The Legal Status of the Unborn After *Webster*

Jeffrey A. Parness*

I. Introduction

The recent U.S. Supreme Court decision in *Webster v. Reproductive Health Services*,¹ as well as recent advances in our understanding of human reproduction, has prompted new dialogue on the legal status of the unborn and on the level of legal protection appropriate for potential human life. In joining the dialogue, this commentary is prompted by several concerns. First, the landmark decision in *Roe v. Wade*² has frequently been misunderstood, creating much confusion over the permissible boundaries of protecting potential human life. A debate about laws pertaining to the unborn must be founded upon a proper understanding of what the Supreme Court said and did in *Roe*. Second, since the *Roe* decision, the legal protections afforded the unborn have expanded. Yet many of the changes are unrelated to the *Roe* decision or to abortion generally. These changes are often interesting and controversial, but are shielded from public view. While the need for significant change in the legal status of the unborn still exists, many of the changes will not be driven by U.S. Supreme Court pronouncements on abortion. Thus,

*Professor of Law, Northern Illinois University. B.A., Colby College, 1970; J.D., The University of Chicago, 1974. This commentary was developed from remarks given on November 30, 1989 at the Social Science Research Institute of Northern Illinois University as part of a series of colloquia on abortion.

² 410 U.S. 113 (1973).
contemporary debates about the unborn should continue, but the debates should include a more thorough consideration of laws outside the abortion context. Third, a review of American laws demonstrates that current legal treatment of the unborn is both inconsistent and inadequate. Such failings should be corrected.

II. Understanding *Roe v. Wade*

Any discussion of the legal status of the unborn necessarily involves consideration of the 1973 U.S. Supreme Court decision in *Roe v. Wade*. Unfortunately, many people continue to misunderstand the case. *Roe* involved a challenge to a Texas criminal law prohibiting all abortions except those aimed at saving maternal life. Finding a constitutional privacy right to choose abortion and no constitutional protection of the unborn, the Court invalidated the Texas law. In doing so, the Court indicated that states could regulate abortions to promote maternal health, particularly after the first trimester. The Court further noted that abortion regulations could protect potential human life, but only after fetal viability has been determined; only then does governmental interest in the unborn become compelling.

Much misunderstanding of *Roe* arises from two erroneous premises. One premise involves the legal personhood of the unborn. In *Roe*, the Court held that the word "person," as used in the fourteenth amendment to the federal constitution, does not include the unborn. Thus, the Court determined that the amendment's protection of the right to life does not extend to the fetus. Many courts have inferred from this holding that the unborn can never be "persons" under law, can never be afforded a right to life, and can never be treated comparably to persons born alive. Such inferences are

3. *Id.* at 117, n.1.
4. *Id.* at 153 ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").
5. *Id.* at 158 ("All this . . . persuades us that the word 'person' as used in the Fourteenth Amendment, does not include the unborn.").
6. *Id.* at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point . . . is at approximately the end of the first trimester . . . . [F]rom and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.").
7. *Roe v. Wade*, 410 U.S. 113, 163 (1973) ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is viability . . . . State regulation protective of fetal life after viability thus has both logical and biological justifications.").
8. *Id.* at 158.
9. *Id.* at 156-57.
10. Such inferences are undoubtedly influenced by the remarks in *Roe v. Wade* that, in "areas other than criminal abortion the law has been reluctant to endorse any theory that life . . . begins before live birth or to accord legal rights to the unborn except in narrowly defined
wrong. In law, the term “person” has several meanings; there is no singular use of the word. Consider distinctions among “persons” granted the right to marry,\(^{11}\) the right to drink,\(^{12}\) and the right to drive a car.\(^{13}\) Another example of multiple meanings of a word is found in the federal constitution itself, where the term “state” as used in the fourteenth amendment has a very different meaning from the term “state” as used in the eleventh amendment.\(^{14}\) Therefore, legal personhood must always be defined by context.

A second erroneous premise regarding *Roe* involves the stage at which state governments can protect the unborn. In *Roe*, the Court held that the State of Texas could prohibit abortions of viable fetuses except when maternal life or health is at risk.\(^{16}\) The Court sanctioned protection of viable fetuses because the state has a “compelling” interest in the potential human life of the fetuses. The Court distinguished viable fetuses from other fetuses based on the “capability of meaningful life outside the mother’s womb.”\(^{16}\) From this reasoning, many courts have erroneously inferred that the unborn can only be protected after the point of viability, and that the preivable fetus and the preconceived unborn can never be protected.\(^{17}\) Such inferences are wrong. The point when governmental interest in the unborn is compelling was a crucial issue before the *Roe* Court since the Court had already determined that the Texas law placed a heavy burden on a woman’s abortion decision—a decision protected by the federal constitution. Earlier cases had clearly established that when constitutional rights are burdened, government regulations that create the burden can only be sustained when the state has a compelling

situations and except when the rights are contingent upon live birth." *Id.* at 161.

11. See, e.g., ILL. ANN. STAT. ch. 40, para. 203 (Smith-Hurd Supp. 1990) (marriage certificates issued to parties 18 years or older or to those 16 or 17 years old who have parental consent or judicial approval).

12. See, e.g., ILL. ANN. STAT. ch. 43, para. 131 (Smith-Hurd 1986) (sales or other deliveries of alcohol allowed only to persons 21 years of age or older).

13. See, e.g., ILL. ANN. STAT. ch. 95 ½, para. 6-107 (Smith-Hurd Supp. 1990) (drivers licenses issued to applicants over the age of 16).

14. The fourteenth amendment includes cities and counties in its definition of “state” while the eleventh amendment does not.


16. *Id.* at 163.

