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AMICI STATEMENT OF INTEREST

The American Civil Liberties Union ("ACLU"), the ACLU of Florida, and the American Medical Women's Association ("AMWA") (collectively "*Amici*

SUMMARY OF THE ARGUMENT

At stake in this case are two related components of the fundamental constitutional right of privacy guaranteed by the Florida Constitution: the right of every adult person to make an informed decision to refuse medical treatment, and the right of women to continue their pregnancies without fear of state intrusion on their bodily integrity and autonomy. In violation of these rights, in March 2009, the State succeeded in completely depriving Samantha Burton, a mother of two who was suffering pregnancy complications in her 25th week of pregnancy, of her physical liberty and medical decision-making authority for the remainder of her pregnancy.

At the State's request, the Circuit Court, Leon County, ordered Ms. Burton to be indefinitely confined, which had her pregnancy gone to term would have been up to fifteen weeks, to Tallahassee Memorial Hospital and to submit, against her will, to any and all medical treatments, restrictions to bed rest, and other interventions, including cesarean section delivery, that in the words of the court, "the unborn child's attending physician," deemed necessary to "preserve the life and health of Samantha Burton's unborn child." (Appellant's Ex. D, at 1-2.) The court further ordered that "Ms. Burton's request to change hospitals is denied as such a change is not in the child's best interest at this time." (*Id.* at 3.) The court approved the State's

wholesale control over Ms. Burton's liberty and medical care during pregnancy on the erroneous legal premise that the "ultimate welfare" of the fetus is the "controlling factor" and was sufficient to override her constitutional rights to liberty, privacy, and autonomy. (*Id.* at 1.) After at least three days of this state-compelled confinement and management of Ms. Burton's pregnancy, doctors performed an emergency cesarean section on Ms. Burton and discovered that her fetus had already died in utero. Thereafter, she was released from the hospital. (Appellant's Ex. E, at 1; Ex. F, at 1.)

As addressed fully below, first, the court erred as a matter of law by failing to give any real consideration to the liberty and privacy rights of Ms. Burton and instead applying what amounted to a "best interest of the fetus" standard. Such an approach turns on its head well-established standards protecting the right of every adult to make private decisions about their own medical care. Second, the court erred in equating the asserted interest in protecting fetal life to the State's "*parens patriae* authority to ensure that children receive medical treatment which is necessary for the preservation of their life and health," (*see* Appellant's Ex. D, at 1), and in holding that the interest in fetal life justified confining Ms. Burton to a hospital bed and overriding her right to refuse medical treatment. Finally, applying the

ARGUMENT

I. The Constitutional Standard for Authorizing Forced Medical Treatment Requires the State to Prove that its Action is Narrowly Tailored to Advance a Compelling State Interest.

It is firmly established that under the Florida Constitution's expressly enumerated right of privacy, article I, section 23, "everyone has a fundamental right to the sole control of his or her person," which includes the "integral . . . right to make choices pertaining to one's health, including the right to refuse unwanted medical treatment." *In re Guardianship of Browning*, 568 So.2d 4, 10 (Fla. 1990). This "inherent right to make choices about medical treatment . . . encompasses all medical choices." *Id.*[2] Thus, the right, which extends to "everyone" and "all medical choices," of course, necessarily encompasses the right of a pregnant woman to refuse medical treatment recommended to preserve her own health or the health of her fetus.[3]

---

[2] While the federal Constitution also protects the right to refuse medical treatment, *see, e.g.*, *Cruzan ex rel. Cruzan v. Director*, 497 U.S. 261 (1990), the greater protections afforded under the Florida constitutional right to privacy control this case. *See, e.g.*, *In re T.W.*, 551 So.2d 1186, 1192 (Fla. 1989) (holding Florida Constitution's express right of privacy "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution").

[3] Indeed, *In re Guardianship of Browning*, 568 So.2d at 10, and *In re Dubreuil*, 629 So.2d at 822, two seminal Florida Supreme Court cases addressing the right to refuse medical treatment, repeatedly draw and quote

The Florida Supreme Court has repeatedly made clear the rigorous standard of review that courts must apply to any infringement of this right:

> The State has a duty to assure that a person's wishes regarding medical treatment are respected. That obligation serves to protect the rights of individuals from intrusion by the state unless the state has a compelling interest great enough to override this constitutional right. The means to carry out any such compelling state interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual.

