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Abortion and the Exceptions to the "No Duty To Aid" Rule.

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ABSTRACT: This paper explores the relationship between a pregnant woman's right to bodily autonomy and the argument that a fetus has a right to life. Though the American law rarely charges a person with a positive duty to act on behalf of another right-holder, it is argued that the pregnant woman-fetus relationship fits into several well established exceptions to this rule. Thus, it can be said that a pregnant woman owes some duty to aid her fetus. However, forcing a woman to allow a fetus to gestate would be a greater duty to aid than has ever before been recognized by American law. Since the woman-fetus relationship is unique in nature, it may be proper for this obligation to be placed on a pregnant woman. It is argued that in order to decide this issue, one must determine whether the duty to allow gestation would be an "undue burden" in light of the woman's relationship to her fetus. Finally, some extensions of the duty to aid in a parental context are explored.

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ABORTION: A CLASH OF RIGHTS.

The modern day debate over abortion is heated by a very formidable dilemma. Any deliberation on this issue must decide between the palpable interests of a woman whose body has become subservient to another organism, and a fetus who would die were that subservience to be terminated. One author eloquently describes this debate as, "a clash of absolutes, of life against liberty."[1] While the right to live is the most basic right we know, "[n]nothing can be more devastating than a life without liberty."[2] Requiring a woman to carry an unwanted baby to term surely represents a unique invasion on her personal liberty.[3] How can anyone presume to impose supposed communal will on a woman's body? On the other hand, what is to be said about a growing life, cut off before it could even get the chance to see the world that s/he might have lived in? Given these parameters, is there any wonder why this debate rages so hot, why it has such a great propensity to stir emotions?

RIGHTS ARE NOT ABSOLUTE.

In order to begin to analyze the relationship between the presumed rights of a woman and the fetus inside her, one must first understand the nature of a right. It is of paramount importance to understand that *rights are not absolute*. Even the most fundamental rights are limited by the principle that one may not cause unjustified harm to another.[4] In order to exercise a certain right, one must first take account of interests held by others that might be effected by the exercise of that right.[5]

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[1] *See* LAWRENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES 3 (1993)
[2] *See id.*
[3] *See id.* at 103.
[4] *See* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 50 (1994)
[5] *See id.* at 179.

In the case of abortion, a crucial questions must be answered. We must determine whether or not there is a competing interest to be considered. This question hinges upon whether or not a fetus may be said to hold a right.[6] Even if a fetus holds a certain interest, it does not necessarily follow that the pregnant woman must refrain from having an abortion. To proscribe abortion would be to require the pregnant woman to carry the fetus within her body, subjecting her to considerable physical and emotional strain. Facially, such a rule would seem to violate the longstanding tenet of American jurisprudence that dictates that a person is rarely if ever required to act on another right-holder's behalf, and is even more rarely (if ever) required to act in a way that would have a substantial cost to the actor.[7]

The goal of this paper is to argue that it may be possible to require a woman to allow an unwanted fetus to gestate within her body without parting from traditional standards of American jurisprudence. Although in most cases there is said to be no duty for one person to aid another, there are well recognized exceptions to this rule.[8] The woman-fetus relationship fits into several of the categories. Although these exceptions rarely require more than an "easy rescue," it will be argued that a greater burden may be placed on the pregnant woman because of the unique relationship that exists within pregnancy.[9] If this analysis is accepted, it effectively breaks the stalemate between the pregnant woman's liberty interest and the fetal interest in its life by analyzing the woman's duties (or lack thereof) to protect the fetal interests.

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[6] There also are other interests to be considered. For example, the Supreme Court in *Roe v. Wade* identified a state interest in protecting the pregnant woman. 410 U.S. 113, 114 (1973). These considerations are not the subject of this work.
[7] *See* Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. REV. 1323, 1366 (1995).
[8] *See generally* Peter M. Agulnick & Heidi V. Rivkin, Notes and Comments, *Criminal Liability for Failure to Rescue*, 8 TOURO INT'L L. REV. 93, 98-99 (1998).
[9] *See, infra* p.13.

THE SCOPE OF THIS PAPER.

This paper argues in favor of applying a specific methodology in an attempt to sort out the rights and obligations that may exist between a woman and her fetus. I do not intend to "solve" these issues by coming to a concrete solution. A solution to this issue may never be possible. Also, I honestly have not come to personal conclusion on many of these issues. I am convinced, however, that abortion analysis should be refocused on the issues surrounding the duty to aid. Thus, this paper will concentrate on developing the duty to aid argument, and applying it to the pregnant woman's situation. Toward the end of the paper, I will also attempt to apply this analysis to other issues that are similar to the abortion issue.[10]

ABORTION RESTRICTIONS AND EQUAL PROTECTION.

