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From the Legal Literature: If the Fetus Is a Person—Is It Relevant? An Argument on the Rights of Pregnant Women

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I. Introduction

In 1971, Judith Jarvis Thomson published "In Defense of Abortion" in *Philosophy & Public Affairs.*[1] In that article, she argued that, even accepting the notion that a fetus is a live human with a right to live, the burden on pregnant women may be too great to require that they continue to keep a fetus alive.[2] To make this argument, she analogized the position of the pregnant woman to a woman who finds she has been medically connected to another person who is in need of a kidney transplant.[3] She then explored the ethical and moral implications of such a situation: Could the state require the woman to carry the physical burdens and limitations of the medical needs of this third person? Can a woman be responsible, on penalty of criminal sanction, for the health and wellbeing of another person?

The analogy is a compelling one and has reappeared many times over the years between Thomson's article and the present day.[4] While the argument was not specifically referenced in *Roe v. Wade*,[5] broad descriptions of the risks and ongoing burdens of carrying a baby to term, delivering the child, and caring for the child afterwards were the primary bases of the U.S. Supreme Court's opinion

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[1]Judith Jarvis Thomson, *In Defense of Abortion*, 1 Phil. & Pub. Aff. 47 (1971).

[2]Thomson, *supra* note 1, at 61–62, 66.

[3]Thomson, *supra* note 1, at 61–62, 66.

[4]*E.g.*, Lawrence Tribe, Abortion: the Clash of Absolutes 129–35 (1990); Joseph Blocher, *Rights To and Not To*, 100 Cal. L. Rev. 761, at 798–99 (2012); Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 Stan. L. Rev. 1135, 1156 (2008); Nancy Hirschmann, *Abortion, Self-Defense, and Involuntary Servitude*, 13 Tex. J. Women & L. 41, 45–46 (2003); Donald H. Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569, 1574–5 (1979).

[5]*Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (establishing a woman's constitutional right to choose to have an abortion).

establishing a woman's constitutional right to have an abortion.[6] These concerns were echoed by Justice Stewart in his concurring opinion.[7] From this, it is evident that although the Court did not directly adopt Thomson's argument that a competition of rights and interests would exist regardless of whether the fetus should have the rights of a child, this balancing of rights and interests was nonetheless highly influential within the Court's opinion.[8]

The Supreme Court's decision in *Ramos v. Louisiana* telegraphed a number of Justices' readiness to overturn precedent.[9] Indeed, several opinions in Ramos even hinted at guidance as to how decisions to overturn precedent may be made.[10] This willingness poses a special threat in the case of abortion jurisprudence, as discussion of overturning *Roe v. Wade*—and a few Justices' clear desire to do

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[6]The Court in *Roe* noted not only that early abortions were safer for women than carrying a child to term, 410 U.S. at 149, but also that,

> [t]he detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child-care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Roe, 410 U.S. at 153.

[7]*Roe*, 410 U.S. at 170 ("the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child").

[8]The Court found in *Roe* that the Constitution's use of the word "person" in the Fourteenth Amendment did "not include the unborn." 410 U.S. at 158. But the Court's decision did not rest on this conclusion. 410 U.S. at 159 ("We need not resolve the difficult question of when life begins."). To the contrary, the Court stated that,

> [t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus . . . As we have intimated above, it is reasonable and appropriate for a State to decide that, at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Roe, 410 U.S. at 159 (internal citations omitted).

[9]140 S. Ct. 1390, 1396–97 (2020) (ruling that the Sixth Amendment requires a unanimous jury verdict in felony criminal cases).

[10]For analyses, see Marcia Coyle, *Justices Sharply Fracture Over When to Overturn Precedent*, NAT'L. L. J. (Apr. 20, 2020, 03:17 PM), https://www.law.com/nationallawjournal/2020/04/20/justices-sharply-fracture-over-when-to-overturn-precedent; Amy Howe, *Opinion Analysis: With Debate over Adherence to Precedent, Justices Scrap Nonunanimous Jury Rule*, SCOTUSBLOG (Apr. 20, 2020, 2:28 PM), https://www.scotusblog.com/2020/04/opinion-analysis-with-debate-over-adherence-to-precedent-justices-scrap-nonunanimous-jury-rule/.

