Fostering Relationships: The State and Pregnancy

Nathalie Levman

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/jlsp

Citation Information
http://digitalcommons.osgoode.yorku.ca/jlsp/vol14/iss1/9
FOSTERING RELATIONSHIPS:
THE STATE AND PREGNANCY

NATHALIE LEVMAN*

INTRODUCTION

Two recent Canadian cases have once again made state intervention in pregnancy and the legal status of the fetus topical issues in legal thought. In the first case, an Ontario court acquitted a mother of attempted murder in the shooting of her almost full-term fetus. In the second case, the Supreme Court of Canada affirmed an appellate court’s decision to set aside a lower court ruling, which ordered the detention of a pregnant

---

* © Copyright 1999, Nathalie Levman, B.A. (Hons.) (Toronto), M.A. (Toronto). The author will receive her Bachelor of Laws from Osgoode Hall Law School in the spring of 1999. Thanks go to Jeremy Dolgin and Roxanne Mykitiuk. This paper was written for Chloe Rebecca Bernice.

woman addicted to solvent sniffing for the protection of the fetus.² Both cases held that the fetus had no legal status as a person until it was born alive.

For many years theorists have expressed passionate views on the role of the state to intervene on the fetus’ behalf and the imposition of criminal and civil liability on those who cause harm to it. The debate hinges on whether the fetus should be granted legal personhood and rights flowing therefrom.

Fetal rights advocates³ favour granting the fetus legal status and rights to justify government intervention in pregnancy when the pregnant woman either refuses treatment believed to be beneficial to the fetus, or endangers her fetus’ health by ingesting intoxicants. A corollary of this view is imposition of both civil and criminal liability resulting from any failure to treat the fetus in accordance with its allotted rights.

Many feminists,⁴ on the other hand, strongly object to any recognition of legal status and rights for the fetus. They are concerned about the potential infringement on

---


women’s autonomy should these “fetal rights” conflict with the rights of pregnant women. According to this view, the coercive effects of state intervention in pregnancy and the liabilities which would flow from allowing such action would seriously and irreparably harm the rights of women.

These feminists recognize self-inflicted abuse and uninformed decision-making during pregnancy as significant societal problems caused often by poor economic and social conditions and reject the underlying assumption of fetal rights advocates that the problem is situated in each “offending” mother. From this feminist viewpoint, the solution lies in addressing the societal conditions which have caused the problem in the first place, rather than pitting mother against fetus by balancing two distinct sets of rights. This position rejects any kind of coercion of the pregnant woman, primarily because coercion infringes on autonomy. Not all feminist theory, however, necessarily leads to the conclusion that every kind of state intervention in pregnancy would seriously infringe on women’s autonomy. A feminist reconception of autonomy may justify limited coercion in rare cases where all other efforts at a pro-active approach to address the systemic problems have failed.

Many feminists condemn all intervention because they do not distinguish between two different contexts in which the state may want to intervene in pregnancy. Where a woman has made an informed choice not to undergo a medical procedure, any abrogation of that decision would constitute infringement of her autonomy. However, where women suffer from addictions or are unable to provide themselves or their fetuses with a proper level of care due to adverse social conditions, it is questionable whether they are exercising autonomous free choice at all. In these cases, intervention may actually fulfil feminist goals to improve the social conditions in which women and their children live.5

Autonomy should not be viewed so much as a value which requires separation and protection from others, but rather as a value which is fostered within the relationships in which it is formed. This “relational”6 approach maintains that autonomy can only develop in the context of relationships which provide the security and dignity neces-

---

5. State intervention does not necessarily translate into coercion and repression. For example, the state may institute outreach programs which supply information, counselling and care to willing participants.

sary to make truly “free” choices. Put simply, an individual cannot make autonomous choices when societal constraints have placed her in a position where she has very few or no options from which to choose.

From this view of autonomy which focuses on fostering the relationships which generate it, a new conception of rights is formed. Rights are no longer to be viewed as protecting defined spheres of individual action into which the collective cannot intrude. Rather, rights are to be seen as:

... structuring the relations between individuals and sources of collective power so that autonomy is fostered rather than undermined.  

Such an approach, in certain extreme cases, justifies minor infringements on an individual right, in the interests of fostering the present and future relationships between pregnant woman and fetus, and pregnant woman and state. Pro-active intervention may be preferable to standing by helplessly as these relationships deteriorate to the point where more drastic action becomes necessary. This approach does not advocate an opposing position to the feminist one by encouraging notions of fetal rights. Rather, it reaffirms feminist critiques of the fetal rights movement, while at the same time providing a different kind of recourse to state assistance in extreme cases, under the guidance of feminist warnings and suggestions.

This paper discusses state intervention in pregnancy in five sections. The first section will examine Canadian case law to provide a foundation for the discussion. The courts have moved away from an interventionist position toward recognizing pregnant women’s “autonomy”. However, neither of these approaches provides an adequate solution to the problem of maternal self-abuse during pregnancy. Current case law calls out for reform. The second section will discuss the fetal rights approach to state intervention with a view to highlighting the theoretical and practical weaknesses of this position in its denial of the unique relationship between the pregnant woman and her fetus. It also warns of the results of according fetuses rights equal to those of their mothers. The third section, which examines the most prominent feminist approach, also indicates many of the dangers inherent in the fetal rights position, but primarily discusses feminist positions on state intervention in pregnancy. This section’s examination of the risks of state intervention to women will significantly inform the fourth section, which attempts to reconceive autonomy, according to feminist relational theory, and to construct a notion of rights in terms of fostering relationships to provide a theoretical basis for limited state intervention in pregnancy. The fifth section will attempt to justify, from a relational perspective, state intervention in extreme cases while accounting for the feminist concerns outlined in the third section. It will also

8. In the sense of a liberty, or an individual’s right to conduct herself in the manner in which she pleases.
9. Such as child apprehension proceedings after birth.
sketch a scheme capable of implementing a feminist approach to government involvement which affirms the relationship between the pregnant woman and her fetus.

I. CASE LAW

Canadian case law involving judicial intervention in pregnancy can be grouped under two headings which describe different contexts in which judicial intervention has been applied for and utilized. Applications for apprehensions of the fetus have occurred both where the pregnant woman has refused medical attention deemed necessary for the fetus' welfare, and where the pregnant woman's conduct has "endangered" the fetus' well-being. The medical intervention and maternal self-abuse cases will be dealt with separately as it is this author's position that the two different contexts warrant different kinds of intervention.

The phrase "medical intervention" refers to procedures which doctors have prescribed as necessary to preserve the life or health of the fetus, such as caesarean-sections or intra-uterine blood transfusions. A woman's refusal of such procedures may be the result of religious or conscientious beliefs, lack of faith in the medical system, or other reasons, but generally her decisions are made on the basis of a belief that she is acting in her own best interests and in the best interests of her fetus. The goal is not to advocate for forced intervention where a woman has made an informed decision not to undergo a medical procedure.

Maternal self-abuse includes cases where women are placing their own health at risk as well as the health of their fetuses. Generally, because of poor social conditions and disadvantage, these women live in situations where their capacity to choose a healthy lifestyle during pregnancy is extremely constricted. Although pregnant women in these cases often require medical attention, their situation differs from most medical intervention cases since they require ongoing assistance and support, not just medically but also emotionally and financially. It is within this type of situation that this paper envisages a form of limited intervention.