At this point, it is appropriate to respond to an initial objection to anti-abortion law. Many scholars have noted that any laws restricting abortion will necessarily create a gender-based burden.[11] There can be no doubt that this is the case. Although this issue will be analyzed in greater detail below[12], we should recognize at the outset that to the extent that that the anti-abortion burden is unique, this is the necessary result of a unique situation in nature. The best one can do is to attempt to treat the case in as equitable a manner as possible, borrowing from precedent that will at best be similar, but can never be identical. The final section of this paper will attempt to extend the argument in this paper beyond abortion to similar parent-fetus and parent-child contexts. In these cases, we will have the opportunity to investigate how a duty to aid might most equitably be applied both to father and mother.[13]

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[10] *See infra* p.18.
[11] *See*, Linda C. McClain, *"Atomistic Man"Revisited*, 65 S. CAL. L. REV. 1171, 1242 (1992) (*citing* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984)).
[12] *See infra* p.12.
[13] *See infra* p.18.

WHEN THE FETAL INTEREST BEGINS.

In order to justify any limitation on a woman's right to an abortion, there must first be an identifiable right that would be compromised by that abortion.[14] A fetus does not need to be deemed a person in order to hold rights.[15] In fact, American law recognizes duties that a person may have to animals.[16] In *Roe v. Wade* the Court indicated that once a fetus becomes viable it has an interest that can be protected.[17] There is no descent philosophical reason why viability should be associated with the recognition of fetal rights.[18] Instead, viability operates as a proxy for the sentience of a fetus.[19] John Robertson explains:

> In biological terms, a fertilized egg, embryo, or fetus cannot be a person or even a moral subject with interests and rights because it is too undeveloped biologically. In the earliest stages, it lacks differentiated organs and a nervous system. Even when those are developed, they still are far short of the cognitive ability to reason or even feel pain and sensation that make a living entity a moral subject in its own right. Not until sentience is reached, roughly at viability in the twenty-fourth to twenty-sixth weeks of pregnancy does the fetus develop interests in its own right.[20]

Viability does not directly create a fetus' interest because the simple fact that a fetus could survive outside the uterus does not mean that the fetus is anything more than an automaton. A rock is viable, yet it has no interests. On the reverse of this argument, a person on life support and feeding tubes, who is still conscious and aware, might not be considered "viable," but certainly such a person has interests. Instead, a person has an actual interest in his or her existence at the point of sentience. This is when the person is somewhat aware of his or her

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[14] *See supra* p.2.
[15] *See* Robertson *supra* note 4, at 53 *and* Tribe *Supra* note 1, at 114.
[16] *See* Robertson *supra* at 53.
[17] 410 U.S. 113, 163-164 (1973). *Roe* identifies the viability point as somewhere between the 24th and 28th week. 410 U.S. at 160.
[18] *See* Robertson, supra note 4, at 51, 53 *and* Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying and Unwanted Fetus,* 63 Brook. L. Rev. 1051, 1060-1061 (1997).
[19] *See id.* Roberts and Walen seem to both indicate that this was the intent of *Roe*. I am not sure that that is the case. Nonetheless, I am convinced that sentience is the proper point at which rights should attache.

existence, and has some capacity to experience pain or pleasure. It is at this point, and only at this point, that a person can be said to care about what happens to him or her[21].

SENTIENCE AND JUDICIAL UNCERTAINTY.

One great difficulty exists in recognizing fetal rights from the point of sentience. Sentience is an abstract term, barely definable, and even more difficult to discern through observation. Thus, a rule based on sentience is subject to a loathsome difficulty of judicial uncertainty. I speculate that this might be the reason why the Court in *Roe* didn't use such a concept. Unfortunately, sentience is the correct basis of analysis. To the extent that it is uncertain, I submit that it is better to have an uncertain definition than a meaningless one. After laying out the argument for a parental duty to aid, it will be necessary to revisit this issue, and decide how the law should best deal with this abstract standard.[22]

AMERICAN LAW AND THE DUTY TO AID.

There is a general rule in American law that no person owes a duty to help another person. Thus, if one were walking down the street and found an unconscious person face-down in a puddle, there would be no duty to roll the person so as to stop the person from drowning. This rule is rooted in the individualistic philosophy of our common law.[23] "It has also been thought that it is a greater interference with one's liberty to require one to act than to refrain from acting: Individuals should not be forced by law to serve or help one another."[24] Additionally, it has been argued that a general duty to save would know no bounds: "Does everyone who knows

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[20] Robertson, *supra* at 51.
[21] Both Robertson, *supra* at 53 and Walen, *supra* at 1061 note that as technology improves, and viability is pushed into an earlier stage of pregnancy, viability will no longer correlate with sentience, and will thus cease to be a useful guide to the existence of fetal rights. As this happens, the Court should shift it's analysis from viability towards a direct analysis of sentience.
[22] *See infra* p.17.
[23] *See* McClain, supra note 11 at 1233.

of the existence of a starving person have a moral duty to give that person food?" [25]

