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Is it murder to refuse a caesarean?

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Barrister Barbara Hewson reflects on the recent Utah case and its implications for women here

I was shocked to learn early in March this year of the case of Melissa Rowland, aged 28, charged with murder in Salt Lake City, Utah, following a stillbirth. Prosecutors accused her of "depraved indifference to human life" after she allegedly failed to undergo a timely caesarean section when pregnant with twins. They claimed that her omissions caused the death of one, a boy. They also claimed she had refused surgery for cosmetic reasons. Rowland denied this in a subsequent TV interview, pointing that she had had two previous C-sections and was scarred anyway.

Rowland, who later agreed to a C-section, vehemently denied being told to have one earlier, on 2 January 2004. According to *The Guardian*, on 13 March, court documents asserted that Rowland visited several hospitals in the run-up to birth because she could no longer feel the fetuses move. One hospital advised her to go to two other hospitals for immediate care. Soon after, Rowland visited a doctor at another hospital, where immediate surgery was advised. Allegedly, fetal distress had been diagnosed. She declined, and left after signing a document that said she understood the risks to her fetuses.

A baby girl was delivered alive and later adopted. Rowland was then accused of taking cocaine late in pregnancy, and local media reported that she had a troubled personal history: she had been adopted, and previously had a child taken into care. Her lawyer, Michael Sikora, argued that she had mental health problems. On 7 April 2004, she agreed a "plea-bargain" with prosecutors, pleading guilty to two counts of child endangerment in return for the authorities agreeing to drop the murder charge. Her lawyer explained that his client wanted an early resolution, and he supported her in that decision. She now faces anything up to five years in jail.

The local reaction

Jacob Santini, writing in the *Salt Lake Tribune* on 13 March 2004, quotes one elected Senator: "This one is uncharted territory, and I hate to be the first state leading out in something of this nature. I think there's legitimate issues to be addressed there, but we have not discussed this and it's not a matter of policy or law yet, or even extensive debate. So going through and charging someone with murder in this situation is a bit discomfiting." Another Senator argued: "If what I hear is true, negligence would have to be considered on the part of the mother if she didn't follow through with that advice. The life of that child is absolutely critical."

Even Lawrence McCullough, a professor at the Center for Medical Ethics and Health Policy at Baylor

College of Medicine, who claims that courts might grant orders for coerced C-sections in certain situations, thought this was too much: "What's wrong with Utah's health-care system that allowed this to get this far?"

The wider US reaction

The case stirred up a chorus of criticism across the US. The National Organization of Women (NOW) President Kim Gandy asked: "When did 'doctor's orders' become the law?" Lynn Paltrow of National Advocates for Pregnant Women (NAPW), counsel in the landmark 1990 case of Angela Carder (deceased), which held that court-mandated C-sections were unconstitutional, called the decision to charge Rowland "a shocking abuse of state authority and a dangerous disregard for medical ethics."

Recounting the shocking Carder case, Paltrow recounted told Keith Olberman, of MSNBC News, on 12 March: "She was 27 years old and 25 weeks pregnant, and had a recurrence of cancer. They believed it was terminal this time. A neonatologist ... decided that, if they cut the woman open now and rescued that 25-week fetus, she could save its life.

"They had a court hearing. They argued that she [Angela] was going to die anyway. The fetus had rights. And even though they were told the C-section could kill Angela Carter, the court ordered the surgery anyway based on the argument that a fetus has rights. As a result of that forced surgery, the fetus died within two hours and Angela Carter died within two days, with the C-section listed as a contributing factor.

"Nobody suggested arresting those doctors and that hospital for murder. This was completely inappropriate medical care and the courts in America have now said that it was an abuse of power. Even between two people for whom we have no dispute about their personhood status, courts in America do not say, this person needs your bone marrow. You must donate it. You have to have part of your kidney taken out.

"And pregnant women should not have fewer civil rights than every other person in America."

