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Judicial, Legislative, and Professional Attempts to Restrict Pregnant Women's Autonomy

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The way a question is framed is important for understanding what lies behind the question. I was asked to write an essay answering the question, "Who should have a say in protecting the unborn?" This includes a number of presuppositions. The first relates to the term "unborn" to refer to the fetus. The implication is that there are two different types of persons: those who are born and those who are not yet born. The presupposition is that those who are not yet born will eventually undergo a change in temporal and geographic status and will, in time, be born. Some in the pro-life movement even prefer the term "pre-born." Here is an example of such thinking around this concept:

I was struck by the term that many pro-life advocates continue to use when speaking about a child in the womb: *unborn*. Of all the prefixes that we could use in referring to the precious life in the womb, I have yet to determine why the term *unborn* was chosen...[W]ith the knowledge and understanding that life begins at fertilization, and that we are living human beings in the womb, why don't we *all* use the reference *preborn* [1]?

But a fetus may ultimately not be born, either because natural causes or the pregnant woman's choice results in its demise before birth. The terms we use to describe life in the womb should not include a presupposition that birth is the intended or inevitable outcome.

A second presupposition in the title relates to the term "protecting." It conjures up an image of a defenseless being threatened with an attack of some sort. It is true that vulnerable persons stand in need of protection from harm, whether at the hands of other human beings or from natural disasters such as hurricanes and earthquakes. From what do fetuses need protecting? The presupposition is that the pregnant woman herself may be visiting harm on the fetus, possibly by ingesting drugs or alcohol, by refusing a medical intervention aimed at the fetus, or by seeking to terminate its life by means of abortion. Does this mean that someone other than pregnant women should "have a say" in decisions about fetuses' interests?

The third presupposition lies in the form of the question. To ask "Who should have a say in protecting the fetus?" presumes that someone other than the pregnant woman may have a say. Should it be the pregnant woman's obstetrician? Should it be the

state? Should it be pro-life demonstrators seeking to close down a clinic that provides abortions? And what does it mean to “have a say?”

My contention is that a pregnant woman is the only one who should ultimately “have a say” in what happens to the fetus. Physicians may have a say, of course, in making recommendations to women for maintaining a healthy pregnancy. They may have “a say” but not the last word. The last word, up until the time a baby is born, belongs to the pregnant woman. The ethical principle from which this claim derives is respect for autonomy. That principle requires that patients with decisional capacity have the right to determine what medical treatments may be administered to them. This right has been enshrined in the United Nations human rights convention (the Convention on the Elimination of All Forms of Discrimination Against Women) that spells out a variety of circumstances ensuring equality of women and men. In particular, Article 16 says that states should ensure that women have “the same rights [as men] to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights” [2]. One plausible interpretation of this article is that women have the right to determine when and whether to initiate a pregnancy, when and whether to terminate a pregnancy, and the manner in which childbirth will be carried out.

But many do not hold this view, in which women’s right to autonomous decision making takes primacy in matters of pregnancy. The remainder of this essay will explore past and current actions by the state and physicians that attempt to restrict pregnant women for the sake of the fetus, thereby violating their right to autonomous decision making.

Actions by the State Regarding Abortion in the US

As long as *Roe v. Wade* is not overturned, women have a constitutional right to abortion in the United States. The Supreme Court opined that the state has an interest in “potential life”—meaning the life of the fetus—but that that interest does not become “compelling” (which is to say it would not justify the government’s impinging on the individual’s constitutional right to be free of law) until the time of viability [3]. But the state has sought to “protect” the fetus by legislating a variety of measures that make it difficult for women to obtain safe, legal abortions, some of which limit what pregnant women may do and some of which restrict physicians in one way or another [4].

There are a variety of types of state and federal laws regarding abortion currently in effect: requirements of physicians and clinics that provide abortions; limits on the gestational circumstances under which abortions may be performed; requirements of the clinician-patient encounter, such as state-mandated counseling and post-counseling waiting periods; limits on public funding and private insurance coverage of abortions; laws that protect clinicians’ and institutions’ refusals to perform abortions; and laws requiring parental involvement when minors seek abortions (see table 1).

It is abundantly clear that most states in the US “have a say” in the circumstances in which women may seek an abortion.

State Laws and Criminal Prosecutions of Pregnant Women

For well over a decade, prosecutors in some states have charged pregnant women with actions that constitute a crime, most often when women are discovered to be using illegal drugs or alcohol during their pregnancies. According to the National Advocates for Pregnant Women, at least 126 women in South Carolina have been arrested during their pregnancies, mostly for using drugs or alcohol that could harm the fetus. In 1997 [13] the Supreme Court of South Carolina “by judicial fiat...declared that viable fetuses are legal persons and that pregnant women who use illegal drugs or engage in any other behavior that jeopardizes the fetus can be prosecuted as a child abusers or murderers” [14].

One tactic used by prosecutors has been to invoke existing laws that punish “delivering drugs to a minor” and assert that a pregnant woman using illegal substances delivers the drugs to the fetus through the umbilical cord [15-17]. In some cases, women undergoing prenatal care have been secretly tested for cocaine use [18]. In other cases, physicians have reported women whom they knew to be using drugs to state authorities [19].