so—exited well before *Ramos v. Louisiana.*[11] Despite *Roe*, states like Georgia and Ohio enacted legislation banning abortion under certain circumstances, such as when a heartbeat can be detected (often as early as the sixth week of pregnancy).[12] Other states went even further; Alabama, for example, banned all abortions except if "physician . . . determines that an abortion is necessary in order to prevent a serious health risk to the unborn child's mother."[13] These statutes follow a movement to offer legal recognition to fetuses as "persons," which has influenced legislation potentially criminalizing a litany of behavior that might endanger a fetus (such as falling down stairs or refusing bed rest).[14]

The intent of these measures is clear. In Alabama, State Representative Terri Collins (R), who sponsored the abortion ban, stated, "This is the way we get where we want to get eventually."[15] Clarifying where the sponsors of the legislation "want to get," Alabama Governor Kay Ivey added this statement when she signed the bill into law: "The sponsors of this bill believe that it is time, once again, for the U.S. Supreme Court to revisit this important matter, and they believe this act may bring about the best opportunity for this to occur."[16] Similarly, in North Dakota, one sponsor of "personhood" legislation stated, "[w]e are intending that it be a direct challenge to *Roe v. Wade*, since [the late Justice Antonin] Scalia said that the Supreme Court is waiting for states to raise a case."[17]

To these activists, the question of whether or not the fetus is a person settles the question of whether and under what circumstances a woman may be allowed to have an abortion. If the fetus is a person, aborting the fetus is killing a person. Such a thing can only be allowed when there is a clear and immediate threat to a woman's

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[11]Robert Koleman, *Justice Kavanaugh Suggests He Might Be Willing to Overturn* Roe v. Wade, FEDERALIST (May 6, 2020), https://thefederalist.com/2020/05/06/justice-kavanaugh-suggests-he-might-be-willing-to-overturn-roe-v-wade/.

[12]*E.g.*, GA. CODE ANN. § 16-12-141 (2020); OHIO REV. CODE ANN. § 2919.192 (2019).

[13]ALA. CODE § 26-23H-4 (2019).

[14]*See* Michele Goodwin, *If Embryos and Fetuses Have Rights*, 11 LAW & ETHICS HUM. RTS. 189, 197 (2017).

[15]Marisa Iati & Deanna Paul, *Everything You Need to Know about the Abortion Ban News*, WASH. POST (May 17, 2019), https://www.washingtonpost.com/health/2019/05/17/havent-been-following-abortion-ban-news-heres-everything-you-need-know/.

[16]Office of Ala. Governor, *Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act*, GOVERNOR.ALABAMA.GOV (May 15, 2019), https://governor.alabama.gov/newsroom/2019/05/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act/.

[17]Goodwin, *supra* note 14, at 197.

life (as is represented in the Alabama legislation previously discussed).[18]

In this context, Judith Jarvis Thomson's argument reemerges. To limit the relevant burdens of motherhood to the threat of death, and more specifically the *immediate* threat of death, negates the broader interests outlined in *Roe*.[19] It also ignores the weight of legal precedent that protects bodily autonomy (at least in the case of men), and the repeated arguments that placing such a level of physical burden on someone in order to save another's life (for instance in the case of a necessary organ transplant) would never be supported.[20]

What is this burden? Strangely, law review articles seem to largely gloss over its extent. Over the past decades, pregnancy and labor have become increasingly dangerous, with the rate of maternal mortality more than doubling in the last thirty years.[21] The U.S. Centers for Disease Control and Prevention ("CDC") recorded a maternal mortality ratio of 7.2 in 1987, but that ratio had risen to 16.9 in 2016.[22] Although these rates are small overall (approximately 700 deaths per year),[23] the steady increase is concerning, especially because pregnancy remains one of the top ten causes of death for women ages twenty through forty-four.[24] Of these, 60% are preventable,[25] suggesting that identifying the risk of death early in the pregnancy would not lead to a determination that an abortion was absolutely necessary in order to save the mother's life. Further support of this assumption is found in the fact that one-third of pregnancy-related deaths occur between a week and a year *after*

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[18] ALA. CODE § 26-23H-4 (2019).

[19] *See supra* notes 6–8 and accompanying text.