American law has recognized several exceptions to the no duty to aid rule. A duty to aid has been found to exist based on: (1) a personal relationship between the person in question and the person in danger; (2) a contractual relationship between the two; (3) the person's part in creating a risk that has put someone else in danger; (4) a person's voluntary assumption of care for another; (5) a statutory obligation (for example statutes governing "hit and run" accidents); (6) a duty to control the conduct of others (e.g. an employer's obligation to protect others from his employee); and (7) ownership of land.[26] Of these obligations, two, the duty based on personal relationship and the duty based on assumption of care, are of particular relevance to the woman-fetus relationship. Although they will be treated separately below, they are certainly interconnected. Note, however that each can stand alone as a basis for a woman's duty to aid her fetus. At this point, my review of these relationships is intended to demonstrate that they apply *in theory* to the woman-fetus relationship. As will be seen, the duty that would be placed upon the pregnant woman to carry the fetus may be unduly disproportionate to those duties that are traditionally placed on others by way of these relationships. This issue will be taken up later.[27]

THE SPECIAL RELATIONSHIP EXCEPTION.

The special relationship exception recognizes a duty to aid another, based on a dependant or interdependent relationship exists between the parties.[28] Special relationships that have been recognized include husband/wife, master/servant, ship captain/seaman and parent/child.[29]

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[24] *See id.*
[25] *See* Agulnick, supra note 8 at 97, *quoting* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.4 (1986). Note that even if the answer to this question were in the affirmative, the operative question should be if everyone would have a "legal duty" to give that person food.
[26] *See id.* at 98-99, 103.
[27] *See infra,*p.13.
[28] *See id.* at 99.
[29] *See id* at 100-101

Agulnick observes that, "[t]he parent-child relationship is most illustrative of this type of personal relationship. The common law has long recognized that parents who fail to aid or protect their children are criminally liable. Today, it is not just the common law that imposes a duty on parents. In fact, every state has enacted statutes."[30] (footnotes omitted) The rationale behind the duty from parent to child has been articulated as, "[t]he inherent dependency of a child upon his parent to obtain medical aid, i.e., the incapacity of a child to evaluate his condition and summon aid by himself, supports imposition of such a duty upon the parent."[31]

There can be little doubt that the special relationship grounds for a duty to aid should apply to the woman-fetus relationship.[32] The fetus is clearly and wholly dependant on its mother for its survival. Even when the fetus is viable, the fetus is certainly far more likely to survive if it is carried to term. Thus, we can conclude that the relationship between woman and fetus clearly fits the description of a "special relationship," and should logically subject the pregnant woman to some duty to care for the fetus.

THE ASSUMPTION OF CARE EXCEPTION

If a bystander begins to aid another, even if no duty to do so existed, the bystander has a duty to continue the rescue if not doing so would leave the victim worse off than the victim would have been had the bystander not intervened in the first place.[33] In the case of a woman and her fetus, the woman has not only taken on to aid the fetus, she has in fact created the fetus, a fetus that she knew would be dependant on her help to survive.[34]

[30] *See id.* at 99.
[31] *See id quoting* Commonwealth v. Konz, 498 A.2d 638, 641 (Pa. 1982).
[32] *See* Stephen C. Ventri, *Abortion: The Clash of Absolutes by Laurence H. Tribe*, 18 Ohio N.U. L. Rev. 257, 267 (1991) (book review).
[33] *See* Restatement (second) of Torts §324 (1963-1964) *and* Agulnick, supra note 8 at 103.
[34] *See* Tribe, supra note 1 at 132. Note that it is not clear whether Tribe actually agrees with this assertion.

Lawrence Tribe notes that the logic behind applying an assumption of care exception to a woman and fetus suggests that, "when the woman is 'responsible' for the pregnancy, she loses at least her moral right to claim that its continuation interferes with her anatomy."[35] Tribe surmises that this is the logic behind those who would readily allow abortions in cases of rape. Accordingly, Tribe questions why in that case a similar exception isn't made for accidental conception, for example where contraception failed. Tribe concludes: "Does this not suggest that such opponents of abortion come to their views about the immorality of abortion not in response to the voluntary nature of the woman's *pregnancy*, but in response to the voluntary nature of the *sexual activity* in which she engaged?" (emphasis in original)[36] While Tribe may be right about the subtext to the distinction between accidental conception and rape, there are several valid distinctions that could also be made. First, one might argue that whenever one voluntarily engages in a sexual act, one might assume the risk of contraception that occurs. This might be true especially because of the known possibility of contraception failure. Second, as I argued above[37], the true interest of a fetus only begins at the point where the fetus becomes sentient. Thus, the assumption of care that I posit in this section should be based on not only conception, but the woman's allowing the fetus to gestate to the point of sentience. In the case of consensual sex resulting in accidental conception, I think it is logical to charge the woman with the responsibility to abort the child before sentience is reached. In the case of rape, the significant mental trauma is likely to leave the victim in a state of shock, precluding her from making any major decision, and particularly a major decision that would involve revisiting the past trauma.[38]

[35] *See id.*
[36] *See* Tribe, supra note 1 at 132.
[37] Page 5.
[38] For more on the relationship between conception, gestation and the special relationship See infra p.16

Another objection to applying the assumption of care exception is that many times a woman does not feel empowered to refuse to have sex, or to insist on the use of birth control.[39] As Tribe notes, this is really a situation-specific question which could be dealt with on a case-by-case basis.[40]

IS AN ABORTED FETUS REALLY WORSE OFF?