After the discussion of judicial intervention in pregnancy, the law on both civil and criminal liability which may result from a mother's failure to take proper care of the fetus is briefly examined. Past developments in this area of the law provide preliminary warnings of the risks of according fetuses rights as well as the dangers of leaving the system as it now exists.

10. I prefer the phrase "maternal self-abuse" to the more common "fetal endangerment" as it focuses attention on the need of both the mother and the fetus for support and care, rather than evoking notions of the fetus needing protection from its mother who is causing harm to it.

11. In a relatively recent American study of court-ordered obstetrical interventions, 81 per cent of the women involved were Black, Asian, or Hispanic, 44 per cent were unmarried, and 24 per cent did not speak English as their primary language. All the women were treated in a teaching-hospital clinic or were receiving public assistance: V.E.B. Kolder et al., "Court-Ordered Obstetrical Interventions" (1987) 316 N.Eng. J. Medicine 1192 at 1192.
a)  **Medical Intervention**

The most common applications for medical intervention in pregnancy involve pregnant women who have refused to undergo a caesarean section which a doctor has prescribed as necessary for the safe birth of the fetus. The *Re Baby R* case\(^{12}\) illustrates a typical judicial response. The mother, Ms. R, had refused a caesarean section because she believed that it would be safe for her to deliver vaginally. Her doctor immediately contacted the child welfare authority who authorized the doctor “to do what was required medically for the child” but clearly stated that “he was not consenting to any medical procedure to be performed on the mother.”\(^{13}\) The lower court upheld this authorization of intervention on the basis that the child was in need of protection due to the mother’s failure to ensure proper medical attention to her fetus. Further, Ms. R’s refusal to undergo a caesarean section, together with her drug and alcohol abuse during pregnancy, were held to constitute “prenatal abuse” and such “abuse” was sufficient to establish permanent guardianship of the child after birth.\(^{14}\) The court ignored the fact that Ms. R had consented to the caesarean section shortly before the birth of her child.

On appeal, MacDonnell J. held that the apprehension of the fetus was pre-birth and intended solely to ensure the safe delivery of the child. After underlining the difficulty of conceptualizing a fetus’ medical treatment as not affecting the mother, the judge found that because the mother had consented to the caesarean section and because the fetus had no legal status as a person until born, there was no factual or legal basis for the apprehension. He followed two abortion cases\(^{15}\) which stated that live birth was the line of demarcation identifying when a fetus became a child. He stressed the drastic nature of fetal apprehension in terms of its infringement on citizens’ rights, stating that there must be express legislation authorizing such action before courts could intervene, and that it was not satisfactory to apply legislation designed for other contexts, such as child welfare.\(^{16}\)

---

16. He also followed an English case, *Re F.*, [1988] W.L.R. 1288, 2 All E.R. 193 (C.A.), which clearly establishes that there is no jurisdiction to apprehend a fetus since, for the apprehension to be effective, there must be a measure of control over the mother. Such powers to interfere with the rights of women must be granted by specific legislation.
Fortunately, the inconsistencies of the decision at first instance were corrected on appeal. However, the negative implications of the lower court decision are illustrative of the significant dangers of judicial authorization of medical intervention in pregnancy. Since the lower court implicitly recognized a right of the fetus to be born in a healthy condition, it was able to overlook the implications of intervention for women’s rights by focusing on fetal rights. The decision assumed that the pregnant woman and her fetus were separate entities on whom different sets of procedures could be performed. Importantly, the decision did nothing to foster the relationship between mother and child: the child was promptly removed from its mother’s care after birth. There was also no attempt to take into account the oppressive social conditions of the women against whom these orders are generally made.

Although the appeal court’s decision attempted to address some of the problems outlined above, in general, courts do not have the ability to deal with the systemic problems which lead to these situations. These problems require programs to help women understand medical procedures better and so make more informed choices.17 There should also be some preventative measures taken to ensure that a history of self-abuse during pregnancy is not presumed to preclude a healthy future relationship between mother and child.

b) Maternal Self-Abuse

The maternal self-abuse cases also show a movement away from judicial intervention toward a recognition of women’s autonomy. In the past, courts have readily confined women in the “interests” of their fetuses. However, recently, judges have refused to override pregnant women’s decisions. While the former approach has had negative repercussions for women’s autonomy, the current approach does not address important social factors. Although pregnant women’s health care decisions are now respected, little assistance is available for those women who require it, thus potentially subjecting them to future discipline by child welfare authorities should they be considered unfit mothers because of their self-abuse during pregnancy. Currently, the case law simply postpones dealing with maternal self-abuse during pregnancy until after the fetus is born when the damage to the maternal-fetal relationship is already done.

Children’s Aid Society of City of Belleville (City) v. L.T. (No. 2)18 exemplifies the courts’ past interventionist tendencies. Here, the court held that a fetus could be found in need of protection under section 37 of Ontario’s Child and Family Services Act19 due to the neglectful conduct of the fetus’ mother during pregnancy. The mother had failed to seek medical attention when she experienced abnormal discharge and severe

For example, outreach programs in health care centers designed to address the individual problems of women in particular communities, including services in the predominant languages spoken in those communities as well as health care workers who understand the specific community’s needs.


abdominal pain. Her "erratic" conduct and the court's finding that her attitude was "not conducive to the safe and healthy delivery of the child", also factored into the court's decision to apprehend the fetus. Importantly, the court made an order for assessment under section 10 of the Mental Health Act and declared the fetus to be a ward of the society for three months. In focusing solely on the welfare of the fetus, the court not only completely overlooked the mother's rights and the necessity of addressing the socio-economic problems underlying this case, but also individualized the blame. The situation became this particular mother's fault.

In Re A, the judge effectively reversed the decision in Children's Aid Society of Belleville, since he found no evidence that the definition of "child" in the Ontario Child and Family Services Act included the fetus. Here the pregnant woman suffered from a serious medical condition, toxemia, which endangered both her own life and that of her fetus. Her conduct revealed no intention to seek any kind of medical care. Consequently, child welfare authorities sought an order to compel the pregnant woman to alter her conduct and provide her fetus with medical attention. The judge found that since the fetus acquired personhood only after birth, there was no jurisdiction to proceed under child welfare legislation. He also refused to exercise his parens patriae jurisdiction, on the basis that the essence of that power was to protect a child in place of its parent, not to coerce the mother to protect her fetus. He concluded that, although the state did have an interest in protecting the fetus, such protection could not be granted by the courts, and that if there were to be intervention, the means and criteria ought to be left for the legislature.

This case illustrates the court's inability to offer support without coercion. No programs have been implemented to offer specialized services, and few, if any, facilities exist which are designed to provide proper emotional and medical support. In addition, no legislation exists which addresses the unique characteristics of these situations, so that courts have applied legislation from other contexts, such as child welfare or mental health statutes, which do not provide due process or proper protection for pregnant women's rights.

