



What ARE “Our Rights” in Childbirth?

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The American Medical Association’s Resolution 205, to support legislation that the hospital is the “safest” setting for childbirth, was reported in news media and addressed on many blogs over the summer. A lot of folks expressed outrage that the AMA would dare to attempt to take away our “right” to give birth where and with whom we choose.

Is this a genuine “right”? Attorney Susan Jenkins kindly agreed to an interview to explore this topic. Susan is legal counsel for The Big Push for Midwives Campaign, and a former General Counsel of the American College of Nurse-Midwives. She has represented midwives, birthing centers, and their state and national professional associations for over twenty years. She cautioned me, however, that she was not a constitutional law scholar or practitioner.

Do we actually have a right to give birth where and with whom we choose?

Well, given the present undeveloped state of the law in this area, my answer has to be "yes and no."

Although the law clearly recognizes individual human rights to bodily integrity and to privacy, nevertheless, at this time in the U.S. there is no well-developed body of jurisprudence regarding these rights specifically in the area of maternity care and place of birth. A legal or constitutional right may exist in a general sense, but for us to enjoy those rights in a specific context, that context must be recognized or acknowledged by the courts and, more generally, by society and the government.

Rights specifically regarding childbirth are not mentioned in the Constitution, but then, neither is abortion or contraception. However, courts have recognized these rights under the umbrella of a right to privacy. There are numerous court decisions on this subject over the past thirty-five or forty years, but, so far, there have been few court decisions at the appellate level (state or federal) that apply to childbirth-related choices. Appeals court decisions are essential for court rulings to acquire precedent value.

In several key cases that preceded *Roe v. Wade* (the landmark Supreme Court case that recognizes a woman’s right to choose abortion prior to the third trimester) the Supreme Court began to articulate the rights of individuals to privacy regarding, for example, family planning and contraception. These cases addressed the issue of whether a state government or the federal government can make laws that infringe on the constitutional right to privacy relating to human reproduction. As you are aware, the Supreme Court held in these cases that this right to privacy exists under the U.S. Constitution and cannot be infringed by government laws or rules unless an important government or public interest justifies the intrusion. Thus, for example, the court determined that third trimester abortions could be regulated or prohibited by states because of the potential viability of the fetus outside the uterus. The state had a significant enough interest in preserving the viable fetus to overcome the woman’s right to privacy and bodily integrity in aborting the fetus.

Courts in these cases weigh what government asserts as being in the public interest and the state's right to regulate, on the one hand, and the individual right, on the other hand. Courts have to strike a balance when faced with these competing interests. Generally, government must show a really compelling reason to infringe on rights to privacy and bodily integrity.

Rights about childbirth involve the same area of law as sexual activity, contraception, and abortion, and involve questions about when and to what extent does the government have a right to intrude into our private lives. This is an area of law that is in constant flux, and the decisions made often reflect the beliefs and attitudes of judges who are ruling on cases. We are all aware of the large area of civil rights, from slavery to voting rights to many forms of discrimination, where early Supreme Court decisions have been overturned by Supreme Courts in later years. Some of this willingness by courts to reconsider previous cases is the result of new legal scholarship, new societal goals, and sometimes, persistent citizen action to have particular human rights recognized through changes in legislation. Courts rule on the constitutionality of legislation and other governmental actions.

What does Roe v Wade mean for childbirth rights and choices?

In the Roe v Wade case the Supreme Court ruled that the right to privacy is not absolute; in the third trimester, when the fetus is considered viable, the government interest in the fetus may override the mother's rights to control her body (although, where the mother's life or health are at risk, the balance shifts back to the mother). There are aspects of the Roe decision that would apply directly to a right to give birth where and with whom the woman chooses, but other aspects -- notably the third trimester exception -- have puzzled legal scholars. If the state has a greater right to "protect" the fetus in the third trimester, does that mean that the state can trump individual rights when it comes to childbirth itself? I mean, home birth is going to be taking place during -- and ideally at the end of -- the third trimester.

The Pemberton case, in which a woman was forced to have a c-section by judicial order, illustrates the problem. When Mrs. Pemberton later sued, after the birth, for violation of her constitutional rights, the court only focused on the fact that the birth was taking place in the third trimester, when the state's interests are generally held to outweigh the mother's interests. Based on this faulty reasoning, the trial court ruled against her without looking at the distinguishing facts more closely -- such as the fact that the fetus was not at risk and the mother's interest was identical to the state's -- a live baby. Unfortunately, Mrs. Pemberton did not appeal that decision.