The assumption of care exception only requires that a good Samaritan continue to render aid if in ceasing that aid the victim would be left in a worse condition than when the Samaritan began to render aid. Donald Regan has argued that the pregnant woman does not leave the fetus worse off for her conduct. Before conception, the fetus did not exist. After abortion, the fetus is in the same state. If this analysis is correct, there would be no duty for the woman not to abort the fetus. [41]

Walen suggests several responses to this argument. First, he says that the argument may be characterized as "metaphysical nonsense," arguing that before conception the fetus did not exist, so there is no basis of comparison to say whether it is better or worse off.[42] Walen retorts, however, that saying otherwise would be to say that the fetus would be better off never to have been conceived.[43] One could suggest that, in fact, a fetus is better off never having been conceived than to have spent a couple of months in small, dark quarters and as a reward getting to experience death.[44] The simple fact is that this equation is far too uncertain to be a basis for denying a woman access to an abortion. Another argument is that in the woman-fetus relationship, a no worse off principle, "simply does not capture all that is morally significant

[39] *See* Tribe, supra note 1 at 132.
[40] *See* Tribe, supra note 1 at 132.
[41] *See* Walen, supra note 18 at 1079-1080 *citing* Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).
[42] *See* Walen, supra note 18 at 1080
[43] *See* Walen, supra note 18 at 1080

about creating a life," and therefore a woman who conceives a child should be obligated to do more.[45] This type of argument, in a slightly different context, will be taken up explicitly later on in this study.[46] The arguments should hold true for this issue as well.

I would like to add one more response to Regan's argument. In response to Tribe's argument above, I insisted that the source of a pregnant woman's assumption of care obligation was the woman's allowing the fetus to gestate to sentience. If this argument is carried through here, it would mean that the "no worse off" comparison should be between the fetal status at the time of sentience and at the time of abortion. There would be no question that the aborted fetus would be worse off. This analysis is consistent with the idea that until sentience there really is no interest that can be used as the basis of comparison.

SUMMARY – THE NO DUTY RULE AND ITS EXCEPTIONS.

Although in general there is no duty for one person to render aid to another, this rule is not without its exceptions. The special relationship and assumption of care exceptions both dictate that the fetus is dependant on its mothers care and that there is at least theoretic grounds to require the mother to render the necessary aid. It should be stressed that this obligation is contingent on the sentience of the fetus. Before the fetus is sentient, it has no interests. Once it is sentient, it has interests in its own life and its own avoidance of pain. These interests would not exist but for the actions of the woman carrying the fetus. The mother-fetus relationship, and the fact that this woman has assumed care of this now sentient fetus dictate that there may be grounds to compel such care.

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[44] *See* Walen, supra note 18 at 1082-1083
[45] *See* Walen, supra note 18 at 1083
[46] *See infra* p.13.

THE "EASY RESCUE".

The traditional exceptions to the no duty to aid rule only give rise to a duty to perform an "easy rescue."[47] This means that even if a special relationship exists, the Samaritan is not obligated to go to great lengths or risks to rescue the person in peril. In contrast, if we are to deny a woman access to abortion on the basis of a special relationship, we would be holding her to a higher moral standard than is recognized by most of American modern law.[48] Tribe points out that up to 30% of pregnancies involve serious complications, while 60% have some complications. Additionally, ¼ of pregnancies require Caesarian section.[49] Additionally, there is a considerable psychological burden and attachment that comes with pregnancy.[50]

DISTINGUISHING BETWEEN CULPABLE ACTION AND INACTION?

Richard Posner has suggested that the extensive duty of a pregnant woman to her unborn fetus may be distinguished on the basis that an abortion is proactive:

> [T]he abortion doctor doesn't merely pull the plug on the fetus. In a first-trimester abortion, he uses surgical instruments or a suction pump to remove the fetus from the uterus. In a second-trimester abortion, he uses surgical instruments to remove the fetus or injects a chemical that either kills the fetus in order to induce premature labor or just induces premature labor. Whatever the method and whatever the stage of the pregnancy, the doctor is employing force for the purpose and with the effect of killing the fetus. And although the killing is a byproduct of the procedure rather than its ultimate goal, the same is true when a child kills his parents in order to inherit their money. (footnotes omitted)[51]

Posner's analysis fails to grasp the profound nature of the woman-fetus relationship. The fatal flaw in his syllogism lies in equating the woman's personal with a person's privilege of