[20] *See* sources cited *supra* note 4.

[21] *E.g.*, CDC, *Pregnancy Mortality Surveillance System*, CDC.GOV, https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm (last updated Feb. 4, 2020); Rachel Mayer, Alison Dingwall, Juli Simon-Thomas, Abdul Sheikhnureldin, & Kathy Lewis, *The United States Maternal Mortality Rate Will Continue To Increase Without Access To Data*, HEALTH AFFAIRS BLOG (Feb. 4, 2019), https://www.healthaffairs.org/do/10.1377/hblog20190130.92512/full/.

[22] The ratio is a function of comparing number of maternal deaths per 100,000 live births in the year. CDC, *supra* note 21.

[23] CDC, *supra* note 21.

[24] CDC, LEADING CAUSES OF DEATH — FEMALES — ALL RACES AND ORIGINS — UNITED STATES, 2017, CDC.GOV https://www.cdc.gov/women/lcod/2017/all-races-origins/index.htm (last updated Nov. 20, 2019).

[25] CDC, *Pregnancy-Related Deaths: Saving Women's Lives before, During and After Delivery*, CDC VITAL SIGNS (May 2019), https://www.cdc.gov/vitalsigns/maternal-deaths/index.html.

delivery, most often due to weakened heart muscle.[26] In other words, although a woman may show no signs of taking on a life-threatening condition early in her pregnancy, pregnancy poses a threat that it will weaken a woman's body to a point that kills her even a year after giving birth. Other risks may be similarly unpredictable—such as the risk of infection (which caused 12% of maternal fatalities in the United States between 2011 and 2015), hemorrhaging, or anesthesia complications.[27] Pregnant women also are more likely to die from common illnesses like the flu.[28]

But fatality is far from the only risk to pregnant women. Popular culture is full of references to the difficulties of childbirth, but shockingly light on actual acknowledgment of the lasting physical damage that can occur as a result. Although slightly more than 1% of births will involve severe maternal adverse health effects, ranging from the necessary use of ventilators, blood transfusions, and temporary tracheostomies, to heart attacks and aneurisms,[29] adds up to 50,000 women per year needing interventions for such complications.[30] Far more common are lesser, but still extreme physical harms. Labor can break bones, and it results in skin and muscle tears in at least half of births.[31] Recovering from this damage can take more than a year.[32]

These risks are substantial, even without the immediate threat of death that would be necessary for a traditional claim of self-defense[33] or to qualify for an abortion under Alabama's highly restrictive abor-

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[26]CDC, *supra* note 25.

[27]Emily E. Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention, 13 States, 2013–2017*, 68 MORBIDITY & MORTALITY WEEKLY REP. 423 (May 10, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6818e1.htm.

[28]CDC, *Pregnant Women & Influenza (Flu)*, CDC.GOV, https://www.cdc.gov/flu/highrisk/pregnant.htm (last updated Dec. 20, 2019).

[29]CDC, *Reproductive Health: How Does CDC Identify Severe Maternal Morbidity?*, CDC.GOV, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/smm/severe-morbidity-ICD.htm (last updated Dec. 26, 2019).

[30]CDC, *Reproductive Health: Severe Maternal Morbidity in the United States*, CDC.GOV, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/severematernalmorbidity.html (last updated Jan. 31, 2020).

[31]Kiera Butler, *The Scary Truth About Childbirth*, MOTHER JONES (2017), https://www.motherjones.com/politics/2017/01/childbirth-injuries-prolapse-cesarean-section-natural-childbirth/.

[32]Butler, *supra* note 31.

[33]Hirschmann, *supra* note 4, at 47; *see also* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment For Organs*, 120 HARV. L. REV. 1813 (2007) (describing the abortion argument as a question of self-defense, but referring to abortion of a clearly viable fetus where a woman's life is under imminent threat).

tion statute.[34] Returning to Thompson's argument here—under what logic can we say a woman must undertake the possibility of these damages? Even if we were to call a fetus a person, by what logic can we say that the woman must act as a good Samaritan, taking on the possibility of severe physical repercussions (let alone mental and financial) for the sake of this other person?