It is clear from these and other examples that states have at least sought to “have a say” in protecting the fetus. But, following initial attempts at prosecution, judges have rejected almost all cases brought to court under existing criminal law statutes. The judicial reasoning has been that granting rights to the fetus threatens women’s rights and the best interest of children [20]. No one believes that it is a good thing for women who are pregnant to use substances that have the potential to harm the fetus. The question is whether criminal prosecution is an ethically acceptable course of action in this situation.

Actions by Physicians

In addition to reporting drug-using pregnant women to the authorities, physicians have engaged in more direct attempts to coerce pregnant women for the sake of the fetus. Perhaps the most egregious are forced caesarean sections, in which a judge’s approval overrides the woman’s refusal. Some contend that the prospect of third-trimester fetal death or a lifetime physical or mental disability for the resulting child can justify overriding the woman’s autonomy [21].

Physicians have also sought court orders to override a pregnant patient’s wish when Jehovah’s Witnesses refuse blood transfusions, but courts have ruled both ways in this situation, with appeals courts overruling lower courts in favor of protecting the pregnant woman’s right to refuse treatment [22].

Conclusion

In seeking to override pregnant women’s decision-making autonomy in refusing treatment, physicians have had a say in protecting the fetus, but not the final word.

Judges have also had a say, and, as the judicial decisions reveal, their final words have conflicted with one another. In a number of cases, higher courts have reversed the decisions of lower courts that found the pregnant woman guilty of some form of fetal abuse [17]. In general, the courts have been more protective of the rights of pregnant women than the states that have passed legislation restricting those rights. Those states are typically politically conservative, with legislative majorities that oppose abortion rights. Although judges may also be politically conservative, for the most part they look to legal precedents, and even judges who are elected rather than appointed are less beholden to constituencies than are legislators. A look at a recently compiled overview of state abortion laws confirms that politically conservative states have far more restrictions on abortion rights than politically liberal states like New York, California, Connecticut, and Oregon, for example [6]. But whether it is the right to a safe, legal abortion, the right to refuse a caesarean section, or other exercise of their autonomy, women should have the final say in matters relating to their pregnancies.

Table 1. Laws regarding abortion in effect in the US (as of August 1, 2014)

<u>Law type</u>	<u>Description</u>	<u>Number of states</u>
<i>Requirements of physicians and clinics that go “beyond what is necessary to ensure patients’ safety” [5]</i>	Requirements that facilities where abortions are performed meet standards intended for outpatient surgical centers, which provide much riskier and more invasive procedures [5]	26
<i>Restrictions on the gestational circumstances under which abortion can be performed</i>	Prohibitions on abortions performed after viability of the fetus or another specified point in gestation, unless they are needed to protect the woman’s health or life [4]	42
	Prohibitions on the intact extraction of a late-term fetus, called “partial-birth abortion” [6]	19, with 13 more states’ laws struck down
<i>Requirements about the content of the patient-physician encounter</i>	<ul style="list-style-type: none"> • Requirement that women receive ultrasounds before abortions <ul style="list-style-type: none"> ○ Requirement that they view the results before proceeding [7] 	<ul style="list-style-type: none"> • 12 <ul style="list-style-type: none"> ○ 3
	<ul style="list-style-type: none"> • Requirement that information that is either controversial or contradicted by evidence be provided as part of mandatory pre-abortion counseling <ul style="list-style-type: none"> ○ Requirement to tell women that personhood begins at conception. ○ Provision of written materials developed by the state health agency (which are in some cases 	<ul style="list-style-type: none"> ○ 5 ○ 5

	<p>required to be distributed) that inaccurately portray the risks of abortion for future fertility</p> <ul style="list-style-type: none"> ○ Requirement to inaccurately assert a link between abortion and breast cancer [8] 	<ul style="list-style-type: none"> ○ 5
	<ul style="list-style-type: none"> • Requirement of a specified waiting period between mandated counseling and the abortion procedure [8] <ul style="list-style-type: none"> ○ Requirement that counseling take place in person before the waiting period can begin [8] 	<ul style="list-style-type: none"> • 26 <ul style="list-style-type: none"> ○ 3
<i>Coverage restrictions</i>	The Hyde Amendment (passed in 1976) prohibiting the use of federal funds to cover abortions, except when the woman is in mortal danger or conception has resulted from rape or incest [9]	federal
	<ul style="list-style-type: none"> • Restrictions on private insurance coverage of abortions [10] <ul style="list-style-type: none"> ○ Restrictions on this coverage for any insurance plan available in the state ○ Limitations or prohibitions on this coverage on insurance plans available through the health insurance exchanges established by the Affordable Care Act • Restrictions or prohibitions on this coverage for state employees 	<ul style="list-style-type: none"> ○ 25 ○ 19 • 10
<i>Protected refusal to provide abortions</i>	The Weldon Amendment, also known as the “federal refusal clause,” protecting from financial, professional, or legal consequences those who conscientiously refuse to perform abortions, or, crucially, to refer patients to those who will perform them [11]	federal
	<ul style="list-style-type: none"> • Allowance for individual clinicians to refuse to participate in abortions [5] • Allowance for institutions, including public hospitals, to decline to provide abortions • Allowance of this refusal for private and religious health care organizations, but not their public counterparts 	<ul style="list-style-type: none"> • 42 • 27 • 16

<i>Parental involvement in abortions for minors</i>	Requirement of some combination of parental notification and permission for a minors to have an abortions [12]	38
	Exceptions for emergencies, rape, and judicial approval of waiving the consent requirement [12]	37

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