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[47] *See* Robert Justin Lipkin, Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252, 261-162 (1983).
[48]*See* McClain, supra note 11 at 1259.
[49] *See* Tribe, supra note 1 at 103.
[50] *See Id* at 104. Tribe notes that a 1986 study indicated that 3% of unwanted mothers actually ended up ochoosing adoption.
[51] Richard A. Posner, Reply to Critics of the Problematics of Moral and Legal Theory, 111 HARV. L. REV. 1796,1821 (1998).

inheritance. The issue here is the clashing of fundamental rights. While one can argue, as Posner does, that freeing a woman of the burden of a fetus is inextricably connected to terminating the fetal life, the reverse can be argued with the same force: that the protection of the fetal life is inextricably connected to a profound denial of personal freedom to the woman! Posner's argument merely attempts to side step a thorny issue. It does not speak to the true question at hand.

BEYOND AN "EASY RESCUE."

We now must address whether or not it is proper to charge a pregnant woman with a duty to aid that outpaces the duty to aid that traditionally attaches when a special relationship is present. We briefly touched upon this issue when we discussed the assumption of care model, and questioned whether a mother should be allowed to cease care as long as the fetus is better off than it was before the woman got involved in its "aid."[52] The question, however goes deeper. Katherine A. Taylor observes that to afford a fetus protection from abortion would afford the fetus greater protection that a parent has traditionally owed to its child.[53] I will argue below that there may be good reason to expand the obligations of a parent to its born children.[54] For now, I will limit the discussion to whether there is reason to apply an even greater duty on the pregnant woman.

Several scholars have suggested that the extent to of a duty to aid should be in proportion to the closeness of the relationship between the parties.[55] "[T]he pregnant woman-fetus relationship presumably would be at the highest level of duty, because of the high degree of

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[52] *See supra* p.11.
[53] Katherine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 COLUM. J. GENDER & L. 85 (1997) (observing that it is unlikely that a parent would be obligated to act as an organ or tissue donor for its children).
[54] *See infra* p.20.
[55] *See* McClain, *supra* note 11 at 1257 *and* Lipkin, *supra* note 45 at 256 note 66 ("A rescuer who has a special legal duty to rescue may be requierd to effect more than an 'easy' rescue").

'intersubjectivity' and 'connection.'"[56] If the logic of this argument is accepted, the profound duty placed upon the pregnant woman would be fair precisely because of the profound relationship that exists. Taylor responds:

> [W]hile we may agree that the pregnant woman might have, in some cases, a moral responsibility to save the life of her fetus by consenting to medical treatment, it is precisely her physical connection with the fetus that mitigates against legally requiring of her a positive duty to undergo medical treatment for its benefit, since her most basic physical liberty is seriously compromised.[57]

Taylor's argument is somewhat circular. While she admits that a unique legal duty may arise because of the intimate duty between the pregnant woman and the fetus, she counters that that duty should not be recognized because of the profound nature of the obligation. Perhaps this circularity is the necessary result of the intimate nature of the relationship we are discussing, and the nature of this clash of fundamental rights. The true question at hand is whether or not the classic exceptions to the no duty to aid rule can be logically extended in order to decide in favor of fetal protection.

In a well celebrated case reviewing a district court ordered cesarean section on a pregnant woman dying of cancer, the majority suggested in dicta that, a fetus could not possibly be expected to have superior rights to that of a born child.[58] The partial dissent of Associate Judge Belson disagreed:

> I submit, a woman who carries a child to viability is in fact a member of a unique category of persons. Her circumstances differ fundamentally from those of other potential patients for medical procedures that will aid another person, for example, a potential donor of bone marrow for transplant. This is so because she has undertaken to bear another human being, and has carried an unborn child to viability. Another unique feature of the situation we address arises from the singular nature of the dependency of the unborn child upon the mother. A woman carrying a viable unborn child is not in the same category as a relative, friend, or stranger called upon to donate bone marrow or an organ for transplant. Rather,

[56] *See* McClain at 1257.
[57] *See* Taylor, *supra* note 51 at 135.
[58] See *In re* A.C., 573 A.2d 1235, 1243-1244 (D.C. 1990) (en banc).

> the expectant mother has placed herself in a special class of persons who are bringing another person into existence, and upon whom that other person's life is totally dependent.[59]

So it would seem that there is significant debate, both in scholarly and judicial circles on this issue. The question is not an easy one to answer. Does our traditional sense of personal autonomy dictate that denying a woman access to an abortion is an inexcusable departure from individual liberties? Or is the fact that we are dealing with a fetus who is uniquely dependant on this woman (a dependence which the woman is at least partially responsible for) dictate a unique response in the law?

THE PRECEDENT FOR EXPANSION OF A MOTHER'S DUTY.