US legal context

Paltrow, who has twins herself, likes to remind people of McFall v Shimp in 1978, where a judge refused an application by someone wanting a bone marrow donation to compel a relative to give it. Judge Flaherty concluded that coerced Samaritanism was not recognised by the law. He said: "The common law has consistently held to a rule that provides that one human being is under no legal compulsion to give aid or to take action to save that human being or to rescue ... the rule is founded on the very essence of our free society." He added that to compel an individual to undergo bodily invasion "would defeat the sanctity of the individual and would impose a rule which would know no limits and one could not imagine where the line would be drawn." His logic applies also in the case of pregnant women who are recommended medical treatment for the sake of their fetuses.

Paltrow has more recently campaigned against punitive state measures directed at drug-addicted pregnant women ('crack moms'). She sees the US trend of such measures as part of a deliberate move to get fetal 'personhood' recognised in law, as part of an effort to roll back abortion rights, in particular, the Supreme Court decision of Roe v Wade in 1973. Roe held that a woman's constitutional right to privacy protects the decision to terminate her pregnancy.

Unlike UK law on abortion, which treats abortion as an exclusively therapeutic matter between a woman and her doctors, Roe made abortion a 'rights' issue and (for those opposed to abortion) raises the question of fetuses as competing 'rights-bearers'. Now, litigation over abortion issues is neverending in the States.

In fact, the US Supreme Court has never recognised a fetus as a legal 'person' enjoying constitutional rights (as pointed out by Justice Stevens in a later abortion decision in 1992, Planned Parenthood v Casey). But this hasn't stopped individual states from introducing laws that purport to criminalise prenatal conduct such as drug-taking.

Such measures were introduced as a calculated response to a series of failed prosecutions of pregnant women who were drug-addicted under either childabuse laws or preexisting criminal laws against administering noxious substances. Those cases foundered because state courts ruled they were not applicable to fetuses. The doctrine of 'legal certainty' requires that criminal laws be sufficiently precise to enable people to know what is criminal and what is not. But it's a big leap from prosecuting a parent who beats or starves a child to accusing a drug-addict of neglect by administering cocaine to her fetus through her own blood supply.

In the 2002 Ferguson v City of Charleston, the Supreme Court declared that a covert hospital policy of testing pregnant women for cocaine without their knowledge or consent was an unconstitutional search policy. In this case, the MSUC Hospital had agreed with police and prosecutors that, if a pregnant woman tested positive, she would be turned over to them. There were disturbing scenes of women giving birth while handcuffed or being taken to prison cells while still bleeding postpartum. All but one of these women were black.

In the 1997 Whitner v State, in which Paltrow was involved, the South Carolina Supreme Court ruled that a fetus was a "person", so a woman who had taken drugs while pregnant could be convicted under a state child-abuse law. The Chief Justice, who dissented, said that this would mean that pregnant women who drank or smoked could also be prosecuted, but the majority remained undeterred at this prospect. The Attorney General of South Carolina then announced that anyone who undertook a late abortion of a viable fetus could be prosecuted for murder and face the death penalty.

Utah's homicide law

In 1999, following this trend, Utah revised its homicide law to expressly apply to "unborn children". In a decision last January called Murphy, the Utah Supreme Court (by a majority) held that a man who fatally

shot his pregnant girlfriend could be convicted of a double homicide. The same arguments were ventilated. The Chief Justice, dissenting, cited Planned Parenthood v Casey, and held that fetuses were not legal "persons". He thought that the new homicide law was therefore unconstitutional.

It seems that this law was not intended to cover pregnant women who simply deferred a decision to have an operation. Shooting someone is a positive act. In contrast, a woman who declines medical advice is doing nothing. She is letting nature take its course. And what would happen if she miscarried involuntarily? Using the prosecutors' logic, this would presumably amount to manslaughter. Yet, it is difficult to see how refusing personal bodily invasion 'murders' another. This is twisted logic. If it were correct, then it would presumably be murder to refuse to donate blood to someone after an accident.

What is troubling about Rowland's guilty plea is that her experience will no doubt be used to browbeat other pregnant women who, for a variety of reasons, may be seen as 'non-compliant'.