17. For example, in *People v. Smith*, 59 Cal. 3d 751, 575, 129 Cal. Rptr. 496, 502 (1976) the court said:

The underlying rationale of *Wade*, therefore, is that until viability is reached, human life in the legal sense has not come into existence. Implicit in *Wade* is the conclusion that as a matter of constitutional law the destruction of a non-viable fetus is not taking a human life. It follows that such destruction cannot constitute murder or other form of homicide, whether committed by a mother, a father (as here), or a third person.
interest. Yet, earlier cases also held that when no constitutional right is burdened, governmental laws will be sustained as long as they are rational. In *Roe*, the Court expressly recognized that Texas's interest in protecting all forms of potential human life is always "important and legitimate," though not always compelling. Thus, governments can, in some instances, protect the potential life of the postconception but previable, as well as the preconceived, unborn.

Despite misconceptions about *Roe*, since 1973, states have enacted a variety of new laws aimed at protecting the unborn. These protections apply both within and without the abortion setting. Recent advances in knowledge about human conception, pregnancy, and birth have prompted the development of these new laws.

Policies underlying the laws that protect potential human life embrace two related concerns. One concern is that the human unborn of today will be born alive tomorrow. This was Texas's concern in *Roe*, and is the concern behind some, but not all, contemporary abortion regulations. The second concern is that the unborn will have the opportunity to live a whole or unimpaired life after birth. This concern is frequently expressed in contemporary debate about laws on prenatal torts and on drug-exposed newborns.

---

18. *Roe*, 410 U.S. at 155 (indicating that, in addition to the necessary compelling interest, sustainable regulations should also "be narrowly drawn to express only the legitimate state interests at stake").

19. After *Roe*, these cases led the Court to sustain public funding laws that distinguished abortion expenses from childbirth expenses. See, e.g., *Maher v. Roe*, 432 U.S. 464, 473-78 (1977) (finding that laws funding childbirth but not abortion impinge upon no fundamental right and are rationally related to the legitimate purpose of protecting potential human life).


22. Consider that medical advances have allowed states to eliminate the "born alive" rule in criminal cases. See *Parness, Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 Harv. J. on Legis. 97 (1985).

23. The protection of potential human life is the cornerstone of laws prohibiting most third trimester abortions, as well as laws financing the childbirth—but not the abortion—expenses of indigent women. Many other abortion laws, including those covering medical facilities and professionals, are founded chiefly on promoting the health of pregnant women. See *Roe*, 410 U.S. at 164 (a state has a greater opportunity to promote maternal health in abortion after first trimester), 147-52 (noting uncertainty about purpose(s) of many 19th century criminal abortion laws).

Often, both the general populace and individuals, including prospective parents who have particularized interests in securing the actual and healthy birth of certain unborn, support the policy of protecting potential life. In this situation, laws protecting potential human life are usually not controversial. Consider, for example, laws providing a low-income pregnant woman with access to medical care, food, and shelter, laws promoting research about, as well as greater public understanding of, ways to prevent handicaps at birth, and laws deterring third-party conduct that will likely result in disabilities at birth.

In other situations, however, public and individual interest in protecting certain unborn diverge. Here, governmental choices about the extent to which laws should protect potential life are more problematic. The controversy over the Texas abortion scheme in *Roe* is illustrative: the state supported, and a woman opposed, the protection of a certain unborn's potentiality for life. The decision in *Roe* suggests that affording protection to the unborn will be more difficult to sustain when the law burdens fundamental rights. While *Roe* involved the fundamental right to abort, other fundamental interests possibly burdened by laws protecting potential life include childbirth, childrearing, and bodily autonomy.

Many types of laws and lawmakers can promote protection of the unborn. Certain legal issues are more appropriate for state governments, such as crimes against the unborn, torts, and child cus-

25. See, e.g., ILL. ANN. STAT. ch. 23, para. 5-5 (Smith-Hurd Supp. 1990) (treatment for substance abuse provided for pregnant women in accordance with Illinois Medicaid program).


27. Consider, for example, laws that make third-parties criminally (feticide) or civilly (prebirth torts) liable for conduct that causes injury to a fetus.

28. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (right to privacy encompasses decisions on "whether to bear or beget a child"). The state may seek to protect potential human life and may burden the privacy right to bear or beget a child by imposing upon pregnant women one form of childbirth (C-section) over another (natural).

29. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (right to conceive and right to raise children are deemed "essential" rights). The state may seek to protect potential human life and may burden the right to conceive and the right to raise children by imposing upon pregnant women responsibilities (e.g. to take medicine or refrain from sex or alcoholic consumption) regarding the care of their unborn children.

30. Winston v. Lee, 470 U.S. 753, 760 (1985) ("substantial privacy interests" in "surgical search and seizure"). The state may seek to protect potential human life and may burden the right to bodily autonomy by imposing upon pregnant women intrusive medical procedures (fetal surgery).
tody; other problems are best addressed on a national level, such as how to subsidize research on and access to prenatal care. Laws protecting the unborn either serve the unborn exclusively, or promote simultaneously the interests of the unborn and of others such as prospective mothers.

Some lawmakers protect potential human life by equating the human unborn with those born alive, creating parity between people of tomorrow and people here today. For example, under California law, an already-born child and a developing fetus may each be victims of parental abuse and neglect. Other lawmakers protect potential human life by passing legislation directed solely at the unborn. For example, both Minnesota and Illinois have separate homicide and feticide laws within their criminal codes.

Governments are more free to act when no constitutionally-protected rights are implicated. Since pregnant women as well as fertile women and men can often assert constitutional rights in challenging laws protecting their potential offspring, many laws protecting potential human life focus on nonparental conduct. Protective laws that do address prospective parents' conduct are often welcomed by would-be parents. The most controversial laws are those that co-

33. Laws directed toward prebirth maternal child abuse or neglect protect the unborn exclusively; laws directed toward uninvited third party assaults (crimes or torts) on the unborn offspring of pregnant women protect the prospective mothers as well as the unborn.
34. CAL. PENAL CODE § 270 (West 1988).
35. MINN. STAT. ANN. § 609.185 (West Supp. 1989) (first degree murder), § 609.2661 (West 1987) (first degree murder of unborn child); ILL. ANN. STAT. ch. 38, para. 9-1 (murder), para. 9-1.2 (homicide of an unborn child, defined as an individual "from fertilization until birth") (Smith-Hurd Supp. 1990).