Several scholars have noted that although a duty to refrain from abortion may be unique, the concept of expansive parental duties is not. Parents can easily be held liable for neglecting their children, even though people do not have an equivalent duty to other people's children.[60] Donald P. Judges observes that the duties of childrearing include "significant, protracted, and sometimes prodigious sacrifices of health and life projects," that go far beyond what might be called "easy."[61] There can be no doubt that the legal and moral obligations of a parent to a child go far beyond the obligation for an "easy rescue" or the like. However, there is certainly a leap of faith necessary to come to the conclusion that, consistent with this rule, a pregnant woman must allow her body to be used for the benefit of the fetus' gestation.

CONCLUSION: BALANCING A MOTHER'S FREEDOM AND A SPECIAL RELATIONSHIP.

Analyzing the pregnant woman-fetus relationship in terms of the common law duty to aid, has provided a unique perspective on the woman's right to autonomy and the woman's duty

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[59] *Id*. at 1256. Note that it would seem that Posner, *supra* note 49 at 1821 seems to agree with this analysis.
[60] Posner, *supra* at 1821.

to her fetus. To be sure, extension of the traditional duty to aid rule is necessary in order to arrive at the conclusion that a woman is obliged to allow the fetus to continue gestation. The case for such an extension is made by pointing out the profound relationship of the woman and the fetus, both in terms of the fetal dependency on its mother, and in terms of the mother's creation of that dependency. Reasonable people can certainly disagree on the outcome of this analysis. I would suggest that deliberation on this matter should be carried out by questioning whether a duty to allow gestation would represent an "undue burden" on the mother. The balance is between the pregnant woman' interest in bodily integrity and the profound special relationship that she has created. This type of balance will be a useful tool to deciding the nature of any obligation that flows from a parent to a child.

CONCEPTION, GESTATION, AND UNWANTED PREGNANCY.

At this point, I would like to stress that the source of a woman's special relationship to her fetus, be it couched in terms of the mother/fetus relationship or in the assumption of care standard is not the act of conception. As discussed above, fetal rights should not exist until such time as the fetus is able to have some sense of self-awareness, and can experience pain and pleasure.[62] Since this is the case, there should be little difference between cases of intended and unintended pregnancy, so long as the woman was a willing participant in the conception.

Although one might argue for a lower culpability of a woman in a case of failed contraception, it would seem that in most cases of failed contraception the person should have been able to choose abortion before the fetus became sentient. Furthermore, I believe there is a strong argument that where a woman voluntarily engaged in sexual intercourse, she has assumed the risk of conception.

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[61] *See supra* note 7 at 1366

In the case of rape, one could argue that the woman should be charged with responsibility for not seeking an abortion expeditiously. This analysis should fail. A rape victim is a victim of the most profound psychological trauma that can be imagined. It is difficult – impossible rather – to argue that a woman in this situation should be charged with profound responsibilities owing from a choice she makes in the time she is attempting to recover from the psychological trauma that has occurred. This is especially true when the decision is one that will undoubtedly expose her once again to thoughts of her most traumatic recent past. What I say here is consistent with an "undue burden" analysis. Placing a burden of gestation on a woman based on her decisions in the time following a rape, would simply be undue.

THE SENTIENCE STANDARD REVISITED.

Previously, we noted the uncertain nature of sentience. [63] We now must ask how we should deal with the lamentable fact that sentience is a difficult term to define, let alone to identify in any human being. There are several responses available. First, we can "punt" and simply decide on a black line that will serve as a presumption of sentience. Some authors have suggested that this is exactly how *Roe v. Wade* landed upon the viability standard.[64] Second, we could require a case-by-case investigation into the sentience of a given fetus. Under either suggestion, there is a serious question of whether we should err on the side of a woman's autonomy, or on the side of protecting an arguably sentient fetus from death. This decision is not an easy one. Additionally, since I have proposed that restricting a woman's access to abortion should be analyzed based on an "undue burden" standard, if we lean towards an earlier definition

[62] *See supra* p.5.
[63] *See* supra p.6.
[64] See *supra* p.5.

of sentience - thus affording the woman less time to consider the abortion option - this would increase the likelihood that the burden upon the pregnant woman is undue.

BEYOND ABORTION LAW.

As has been mentioned above, there are many other obligations that arguably may flow from parent to child. These other obligations are certainly susceptible to the special relationship analysis that has been applied to abortion. Below, some such obligations will be briefly discussed. In each of them, I suggest that the result should be based on an "undue burden" analysis. I suggest the following factors should be considered:[65] First, the nature of the special relationship. Second, we must ask if we are we dealing with a duty to act or a duty to refrain from action.[66] Third, the profundity of the invasion into a parent's freedom.[67] Finally, the gravity of the child or fetus' needs must be considered.

A FATHER'S DUTY: RESPONSE TO EQUAL PROTECTION CLAIMS.

