duties on pregnant women.²⁰⁰ These suggested legal controls would contribute to the systematic regulation of pregnant women.²⁰¹ State intervention would take many forms including crime, compensation, compulsion, prior restraint, restriction, and limitation. It would involve postbirth sanctions and prebirth seizures, span the entire biological process of procreation, and be justified on the basis of the state's police power and its *parens patriae* jurisdiction. These proposals are also linked conceptually and cumulatively to other forms of legal control on women and reproduction, such as provisions on sexual assault, contraception, and abortion.

A desire to control the conduct of pregnant women is simply the most recent example of the role of law in controlling women's sexual and reproductive lives. These claims occur at a time when new technologies allow us to view the fetus, detect abnormalities, and perhaps even correct them.²⁰² Current medical knowledge has also improved the understanding of the detrimental effects of various substances on the development of fetuses. Technological invention and increased knowledge have therefore helped create an environment in which the fetus can be characterized as a separate patient.²⁰³ This phenomenon has certainly facilitated the redefinition of women's decision-making as a potential maternal-fetal conflict, but it certainly does not require it and, indeed, the majority of Commissioners expressly rejected this redefinition.

Legal prescriptions intended to dictate the conduct of pregnant women exaggerate the danger to "society" which would result if pregnant women were the legally em-

¹⁹⁹ *Tremblay v. Daigle*, *supra* note 124.

²⁰⁰ Each proposal forms part of a comprehensive system of regulation. Those in favour of legal controls on pregnant women usually endorse a vast array of regulation and tend to be anti-choice. It is rare that merely one form of intervention is thought to be justifiable or desirable.

²⁰¹ See "Prenatal Invasions", *supra* note 18 at 45, where Gallagher explains that liability could "push ambivalent women toward abortion, frighten pregnant women away from prenatal care, and deter women from carrying a fetus to term and giving it up at birth for adoption" [references omitted].

²⁰² See Hubbard, *supra* note 94.

²⁰³ Hubbard, *ibid.* at 210, explains that as new technologies make more "choices" available, there are pressures which rapidly become "compulsions to 'choose' the socially endorsed alternative."

powered caretakers of the fetuses they carry. Although women are obliged to be the literal and legal "keepers" of their fetuses, and are the primary caretakers and nurturers of children, certain forms of legal controls effectively deny that women remain full legal persons and morally responsible decision-makers throughout their pregnancies. Many types of regulation also ignore biological reality and intentionally obfuscate the fetus' complete dependence on the pregnant woman by presenting the fetus as a distinct and separate patient vested with and capable of exercising competing rights.

The tendency to defer to science, combined with a history of gender-biased laws on human reproduction, illustrate that strong statements, like those of the Royal Commission, are necessary to reorient the discussion away from a conflictual model, and towards a model which truly seeks the welfare of women and the best interests of children.