I believe, however, that a significant distinction exists between Roe and birthing rights cases, because in the latter cases both the mother and the state have the same desire for a healthy baby. It is possible to adequately protect the fetus without trampling on the mother's right to her bodily integrity and privacy by less drastic and intrusive means than tying a woman down and forcing her to have major surgery against her will. The mother in a forced c-section case has no intent to terminate this third trimester pregnancy; rather, she wants to continue it to term.

The Roe v. Wade line of cases address the situation where the mother wants to have a procedure and the state is resisting. This is quite different from the c-section cases, where the state is trying to force a dangerous and unwanted procedure on the woman. However, this distinction has not yet been recognized because no such cases have been decided by an appeals court.

The Supreme Court has also recognized the right of individuals to refuse any type of medical treatment, as they wish. The law is clear that no person can be forced to have surgery simply in order to benefit another person. A famous case involved a man who sued his cousin, a perfect DNA match, to try to force the cousin to donate bone marrow that would save his life. The cousin refused. The court ruled that the cousin had an absolute, inviolate right NOT to have surgery (to harvest bone marrow) no matter how much benefit it would have been for the man who needed the bone marrow transplant. While this right has not been established specifically

for childbearing, to exempt pregnant women who want a healthy baby from these constitutional protections goes far beyond what is necessary to protect the fetus.

Women who want to choose where to give birth differ from the plaintiff in *Roe v Wade*, because their intent is the same as that of the State -- to end up with a healthy live baby. It can and should be argued that existing Supreme Court precedent -- that individual rights could be subordinated for the sake of a viable fetus in the third trimester when a woman wants an abortion -- does not apply when the issue is where, not whether, that fetus should be born.

The test in these cases depends upon how compelling is the state's interest versus the mother's interest. I would argue that the State has a less compelling interest in the homebirth context when it comes to the balance of State interest versus privacy rights, since neither party in that equation seeks to terminate the pregnancy. This concept has not been tested yet in any appeals court.

Can the American Medical Association actually get legislation passed that would "outlaw" home birth? How can the AMA, ACOG and/or state legislatures override our rights?

The AMA may very well try to get legislation that outlaws home birth, but I would think that birth activists would find lots of support from civil libertarians, the reproductive rights movement, and newspaper editorials to defeat any attempt to get such an overt law passed in any state.

I am more worried about more subtle effects from Resolution 205, such as laws that prohibit Medicaid payment for home birth, or restrictions on who can provide home birth services.

Even more subtle is the value of this resolution for "signaling" to state medical societies, hospitals, medical boards, insurance companies that this is the new AMA party line. Think about it. The AMA has lots of very good attorneys, including anti-trust specialists, who will have told the AMA not to overtly try to ban home birth by making agreements with their state societies or disciplining members who provide backup for home birth midwives. It is very unlikely that we will see any bills that spell out a ban on home births.

However, the Supreme Court has recognized an exception to the antitrust laws, based upon the constitutional rights to petition the government and free speech. Under this exception, professional groups can lobby for legislation that will hurt their competitors, and can even solicit grassroots support for such legislation without violating the antitrust laws. So, when the AMA indicates its opposition to home birth in the context of initiating or supporting legislation in Resolution 205, its action would not likely be considered an antitrust violation, even if others -- such as health insurance companies, malpractice insurance companies, state medical groups, or hospitals -- take actions other than legislation that are prompted by the AMA's publicly-voiced opposition to home birth. The resolution has "signalled" that opposition in an antitrust-neutral manner. So, one way to interpret this Resolution is that it is the AMA signaling their intentions to their members and others without violating the antitrust laws.

It is likely that the results of this resolution will start showing up in other contexts, such as medical boards passing rules to discipline home birth physicians, or hospital medical staffs claiming that home birth violates clinical guidelines, and thus barring those who support or provide such services. Managed care plans or malpractice insurers may claim that, based upon AMA norms, they will not cover home birth. We have seen that already.

Another risk area is so-called "fetal protection" laws. These laws are often presented as laws to punish people who deliberately injure a pregnant woman and/or her fetus. But these laws are often written in such a way that, should ANYTHING happen to the fetus, the mother herself and/or her care providers could be subject to criminal prosecution. Laws that define the fetus as a person separate from the mother are problematic, because they set up a potential scenario of "mother vs. fetus" conflict.