Id. at 13-14; *see In re Dubreuil*, 629 So.2d 819, 822 (Fla. 1993), *reh'g denied*, 629 So.2d 819 (Fla. Jan. 20, 1994) (No. 80311) (quoting same).

There is no "'bright-line test'" for determining what constitutes a sufficiently compelling interest to override a patient's refusal of medical treatment. *In re Guardianship of Browning*, 568 So.2d at 14 (quoting *Pub. Health Trust v. Wons*, 541 So.2d 96, 97 (Fla. 1989)). Rather, each case "'demand[s] individual attention.'" *In re Dubreuil*, 629 So.2d at 827 (quoting *Wons*, 541 So.2d at 98). However, it is clear that even if a compelling interest is shown, the State must put forth "sufficient evidence" to "satisfy the heavy burden" of demonstrating the necessity of "overrid[ing] the patient's constitutional right to refuse medical treatment." *Id.* at 828.

---

from the Florida Supreme Court's decision in *In re T.W.*, 551 So.2d 1186, a case delineating the fundamental privacy rights of pregnant women.

As discussed below, the trial court wholly failed to apply this strict scrutiny standard, which places the "heavy burden" of proof squarely on the State. Rather, it improperly assumed that the State's *parens patriae* authority – which permits the State, in exceptional cases, to order medical treatment for a *child* over a parent's religious objections – permitted the State to confine Ms. Burton and force *her* to undergo medical treatment for the benefit of her fetus. *See infra* Part II. In so doing, the court overrode Ms. Burton's fundamental rights without requiring the State to establish a compelling need that justified the extreme deprivation imposed.

II. The State's Interest in Protecting Fetal Life is not Equivalent to its Interest in Protecting Children and was not Sufficient to Override Appellant's Liberty and Privacy Rights.

The State argued, and the trial court incorrectly found, that this case involved the State's "*parens patriae* authority to ensure that children receive medical treatment which is necessary for the preservation of life and health," and therefore applied the rule that "as between parent and child, the ultimate welfare of the child is the controlling factor." (Appellant's Ex. D, at 1.) But cases recognizing the *parens patriae* authority of the State to, in exceptional circumstances, override a parent's refusal to allow their *children* to receive life-saving medical care, *see., e.g., M.N. v. Southern Baptist Hosp. of Florida*, 648 So.2d 769 (Fla. 1st DCA 1994) (involving parents' refusal for

religious reasons to consent to blood transfusion for minor child); *ex rel. J.V. v. State*, 516 So.2d 1133 (Fla. 1st DCA 1987) (same); *ex rel. Ivey*, 319 So.2d 53, 58 (Fla. 1st DCA 1975) (same), have no application to this case, in which the State forced a *woman* to be confined and undergo unwanted medical treatment for the benefit of her fetus.

Indeed, no Florida court has applied these principles to the State's interest in potential fetal life. This is unsurprising, as the courts of this state – including the Florida Supreme Court – have time and again refused to extend the meaning of laws protecting children or persons to include fetuses. For example, the Florida Supreme Court has held that a statute criminalizing the distribution of a controlled substance to children was not intended to apply to transmission during birth. *See Johnson v. Florida*, 602 So.2d 1288 (Fla. 1992). And, in *In re Guardianship of J.D.S.*, 864 So.2d 534, 538 (Fla. 5th DCA 2004),[4] the Fifth District Court of Appeal cited numerous Florida

cases in support of its holding that the protections of the state guardianship laws “[do] not extend to fetuses.”

Nor can such an extension be permitted in this case without creating an impermissible constitutiona

even a viable fetus,[6] does not ultimately "control" the privacy and autonomy rights of a pregnant woman.