One suggested answer is that a woman who is a mother carries a special duty to her child and, therefore, has a duty to protect her child even to her own detriment under a duty to rescue standard.[35] But as Michele Goodwin argues in *If Embryos and Fetuses Have Rights*,[36] even this analogy fails; it also stands in conflict with a century of precedent. Her argument is reviewed below.

II. MICHELE GOODWIN, *IF EMBRYOS AND FETUSES HAVE RIGHTS*, 11 LAW & ETHICS HUM. RTS. 189 (2017).

In *If Embryos and Fetuses Have Rights*, Michele Goodwin explores the history and legitimacy of fetal personhood laws, asking how, *legally*, we can say that an embryo's or fetus' safety is of higher priority than a woman's own bodily autonomy. She states, provocatively,

> Embryos and fetuses are parasitic to a woman's body: they are foreign and . . . are not vital to her (or anyone else's) survival. Thus, if . . . gestating a fetus may kill her, what justifies punishing a woman for excising a fetus from her body? Likewise, on what basis can law legitimately obligate a woman to host an embryo or fetus when doing so could mean her death?[37]

Goodwin begins by summarizing the history of the fetal personhood movement.[38] She highlights that proponents of personhood laws have assumed, or asserted through implication, that the rights of fetuses must supersede the rights of pregnant women.[39] She then describes the threats that such statutes have posed to pregnant women through criminal law, including the potential to criminally punish women for "falling down steps, or even for refusing bed rest," or to charge women who miscarry with statutes as severe as first degree murder.[40]

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[34] ALA. CODE § 26-23H-4 (2019).

[35] Goodwin, *supra* note 14, at 192.

[36] Goodwin, *supra* note 14, at 192.

[37] Goodwin, *supra* note 14, at 190.

[38] Goodwin, *supra* note 14, at 193–96.

[39] Goodwin, *supra* note 14, at 194.

[40] Goodwin, *supra* note 14, at 196.

Goodwin explains that fetal personhood statutes are not only extreme, but also run contrary to longstanding precedent.[41] She states "more than a century ago, courts refused to prosecute women for *in utero* based harms. For one thing, courts considered proximate causation to remote and indirect. Furthermore, the legal presumption of life was rooted at birth not conception."[42] In supporting this argument, Goodwin quotes Justice Oliver Wendell Holmes II, who stated in the 1884 Massachusetts Supreme Judicial Court decision in *Dietrich v. Northampton* that a fetus was not a child, and that neither law nor common sense supported the idea that a fetus could "stand[] on the same footing as . . . an existing person."[43] She also relies on key pieces of English Common Law precedent, including *Regina v. Knights*[44] and *Rex v. Izod.*[45] But in Section II, Goodwin goes into this legal background in depth.

Goodwin's Section IIA recounts in some detail the historical legal acceptance that a fetus could not be a legal child (with the rights of a person) until after "complete birth and physical independence."[46] She outlines this doctrine in tort and criminal law, in cases as early as 1901[47] and as late as 1969.[48] Although some exceptions existed, none of these exceptions provided rights for the fetus *against* the interests of the mother. Instead, these were limited to statutes allowing prosecution for the death of a fetus if the pregnant woman also died, such as statutes allowing litigation on behalf of a fetus that died as a result of an automobile accident; fetuses injured due to "medical negligence in the performance of tubal ligations and vasectomies;" and suits against genetic counselors who "fail to catch genetic abnormalities."[49] In other words, these suits appear to have been allowed in order to "compensate parents *for their injuries* rather

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[41]Goodwin, *supra* note 14, at 197.

[42]Goodwin, *supra* note 14, at 198.

[43]Goodwin, *supra* note 14, at 197 (quoting *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 16, 1884 WL 4976 (1884)).

[44]Goodwin, *supra* note 14, at 198 (citing Regina v. Knights, 2 F. & F. 46, 175 Eng. Rep. 952 (Bury St. Edmund's Spr. Assizes 1860) (Cockburn, C.J.)).

[45]Goodwin, *supra* note 14, at 198 (quoting Rex v. Izod, 20 Cox's Crim. L. Cases 690 (Oxford Cir. 1904) (holding that "a woman's manslaughter conviction in the death of her child required a showing of criminal 'neglect after the child has been completely born.' ").

[46]Goodwin, *supra* note 14, at 201.