Teasing out the issues

In Paltrow's passionate defence of pregnant women's autonomy, she argues: "Today, both the law and medicine agree that coerced medical interventions on pregnant women are an abuse of medical and state authority, and that while pregnant women do not always make the right decision, in America, it is the person on whom the surgery is to be performed who gets to decide. In spite of this, Utah prosecutors apparently think that a pregnant woman who exercises her constitutional and common- law right to refuse medical advice can be arrested for murder. This is not only a clear misuse of the law, it is dangerous to children and fundamentally dehumanizing to pregnant women and their families."

There's a world of difference between simply recommending a course of action and saying that it is medically essential. Paltrow's point, that patient-physician conflict can be attributed to misunderstanding fostered by poor communication and listening by doctors, is important.

A perverse aspect of the Utah case is that, if the prosecutors had any legal basis for charging Rowland, why didn't they also charge those caring for her? Aren't those who permit or facilitate a murder accessories to murder? Presumably, the Utah law-enforcement agencies saw Rowland, a poor white woman at the bottom of the pile (and possibly socially incompetent, too) as an easier target than well-heeled and heavily insured professionals.

In a lucid commentary on the case of 16 March (Crying Murder When A Woman Refuses a C-Section: The Disturbing Implications of a Utah Prosecution), Sherry F. Colb dissected the arguments for and against: "Ultimately, this prosecution raises a very simple question: Are we, as a society, prepared to demand more of pregnant women than of anyone else?"

The premise that an obstetrician's surgical recommendation ought to be followed is itself questionable. In the US, about one-quarter of all babies are delivered by C-section. According to the World Health Organization's Safety Standards, though, there's no justification for a C-section rate of more than 10-15 per cent-in other words, roughly half the C-sections in the US are unnecessary.

Furthermore, the risk of maternal death is between two and four times greater with a C-section than with a vaginal delivery.

In the UK

In the landmark case of St George's Healthcare NHS Trust v S in 1998, the Court of Appeal reiterated that fetuses are not legal persons and found that a court-ordered C-section on a detained mental patient (unlawfully detained at that) was unlawful. It did not accept that pregnant women should be treated differently just because they are pregnant. On the contrary, if pregnant women could be compelled to undergo bodily invasion to save their fetuses, then why shouldn't any adult be at risk of compelled bodily invasion to save a born child, even a stranger's child?

We should not be complacent, however. In late May this year, trainee vicar Joanne Jepson will be in the London High Court arguing that the Human Rights Act 1998 should apply to fetuses and that doctors who perform a lateterm abortion for fetal abnormality be prosecuted. Does this sound familiar?

Meanwhile, in a case before the Grand Chamber of the European Court of Human Rights, a Ms Vo is arguing that a French doctor and midwife, who negligently caused her to miscarry at six months, should be prosecuted for manslaughter.

Both cases claim that Article 2 of the European Convention on Human Rights (which begins "Everyone's right to life shall be protected by law ...") includes fetuses.

A ruling is expected soon, but it seems unlikely that either the English or the European Court will accept 'fetal rights' arguments. This is because, on a number of previous cases concerning abortion, both the Court of Human Rights and the Commission have ducked the issue, saying that it is not necessary to decide it - a polite way of saying that the issue is too politically sensitive. The vast majority of the 44 Member States have legalised abortion, and finding now that fetuses are protected by the Convention would be disastrous. It seems the 'pro-life' tactic is to get legal recognition for fetuses later in pregnancy, perhaps to make it easier to chip away at laws permitting early abortion. As the US experience shows, fetal rights arguments lead to uncomfortable consequences for pregnant women and, by implication, health professionals. They are fundamentally destructive of the trust between women and providers of maternity care. Punitive measures directed at either pregnant women, or those caring for them, are simply not compatible with a civilised system of healthcare for women.

Further reading

- Lee E. Abortion, Motherhood and Mental Health: Medicalizing Reproduction in the US and

Britain. Aldine de Gruyter, 2004

- Paltrow L. Pregnant drug users, fetal persons, and the threat to Roe v Wade. Albany Law Review, 1999; www.advocatesforpregnantwomen. org

Editor's note: Barbara Hewson, of Hardwicke Building, Lincoln's Inn, acted for S in the St George's case and is currently counsel for ARC, an intervener in the Jepson case.