As discussed above, there is a valid argument that any rule against abortion would necessarily place an unequal burden on women.[68] As Lawrence Tribe argues, "When the law prohibits a woman from freeing herself of the fetus that is inside her, the law appears to work a harsh discrimination against women *even if fetuses count as persons.*"[69] (emphasis in original) While this is no doubt true, I believe this to be the result not of deliberate discrimination but of the fact that pregnancy is a unique phenomenon in nature. Tribe also argues that in cases where a father's obligation might be roughly the same as that of the pregnant mother to the fetus (for

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[65] Note that this list is certainly not exhaustive.
[66] *See* Posner, *supra* note 49 at 1822 ("action and inaction often carry a different moral valence even when their consequences are similar").
[67] For instance, a duty for a parent to submit to a Caesarian section is clearly more profound than a duty of a parent to take a pill. *See infra* p.22
[68] *See supra* p.Abortion Restrictions and equal protection.
[69] *See supra* note 1 at 131.

example to donate a piece of his liver), the law has failed to find a duty.[70] This fact certainly does not represent a *per se* discriminatory rule, because a woman also would not be obligated to make that similar sacrifice. I presume that Tribe is arguing that the difference in these rules demonstrates the unique and discriminatory attitude toward a woman's role in procreation. This may be a valid charge. My response to Tribe's argument is that there are some significant conceptual differences between the pregnant woman-fetal relationship and the relationship between a mother or father an child that has been born. Furthermore, I do feel that there is a valid argument that would find a duty for a mother or father to undergo medical procedures for the benefit of their already born children. This issue will be discussed below. Nonetheless, the charge of an unequal burden being placed on women certainly has merit. In the following analysis, I will do my best to find common ground between the father-child relationship and the pregnant woman-fetal relationship.

THE SOURCE OF FATHER-CHILD OBLIGATIONS.

In searching for a source of obligation from the pregnant woman to a fetus, I found that two exceptions to the no duty to aid rule that applied.[71] The special relationship exception, which fit mother-child and pregnant woman-fetus, also suggests the existence of a father-child obligation. Although it is less obvious, the assumption of care argument also applies to a father-child obligation. This is clearly true when the father and mother were looking to have children. But even in the case where the pregnancy was unwanted, I would argue that the father should be charged with the responsibility for the child. This may be argued form an assumed risk perspective. This argument holds true even if the father wanted his spouse to have an abortion. Similarly, to the extent applicable, an obligation can be charged to a rape-father. The rape-father

[70] *See id* at 133.

may, against his will, be said to assume the risks of conception, which may include some obligations if the child that results is in need of his aid.

EXPANDING THE DUTY OF PARENTAL CARE

Above we mentioned that there is a unique obligation of parental care that has been recognized in American law.[72] These were obligations not to neglect born children. Below, I will explore possible expansion of the parental obligation based on the special relationship and assumption of care obligations. These obligations potentially include both a duty to not neglect or harm a fetus or child, and an obligation to take steps to aid that go beyond the "safe rescue" standard.

PARENTAL DUTY TO A FETUS.

A DUTY TO REFRAIN FROM PRENATAL HARM.

John Robertson proposes that based on a special relationship model, a mother may be obligated to take steps to avoid prenatal harm to a fetus.[73] Robertson discusses in particular a duty to refrain from such dangerous activities as drinking and smoking.[74] Note that if such a duty is found, it should also attach to the father, who would thus be obligated to avoid smoking in the presence of his pregnant spouse.

Consistent with the "undue burden" argument, I note the following: (1) The relationship between child and parent is most strong during the fetal stage, because the child is most helpless and most dependant on its parents; (2) We are dealing not with a duty to act, but with a duty to refrain from dangerous conduct; (3) The right at stake is not the parents procreative right itself

[71] *See supra* p.7-8
[72] *See supra* p.15.
[73] *See supra* note 4 at 173-194
[74] *See id.* at 173.

(as it was in the abortion issue), but "the freedom to act as one wishes in the course of reproduction, regardless of the effect on offspring[;]"[75] and (4) The gravity of the child's needs are fairly significant, as permanent damage will likely result. It seems to me that these factors weigh on the side of recognizing a parental obligation to refrain from damaging a fetus.

DUTIES TO ACT TO AID THE FETUS.

The presence of a positive duty on the part of a parent to take actions that would help the fetus has been litigated many times. Many cases have questioned the obligation of a pregnant woman to submit to a Cesarean section that would increase a fetus' chance of survival. The results have varied, but tend to indicate an obligation to undergo such procedures.[76]

Analyzing the burden of requiring medical procedures indicates that we are dealing with high degree of interconnection between the pregnant woman and the child. Demanding a medical procedure calls into question the woman's right to bodily integrity – the right to not be forced to go under the knife – is a far more fundamental right than the right of a father or mother to smoke around a fetus. On the other hand, we are dealing with cases where the medical procedure would be of profound benefit to the child. Unless the fetus is guaranteed to die if the procedure is not performed, this benefit is not as strong as the benefit derived from a mother's obligation to avoid abortion. One might also note that this case is a question not of a duty to refrain from hurting a child, but a duty to act. I argued above, however, that the distinction between a duty to act and a duty to refrain from acting is somewhat irrelevant when two fundamental rights are being considered.[77] In the end, it seems to me that it is far more difficult

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[75] *See* Robertson, *supra* note 4 at 178.