Since its decision in *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court has repeatedly protected a woman's constitutional right to make independent medical decisions related to her pregnancy, including, ultimately, the choice whether to continue a pregnancy. *See, e.g.*, *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 327-28 (2006) (describing *Roe* and *Casey* as controlling); *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) (reaffirming *Roe*); *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992) (same). This stems from the Court's recognition that decisions related to pregnancy involve personal considerations that are central to a woman's dignity, autonomy, and health. As the Court has explained:

---

[6] The United States Supreme Court has held that a "viable" fetus is one that is capable of sustained life outside the womb and has recognized that this rersopabllikelinthooe c

> [T]he liberty of the [pregnant] woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.

Casey, 505 U.S. at 852.

These principles apply even more strongly in Florida, where state interference with the exercise of a person's right to privacy – including decisions about reproductive health – must further a compelling state interest by the least intrusive means. The Florida Constitution contains an explicit right to individual privacy that has no parallel in the United States Constitution. Article I, section 23 of the Florida Constitution provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life . . . ." Fla. Const. art.1 § 23. The Florida Supreme Court has repeatedly held that this provision provides more protection for the right of individual privacy, including the right to make decisions about reproductive health care, than does the federal Constitution. *See, e.g.*, *Beagle v. Beagle*, 678 So.2d 1271, 1276 (Fla. 1996); *B.B. v. State*, 659 So.2d 256, 259 (Fla. 1995); *In re T.W.*, 551 So.2d 1186, 1192, 1195 (Fla. 1989) (holding "the Florida constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated").

Likewise, in a case involving a court-ordered cesarean section to be

As these cases demonstrate, while the State may seek to advance a "substantial interest in potential fetal life throughout pregnancy," *Casey*, 505

Thus, the overwhelming weight of federal and Florida precedent

Gynecologists (ACOG) and the American Medical Association (AMA) not only vigorously discourage the approach taken in this case, they demonstrate why court-ordered interventions undermine, rather than advance, fetal health.

In the ACOG Committee Opinion, *Maternal Decision Making, Ethics,*

"potentially counterproductive in that [it is] likely to discourage prenatal care." *Id.* at 8. Thus, "court-ordered interventions and other coercive measures may result in fear . . . and ultimately could discourage pregnant patients from seeking care." ACOG Opinion at 8. In contrast, as ACOG advises, "[e]ncouraging prenatal care and treatment in a supportive environment will advance maternal and child health most effectively." *Id.*

For these reasons, ACOG recommends:

> In caring for pregnant women, practitioners should recognize that *in the majority of cases, the interests of the pregnant woman and her fetus converge rather than diverge*.
>
> ….
>
> Pregnant women's autonomous decisions should be respected. . . . *In the absence of extraordinary circumstances, circumstances that,*

http://www.amwa-doc.org/index.cfm?objectId=243A88E4-D567-0B25-5C4EBCA9757330EF (last visited July 30, 2009) (App. B) (emphasis added).

Likewise, the AMA Board of Trustees advises:

> Judicial intervention is inappropriate when a woman has made an informed refusal of a medical treatment designed to benefit her fetus.
>
> *If an exceptional circumstance could be found* in which a medical treatment poses an insignificant or no health risk to the woman, entails a minimal invasion of her bodily integrity, and would clearly prevent substantial and irreversible harm to her fetus, *it might* be appropriate for a physician to seek judicial intervention. *However, the fundamental principle against compelled medical procedures should control in all cases that do not present such exceptional circumstances*.

AMA Board of Trustees Report, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2670 (Nov. 1990) (Report adopted by the House of De

interventions," and cautions that the use

AMA, or other courts, have contemplated as potentially falling within that rarity of "justified" court intervention.

Moreover, if the decision below stands, it invites State requests for court intervention in nearly all aspects of pregnant women's behavior and medical judgments. In turn, some women will be discouraged from coming to a hospital for pregnancy care if they know that any disagreement may lead to forced medical treatment. Such a result does not advance maternal or fetal health by any measure and is not constitutionally permissible.

CONCLUSION

For all of the foregoing reasons, *Amici* urge this Court to hold that the order below violated Ms. Burton's constitutional right to refuse medical treatment and constituted an unauthorized intrusion into her fundamental rights of privacy, liberty, and bodily integrity.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the foregoing brief is submitted in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210(a)(2).