Unlike Illinois and Minnesota, some states confine their feticide laws to acts causing the death of viable or quick fetuses. See, e.g., N.Y. PENAL LAW §§ 125.00 (homicide means conduct causing the death of an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting abortion in the first degree), § 125.45 (abortion in the first degree involves a nonjustifiable abortional act) (McKinney 1987); GA. CODE ANN. § 16-5-80 (1988) (feticide includes the killing of an unborn child so far developed as to be ordinarily called "quick"); MISS. CODE ANN. § 97-3-37 (1973) (willful killing of an unborn quick child may be manslaughter).

A Minnesota homicide statute covering unborn children (viable and previable alike) was recently sustained when challenged on various federal constitutional grounds. See State v. Merrill, 450 N.W.2d 318 (Minn. 1990). See also Smith v. Newsome, 815 F.2d 1386, 1388 (11th Cir. 1987) (sustaining Georgia feticide statute).
36. Consider, for example, laws criminalizing conduct against the unborn but exempting pregnant women from prosecution. See, e.g., MINN. STAT. ANN. § 609-266 (West 1987).
37. For example, prospective parents welcome laws that provide financial support for research into the means of securing more live and healthy babies. See, e.g., 42 U.S.C.A. §
erence prospective parents in order to benefit their future offspring.38 When such coercion constitutes significant burdens on fundamental rights, governmental action must, of course, serve some compelling interest.

III. Expanding Protections of Potential Human Life

The recent growth in American laws protecting potential human life has been significant. A brief examination reveals variations in the types of laws and lawmakers now concerned with promoting the birth of healthy infants.

A major development in the post-"Roe" regulation of nonparental activities is the creation of laws characterizing the unborn as victims of crime. In 1986, Minnesota adopted a statutory scheme providing broad criminal law protection of the unborn.39 The scheme encompasses various forms of culpable activity that cause injury to the unborn, including premeditated, intentional, grossly negligent, and negligent acts.40 The scheme also covers varying forms of injury to the unborn, including pregnancy termination and injuries surfacing at or after live birth.41

Also in 1986, Illinois adopted a scheme similar to Minnesota's, with the unborn deemed possible victims of intentional homicide, voluntary manslaughter, involuntary manslaughter, reckless homicide, battery, and aggravated battery.42 Of course, such alterations of criminal laws can influence existing and related civil laws. For example, the court-recognized duty of due care under tort law is often guided by legislative policies underlying criminal law.43

Tort law has also recently expanded to embrace nonparental conduct affecting the unborn. Courts now generally recognize claims by those alleging that prebirth misconduct by doctors and others caused their disabilities.44 In many states, claimants include those

---

38. Consider, for example, CAL. PENAL CODE § 270 (West 1988) (parental duty to furnish care to children conceived but not yet born).
39. MINN. STAT. ANN. §§ 609.266-.269 (West 1987).
41. Id. §§ 609.2661-.268 (West 1987 & West Supp. 1990).
44. Claimants may include those injured as a result of misconduct directed at men. See, e.g., Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. CHI. L. REV. 1219, 1245 (1986) (examples of fetal injury due to paternal occupational exposure).
who were previable fetuses at the time of the alleged misconduct. A few states have gone further, permitting claims by those who were not even conceived at the time of the alleged misconduct. For example, the Illinois Supreme Court allowed a claim against medical personnel by a child who was disabled as a result of a negligent blood transfusion to her mother nine years earlier, at which time the mother was thirteen years old.

Laws addressing the conduct of prospective parents in order to protect the potential life of their future offspring often raise little controversy. Consider, for example, laws granting financial support for prenatal care, laws providing pregnant women with opportunities for treatment of drug or alcohol abuse, and laws requiring warning labels on products known to cause birth disabilities. These laws are relatively noncontroversial because they are noncoercive.

Among the most controversial of all laws protecting potential human life are laws that seek to compel certain behavior of potential parents, especially pregnant women. As noted earlier, these laws often impact upon constitutionally protected rights; when they do, the laws can only be sustained if the state demonstrates a compelling interest.

Laws addressing substance abuse during pregnancy exemplify the controversy over coercive governmental action. Consider laws that make substance abuse during pregnancy the basis of: (1) a criminal prosecution for prenatal child abuse or neglect, (2) an order terminating parental rights based upon prenatal conduct, and/or (3) an injunction restricting the activities of a prospective parent in order to protect an unborn child.

48. See supra note 32 and accompanying text. Of course, there is significant controversy over government subsidy of childbirth expenses, but not expenses related to abortion.
49. See supra note 25.
50. See, e.g., 15 U.S.C. § 1333(a) (West Supp. 1990) (requirement that cigarette packages and ads bear rotational health warnings, including a warning to pregnant women about the dangers to the unborn posed by smoking); 27 U.S.C. § 215(a) (West Supp. 1990) (requirements of warnings on labels of alcoholic beverage containers regarding the dangers posed to the unborn by alcohol).
51. Although there now appears to be no such explicit laws, there was an unsuccessful attempt in California a few years ago to employ a more general misdemeanor provision to cover such a case. See infra notes 54-56 and accompanying text.
Criminal prosecutions against women who take certain drugs during pregnancy may be permitted in some parts of the country. In California, for example, a provision of the Penal Code makes it a misdemeanor when a parent willfully fails to furnish remedial care for his or her conceived but unborn child.\textsuperscript{54} This law applies equally to prospective mothers and prospective fathers.\textsuperscript{54}