Joe v. Yukon (Director of Family and Children's Services) is unique in that it involved legislation which authorized forced supervision in cases where the Director had

20. The mother claimed she would deliver the child "wherever": supra note 18 at 193.
22. In fact the judge specifically declined to take account of any economic factors when judging the mother's conduct: supra note 18 at 193.
24. Following Dehler, supra, note 15.
25. Steinberg U.F.C.J. stated: "I believe that the parens patriae jurisdiction is just not broad enough to envisage the forcible confinement of a parent as a necessary incident of its exercise" (supra note 23 at 92).
reasonable and probable grounds to believe that a fetus was being subjected to a serious risk of suffering from fetal alcohol syndrome.\textsuperscript{27} Although the appeal was dismissed as moot because the mother voluntarily complied with the order, it was held that the legislative provision infringed section 7 of the \textit{Canadian Charter of Rights and Freedoms}\textsuperscript{28} as its vagueness lacked substantive fairness. The \textit{Act} did not define fetal alcohol syndrome, nor did the judge at first instance attempt to define it or allow counsel to make submissions regarding its meaning. This case is useful as a warning to those who wish to authorize intervention through legislation, that they will have to address and account for pregnant women’s rights under section 7 of the \textit{Charter} and attend carefully to the conditions under which infringements of rights may be permitted under section 1.

The most recent maternal self-abuse case, \textit{Winnipeg Child and Family Services v. D.F.G.},\textsuperscript{29} involved an appeal from an order committing a pregnant woman to the custody of the Director of Child and Family Services and empowering him to dictate her medical treatment. The order was purportedly based on the woman’s mental health, as she was addicted to sniffing solvents. However, as the Manitoba Court of Appeal pointed out,\textsuperscript{30} the agency’s real concern was the welfare of the fetus. The appellate court held that either the court could make a direct order for protection of the fetus or it could not, but that it would not be allowed to do indirectly what could not be done directly. Since the fetus was not a legal person in any jurisdiction\textsuperscript{31} and the \textit{parens patriae} jurisdiction was only exercisable after the child was born, there was no legal foundation for fetal protection. Again, the court found itself unable to intervene in such a complex issue, deciding that any reform must be left to the legislature, the “body directly answerable to society”:\textsuperscript{32}

... I do not see how a court can select which conduct harmful to an unborn child should be restrained and which not. That is more properly a legislative function.\textsuperscript{33}

The Supreme Court of Canada affirmed the appellate court’s decision by a seven to two majority. McLachlin J., who wrote the majority judgement, reiterated that a fetus had no legal personhood until birth, with the result that a woman’s actions could not

\textsuperscript{27} Section 134(1) of Yukon Territory’s \textit{Children’s Act}, S.Y.T. 1984, c.2. Subsection 134(1) is now s.133 of R.S.Y. 1986, c.C-22. The only other jurisdiction which specifically authorizes state intervention in pregnancy is the New Brunswick. See \textit{Family Services Act}, S.N.B. 1980, c.C-21, C.C.S.N.B., c.F-2.2, s.1, which defines “child” to include “unborn child”.


\textsuperscript{29} \textit{Supra} note 2.


\textsuperscript{31} With the exception of New Brunswick: \textit{supra} note 27. However, intervention based on New Brunswick’s \textit{Family Services Act} probably would not pass \textit{Charter} scrutiny, in view of the \textit{D.F.G.} decision.

\textsuperscript{32} \textit{D.F.G.}, \textit{supra} note 30 at 11.

\textsuperscript{33} \textit{Ibid.} at 9.
be restrained either through tort law or through the court's *parens patriae* jurisdiction. Any change to this principle would involve important moral choices and would create conflicts between fundamental interests and rights.\textsuperscript{34} Since the common law was limited to incremental change, and the complex ramifications of any alteration to the common law permitting confinement of pregnant women were too difficult for the court to assess, any such change ought to be made by the legislature.\textsuperscript{35}

Importantly, McLachlin J. recognized that, before birth, the pregnant woman and her fetus were one, since the fetus was intimately connected with, and could not be regarded in isolation from, the life of the pregnant woman. She stated that any change to the common law of tort would create an antagonistic relation between pregnant woman and fetus, which would contradict the reality of the physical situation: the woman and her fetus were bonded in a union separable only by birth.\textsuperscript{36} McLachlin J. also recognized that any test which imposed a duty of care on a pregnant woman toward her fetus would probably have the greatest impact on minority and disadvantaged women who tended to have less access to information about medical care. She specifically emphasized that the *parens patriae* jurisdiction did not permit the court to make decisions for a competent person regarding her own body.\textsuperscript{37} Any such significant change to the common law would have to be effected by the legislature in compliance with the *Charter*.\textsuperscript{38}

The dissenting opinion took a very different approach to the ability of the common law to address changing circumstances. Major J. maintained that the common law "has proven to be adaptable to meet exigent circumstances as they arise".\textsuperscript{39} Consequently, he had no problem with extending the *parens patriae* jurisdiction to restrain a pregnant woman where there was a reasonable probability of her causing irreparable harm to her fetus.\textsuperscript{40} He maintained that the *parens patriae* jurisdiction was intended to deal with unanticipated situations where it appeared necessary. He extended its ambit to the fetus by finding the "born alive" rule antiquated in light of modern medicine, calling it a "legal anachronism based on rudimentary medical knowledge."\textsuperscript{41}

Although Major J. outlined a relatively restrictive test to determine whether confinement was warranted,\textsuperscript{42} he did not have a plan for addressing the systemic causes of

\textsuperscript{34} Supra note 2 para. 20.
\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid. at para. 29.
\textsuperscript{37} Ibid. at para. 56.
\textsuperscript{38} Ibid. at para. 58.
\textsuperscript{39} Ibid. at para. 61.
\textsuperscript{40} Ibid. at para. 93.
\textsuperscript{41} Ibid. at para. 102.
\textsuperscript{42} Ibid. at para. 96:
1. The woman must have decided to carry the child to term.
2. Proof must be presented to a civil standard that the abusive activity will cause serious and
ations. Moreover, he placed the blame on the pregnant woman by conceptualizing an antagonistic relationship where the fetus was a separate entity “suffering from its mother’s abusive behaviour”. He pointed to two sets of rights, those of the mother and those of the fetus, and stated that a fundamental precept of our society was that it could restrict an individual’s right to autonomy where the exercise of that right caused harm to others. There was no recognition of the unique and inextricable relationship between mother and fetus. Interestingly, he even envisaged himself as speaking for those “who cannot speak for themselves”. In his view, the fetus was a separate entity which had an implicit right to be born healthy and, importantly, which was in need of the court’s protection from its mother who was abusing it.

Since Canadian case law maintains that a fetus is not a person and the courts consequently cannot intervene on its behalf, it seems to accept that the court is not an adequate forum to deal with the complexities of such problems. The result, however, is that no assistance or support is provided to pregnant women who are poorly informed or suffer from addictions, nor are the poor economic conditions which are often at the root of the problem addressed. This inaction leads to the blame being continuously directed at individual “offending” women insofar as the courts insinuate that they would like to intervene, if only the law did not prohibit intervention. Such consistent calls to the legislature to deal with this problem may provide motivation to Parliament to take some preventative measures. Effort must be made to avoid intervention programs based on the notion of fetal rights since such an approach could seriously and negatively affect a mother’s relationship with her fetus and future child. Any potential legislative action ought to avoid the dangers illustrated in the cases authorizing intervention and address the causes of the problem rather than the casualties.