[76] *See In re* A.C., 573 A.2d 1235, 1243 (D.C. 1990) (en banc). The case reports a study that reports that over a five year period there were 36 attempts to override a mother's refusal of medical treatment. 15 of these cases involved Caesarian sections, and of these 13 Caesarian sections were ordered.

[77] *See supra* p.12.

to find a parental obligation to submit to such a procedure than it is to find an obligation refrain from smoking. In the majority of cases, the argument to force the medical procedure should be more difficult to the argument in favor of proscribing abortion, because the mortality of abortion is 100%.

Tribe proposes a situation where the duty to act might be less difficult to find. He suggests the existence of a pill that was known to reduce the chance of miscarriage by five percent.[78] Would the state be able to force the woman to take the pill? This hypothetical differs from invasive medical procedures because it is less violative of the woman's bodily integrity. The obligation to take such a pill would be far less likely to be defined as an "undue burden."

PARENTAL DUTY TO ACT ON BEHALF OF A BORN CHILD.

After birth, it is very rare for a court to order a parent to participate in any medical procedure.[79] The current state of law would not allow a court to compel a parent to donate a segment of his or her liver in order to save a child who would otherwise die.[80] The duty of a post-natal rescue can be distinguished based on some of the factors we have used in deciding what is an "undue burden." First, the relationship between parents and an unborn child is quite different. In the first place, a degree of emancipation comes with birth. Second, parents might be said to have assumed care for a fetus, knowing that there are risks inherent to pregnancy. For instance, one in four cases of pregnancy require Caesarian.[81] An interesting question would be how this analysis would be effected if the parents conceived a child knowing that it would be likely to have an affliction that required donation of their organs.

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[78] *See Tribe*, *supra* note 1 at 125.
[79] *See* Taylor, *supra* note 51 at 135
[80] *See Tribe* at 133.
[81] *See* Tribe, supra note 1 at 103.

The degree to which a parent's bodily integrity would be violated by requiring a rescue would depend on the risk involved, and on the invasive nature of the procedure. Being required to give a section of ones kidney would clearly be on the high end of this scale. If, on the other hand, a blood transfusion were needed (say, for instance the hospital is low on the type of blood, and the father's blood type matches) the invasion would be far less egregious. The final consideration is the interest of the child. It seems to me that there may be cases that requiring a parent to undergo a certain procedure would not represent an "undue burden". As compared to a requirement for prenatal procedures, it would seem that an "undue burden" would sooner be found in postnatal cases.

PRE-CONCEPTION OBLIGATIONS

Finally, I would like to briefly explore the possibility for parental liability for actions taken by the parents before the child was conceived. There is evidence, for example, that a father's semen may be adversely effected by certain chemicals, which may in turn lead to dangers to the child.[82] Although this is certainly pushing the envelope, there may be an argument that people who engage in procreative activity will be liable if their previous acts cause damage to the fetus. This would seem, however, to violate the principle that there is no such thing as wrongful life. [83] Alternatively, one could argue that the liability here is not for conception, but for engaging in acts prior to conception that later damaged the child.

Analyzing the burden that would be placed on a parent through pre-conception damage, I first note that the relationship that exists between the child-to-be-conceived and the parent is tenuous at best. The other factors that I have laid out for determining undue burden may come out all over the map, depending on what relationships can be found between pre-conception

[82] *See* Jane E. Brody, *Sperm Found Especially Vulnerable to Environment*, N.Y. Times, March 10, 1991, at C1.

behavior and detriment to the child. In any event, I highly doubt that a court would find such a liability. It is, nonetheless, an interesting possibility.

CONCLUSION

This study began with a discussion of a clash of absolutes. A woman's right to bodily integrity, versus a fetus' right to live. I have suggested that a pregnant woman has had a part in creating a pregnant woman-fetus special relationship and has also assumed care of the fetus. These facts are consistent with modern day exceptions to the no duty to aid rule. Thus, it is not violative of the American principle of liberty to say that a pregnant woman owes at least some degree of care to the fetus. The true question is, whether or not that duty to aid can rise to such a level as to require that the woman allow the fetus to gestate (thus overriding the "right" to abortion). At the very least, there is precedent for the idea that a parental duty goes beyond the duty of an "easy rescue." Once a fetus becomes sentient, it can be said to hold certain rights. At this point, the abortion question should be: "given the relationship between the woman and her fetus, would it present an undue burden to require her to allow the fetus to gestate?" Reasonable people can certainly disagree on the answer to this question. Therefore, this study cannot give a concrete answer as to the right to an abortion when the fetus is sentient. Hopefully this work has at least presented a useful way in which to analyze the question.

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[83] *See e.g.* Greco v. United States, 893 P.2d 345