The California law could conceivably be applied to pregnant, drug-taking women without infringement on constitutional rights. Such an application would promote what the \textit{Roe} Court deemed to be a state’s “important and legitimate” interest in the unborn. Nevertheless, the much-publicized dismissal of child abuse charges against Pamela Rae Stewart in 1986 casts a cloud over the California statute’s future utility.\textsuperscript{55}

Ms. Stewart, while pregnant, ignored a doctor’s advise to discontinue amphetamine use, to abstain from sex (because her placenta had detached), and to seek immediate medical attention if she hemorrhaged. The court read the statute narrowly and deemed that the law related solely to furnishing financial support for a fetus.\textsuperscript{56} The apparent failure to consider criminal charges against the prospective father, whose own conduct was not exemplary,\textsuperscript{57} does suggest that criminal prosecutions based upon drug use during pregnancy potentially involve issues of discrimination against women. The California law correctly recognizes comparable male and female responsibilities toward their unborn offspring; enforcement efforts must be initiated accordingly.

Consider as well the prosecution of a woman for delivering drugs to her newborn child through the umbilical cord. Although such a situation evinces concern about prenatal child abuse, utilization of criminal statutes prohibiting the delivery of a controlled sub-

\begin{center}
\textit{CAL. PENAL CODE} § 270 (West 1988).
\end{center}

\begin{center}
\end{center}

\begin{center}
\end{center}

\begin{center}
\textsuperscript{56} See Pollitt, \textit{Fetal Rights: A New Assault on Feminism; Laws Protecting the Fetus from the Mother}, The Nation, Mar. 26, 1990, at 409, 416. \textit{See also} Note, \textit{Pregnancy Police}, supra note 55, at 316-17; \textit{In re} Dodge, 8 Kan. App. 2d 259, 655 P.2d 135 (1982) (termination of mother’s parental rights based upon her failure to take steps to keep her husband from impairing their child’s health).
\end{center}
stance presents problems\textsuperscript{58} that could be avoided if statutes more directly addressed the problem of prenatal abuse.

A simple hypothetical illustrates possible civil court involvement in terminating parental rights for prebirth conduct and in enjoining certain acts of prospective parents in order to protect their unborn offspring. Consider a scenario involving a potential parent whose conduct causes significant harm to an unborn child. How concerned must a court be about the parent's prebirth conduct before it will terminate the parent's rights in the later-born child? Assuming a constitutionally protected interest would be implicated, what compelling state interest, especially in conduct that is non-criminal, would sufficiently justify an injunction restricting the actions of a prospective parent in order to protect an unborn child?

Courts and legislatures that create child custody laws are increasingly concerned with the prebirth conduct of prospective parents. Lawmakers have recently determined that a drug-addicted infant can be found to be abused or neglected by a mother who took illegal drugs during pregnancy.\textsuperscript{59} Courts have also ruled that certain prenatal acts of a potential father constitute child abandonment, justifying termination of his parental rights.\textsuperscript{60} Accordingly, the Florida Supreme Court recently ruled that a man who fails to support his unborn child's mother during her pregnancy loses standing in a later adoption proceeding.\textsuperscript{61} Specifically, the court stated that "[b]ecause prenatal care of the pregnant mother and unborn child is critical to the well-being of the child and of society, the biological father, wed or unwed, has a responsibility to provide support during the prebirth period."\textsuperscript{62}

Recently, there has been increasing interest in developing the legal means to prevent potential harm to the unborn by prospective parents. In the last few years, some courts have considered ordering

\textsuperscript{58} Problems of statutory construction include whether the newborn is a person to whom delivery of drugs can be made given the attachment to the mother, and whether such a prosecution encompasses a form of conduct that the law was meant to address.


\textsuperscript{60} \textit{State ex rel. Lewis v. Lutheran Social Serv.}, 68 Wis. 2d 36, 227 N.W.2d 643 (1975).

\textsuperscript{61} \textit{In re Adoption of Doe}, 543 So. 2d 741 (Fla. 1989).

\textsuperscript{62} \textit{Id.} at 746.
pregnant women who take illegal drugs, or otherwise act dangerously with respect to their unborn babies' health, to cooperate with health officials in order to protect their unborn children. These orders have been considered by both civil and criminal courts. While such orders have met with difficulty during criminal sentencing, civil court orders have had limited success. In 1989, Minnesota enacted laws permitting court-ordered confinement of drug-using pregnant women under the state's existing involuntary commitment provisions for alcoholic, drug addicted, and mentally ill persons. Occasionally, courts have recognized prebirth paternity actions filed for the purpose of securing support for the unborn child and the prospective mother.

Can court orders proscribe potential parents' noncriminal conduct that, although constitutionally protected, is harmful to potential human life? In a 1983 case, the Massachusetts Supreme Judicial Court confronted the issue when it was urged to order a pregnant woman to undergo a "purse string" operation so that her cervix would better hold the pregnancy. In declining to issue the order, the state high court said:

We do not decide whether, in some situations, there would be justification for ordering a wife to submit to medical treatment in order to assist carrying a child to term. Perhaps the State's interest, in some cases, might be sufficiently compelling . . . to justify such a restriction on a person's constitutional

---


65. See, e.g., State v. Mosburg, 13 Kan. App. 2d 257, 768 P.2d 313 (1989) (noting that criminal court probation orders prohibiting pregnancy have generally failed because they have been deemed to be not reasonably related to the probationer's past and future criminality, not related to the rehabilitative process, or overly broad).


67. MINN. STAT. ANN. §§ 253B.02, 253B.05, 626.5561 (West Supp. 1990). See also N.J. STAT. ANN. § 30.4 C-11 (West 1981) (endangered unborn child can be subjected to agency's care and custody).