It cannot be ignored that there is a strong undercurrent supporting the notion of fetal rights, as represented by the dissent in the D.F.G. case. Such strong views seriously influence how society conceptualizes motherhood and the problems a pregnant woman may face in bringing a child into this world. Therefore, any attempt to address such problems must do more than improve difficult social conditions and provide much needed support and care. It must also challenge the idea that a mother who inflicts abuse on herself while pregnant is a bad mother from whom her fetus and future children need protection.

---

irreparable harm to the foetus.
(3) The remedy must be the least intrusive option.
(4) The process must be procedurally fair.

43. Ibid. at para. 91.
44. Ibid. at para. 131.
45. Ibid. at para. 140.
c) **Criminal and Civil Liability**

Civil liability for harm a pregnant women has caused her fetus *in utero* may only be imposed after the fetus has been born alive.\(^4\)\(^6\) Even then the law is uncertain as to the extent to which a woman may be held responsible for her conduct during pregnancy. Traditionally, parents have enjoyed immunity from such actions in the interest of preserving family harmony. However, recently, the law has been expanding to include liability for a mother's negligent driving which causes harm to a fetus.\(^4\)\(^7\)

Civil liability is a reactionary measure designed to provide compensation *ex post facto*. If the law were to expand to include liability for all types of parental negligence, emphasis would be placed on the results of the problem rather than the cause itself. Any attempt to develop a new scheme dealing with state intervention into pregnancy ought to take an exclusively pro-active approach by banning imposition of any kind of maternal civil liability. By focusing efforts on addressing the causes, the problem would be properly addressed as societal rather than as the fault of each "offending" mother.

Criminal law in Canada has firmly established that a fetus is not a human being for the purposes of the *Criminal Code*.\(^4\)\(^8\) Therefore, a pregnant woman cannot be charged with committing a crime against a fetus. In *Drummond*,\(^4\)\(^9\) a recent case where a woman was charged with attempting to murder her fetus, it was held that the definition of homicide was based on the victim being a human being. The judge followed *R. v. Sullivan*\(^5\)\(^0\) in which it was held that a fetus was not a person until born alive. In *Sullivan*, two midwives were acquitted of criminal negligence causing death, after a fetus in their care died while in the birth canal.

Although, in Canada, criminal law cannot be used directly to punish the acts of pregnant women,\(^5\)\(^1\) it may be used indirectly to limit their behaviour while pregnant. Women have been sentenced to jail terms for crimes which would not normally carry a sentence, in order to "protect" their fetuses. For example, Andrea MacKenzie, a young woman who pleaded guilty in a Toronto Provincial Court to charges of communicating for the purposes of prostitution was sentenced to 60 days in prison.

---


\(^4\)\(^7\) Keyserlingk, *supra* note 3 at 41–7. Also see *Dobson (Litigation Guardian) v. Dobson* (1997), 148 D.L.R. (4th) 332, 189 N.B.R. (2d) 208, 37 C.C.L.T. (2d) 103 (C.A.), holding that a child could recover for injuries inflicted *in utero* by a mother's negligent driving of a motor vehicle, but not for injuries occasioned as a result of a pregnant woman's lifestyle choices. Leave to appeal to the Supreme Court of Canada was allowed ((1997), 194 N.B.R. (2d) 320n, 496 A.P.R. 320n (S.C.C.)) and argument was heard in December 1998. However, no decision has yet been released.


\(^4\)\(^9\) *Supra*, note 1.


\(^5\)\(^1\) In the United States, however, seventeen states have criminally charged pregnant women with manslaughter, delivering drugs to newborn children and prenatal child abuse. See Holmgren, *supra* note 4 at 81.
Ms. Mackenzie, who was eight and a half months pregnant at the time, explained that she had been seeking other jobs but was unable to find work, and needed a way to support herself and her four year old child. Provincial Court Judge Hogg clarified his rationale for the imposition of an unusually lengthy sentence:

I cannot comprehend what would drive a woman to act in this manner, and the only way to protect this child is to have this child born in custody, and hopefully things will be done about it.52

Importantly, in this case there was no evidence that Ms. Mackenzie abused drugs or alcohol, nor was there evidence that the fetus was at risk.

This kind of sentencing poses serious threats to pregnant women’s rights and health. No matter how criminal liability is imposed, whether directly or using a smaller crime as a proxy, the solution is reactionary and consequently does nothing to assist the pregnant woman’s poor economic conditions or preserve the relationship between the pregnant woman and her fetus. In fact, it has quite the opposite result, placing the pregnant woman at a further disadvantage economically by taking her away from potential job opportunities. It also may contribute to severing the relationship between pregnant woman and fetus by providing evidence of parental unfitness, which child welfare authorities may use once the child is born to justify finding it in need of protection.53 As with the imposition of civil liability, criminal liability shifts the focus from fixing the cause to punishing the casualties and individualizing the blame.

II. THE FETAL RIGHTS POSITION

Fetal rights advocates54 strive for a protective and anticipatory approach as well as a legal regime which permits compensation. They wish to provide protective legal mechanisms to stop further “abuse” of the fetus and afford “needed” care. They stress that the fetus must be considered to be separate from the pregnant woman, with its own interests and needs.55 If it were accorded legal status as a person and the right to be born healthy, the fetus could be viewed as a child for the purposes of all child welfare legislation. Justification for granting juridical personality is based on the essential continuity between the child’s unborn and born status: what happens to the fetus may affect the life of the future child.

From this perspective, the scheme for state intervention in pregnancy would be based on existing child welfare legislation. The duties of a parent could be deduced from the criteria to determine when a child is in need of protection. Once the fetus is found to

52. Cited in Dawson, supra note 4 at 270 as R. v. Mackenzie, Transcript of Guilty Plea and Submissions to Sentencing, August 3, 1988 (Ont. Prov. Ct., D. Hogg J.), 7-8. In the United States, criminal sanctions are also used as preventative measures: see Holmgren, supra note 4 at 90.

53. Ms. Mackenzie’s child was apprehended by the child welfare authorities immediately after birth.

54. In the following few paragraphs I am primarily describing the position taken by Keyserlingk, who is considered one of the most prominent Canadian fetal rights advocates.

55. Keyserlingk, supra note 3 at 99.
be in need of protection, interventions would be adapted to fetuses under the remedies sections. Remedies such as supervision orders and placement in institutions would apply. To determine whether a fetus is in need of protection, a careful balancing of the rights of the fetus against those of the mother is proposed. The benefits of the intervention for the fetus, for the pregnant woman and her family and the advantages to society should be examined and weighed against the potential risks to the fetus and the pregnant woman, the accuracy of diagnosis and the prognosis for success.

Flowing from the concept of fetal personhood and rights is the imposition of civil liability as a result of the failure to uphold such rights. This approach maintains that a legal duty should be imposed on pregnant women to protect the fetus, the breach of which may be tortious. The duty would mandate provision of care which best promotes an adequate level of health for the fetus. General tort law principles would be followed in establishing a duty of reasonable care, proving fault to establish negligence and proving a causal connection to the resultant damage.