/s Randall C. Marshall

Randall C. Marshall

Certificate of Service

I certify that a true and accurate copy of this motion has been sent by Federal Express, and by e-mail,

APPENDIX

A. American College of Obstetricians and Gynecologists Committee Opinion No. 321

B. American Medical Women's Association, *Principles of Ethical Conduct*

C. American Medical Association Board of Trustees Report, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*

APPENDIX

A. American College of Obstetricians and Gynecologists Committee Opinion No. 321

B. American Medical Women's Association, *Principles of Ethical Conduct*

C. American Medical Association Board of Trustees Report, *Legal Interventions During Pregnancy: Court-Ordered Medical*

[redacted]

Appendix A

ACOG

Committee on

Committee Opinion

[redacted]

relieved, adverse and sometimes disastrous effects can occur for the unborn child" (10).

Furthermore, for beneficiaries of sCHIP, many [redacted] women's health issues, even those that

Furthermore, many writers have noted a moral injury that arises from abstracting the fetus from the pregnant woman, in its failing to recognize the pregnant woman herself as a patient, person, and

One fundamental ethical obligation of health

examine the barriers to change along with her,

- Physicians must make a substantial effort to "treat the patient with a substance abuse problem with dignity and respect in order to form a

to bone marrow harvest. The court declined, explaining in its opinion:

> For our law to compel the Defendant to submit to an [illegible] of his body would change every concept

cally nor legally justified, given her fundamental rights to bodily integrity. Even those who challenge these fundamental rights in favor of protecting the

the inability to guarantee that the pregnant woman will not be harmed by the medical intervention, great care should be exercised to present a balanced evaluation of expected outcomes for both parties

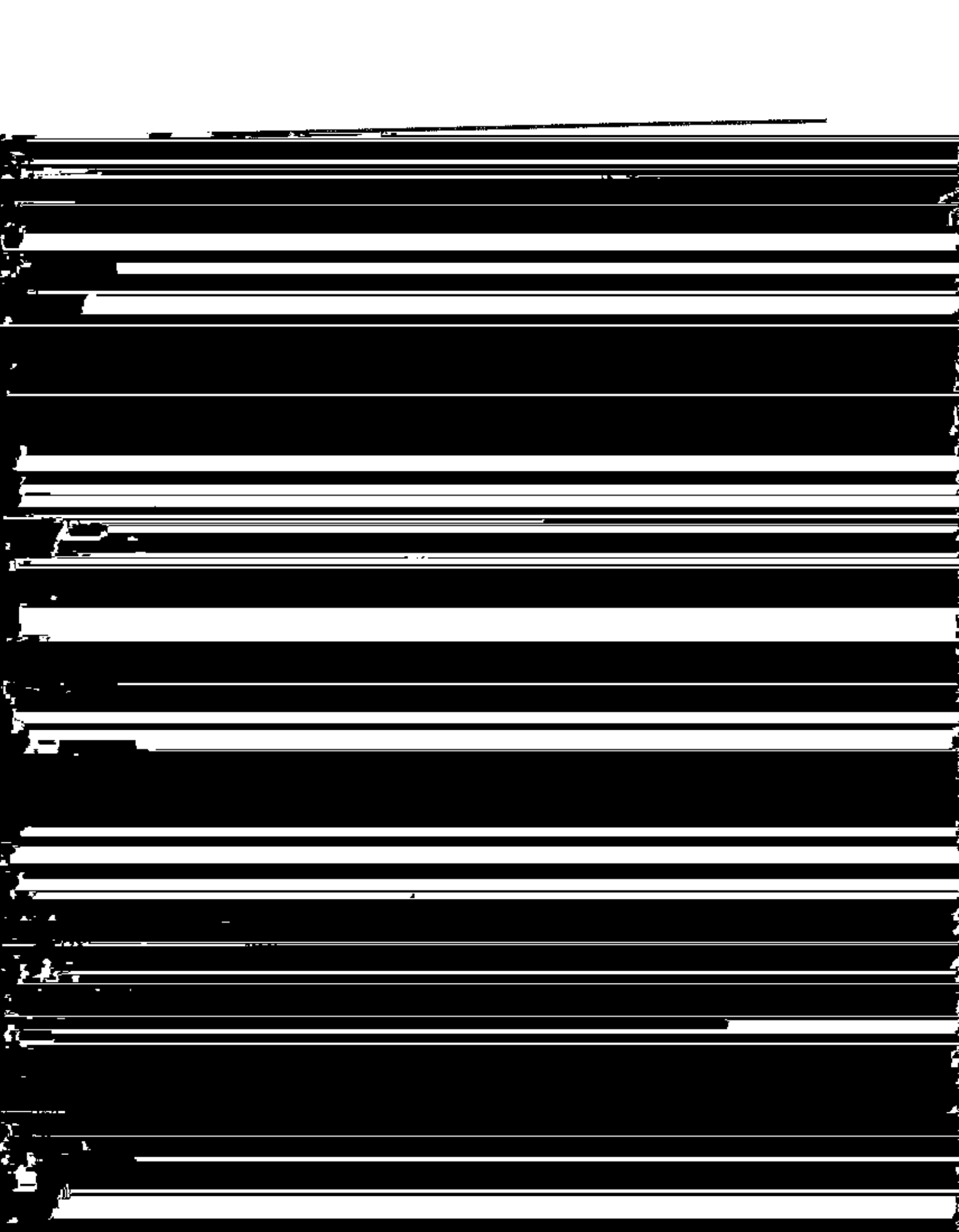
requiring medical attention (30). Pregnancy should not change how clinicians understand the medical nature of addictive behavior. In fact, studies over-

