PERINATAL SUBSTANCE ABUSE: THE RHETORIC AND REALITY OF 'RIGHTS,' AND BEYOND

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American state courts have tried cases involving perinatal substance abuse (PSA) since the late 1960s.[1] The explosion of crack cocaine in the mid-1980s caused the number of such cases to increase, forcing the issue of PSA into the limelight. One commonly quoted statistic estimates that 375,000 children are born addicted to drugs each year;[2] in 1990, one survey estimated that such births cost the health care system $504 million dollars.[3] Since the late 1980s, 167 women in 24 different states have been criminally prosecuted for "fetal abuse."[4] A greater number of women have had their children removed from their homes by social welfare agencies based on a positive toxicology screen. Approximately thirty cases have been reported at the appellate level.

The effects of various substances on the fetus are well-documented. These substances include: (1) "hard," illegal drugs such as cocaine, heroin, and marijuana,[5] (2) legal substances such as alcohol and tobacco,[6] (3) outwardly innocuous activities such as exercise or caffeine consumption.[7] The legal profession has refused to recognize any coherent legal distinctions of man-made teratogens. This refusal leads to dilemmas for policy-makers. This article will explore this dilemma and propose a new solution.

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1 *See In re* Three "John" Children, 306 N.Y.S.2d 797 (Fam. Ct. 1969).

2 This estimate comes from the National Association for Perinatal Addiction Research and Education. S. REP. No. 476, 101st Cong., 2d Sess. 34.

3 Ciaran Phibbs et al., *The Neonatal Costs of Maternal Cocaine Use*, 266 JAMA 1521 (September 18, 1991).

4 *Courts Side with Moms in Drug Cases*, 78 A.B.A. J. 18 (1992).

5 For an excellent digest of current clinical research and summarizations of findings to date, see *Maternal Substance Abuse and the Developing Nervous System*, (Ian S. Zagon et al. eds., Academic Press, Inc., 1992); and *Perinatal Substance Abuse: Research Findings and Clinical Implications*, (Theo Sonderegger ed., Johns Hopkins Press, 1992).

6 *See Id.*

7 *See* James F. Clapp III, *Exercise and Fetal Health*, 15 J. DEV. PHYSIOL. 9 (January 1991); Ben G. Armstrong et al., *Cigarette, Alcohol and Caffeine Consumption and Spontaneous Abortion, Cigarette, Alcohol and Caffeine Consumption and Prematurity, Cigarette, Alcohol and Caffeine Consumption and Congenital Defects*, 82 AM. J. PUB. HEALTH 84 (1992). The findings in these studies are tentative, and further research is ongoing.

This note will first examine the major issues posed by PSA, both in the areas of law and psychology. Part I explores the evolution of the fetal rights doctrine, cited by those favoring state intervention in PSA cases. Part II explores the concept of privacy and autonomy rights derived from abortion cases. Part III illustrates the clash between these two doctrines in cases of forced medical treatment for pregnant women. Part IV analyzes recorded PSA cases. Part V briefly examines constitutional objections to such prosecutions. Part VI provides an overview of American PSA legislation to date. Part VII proposes alternative solutions to the problem.

I. FETAL RIGHTS DOCTRINE

The concept of fetal rights originated just over a century ago in a decision written by the then-Massachusetts Supreme Court Justice, Oliver Wendell Holmes. In this case, *Dietrich v. Inhabitants of Northampton*,[8] Holmes considered the case of a woman who had sued the city of Northampton for damages to her unborn child resulting from a fall on a defective sidewalk; the child was born prematurely and died. Holmes disposed of the claim. He noted that common-law criminal liability for causing miscarriage or death of a "quickened" fetus did not apply to civil cases. A fetus unable to live outside its mother did not have the standing to sue.

> Taking all the foregoing conclusions into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning.[9]

Holmes' rule stood unchallenged for sixty years. In 1946, the reasoning was questioned by the District Court of the District

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[8] 138 Mass. 114 (1884).