68. See, e.g., Malek v. Yekani-Fard, 422 So. 2d 1151 (La. 1982).

69. Consider Pamela Rae Stewart's failure to abstain from sex and her consumption of drugs during pregnancy. See Note, Criminalization of Maternal Misconduct, supra note 55, at 358.

right of privacy.71

The door was properly left open. Factors relevant to a determination that such an order is justified include the burden placed on the individual's constitutional rights, the nature and certainty of harm to potential life or to maternal health, and the possible alternatives to coercive governmental action.72

Such factors should be applied by courts on a case by case basis. Consider a case in which a pregnant woman has only a fifty percent chance to survive natural childbirth and her viable fetus has only a one percent chance to survive natural birth. If the woman refuses to undergo a caesarean section, though it would increase the chances of survival for both her and her child to almost 100%, should the state intervene?73 In this case, the impact upon the woman's constitutional right to refuse treatment for herself is seemingly outweighed by the risk to the fetus, the significant chance of death of the mother, and the increased chance of fetal/maternal survival if a caesarean section is performed.

Equal protection concerns are often raised in cases in which the medical procedure is one that may not usually be compelled for non-pregnant women. Consider the case in which a woman refuses to consent to a blood transfusion. Nonpregnant women may have a constitutionally protected right to refuse a transfusion even though death may result. A court-ordered transfusion, however, may be permissible if the woman is pregnant.

State intervention rarely occurs in situations in which a medical procedure will benefit the fetus and will benefit or at least not harm the woman because the women in these situations typically submit to the procedure.74 Procedures that would only benefit the fetus and that would probably harm the woman75 are more problematic. Again, many women will undergo the procedure to benefit the fetus. If the woman refuses the procedure, however, the state may object.

71. Id. at 397.
72. But see, Comment, In re A.C., supra note 66 (reviewing factors and cases, and opining that the balancing test should be abandoned).
73. See Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981) (medical procedures ordered for pregnant woman when there was a 99-100% chance of fetal death and a 50% chance of maternal death without the procedures, and nearly a 100% chance that both would survive with them).
74. But see id. (caesarian section would benefit both fetus and mother but was opposed by mother because of her religious beliefs).
75. See, e.g., Surgeons Fix Birth Defect in Fetus, Chi. Trib. May 31, 1990, § 1, at 6, col. 1; Doctors Perform First Heart Operation on Baby in the Womb, Chi. Trib. Feb. 1, 1990, § 1, at 11, col. 1. See also ILL. ANN. STAT. ch. 110 ½, para. 703(c) (Smith-Hurd Supp. 1990) (living wills inapplicable to most pregnant women).
Then, a case by case approach seems necessary, with the opportunity for judicial review.

Pregnant women are not the only group subject to court orders pertaining to fetuses. Fathers, too, are subject to legal action on behalf of the unborn. For example, an Arkansas statute expressly recognizes prebirth paternity actions and permits courts to order alleged prospective fathers to render financial aid and other support to pregnant women and their fetuses. Courts considering such orders should employ a balancing test. Male respondents are less likely to raise fundamental constitutional rights than pregnant women are when responding to government-initiated injunction actions.

Like prenatal abuse laws, coercive laws proscribing abortion are controversial because they involve prospective parents and frequently implicate fundamental constitutional rights. Notwithstanding the difficulties posed by Roe v. Wade, since 1973, many states have attempted to protect the unborn via abortion regulations. Some states have banned nontherapeutic, third-trimester abortions, as expressly permitted by the Roe Court. Other states have gone further by trying to move up the point of viability.

Such attempts, however, offer little protection to potential human life, as most abortions occur long before fetal viability is possible. Similarly, prohibitions on so-called sex selection abortions (regardless of their constitutional status) now fail to protect significant numbers of unborn. State laws foreclosing the involvement of public monies, hospitals, and employees with abortions today afford more significant protection of potential life. Yet, such laws clearly operate disproportionately on the poor; thus, in some states, the constitutional protections afforded by Roe may only be exercised by the

78. Roe v. Wade, 410 U.S. 113, 163-64 (1973) (states can proscribe postviability abortions except those needed to preserve maternal life or health).
79. Compare Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 63 (1976) (upholding a definition of viability which includes the "stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems") with Colautti v. Franklin, 439 U.S. 379, 380 n.1 and 390-94 (1979) (striking down a viability determination requirement that necessitated an inquiry into whether "there is sufficient reason to believe that the fetus may be viable").
82. Those laws have been sustained in a number of cases, including Webster v. Reproductive Health Serv., 109 S. Ct. 3040 (1989); Harris v. McCrae, 448 U.S. 297 (1980); and Maher v. Roe, 432 U.S. 464 (1979).
upper and middle classes. Given the protection of the abortion choice under *Roe*, some state courts have made abortion more uniformly available by interpreting state law to require governmental financial support for poor women who wish to exercise their decisional rights under *Roe*.83

Regulations proscribing abortion occasionally promote other interests as well. Consider, for example, laws requiring a pregnant woman to notify her husband or the potential father of her intent to abort.84 Similarly, consider laws requiring a pregnant minor to notify, or to obtain consent from, her parents or guardian.85 Such laws arguably promote governmental interests in informed decision making, family autonomy, and the procreative potential of men. Yet, most are clearly "pro-life." They usually do not apply when birth, rather than pregnancy, termination is contemplated. Similarly, most laws mandating that certain information be conveyed to pregnant women who are considering abortion are "pro-life" laws in that the required information encourages the choice of childbirth.86 Laws requiring an informed decision about abortion are unique; similar laws regarding other important decisions do not exist. Consider that we do little to promote informed decisions about marriage. We do not require that the prospective bride and groom be told about the statistical likelihood of divorce; there are no required screenings of "The War of the Roses."

IV. The Inadequacies and Inconsistencies of Legal Protection for the Unborn

A few questions remain. Will the recent decision in *Webster v. Reproductive Health Services*87 significantly alter the contemporary debate over protecting potential life? What problems—if any—exist

---


LEGAL STATUS OF THE UNBORN

regarding the present legal status of the unborn?