This approach also encourages imposition of criminal liability against third parties and the pregnant woman. The fetal rights position on the role of criminal law derives from a working paper of the Law Reform Commission of Canada. Interestingly, the paper does not advocate the granting of legal personhood to the fetus. Instead, it attempts to effect the same result without dealing with the controversial subject of fetal rights. It recommends the creation of a new crime specifically geared toward fetuses. In part, this provision would provide as follows:

1. Everyone commits a crime who
   1. being a pregnant woman, purposely causes destruction or serious harm to her fetus by any act or by failing to make reasonable provision for assistance in respect of her delivery.

2. Section 1 [sic] applies even though the destruction or harm results after the fetus becomes a person.

The fact that the proposed provisions would relieve pregnant women of liability where the destruction or harm was the result of life saving or health preserving measures is small comfort to women who would risk being charged criminally even for inadvertent acts during pregnancy.

56. Ibid. at 110.
57. Ibid. at 72.
58. Ibid. at 83.
60. Ibid. at 51.
61. In this proposed scheme, no liability would attach for harm resulting from lawful abortion or from medical treatment for the mother's benefit to which she has consented: Ibid. at 53–57.
The State and Pregnancy

The fetal rights approach avoids addressing the cause of the problem and so fails to change the social conditions which bring about such situations. It both implicitly and explicitly places blame on the individual woman by focusing the attention entirely on her conduct and making her both criminally and civilly responsible for her actions. It also creates an adversarial relationship between the pregnant woman and her fetus by viewing the woman's rights as being overridden by those of her fetus. There is no emphasis on preserving the relationship between pregnant woman and fetus. Rather, a woman who asserts her rights to the detriment of her fetus is assumed to be unfit for motherhood. This approach applies legislation not tailored for the specific context of intervention in pregnancy and so fails to provide proper safeguards for the mother's rights.

III. A FEMINIST CRITIQUE AND SOLUTION

The most prominent feminist critique of state intervention in pregnancy is centred on a rejection of fetal rights as a legal basis for intervention. Feminists generally wish to preserve the fetus' status of non-personhood in order to protect pregnant women from coercion. They maintain that state protection of fetuses may appear benevolent, but that when it is coercive, it disempowers women by infringing on their autonomy, which "further subjects them to the arbitrary control of patriarchal power." In this section, the main feminist arguments against intervention are grouped according to those that critique state intervention generally and those that specifically critique apprehensions intended to negate the refusal to undergo medical treatment.

a) General Critique of State Intervention in Pregnancy

The key feminist critique of granting fetuses personhood and rights in order to justify state intervention in pregnancy is that it leads to blaming individual women for "complex societal drug and infant mortality problems". By emphasizing the importance of fetal rights, rather than maternal needs, this approach fails to recognize the larger causal problems such as the effects of malnutrition due to poverty, physical abuse and lack of adequate prenatal education and care. According to Gallagher:

[T]he focus on fetal rights directs medical and legal attention away from affirmative programs of public education and health care reforms required to ensure healthy pregnancies and babies.

In addition, where the focus is on protecting the fetus rather than helping the pregnant woman, a physical addiction is not properly recognized as a disease, but rather as a sign of poor motherhood. Women do not abuse drugs out of lack of care for their

62. Hanigsberg, supra note 4 at 37.
63. Krauss, supra note 4 at 533.
64. Ibid. at 534.
65. Gallagher, supra note 4 at 56.
infants. Rather, they are unable to control the intake of the substance being abused and generally do not want to be addicts. As one author has stated:

Addiction typically involves loss of control over use of the drug and continued involvement with the drug even when there are serious consequences. Thus, to treat pregnant addicts as indifferent and deliberate participants is to misunderstand the addiction process.66

Many feminists also disagree with the way in which according sets of conflicting rights to the pregnant woman and her fetus establishes an antagonistic relationship before birth, rather than recognizing that mother and fetus are an organic whole.67 Such an adversarial contest threatens to undermine the physical integrity of pregnant women by attempting to distinguish the pregnant woman from the fetus growing inside her.68 There is also an underlying assumption in the fetal rights approach that the best way to help the fetus is to curtail the rights of pregnant women. But women’s needs should not be seen as opposed to those of their fetuses. According to Overall, the interests of the fetus and the mother are so intimately bound that:

... one cannot speak about distinct, let alone conflicting, interests without simplifying distortion.69

Although the fetus is not yet a child, it may become one. The relationship between pregnant woman and fetus is interdependent but not symmetrical: the fetus’ existence depends on the woman but not vice versa. Such a relationship therefore demands not that equal sets of rights be balanced, but rather that the pregnant woman be accorded increased rights and interests, since the mother is an independent being without whom the fetus cannot exist.

Adversarial relationships are not only created between pregnant woman and fetus by the fetal rights scheme. If doctors are required to report “offending mothers”, the very person who is intended to provide proper medical care and support is set up as a person adverse in interest to the woman, since the doctor’s role becomes one of protecting the fetus. This may drive women out of the health care system, especially if one of the consequences of reporting “inappropriate” maternal behaviour is criminal liability.70 Significantly, any reporting requirements would have disproportionate effects on low-income women who are more likely to lack resources to care for themselves properly during pregnancy, whether it be proper food, shelter and a healthy lifestyle, or simply information on healthy conduct during pregnancy.71

67. Hubbard, supra note 4 at 215. See also Tateishi, supra note 4 at 139: “Creating separate individual rights negates the fundamentally biological relationship between mother and fetus.”
68. Tateishi, ibid. at 123.
69. Overall, supra note 4 at 14.
70. Krauss, supra note 4 at 535.
71. Ibid. at 524. See also Dawson, supra note 4 at 271.
Many feminists also warn that the fetal rights approach would perpetuate negative stereotypes regarding women. The more weight is placed on fetal rights, the more women will be seen as unfit to be trusted with their own children.\textsuperscript{72} The female body will come to be seen as dangerous to the fetus because pregnant women cannot be trusted not to abuse it.\textsuperscript{73} Tateishi stresses that intervention on behalf of the fetus may come to be thought of as necessitated by the danger and inefficiency of the female body. The "Eve" image of women will be perpetuated in the idea of self-interested mothers whose "hedonism conflicts with the rights of the fetus".\textsuperscript{74}

Since reactionary measures tend to form a part of the fetal rights' vision of state intervention, many feminists also stress the risks of imposing liability on the pregnant woman. First of all, imposition of criminal liability drives women away from seeking help during pregnancy and may encourage abortion as a means of avoiding liability.\textsuperscript{75} Punitive solutions may even harm maternal and fetal health since prisons are not an appropriate setting for pregnancy. Prisons are not necessarily drug free environments and they are not able to offer suitable drug addiction treatment programs or medical facilities for pregnant women.\textsuperscript{76} In addition, criminal penalties are based on the false assumption that addictive use of alcohol and drugs by pregnant women is a matter of choice or a problem of moral weakness. Civil accountability also creates adversarial relationships between mothers and fetuses since mothers could be held accountable for even inadvertent behaviour which results in damage to a child.\textsuperscript{77} Finally, as mentioned above, reactionary measures compromise the most promising solution to the problem: provision of adequate health care, including drug addiction treatment tailored to meet the special needs of pregnant women.\textsuperscript{78}