[9] *Id.* at 117. Holmes' ruling was applied to a child within ten days of delivery in Allaire v. St. Luke's Hospital, 56 N.E. 638 (1900). The Illinois Supreme Court opinion noted that:

> a child before birth is, in fact, a part of the mother and is only severable from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts that an unborn child may be regarded as *in esse* for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing action by an infant for injuries occasioned before its birth.

of Columbia in *Bonbrest v. Kotz*.[10] This court allowed a father to recover damages incurred during the negligent delivery of his child. Unlike *Dietrich*, the *Bonbrest* court noted that the child was viable, and therefore had standing before the court.[11]

Fetal rights doctrine advanced further in *Smith v. Brennan*.[12] In this case, the New Jersey Supreme Court allowed a fetus to recover against a third party for injuries it suffered in an automobile accident. After reviewing civil law precedents, the court formulated a general principle of law:

> [R]egardless of analogies to other areas of the law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body.[13]

In time, the right of the fetus against prenatal injury expanded from harm inflicted by third parties to harm inflicted by the fetus' mother. Initially, this was met by judicial resistance. For example, in *Stallman v. Youngquist*,[14] the Illinois Supreme Court refused to recognize a cause of action by a child against its mother for damages caused in an auto accident. However, the court discussed the "right to be born with a sound mind and body," particularly emphasizing societal views concerning women's unique reproductive status.

> The recognition of such a right by a fetus would necessitate the recognition of a legal duty on the part of the woman who is the mother; a legal duty, as opposed to a moral duty, to effectuate the best prenatal environment possible. The recognition of such a legal duty would create a new tort: a cause of action assertable by a fetus, subsequently born alive, against its mother for the unintentional infliction of prenatal injuries. . .
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> A legal right of a fetus to begin life with a sound mind and body assertable against a mother would make a pregnant woman the guarantor of the mind and body of her child at birth. A legal duty to guarantee the mental and physical health of another has never before been recognized in law . . . Mother and child would be legal adversaries from the moment of conception until birth.[15]

Further complications surrounding this issue arose out of (1)

Id. at 640.
10 65 F. Supp. 138 (D.D.C. 1946).
11 *Id.* at 140.
12 157 A.2d 497 (N.J. 1960).
13 *Id.* at 503.
14 531 N.E.2d 355 (Ill. 1988).
15 *Id.* at 359.

the creation of judicially-sanctioned standards of care for pregnant women, and (2) the lack of one standard courts could follow when evaluating their degree of intrusion into a woman's daily life to ensure proper, non-harmful behavior.[16]

Other courts were not as reluctant to find liability. In *Grodin v. Grodin*,[17] the Michigan Court of Appeals reversed a summary judgment against a child suing its mother for discoloration of the child's teeth resulting from her mother's use of tetracycline during pregnancy. The court focused on parental immunity for those instances when parental discretion was "ordinarily or reasonably employed."[18]

> A woman's decision to continue taking drugs during pregnancy is an exercise of her discretion. The focal question is whether the decision reached by a woman in a particular case was a "*reasonable* exercise of parental discretion." [citation omitted].[19]

In *Curlender v. Bio-Science Laboratories*,[20] a California Court of Appeals seemed willing, in *dicta* at least, to abandon the parental immunity doctrine altogether. A child, through her father, made a "wrongful life" claim against a corporation which had incorrectly determined that the child was not at risk for carrying the Tay-Sachs gene. The court reversed the trial court's dismissal and allowed the action to proceed.

In discussing the nature of a "wrongful life" suit, the court was not concerned that such actions would be pursued against parents rather than medical practitioners. The court, however, opened the door to just that possibility.

If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made

> a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice would provide an intervening act of proximate cause to preclude liability insofar as defendants were concerned. Under such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring.[21]

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16 *Id.* at 360-61.
17 301 N.W.2d 869 (Mich. Ct. App. 1980).
18 *Id.* at 870; *See* Plumley v. Klein, 199 N.W.2d 169 (Mich. 1972).
19 *Id.* at 870-71.
20 165 Cal. Rptr. 477 (1980).
21 *Id.* at 488.