Clearly, the Webster decision has altered, and will continue to alter, initiatives on protecting the unborn. As Justice Blackmun suggested, many read the plurality opinion in Webster as an invitation to state legislatures “to enact more and more restrictive abortion regulations.” 88 Since Webster, serious legislative attempts to enact such regulations have failed in Illinois and Florida, but have succeeded in Pennsylvania, where new sex selection, informed consent, parental notice, and spousal notice abortion laws were recently passed. 89 While a few jurisdictions have engaged in more serious efforts to restrict abortion, 90 no one has yet succeeded in restricting first trimester abortions. Several Supreme Court Justices have observed, however, that governments have a compelling interest in protecting the unborn throughout pregnancy 91 and Justice Scalia opined that the privacy right in Roe should be eliminated. 92

Aside from prompting anti-abortion forces to push state lawmakers toward more restrictive abortion laws, Webster has prompted pro-choice forces to push for state law recognition of the type of privacy right found in Roe. If the constitutional privacy right recognized in Roe is eliminated, states will acquire the responsibility for defining privacy rights regarding pregnancy termination. 93 No one seriously contemplates a reversal of Roe so that a fetus will be defined under the federal constitution as a “person” entitled to the right to life. 94 Forces advocating abortion rights under state law can

88. Id. at 3077.
89. 18 PA. CONS. STAT. ANN. §§ 3204(c), 3205, 3206, 3209 (Purdon Supp. 1990).
90. See Abortion Amendment Makes Oregon Ballot, Chi. Trib., July 21, 1990, § 1, at 4, col. 1 (voters to decide in Nov. 1990 on state constitutional amendment barring most abortions); Louisiana Tries Again on Abortion, Chi. Trib., July 9, 1990, § 1, at 5, col. 6 (bill passed which bans all abortions except in cases of rape, incest, or when maternal life is in danger); Guam’s Abortion Law Blocked, Chi. Trib. March 24, 1990, § 1, at 4, col. 3 (abortion prohibited except when pregnancy endangers mother’s life, but issue to be decided by voter referendum in November); Idaho Senate OKs Bill Banning Most Abortions, Chi. Trib. March 23, 1990, § 1, at 3, col. 2 (abortion would only be permitted if a woman’s health is endangered, if a fetus is deformed, or if there was rape or incest).
92. Webster, 109 S. Ct. at 3064 (Scalia concurring).
93. U.S. CONST. amend. X (powers neither delegated by the federal constitution to the federal government nor prohibited from exercise by the states are reserved for the states or for the people).
94. Roe v. Wade, 410 U.S. 113, 158 (1973) (“person” as used in the fourteenth amendment, does not include the unborn). Even in Illinois, where the legislature has declared that human life begins at conception, the laws do not accord the unborn all the rights accorded those born alive where Roe poses no barrier. See Parness, supra note 31.
point to several supporting state court decisions, including a 1989 Florida Supreme Court ruling. Debates about state law present local courts with difficult questions about judicial responsibility and lawmaking authority, comparable to the debates and questions triggered by the decision in \textit{Roe}:

The increasing legal protections afforded potential human life, as well as the renewed debate about abortion, raise questions about the present legal status of the unborn. Foremost, it is clear that the contemporary legal treatment of the unborn is both inconsistent and inadequate. These inconsistencies and inadequacies are troubling for two reasons. First, there are no comprehensive laws to protect the unborn. Second, while abortion laws purport to protect potential human life, many abortion laws actually seem to be initiatives against women. These problems will not disappear even if the Supreme Court reverses \textit{Roe} and each of the states quickly recognizes or rejects a privacy right in abortion.

How are the unborn treated inconsistently under the law? Consider the laws of both Illinois and Missouri, two states with a very long and strong history of anti-abortion legislation.

In Illinois, the General Assembly responded critically to \textit{Roe}. The Illinois Abortion Law of 1975 includes a statement of "legislative intention" that says, in part:

\begin{quote}
[T]he [members of the] General Assembly . . . do solemnly declare . . . in reaffirmation of the longstanding policy of this state, that the unborn child is a human being from the time of conception, and is therefore a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and constitution of this state. Further, the General Assembly finds . . . that [the] longstanding policy . . . to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions . . . are ever reversed . . . then the former policy of this state to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.\end{quote}
With these assertions in mind, consider the following case. On January 21, 1978, Alan Greer spent much of the day in a tavern drinking whiskey and beer. He left the tavern at about 5 p.m., saying he was going home to "beat the hell out of his old lady." Upon arriving home, Alan fed his pigs and then argued with his eight and a half month pregnant girlfriend, Sharon Moss, who had been living with him. The argument led to a physical assault. Alan beat Sharon with his fists, kicked her with his feet, and struck her repeatedly with a broomstick. Then Alan tried to nurse Sharon. The next morning, Alan summoned help for Sharon, but when the ambulance arrived, Sharon was dead. The time of her death could not be established, but it was clear that the beating caused Sharon's death and the death of her fetus. Alan was charged with Sharon's murder and the murder of the fetus. Surprisingly, the Illinois high court found, in 1980, that Alan could not be charged with murdering the fetus since Illinois law did not define murder as encompassing the unlawful killing of a fetus.