[47]Goodwin, *supra* note 14, at 201 n.66 (citing Rex v. Pritchard, 17 T.L.R. 310 (Shrewsbury Spr. Assizes 1901).

[48]Goodwin, *supra* note 14, at 202 n.70 (citing *Endresz v. Friedberg*, 24 N.Y.2d 478, 301 N.Y.S.2d 65, 248 N.E.2d 901 (1969)).

[49]Goodwin, *supra* note 14, at 202.

than remedying harm to the unborn."[50] Such cases present a very different theory of fetal personhood than modern cases, that provide suits on behalf of injuries to the fetus, against the interests of the mother.[51]

In Section IIB of her article, Goodwin explores these tort cases further, explaining the courts' understanding that, generally, tort litigation on behalf of a fetus could not be successful because no proximate cause exists.[52] When a fetus has not been born, causation of death is necessarily questionable.[53] This issue further contributes to courts' unwillingness to extend tort litigation for fetal injuries (rather than in the interests of the parents), and even in cases of parents' loss courts questioned the propriety of allowing recovery through tort.[54] Such cases were allowed only when litigants could prove the fetus was viable, and even then, courts "expressed concerns" due to "the potential for fraud, fictitious claims, [and] false testimony."[55]

In all, then, Goodwin's history shows that suits against persons other than parents were strictly limited because of the lack of confidence that the fetus would ever become a live person even without whatever unfortunate event had harmed it. Suits against parents for harms to their unborn offspring were barely contemplated and quickly dismissed when they occurred.

In Part III of her article, Goodwin turns to the "no duty to rescue" rule.[56] Noting that the rule is morally uncomfortable and often criticized, she still highlights the point that *it is a broadly accepted and universally established rule.*[57] To apply the rule against women, to say that women are obligated to support their children, even to their own detriment, when men are not, would be applying differing legal standards based on sex.[58] It is therefore untenable.[59]

In Section IIIA of her article, Goodwin addresses the instinctive,

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[50]Goodwin, *supra* note 14, at 203.

[51]Goodwin, *supra* note 14, at 203.

[52]Goodwin, *supra* note 14, at 203–06.

[53]Goodwin, *supra* note 14, at 205.

[54]Goodwin, *supra* note 14, at 205–06.

[55]Goodwin, *supra* note 14, at 205–06.

[56]Goodwin, *supra* note 14, at 207.

[57]Goodwin, *supra* note 14, at 208 (italics added) ("Simply put, generally, law does not impose a duty to rescue"); Goodwin, *supra* note 14, at 209 ("[I]t is evident that to attempt to punish men by law for not rendering to others . . . would be preposterous.") (quoting THOMAS BABINGTON MACAULEY, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSION 55–56 (1837)).

[58]Goodwin, *supra* note 14, at 209.

[59]Goodwin, *supra* note 14, at 209.

emotional, natural response, that protecting children is different. She devotes the entire section to showing the huge number of foundational "no duty to rescue" cases that involve babies and toddlers.[60] She concludes by recalling classic negligence and fault principles that "penal law must content itself with keeping men from doing positive harm . . . [as opposed to] furnishing men with motives for doing positive good."[61] The two exceptions to this rule are if the individual has created the peril or if some special relationship exists with the person to be rescued.[62] Of course, the immediate response is that there *is* a special relationship between parent and child, and so this is the issue Goodwin takes up in Section IIIB of her article.

In exploring the extent of the duty to rescue in special relationships, Goodwin begins by discussing *McFall v. Shimp*.[63] The court in this case explored whether a duty to rescue existed between two (very close) cousins, one of whom was in immediate need of a bone marrow transplant, and the other was the only suitable donor.[64] In this case, the court found that

> [u]ltimately, Robert McFall did not possess a legal right to invade his cousin's body, even if to save his own life . . . even in the case of an intimate relationship where the individuals share a genetic bond and intimacy, a court cannot compel th[is] type of altruism . . . one's body cannot be invaded for the purpose of saving another's life.[65]

Goodwin then recounts several similar decisions between siblings, rather than cousins.[66] She notes that even in cases in which the burden to the donor is minimal and the need of the relative is life or death, courts repeatedly state that no one can be forced to undergo medical procedures.[67] She notes that "Bone marrow transplants are surgeries with minimal risks for the donors; they involve a needle inserted in the hip and extraction of the marrow. During the process, the donor is under anesthesia and subsequent pain can be treated through postoperative medication."[68] Yet even in these cases, "the courts collectively emphasize the importance of bodily integrity,

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[60]Goodwin, *supra* note 14, at 209–11.