Many feminists have also critiqued the competence of the courts to deal with the complexities of fetal apprehension. Child welfare legislation, the legislation under which direct apprehension orders have been made, is unable to account for the "unique social and biological realities of the pregnant woman's context and her constitutional rights,"\textsuperscript{79} since it was drafted to deal with children, not fetuses and pregnant women. In addition, when an order is made under child welfare legislation, it must be made in accordance with the "best interests of the child" with the result that resolution in favour of the fetus is virtually guaranteed.\textsuperscript{80}

\textsuperscript{72.} Ibid. at 271.
\textsuperscript{73.} Hanigsberg, \textit{supra} note 4 at 44. See also Tateishi, \textit{supra} note 4 at 114.
\textsuperscript{74.} Hanigsberg, \textit{ibid.} at 46.
\textsuperscript{75.} Holmgren, \textit{supra} note 4 at 101; Gallagher, \textit{supra} note 4 at 45.
\textsuperscript{76.} Holmgren, \textit{ibid.} at 101.
\textsuperscript{77.} \textit{Ibid.} at 95.
\textsuperscript{78.} Berrien, \textit{supra} note 4 at 242. At 246, Berrien describes an American pilot project initiated to reach out to addicted pregnant women, but which was largely unsuccessful because punitive measures were attached.
\textsuperscript{79.} Tateishi, \textit{supra} note 4 at 133.
\textsuperscript{80.} \textit{Ibid.} at 130.
Recourse to mental health legislation is usually not an improvement since a woman's simple refusal of her doctor's advice is often implicitly equated with mental incompetence. In addition, an order under such legislation is often utilized to allow the courts to do indirectly what they cannot do directly. In D.F.G., the appellate court specifically forbade forcible intervention on the basis of a finding of mental incompetence, when this route was taken to bring about the same effect as if the law permitted confinement of pregnant women.

b) Critique of Medical Intervention Cases
This section begins by discussing issues of autonomy. As the autonomy critique may apply equally to the maternal self-abuse cases, it is a suitable topic to bridge a discussion of general objections to state intervention in pregnancy and objections specifically directed at medical intervention. However, since this paper argues that the autonomy argument is more suitable to the medical intervention context, issues of autonomy are more aptly dealt with under this heading.

Generally, many feminists have argued that an isolated focus on the fetus obscures the physical reality that the state cannot take custody of the fetus without infringing on pregnant women's autonomy. Pregnancy should not compromise the autonomy given to competent humans to make decisions regarding their own bodies. Further, coercive intervention overlooks the possibility of working with pregnant women's decision-making processes. Ultimate respect of their decisions is the most woman-affirming approach since it is premised on respect for women's autonomy and bodily integrity. Women should be able to participate in meaningful ways in the making of decisions concerning their own health treatment; there should never be a denial of the patient's ability to think for herself.

The final concern regarding practices which abrogate women's autonomy is that coerced medical treatment will remove "the locus of reproductive decision-making from women and vest it in the medical profession."

Underlying the autonomy critique is the premise that a woman's "free" choice should never be infringed, but this alone is an impoverished theoretical perspective. A competent woman's decision to undergo a medical procedure can easily be characterized as a "free" choice and, therefore, deserving of societal respect and protection. However, the autonomy critique would apply the same analysis to pregnant women who ingest intoxicants. But most feminists would agree that drug addiction is often caused by social constraints and cannot be fully characterized as a result of "free"
The autonomy critique fails to address this theoretical difficulty by simply arguing that women's "free" choice should always be protected, no matter how circumscribed that "freedom" may be. Sections four and five suggest going beyond this analysis by positing a relational approach as an improved perspective from which to analyze medical intervention and maternal self-abuse cases.

Forced medical intervention has also been criticized on the basis that doctors' opinions regarding "necessary" medical procedures are not infallible.\(^8\) Doctors will often take aggressive preventative measures to avoid the worst possible outcome regardless of the probability of its occurring. The increased number of caesarean sections in recent years, it has been argued, may be the result of physicians' anxiety about potential malpractice liability.\(^8\)\(^9\) Accepted medical practice can also change drastically over a relatively short period of time and doctors in general are extremely skeptical of alternative birthing techniques.\(^9\) In addition, judges tend to give special credence to medical opinions due to their own lack of expertise in the area.\(^9\) Finally, because action must be taken so quickly in these cases, it is generally impossible to assure even minimal due process. This lack of opportunity to deliberate increases the chance of "misapplication of the controlling legal principles and derogation from constitutional rights."\(^9\)\(^2\) In essence:

The procedural shortcomings ... undermine the authority of the decisions themselves, posing serious questions as to whether judges can, in the absence of genuine notice, adequate representation, explicit standards of proof, and right of appeal, realistically frame principled and useful legal responses to the dilemmas with which they are being confronted.\(^9\)

The *Charter* has inevitable importance in any discussion which involves curtailing citizens' rights, and many feminists do not hesitate to point to the significance of the *Charter's* protection of the rights of pregnant women. Many critics emphasize that any intrusion upon the physical autonomy or reproductive decision-making of preg-

---

\(^8\) Kolder, *supra* note 11 at 1192: six out of fifteen caesarean sections were unnecessary. One of the studies referred to by Hanigsberg, *supra* note 4 at 51, found that up to fifty per cent of all caesarean sections were unnecessary.

\(^9\) Gallagher, *supra* note 4 at 51.

\(^9\) Grant, *supra* note 4 at 244.

\(^9\) Tateishi, *supra* note 4 at 134–138. At 135–136, Tateishi refers to a recent American case which provides a good example of how judicial trust of medical opinion can go seriously awry. In that case, George Washington University and George Washington University Hospital sought a declaratory order allowing the Hospital to perform a caesarean section on a mother against her will. The mother was six and a half months pregnant and was terminally ill with cancer. The trial court held a hearing at the Hospital and granted the application. The child died two hours after the operation and the mother within two days, the caesarean section operation being one of the factors contributing to the mother's death. See *In re A.C.*, 533 A.2d 611 (D.C. 1987), *vacated* 539 A.2d 203 (D.C. 1988), *vacated and remanded* 573 A.2d 1235 (D.C. 1990).

\(^9\) Martin & Coleman, *supra* note 4 at 963.

\(^9\) Gallagher, *supra* note 4 at 49.
nant women violates the Charter. Importantly, fetuses have not traditionally been accorded any rights under the Charter. In Borowski v. Canada (Attorney General) and Dehler, it was held that “everyone” in section 7 did not include the fetus, because the fetus was not a legal person. This finding was reiterated in Tremblay v. Daigle. Many feminists believe that it is important to maintain the current status of the fetus because once the fetus is granted legal status, the courts must come down in favour of intervention; if the fetus is a person, a person has a right to life, therefore the state can intervene to preserve that life.