In 1981, Illinois did pass such a murder statute, but surprisingly, and notwithstanding the declarations in the 1975 Illinois Abortion Law, the penalty for feticide was less strict than the penalty for murder. More importantly, the legislature did not criminalize all conduct leading to fetal death or birth disabilities. Not until 1986 did the unborn obtain comprehensive criminal law protection, but these protections also punish crimes against the unborn less severely than crimes against the born. These reduced penalties are at odds with Illinois's 1975 policy that considers an unborn child to be a human being from the time of conception. In other states, comparable statements about the value of potential life re-
main wholly unaccompanied by supplementing criminal laws.\textsuperscript{104}

With the 1975 Illinois Abortion Law in mind, consider another case:\textsuperscript{105} A woman who had given birth to a heroin-addicted child appeared before a trial judge for a custody hearing. The hearing resulted from a finding that the woman's drug abuse during pregnancy constituted child abuse. At the hearing, the judge learned that the woman was again pregnant and was addicted to heroin. The judge ruled that the fetus was an abused child and appointed an officer of the Illinois Department of Children and Family Services as guardian of the fetus.\textsuperscript{106} The judge ordered the woman to cooperate with the Department and to try to control her heroin intake.\textsuperscript{107} The Children and Family Services Department, surprisingly, moved to vacate the court order, arguing that there was no juvenile court authority and that the order created serious practical problems and policy issues.\textsuperscript{108} Again, this governmental reaction seems at odds with clearly articulated state legislative policy. If anyone was to complain, it should have been the woman.

Missouri has fewer criminal, child custody, and other laws expressly protective of the unborn than Illinois has. Yet last July, Missouri defended before the U.S. Supreme Court a legislative preamble which states, in part:

1. The general assembly of this state finds that:
   (1) The life of each human being begins at conception;
   (2) Unborn children have protectable interests in life, health and well-being; and
   (3) The natural parents of unborn children have protectable interests in the life, health and well-being of their unborn children.

Effective January 1, 1988, the laws of this state shall be

\textsuperscript{104} In Louisiana, for example, there is a longstanding policy of entitling unborn children to the right to life from the time of conception. \textit{La. Rev. Stat. Ann.} § 1299.35.0 (West Supp. 1990). Thus, the definition of "person" in the Louisiana Criminal Code has included the unborn since 1976. See \textit{La. Rev. Stat. Ann.} § 14:2(7) (West 1986). Nevertheless, the state high court ruled in 1980 that the unborn could not be victims of homicide. \textit{State v. Brown}, 378 So. 2d 916 (La. 1980). While three degrees of feticide were added to the Criminal Code in 1989, possible punishment is less than that for comparable acts of homicide. \textit{La. Rev. Stat. Ann. §§} 14:30-31, 14:32.6-32.8 (West Supp. 1990) and there are no other crimes (such as assault or battery) against the unborn.

\textsuperscript{105} The fact pattern is derived from \textit{In re Ridgeway}, No. 82-J-319 (6th Cir. Ill. 1984), described in Parness, \textit{supra} note 31, at 20-22 (documents pertaining to the case are on file at the Dickinson Law Review office).

\textsuperscript{106} \textit{In re Ridgeway}, No. 82-J-319 (6th Cir. Ill. 1984).

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.}
LEGAL STATUS OF THE UNBORN

interpreted [wherever possible] . . . to acknowledge on behalf of the unborn child at every stage of development, all the rights . . . available to other persons . . . 109

Notwithstanding these statements, Missouri laws still appear to disallow criminal prosecutions of persons like Alan Greer.110

Further illustrations of inconsistent legal treatment of the unborn abound. Enunciated public policies that are protective of potential human life are often not promoted by existing laws. Protective laws that do exist are often incomplete and inadequate. These inadequacies, in part, result from the inability of pro-choice and pro-life forces to find the common ground they share. For example, these forces should have joined hands when the Illinois Legislature discussed the criminal prosecution of people like Alan Greer. The most ardent pro-choice advocate should have recognized that Sharon Moss’s privacy right to abort was not implicated by the criminal prosecution of Alan Greer and that she was, in fact, deprived of the privacy right to bear a child because of his actions.111

Similarly, the pro-life/pro-choice forces should join together to urge Congress to mandate that states expand their Medicaid programs to include more extensive coverage for pregnant women. Many American women today receive inadequate prenatal care, especially those who are poor. It seems strange to spend so much time debating whether more extensive medical facilities are needed for 18 week rather than 20 week pregnancy terminations112 and so little


110. At one time, Missouri did characterize certain willful killings of unborn quick children as manslaughter. Mo. ANN. STAT. § 565.026 (Vernon 1979). The relevant provision, however, was removed from the criminal code in 1984. Mo. STAT. ANN. § 565.026, repealed by L. 1983, p. 923, S.B. No. 276 § 1.

Use of existing criminal laws designating “persons” as victims of crime in order to protect the unborn (see, e.g., Mo. ANN. STAT. § 565.020 (Vernon Supp. 1990) (first degree murder)) is probably disallowed because of the so-called “born alive” rule. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. L. Rev. 563 (1987) (born alive rule, under common law and in statutory analysis, allows only persons born alive to be victims of crimes).

111. In fact, regarding this type of criminal prosecution, a representative of the Illinois ACLU wrote to Illinois legislators suggesting that because of Roe, state law could never characterize the unborn as persons deserving some legal protection. Specifically, the letter said:

In making this decision, the Supreme Court unquestionably placed the responsibility for defining that point of fetal development at which “human life” begins within the realm of private conscience and beyond the purview of governmental intervention. Although Roe struck down a criminal abortion statute its impact is not limited to the abortion context.


112. The question about facilities was central to the out-of-court settlement that re-
time finding ways to improve access to adequate prenatal care or to encourage the use of birth control devices. Joint efforts by those espousing fetal rights and those supporting a woman's right to choose are necessary to fight for laws that limit third party intrusion upon a woman's childbearing rights and laws that promote a woman's ability to secure the live and healthy birth of a wanted child.

V. Conclusion

Some issues are ripe for legislative reform on behalf of the unborn, though they are undoubtedly more controversial than are the cries for increased governmental support of prenatal care and for expanded education and research programs concerning the unborn.