Today, virtually all states allow for recovery for prenatal injury.[22] Despite the various criminal and civil cases against pregnant substance abusers, tort liability for these abusers has yet to be applied, however, it may only be a matter of time before such a suit is brought. Creation of the attendant "duty" and the resultant standard of care present problems. Using a "reasonable pregnant woman" standard, to avoid overly intrusive, even unconstitutional, state actions, even in the name of prevention, becomes impossible.[23] The collection of an award remains doubtful because most insurance policies would not likely cover this sort of injury. Moreover, many women most often affected do not carry insurance.

One suggestion, that of a "gross negligence" standard of care, balances the child's expectation of health and the mother's liberty interests.[24] This standard would exempt normal, discretionary maternal conduct, and intentional maternal conduct not fraught with dangers that an individual with normal perception would fail to recognize.

II. Maternal Rights: Privacy, Autonomy and Integrity

In addition to the fetal interest in being born with a sound mind and body, the mother possesses a right to privacy and interests in bodily integrity and autonomy. The starting point for these rights is *Roe v. Wade*[25] and the 'abortion jurisprudence' that it engendered.

In *Roe*, the Supreme Court struck down a Texas statute criminalizing abortion. The Court held the statute void for vagueness, and violating the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[26] In holding that the right to have an abortion stemmed from the right to privacy,[27] the Court continued a decade old line of reasoning which began in *Griswold v. Connecticut*[28] and *Eisenstadt v. Baird*.[29]

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22 Roland F. Chase, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971).

23 Judith Kahn, *Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus: Is This a Mother's Crime?* 53 Brook. L. Rev. 807, 833 (1987).

24 Mary K. Kennedy, *Maternal Liability for Prenatal Injury Arising from Substance Abuse During Pregnancy: The Possibility of a Cause of Action in Pennsylvania*, 29 Duq. L. Rev. 553, 576-77 (1991). Kennedy also suggests that such actions may not in fact become numerous, as insurance policies held by most families may not cover this type of injury, making actual recovery impossible.

25 410 U.S. 113 (1973).

26 *Id.* at 120.

27 *Id.* at 153.

28 381 U.S. 479 (1965)(State statute proscribing contraceptive devices for married couples unconstitutional under "penumbras" of First, Third, Fourth, Fifth and Ninth Amendments).

The Court's opinion balanced Texas' assertion that life began at conception and the plaintiff's contention that the right to terminate a pregnancy should be unrestricted. It held that a fetus was not a "person" for Fourteenth Amendment purposes.[30] It also held that the state's legitimate interest in protecting "potential human life"[31] began after viability in the third trimester.[32]

In its subsequent decisions, the Court retreated from *Roe*. For example, in *Planned Parenthood of Missouri v. Danforth*,[33] the Court defined "viability" as the "ability of the fetus to live outside the womb,"[34] rather than using the trimester approach. In *Akron v. Akron Center for Reproductive Health*,[35] the court upheld city ordinances regulating second-trimester abortions but struck down those involving parental consent, informed consent and a 24-hour waiting period.[36] *Akron* is more noted for Justice O'Connor's dissent which first claimed that, due to the advance of technology, *Roe* was on a "collision course with itself,"[37] and then proposed the "unduly burdensome" test for measuring restrictions on abortions.[38]

In the late 1980s, the Court placed further restrictions on abortion. It upheld a preamble to a state law which stated that the life, health and well-being of the unborn child was protectable.[39] The Court validated a state law prohibiting minors from obtaining abortions without parental consent or a judicial bypass;[40] it also held that two-parent notification for minors was constitutional with a judicial bypass.[41] The Court upheld the removal of federal funds for family planning projects that counseled or promoted abortion.[42] Although reaffirming *Roe*, the Court most recently: (1) upheld the "informed consent" require-

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29 405 U.S. 438 (1972)(State statute forbidding contraceptive devices or information to unmarried persons struck down under Equal Protection Clause).

30 *Roe*, 410 U.S. at 159-62.

31 *Id.* at 159.

32 *Id.* at 160, 163-64.

33 428 U.S. 52 (1976).

34 *Id.* at 63-64.

35 462 U.S. 416 (1983).

36 *Id.* at 452.

37 *Id.* at 458.