Section 7 of the Charter protects women from forced medical intervention because liberty and security of the person would be infringed. Importantly also, in situations where medical intervention would be forced on a pregnant woman, there is no time to comply with the principles of fundamental justice. A quick decision must be made, when a woman is, for example, in labour and refusing to undergo a caesarean section. To comply with the principles of fundamental justice, the pregnant woman in question would need to be informed immediately of the apprehension and she should be granted a right to make submissions and to consult legal counsel. Such precautions are practically impossible to undertake since generally the procedure must be performed immediately after a mother refuses to be subjected to it.

c) A Feminist Solution
As previously stated, many feminists maintain that the failure by some pregnant women to make healthy choices for themselves and their fetuses is a social rather than a legal problem. The answer, they argue, lies in the socio-economic, psychological and physical reasons that compel women to make unhealthy choices during pregnancy. Society can only help fetuses by helping women. This would involve treating women as people worthy of support by establishing progressive support programs such

94. See Jackman, supra note 4 at 49; Grant, supra note 4 at 71.
96. Supra note 15.
98. Grant, supra note 4 at 220.
100. Grant, supra note 4 at 228–31. In addition, according to Morgentaler, ibid., to determine whether the principles of fundamental justice have been complied with, one must consider whether any other Charter rights have been violated. For example, some individuals may object to procedures such as caesarean sections on religious or conscientious grounds, resulting in a potential infringement of s.2(a). As Grant has pointed out, “women from various ethnic backgrounds have profoundly differing religious and personal beliefs regarding child birth.” In particular, people from Jamaica, Haiti and Africa place social stigma on use of the caesarean section.
101. Holmgren, supra note 4 at 103.
as drug treatment facilities where participation is seen to be an indication of good mothering, and where free nutritious food, information and counselling are all provided.\textsuperscript{102} The goal must be to uncover the "roots of self-destructiveness" and treat them effectively so as to avoid placing a deeper wedge between mother and fetus by establishing opposing interests.\textsuperscript{103} Such progressive and pro-active measures would help prevent state intervention after birth thus avoiding the need for out-of-home (e.g. foster) care.\textsuperscript{104}

IV. A RELATIONAL PERSPECTIVE

This section attempts to establish the theoretical basis for a solution to maternal self-abuse during pregnancy, should the feminist pro-active approach fail to assist. It addresses only those situations where pregnant women are abusing themselves during pregnancy. This approach is intended to avoid situations where a pregnant woman consistently refuses help, to her own and her fetus’ detriment, and there is no other recourse to provide any assistance. Currently, the state waits until the child is born and subsequently may take custody under child welfare legislation, leaving the mother in the same adverse circumstances as before the child’s birth, but without the opportunity of developing a relationship with her child. The focus of this section is on preserving the maternal-fetal relationship both before and after birth in all situations, regardless of whether the pregnant woman voluntarily complies with a recommended course of action or refuses to do so.

a) A Relational Reconception of Autonomy

To determine whether and when intervention in pregnancy constitutes a derogation from women’s autonomy, the theoretical underpinnings of autonomy must be examined to establish in which contexts it is possible to conceive of intervention as potentially enhancing autonomy rather than necessarily undermining it.

Traditionally, liberalism has taken atomistic individuals as the basic units of legal theory. Consequently, autonomy has come to be viewed as an independence which requires separation and protection from others. An individual’s personal choice is therefore almost always considered a proper exercise of her autonomy since it originates from her independent existence. The state ought to protect these “autonomous” decisions by preventing any infringement of them.

Much feminist work, conversely, tends to emphasize relationships between people rather than treating people as autonomous with identities existing prior to their social

\textsuperscript{102} Hanigsberg, \textit{supra} note 4 at 68–9.
\textsuperscript{103} Tateishi, \textit{supra} note 4 at 138.
\textsuperscript{104} Krauss, \textit{supra} note 4 at 537. For an entirely Canadian version of the pro-active approach, see Canada, Royal Commission on New Reproductive Technologies, \textit{Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies} (Ottawa: Minister of Government Services Canada, 1993) (Chair: P. Baird) vol.2 at 949–65.
relationships. Relational theorists especially focus on the importance of relationships in shaping and forming human existence and posit that we take our being from our relations with others. Although feminists are centrally concerned with freeing women to shape their own lives, it cannot be forgotten that people are the products of their social contexts. From a relational perspective, to use the language of Nedelsky, we must "combine the claim of the constitutiveness of social relations with the value of self-determination" by focusing on the centrality of relationships in constituting the self.

Traditional notions of autonomy, therefore, must be reconceived in a way which recognizes both the importance of self-determination and the constitutiveness of social relations. Autonomy, which is defined by Nedelsky as "one's own law", is shaped by the society in which one lives and the relationships which are a part of one's life. Although autonomy is one's own, it is not made solely by the individual. Rather the individual develops it in connection with others. In other words, the capacity to find one's own law can develop only in the context of relations with others which nurture this capacity. Relationships enable people to be autonomous; they provide the support and guidance necessary for the development and experience of autonomy. Therefore, positive social conditions and healthy relationships are prerequisites to the proper development and exercise of autonomy.

b) Protecting Autonomy as a Fundamental Value in Society
To protect a reconceived notion of autonomy as a fundamental value in our society, our conception of the relation between the individual and the state must change. A right which protects a fundamental value such as autonomy should not be seen as defining a bounded sphere into which the state can never intrude. It should rather be conceptualized as "a means of structuring the relations between individuals and sources of collective power so that autonomy is fostered rather than undermined." Since rights mediate and often define relationships, we must examine ways of either enhancing or limiting them in order to foster the relationships which rights form.

In liberal rights theory, the individuals to be protected by rights are seen as essentially separate, rather than as beings whose interests and needs are intertwined. Consequently, respecting the delineated boundaries which rights protect draws our minds away from the relationships which they form. A relational reconception of autonomy forces us to see rights not as a mechanism which shields the individual from the

105. Minow, supra note 6 at 194.
107. Ibid.
108. Ibid. at 10.
110. Ibid. at 13.
state but rather as a vehicle through which autonomy may be "rendered compatible with the interdependence of human beings."\textsuperscript{112}

From this perspective, the scope of rights, whether this involves protecting a value or limiting the extent of that value, must be determined by the kinds of relationships we want to foster. However, in order to find the optimal relation between the individual and the state which fosters the relationships in which autonomy is created, we must discern what constitutes autonomy:

We cannot understand or protect ... autonomy unless we attend to what gives citizens a sense of autonomy, to what makes them feel competent [and] effective. ...\textsuperscript{113}

This may involve inquiring into whether official action denies citizens basic respect or treats them in ways that make them less able to participate effectively in decisions affecting their own lives.\textsuperscript{114} Citizens who participate directly in decisions affecting them are less likely to relinquish their autonomy when they accept the benefits or control of the state, because they have had some say in how the law will affect them.

V. A RELATIONAL SOLUTION

If we view autonomy as developed by the individual in relations which provide the support and guidance necessary for individuals to make what they feel are competent and effective decisions, we can no longer call a woman’s decision to harm herself and her fetus an autonomous choice. People do not choose to suffer adverse social conditions or to purposefully harm the positive relationships which constitute their social contexts:

Women do not abuse drugs out of a lack of care for their fetuses. Drug abusing pregnant women, like other drug abusers, are addicts. People do not want to be drug addicts.\textsuperscript{115}

There are two relationships at risk here. One is the maternal-fetal relationship which may be severed after birth because of the mother’s inability to care for her child due to her addiction or lack of ability to provide proper care, or because of physical harm caused to the fetus. The second is the relationship between pregnant woman and state, which possesses the power to apprehend the child after birth or otherwise hold the mother liable for her treatment of the fetus prenatally.