The first issue ripe for reform involves assaults on pregnant women. Alan Greer's assault on Sharon Moss not only killed her, but also undermined both the general and individual interests in the potential life of her unborn child. Alan's acts against the unborn child should be criminalized. Further, crimes against the unborn should not be limited to situations involving pregnancy termination or viable fetuses or premeditated conduct. Birth disabilities, harm to previable fetuses, and reckless behavior that may harm the fetus should also be illegal.

The second issue ripe for reform concerns tort actions against third parties by children born with birth disabilities. In particular, preconception torts—that is, civil claims involving conduct that preceded the claimant's conception, but that caused the claimant's birth disabilities—should be recognized. Preconception torts do, however,

moved Ragsdale v. Turnock, 841 F.2d 1358 (7th Cir. 1988), from the U.S. Supreme Court docket after certiorari had been granted. Abortion Case Talk Stalls Over Where and When, Chi. Trib. Nov. 21, 1989, § 2, at 1, col. 2 ("settlement negotiations . . . stalled . . . over a key issue: At what point in a pregnancy should a woman seeking an abortion be required to go to a facility more sophisticated than an abortion clinic . . . . Dr. Bernard Turnock, Director of the Illinois Department of Public Health, wants women who undergo abortions after 18 weeks of gestation to do so in highly regulated ambulatory surgical centers or hospitals. The ACLU wants women to be able to have abortions in less-regulated, less-expensive abortion clinics through 20 weeks' gestation . . . .").

113. See, e.g., Parness, Letter, Abortion and the Unborn: Refraining the Issue, Nat'l L.J., Sept. 23, 1985, at 12 (noting the benefits of talking about protecting potential life rather than whether a fetus is a person, including the diminished likelihood of an "all or nothing" mentality in which the unborn are viewed as being comparable to the born either in all respects or in no respect).

114. Tort reforms involving parental duties have been urged, but they trigger more significant questions including issues of immunities under common law and issues of federal and state constitutional rights such as childrearing and bodily autonomy. See, e.g., Note, supra note 24; Note, Developing Maternal Liability Standards for Prenatal Injury, 61 ST. JOHN'S L. REV. 592 (1987); Comment, Setting the Standard: A Mother's Duty During the Prenatal Period, 1989 U. ILL. L.F. 493.
LEGAL STATUS OF THE UNBORN

trigger concerns about stale claims, difficulties of proof, and the possibility that successive generations will sue over genetic changes inflicted upon their ancestors.115

The third and perhaps most controversial issue deserving legislative attention concerns the legal duties that prospective parents owe their unborn children. Here, federal constitutional rights involving childbegetting, childrearing, and bodily autonomy are often implicated. Therefore, more compelling governmental interests and more careful legal drafting are required. Nevertheless, parental duties should be expanded so that potential life is more completely protected. Such an expansion can, and should, occur without the troubling characterization of the unborn as "persons." The unborn can be protected much like snailfishers or historic buildings. Any expansion of parental duties would, of course, have a significant impact upon the fundamental rights of pregnant women. Yet, these duties are not inappropriate even though women can opt to terminate the pregnancy. It was clearly wrong for the grand jury in Rockford, Illinois to refuse to indict a woman who transmitted cocaine to her unborn child, thereby causing the child's death, because the jury was concerned about the woman's right to bodily privacy.116 There was no privacy right involved. It is illegal to use certain drugs whether or not the user is pregnant. The harm caused by drugs is intensified when potential life is involved. A pregnant woman's legal duties should contemplate not only the possibility of punishment for misconduct during pregnancy, but also the possibility of coercive governmental action intended to prevent harm to the unborn.

Finally, parental duties should be expanded for prospective fathers. Legislatures and courts must recognize the need for greater equality in the responsibilities assigned to prospective mothers and fathers. The Florida Supreme Court's recent recognition of the bio-

116. Grand Jury Won't Indict Mother in Baby's Drug Death, Chi. Trib. May 27, 1989, at 1, col. 5 ("... her arrest drew criticism from women's rights activists who branded the prosecution a violation of her right to privacy and control over her own body... Those issues apparently were also on the minds of the grand jury members according to Paul Logli, the Winnebago County State's Attorney..."). It may not have been wrong to determine that the criminal statute on delivery of illegal drugs was not intended to apply to the case at hand. Because the woman's child was born alive and then died as a result of drug exposure, and because Illinois follows the born alive rule for homicide prosecutions, People v. Greer, 79 Ill. 2d 103, 116, 402 N.E.2d 203, 209 (1980), other criminal provisions were seemingly available. Yet, the 1986 Illinois initiatives on crimes against the unborn, see supra note 102, were unavailable because pregnant women were immunized from prosecution. See, e.g., ILL. ANN. STAT. ch. 38, para. 9-1.2(b), 9-2.1(d), 9-3.2(c), 12-3.1(b) (Smith-Hurd Supp. 1990) (crimes of homicide, manslaughter, and battery of unborn child do not apply to pregnant women who carried the victim).
logical father's duty to provide support during the prebirth period is a step in the right direction, as is California's mandate that all prospective parents provide care for their unborn. In fact, prebirth paternity actions are also ripe for new legal developments. These actions would not only protect potential human life, but would also protect maternal health. Permitting such actions may also help remove at least some of the concern that legal initiatives on behalf of the unborn constitute no more than sex discrimination in disguise.

117. See supra note 61 and accompanying text.
118. See supra note 54 and accompanying text.
119. A number of state statutes expressly permit such filings. But compare, e.g., Ark. Stat. Ann. § 9-10-103(a) (1987) ("If the child is not born when the accused appears . . . the court may . . . make temporary orders and findings pending the birth of the child.") with Ill. Ann. Stat. ch. 40, para. 2507(d) (Smith-Hurd Supp. 1990) ("If an action . . . is brought before the birth of the child, all proceedings shall be stayed until after the birth, except for service or process, the taking of depositions to perpetuate testimony, and the ordering of blood tests under appropriate circumstances.").