[61]Goodwin, *supra* note 14, at 212 (quoting BABINGTON MACAULAY, *supra* note 58, at 56).

[62]Goodwin, *supra* note 14, at 2012.

[63]Goodwin, *supra* note 14, 212–13 (citing *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 1978 WL 255 (C.P. 1978)).

[64]Goodwin, *supra* note 14, at 212–13.

[65]Goodwin, *supra* note 14, at 213.

[66]Goodwin, *supra* note 14, at 214.

[67]Goodwin, *supra* note 14, at 215 (citing, *inter alia*, *Curran v. Bosze*, 141 Ill. 2d 473, 153 Ill. Dec. 213, 566 N.E.2d 1319, 4 A.L.R.5th 1163 (1990)).

[68]Goodwin, *supra* note 14, at 215.

autonomy, informed consent, and best interest of individuals from whom bodily resources are demanded."[69]

In Section IIIC, Goodwin makes the direct connection to pregnancy and the duty to rescue a fetus (by continuing a pregnancy).[70] She returns to the risks that such a policy would pose, in terms of criminal prosecution and tort litigation. She quotes the Supreme Court of Canada to make the point that, since every aspect of a pregnant woman's life may affect a fetus, opening the door to criminal or tort liability for prenatal negligence "could render the most mundane decision taken in the course of her daily life as a pregnant woman subject to the scrutiny of the courts."[71]

Like so many, even after exploring the idea of comparative risks and benefits from the no duty to rescue cases, Goodwin largely leaves unspoken the extent of risks or burdens to pregnant women, instead referring to a general slippery slope argument. Although she later explores the implications of forced cesarean section (and having quoted the aforementioned court description of bone marrow transplants' minimal invasiveness), she does not discuss how much larger and more invasive a surgery this would be compared to a bone marrow transplant.[72] Instead, she focuses on the possible end results of a line of reasoning that allows requiring surgery—limitations on flying, liability for failure to take prenatal vitamins.[73] It is, in some ways, fascinating that her argument acknowledges the role of stereotypes and long status as property "render[ing] any ideas about their self-autonomy, privacy, and equality meaningless,"[74] but still fails to highlight the burdens and risks of *pregnancy itself.*

Goodwin returns to the distastefulness of the no duty to rescue doctrine in Section IIID of her article.[75] Although she acknowledges the problems attendant to it, she also highlights the policy interests that have supported the doctrine's establishment, including the risk of vague and confusing duties, and the risk to actors, compelled to act, who may harm themselves in doing so.[76] Here, again, the risk to pregnant women's lives goes unspoken.

III. CONCLUSION

Goodwin's argument is a classically legal argument. She presents

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[69]Goodwin, *supra* note 14, at 216.

[70]Goodwin, *supra* note 14, at 216–22.

[71]Goodwin, *supra* note 14, at 218 (quoting *Dobson (Litigation Guardian of) v. Dobson*, 1999 WL 33190099 (Can. 1999) (Can.)).

[72]Goodwin, *supra* note 14, at 219–20.

[73]Goodwin, *supra* note 14, at 221.

[74]Goodwin, *supra* note 14, at 219.

[75]Goodwin, *supra* note 14, at 221.

[76]Goodwin, *supra* note 14, at 222–23.

the doctrines that clearly contradict the modern move towards fetal personhood, and refers back to the inequality and irrationality of making exceptions in those doctrines for women only. This is a compelling argument against imposing criminal liability for negligent, reckless, and even intentional actions by women that harm their unborn fetuses.

More importantly in the current climate, however, Goodwin's argument applies regardless of whether we consider fetuses to be people vested with legally cognizable rights. Even if fetuses have rights, the rights of pregnant women still exist. As Goodwin shows, established U.S. doctrine suggests that people have a right to choose not to take on extended physical risk and invasion for the sake of saving someone else's life—even if that life belongs to a fetus.