Protecting the value of a “reconceived” autonomy in our society may involve using state power to ensure that the relationships which foster autonomy are preserved. Consequently, a scheme which seeks ultimately to enhance women’s autonomy may involve temporarily limiting the extent of freedom of choice in the interests of

\textsuperscript{112} Nedelsky, “Reconceiving Rights as Relationship”, supra note 6 at 13.
\textsuperscript{113} Nedelsky, "Reconceiving Autonomy", supra note 6 at 25.
\textsuperscript{114} Ibid. at 34.
\textsuperscript{115} Hanigsberg, supra note 4 at 53.
protecting the relationships between the pregnant woman and her future child and the woman and the state. To establish the extent to which we must limit a woman's right to make choices regarding her conduct during pregnancy, we must examine which measures will best contribute to the fostering of the maternal-fetal relationship. The goal is not to create an adversarial relationship between the woman and her fetus but rather to foster that relationship. Consequently, any infringement on women's informed decisions should be prohibited in the interests of furthering autonomy and the relationships which create it.

The only situation where intervention may be justified, and only then where all pro-active, non-coercive measures have been exhausted, is when a pregnant woman has made unhealthy choices because she suffers from an addiction or because she has no other meaningful options. In these situations, however, there must be safeguards to ensure that official action provides citizens with basic respect and treats them in ways that allow them to participate effectively in the decisions which will affect their lives.

This approach proposes establishing a new agency designed specifically to deal with the particular needs of pregnant women. Its objectives would be to unearth and rectify the causes of maternal self-abuse during pregnancy and, most importantly, to preserve the maternal-fetal relationship both before and after birth. Its enabling legislation would establish a pro-active, preventative approach, while providing for forced intervention, as a last resort, where a mother is abusing herself during pregnancy and refuses any assistance. The procedures would be designed not simply to force the mother to cease any self-destructive behaviour, but also to inquire into the causes of her situation and attempt to rectify them on a personal level. The ultimate goal is rehabilitation and consequently helping the woman and the fetus, once born, to establish a long-lasting relationship in which the autonomy of both may be fostered.

Any state action to intervene in the lives of citizens must accord basic respect and enable citizens to participate effectively in decisions which affect their lives. Therefore, the system must follow due process which would involve requirements that agency officials immediately inform the pregnant woman of the intention to intervene and that the pregnant woman be given an opportunity to make submissions and seek counsel. A hearing would then be provided with adjudicators consisting of experts in obstetrics and gynecology, psychology and women's studies, to ensure that the complexities of the contexts which cause maternal self-abuse are duly considered. The agency would be required to prove that coerced intervention is warranted by satisfying a test outlining the criteria to be considered. The criteria must have as their underlying purpose the preservation of the maternal-fetal relationship. Such factors as the risks to the pregnant woman and the fetus' health and the potential of the woman to function

116. See section III.

117. In situations where mothers refuse to undergo medical procedures, this approach would only provide for recourse to counselling. Under no conditions could the agency attempt to apprehend the mother or override her decision-making capabilities forcibly.
as a fit parent if her conduct continues should therefore be considered.\footnote{1.18} Hopefully, this process, if established to be as non-adversarial as possible, would effect voluntary compliance. However, if it is found that coercion is necessary, the pregnant woman would be placed in a facility properly equipped to deal with her needs.\footnote{1.19} Importantly, any assistance, whether or not it was provided on a voluntary basis, would result in a presumption of fit motherhood so as to prohibit child protection proceedings based solely on allegations of “prenatal abuse”.

Since the scheme does not accord the fetus legal personhood or rights, the procedures must only refrain from infringing the mother's rights under section 7 of the Charter. The provisions would require strict adherence to due process in order to make them accord with the principles of fundamental justice. Therefore, they would either be found not to violate section 7 or to be justified by section 1. Also, refraining from according fetuses rights equivalent to those of pregnant women avoids placing women and their fetuses in adversarial positions. The scheme recognizes the interdependence of pregnant woman and fetus but acknowledges that the fetus' interests are entirely dependent. The focus is therefore appropriately placed on helping the pregnant woman which in turn necessarily helps her fetus. It also avoids blaming individual pregnant women because the emphasis is on rectifying the cause of the problem, rather than dealing superficially with the results.

Providing a scheme which specializes in dealing with maternal self-abuse during pregnancy will help avoid situations where judges use minor offences as devices to incarcerate pregnant women and protect the fetus. There would now be an appropriate forum to address judicial concern regarding maternal self-abuse during pregnancy. A specialized scheme would also avoid the danger of courts resorting to legislation not designed to deal with the complexity of issues in this area. Importantly, also, since the fetus is not accorded personhood or rights, a prohibition on any kind of reactionary measures theoretically follows. A specific provision in the legislation to that effect would prevent the scheme from deterring women from seeking prenatal care. In fact, the presumption of fit motherhood might actually encourage women to seek assistance.

Finally, it has been established that women suffering from poor socio-economic conditions, who tend to belong to minority groups, are disproportionately represented in the group of women whose conduct during pregnancy could warrant intervention.\footnote{1.20} Therefore, any measures taken must be implemented in a culturally sensitive manner. This could be accomplished by special outreach programs in different communities which are run by members of that community acquainted with the specific difficulties

\footnote{1.18} This would protect against coercion for less serious conduct such as smoking tobacco or having the occasional alcoholic drink.

\footnote{1.19} Clearly, the mother would not be held indefinitely. If the worst result occurred and the facility was unable to help the mother heal, she would be released after the birth of her child and offered more assistance, which she would be entitled to refuse.

\footnote{1.20} See Kolder, supra note 11.
women encounter therein. The facility would provide counselling by trained members of the community who understand the issues pertinent to that specific culture. The system would be mandated to be culturally sensitive in all the ways in which it involves itself in the lives of pregnant women,\textsuperscript{121} whether through voluntary compliance on the part of the pregnant woman or through forced intervention, thus further assisting in preserving the future relationship between mother and child in the social setting in which they live.

**VI. CONCLUSION**

Undeniably, no solution to the debate surrounding state intervention in pregnancy would satisfy every member of society. The topic is fraught with moral and political dilemmas which can probably never be reconciled. Nonetheless, most believe that society should take some responsibility to deal with the problem. No approach, however, can be held out as necessarily correct; only the results of a scheme's implementation could conclusively prove that its means are capable of meeting its goals. One may try to refine ideas for political action with reference to specific contexts, but positive results can never be absolutely guaranteed. They may only be more or less likely within a given situation; conclusive proof is unattainable until a historical analysis can be undertaken. Regardless of one's perspective, most will agree that some action must be taken since, as current case law reveals, the relationship between mother and child, one of the most important relationships in which autonomy is fostered in our society, appears to be in jeopardy.

\textsuperscript{121.} Provisions in Ontario's *Child and Family Services Act*, R.S.O. 1990, c.C-11 could be used as a model. See ss.1(e) and (f) which establish as one of the purposes of the *Act* that services should be provided in a culturally sensitive manner.