able on utilitarian grounds, because they would likely result in more harm than good for maternal and child health, broadly construed. Various studies have suggested that attempts to criminalize pregnant

with bias, unfairly burdening the most vulnerable despite the fact that addiction occurs consistently across race and socioeconomic status (41). In the

Recommendations

In light of these six considerations, the Committee on Ethics strongly opposes the criminal prosecution



at: http://www.nida.nih.gov/NIDA_Notes/NNVol10N1/NIDASurvey.html. Retrieved June 17, 2005.

42. Chasnoff IJ, Landress HJ, Barrett ME. The prevalence of illicit-drug or alcohol use during pregnancy and discrepancies in mandatory reporting in Pinellas County, Florida. [redacted]

43. Cedergren MI. Maternal morbid obesity and the risk of adverse pregnancy outcome. Obstet Gynecol 2004;103: 219–24.

44. Chattingius S, Bergstrom R, Lipworth L, Kramer MS. Prepregnancy weight and the risk of adverse pregnancy outcomes. N Engl J Med 1998;338:147–52.

Appendix B

[redacted]

Principles of Ethical Conduct

[redacted]

Appendix C

American Medical Association Board of Trustees Report, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*

[redacted] common carrier to passenger, have a legal obligation to come

provide a useful analogy, eg, serious and irreversible consequences.

physician-patient relationship would certainly be damaged by physician participation in the forcible administration of medical care.[a]

A physician's role is as a medical adviser and counselor. Physicians should not be responsible for policing the decisions that a pregnant woman makes that affect the health of herself and her fetus, nor should they be liable for respecting an informed, competent refusal of medical care. In the interest of

to her fetus. Given the current state of medical technology, it is unlikely that such a situation would occur. In addition, as a practical matter, it is unlikely that a woman would refuse treatment in that situation.

If an exceptional circumstance could be found in which a medical treatment poses an insignificant—or no—health risk to the woman, entails a minimal invasion of her bodily integrity, and would clearly prevent substantial and irreversible

people or institutions who might take action leading to their

nant woman suffers from a substance dependency; it is the physical impossibility of avoiding an impact on fetal health that causes severe damage to the fetus, not an intentional or

resulting from negligent actions during the prenatal period."[1]

The consequences of harm may be similar regardless of

[redacted] cause a pregnant woman and her fetus cannot practically be

RECOMMENDATIONS

The AMA Board of Trustees recommends adoption of the following statement:

Rep. June 1982;12:16-17, 45.
24. Field MA. Controlling the woman to protect the fetus. *Law Med Health Care.* 1989;17:114-129.
25. Chasnoff IJ. Drug use and women: establish