Furthermore, even though some such laws have made an exception specifically for abortion, these laws often fail to differentiate between someone whose intent is to harm the mother or the fetus, on the one hand, and the mother or care provider whose intent is to have a healthy baby. Without language that makes an absolute exception for the mother herself and her care-provider(s), such laws leave mothers vulnerable, especially when ACOG and the AMA have made public pronouncements that the hospital is the “safest” site.

While such a prosecution has not yet occurred, a mother who chooses a home birth, or who refuses a medical intervention for any reason, could potentially be prosecuted under a fetal protection act for endangering her fetus. Such prosecutions could conceivably be based upon some doctor's "official" medical opinion, even if no harm actually occurred or -- on an evidentiary basis -- was likely. It would not necessarily matter if the scientific evidence showed the mother's choice to be valid. The prosecution would only need to persuade a judge or jury with so-called “expert testimony” from the authoritative-seeming ACOG and AMA. Therefore, fetal protection acts should be regarded as legislation that could be used to support “hospital is safest” and undermine home birth.

Just by announcing their positions on home birth in previous years, the AMA and ACOG have potentially affected insurance coverage. For example, health insurance companies like Aetna have official policies to not cover home births. In many states, liability insurers will not cover physicians who see a woman planning a home birth or who accept referrals from home birth midwives. The power of ACOG's “recommendations” can be seen in the case of VBACs, where ACOG clinical guidelines that lack any solid scientific evidence have resulted in many hospitals refusing to “allow” a woman with a previous cesarean to try to give birth vaginally, leading to many more cesarean sections. All of this has been accomplished without passing a single law or changing any regulations.

The AMA's Resolution 205 is significant, I believe, for the signals that will be perceived, regardless of any legislation the AMA might support or obstruct.

What can we do to secure our rights? To prevent the AMA and ACOG from curtailing our rights?

How does any person or group in the U.S. secure and protect its rights? Through the legal process, both the legislative process and the courts. Having legal, licensed certified professional midwives will make it more difficult for the AMA to gain support for banning home births.

But, beyond ensuring that we have licensed home birth providers, we also need a way to enforce legal rights if they are threatened. To do this, we also need lawyers so that people have assistance in protecting their rights. We need lawyers who can litigate cases where legal theories will be developed, so we need more attorneys to acquire expertise in this area of the law.

Ideally, a legal clinic affiliated with a law school would be very helpful. The fact that the ACLU and women's legal rights organizations are beginning to recognize birthing rights as a genuine area of reproductive rights will help a great deal. These lawyers know this area of law and are in the best position to help us extend already-recognized constitutional protections into the birthing rights area. State consumer and midwife groups should try to get acquainted with their local law schools, particularly professors who teach gender equality courses, and professors at university and college women's studies departments. This could be an important step in finding individuals and networks as potential allies who would be interested in activism and strategy development for birth rights.

Once some of the legal theories are developed, we will need to have some good cases to establish rights that must be recognized by our government. To accomplish this there will need to be a few strong and courageous women with the “right” situation who are willing to be the

plaintiffs, attorneys who are willing to litigate these cases, and effective fund-raising to cover the costs.

Because the issues involved in birthing rights involve the same area of law as reproductive rights and there are attorneys who have had years of experience in this area of the law, it makes sense for our movement to find some ways we can work with reproductive rights activists and attorneys. I recognize that the birth advocacy community includes a broad spectrum of positions about abortion, but we are also not a monolithic movement, so there will be various opportunities for working together on specific issues where there is agreement on basic principles. Reaching out to these actual and potential allies can be a huge help to our movement. Even though you and I are talking specifically about rights to choose the place and attendant for birth, other rights are also important and should be addressed, especially rights to informed consent and informed refusal.

It will be important for state organizations to monitor bills, amendments, and regulations that come up in the legislature and state agencies, so that they can assess whether such provisions include "stealth" sections that could jeopardize access to home birth and/or the rights of women to make their own choices about where and with whom they will give birth. This "spotting" of potential problems would have to be followed up with a coordinated strategy to deal with those problematic statutes or regulations, whether through lobbying, lawsuits, and/or public information campaigns.

I would like to see the kind of mutual outreach that is occurring on the national level across the spectrum of reproductive rights also occur on the state level. Birthing advocates can provide educational sessions about "birth rights" and how they are in jeopardy to women's studies groups, lobbyists for Planned Parenthood, and state NOW chapters and other women's rights groups, and any others who might be interested in working with us, so that more people are informed and alert to these issues.

Thank you Susan Jenkins!