38 *Id.* at 461-66. If a regulation was found by the court not to be "unduly burdensome," i.e., placing "absolute obstacles or severe limitations" on the abortion decision, then the state need only pass the rational relationship standard of review. However, if the court found a law to be "unduly burdensome," then the law must be in furtherance of a "compelling" state interest.

39 Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

40 Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990).

41 Hodgson v. Minnesota, 497 U.S. 417 (1990).

42 Rust v. Sullivan, 111 S. Ct. 1759 , 114 L. Ed.2d 233 (1991). The Clinton Administration lifted the "gag rule" on January 22, 1993.

ments (2) upheld a 24-hour waiting period and parental consent for minors (3) adopted Justice O'Connor's "unduly burdensome" test as the measure for future restrictions.[43] The right to an abortion has been constricted since *Roe*, but the right of privacy remains intact.

Courts treat the doctrine of bodily integrity deferentially. The procedural barriers erected in the care of incompetent persons evidence this.[44] Bodily integrity derives from the tort of battery, or unauthorized touching.[45] As the Supreme Court stated in *Terry v. Ohio*,[46]

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of the individual to the possessin and control of his own person, free from all restraint and interference by others, unless by clear and unquestionable authority of law.[47]

The right against bodily interference has been extended to medical procedures for the benefit of another. In *McFall v. Shimp*,[48] a Pennsylvania court found no legal basis for compelling a man to undergo a bone marrow extraction in order to save a terminally ill cousin. The court held that "for the law to *compel* defendant to submit. . .would defeat the sanctity of the individual, and would impose a rule which would know no limits . . . [italics in original]."[49]

Personal autonomy includes a pregnant woman's right to choose her lifestyle. The concept also encompasses the permissible extent of governmental ignorance as to her activities. Personal autonomy, or the "freedom to care for health and person,"[50] includes the right to care for one's children and raise them as one sees fit.[51] Primary duty for the care of the child lies with parents:

> [T]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with

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43 Planned Parenthood v. Casey, 112 S. Ct. 2791, 120 L. Ed.2d 674 (1992).

44 *See, e.g., In re* Quinlan, 70 N.J. 10, 54 (1976).

45 Restatement (Second) of Torts, § 18 (1965).

46 392 U.S. 1 (1968).

47 *Id.* at 9, *quoting* Union Pac. R. Co. v. Botsfield, 141 U.S. 250, 251 (1891).

48 10 Pa.D. & C.3d 90 (1978).

49 *Id.* at 91; *contra* Strunk v. Strunk, 445 S.W.2d 145 (Ky. App. 1969),(where a court granted a parental petition to force a kidney donation from an incompetent (retarded) man to his brother).

50 Doe v. Bolton, 410 U.S. 179, 213 (Douglas, J. concurring).

51 Meyer v. Nebraska, 262 U.S. 390 (1923)(individuals have a right to "establish a home and bring up children" under the liberty clause of the Fourteenth Amendment).

> the high duty, to recognize and prepare him for additional obligations.[52]

III. Forced Medical Treatment: Where Rights Clash

The clash of the rights of the fetus and the woman's autonomy over her body occurs most clearly in cases of forced medical procedures. Two state-level appellate court decisions, and one from the District of Columbia, are used to justify court intervention in cases of PSA. These decisions lack, almost entirely, any substantive basis.

In *Raleigh-Fitkin Paul Morgan Memorial Hospital v. Anderson*,[53] a hospital sought a court order to administer transfusions against the wishes of its patient, a pregnant member of the Jehovah's Witnesses. She needed a transfusion for the delivery of her child. Since doctors at the hospital believed severe hemorrhaging to be likely during delivery, the court granted the hospital's request.

The court based its decision on the interests of the child in receiving legal protection. However, it neglected to state the origin of that interest. It cited no specific statute or general legal principle. Rather, it declared that

> We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event they are necessary. . .[54]

The court did not deal with the legitimacy of overruling the mother's right to refuse treatment and her autonomy in favor of the fetus' interests. The court held that

> . . .we think it unnecessary to decide that question in broad terms because the welfare of the child and the mother are so intertwined that it would be impracticable to distinguish between them with respect to the sundry factual patterns which may develop.[55]

In *Jefferson v. Griffin Spaulding County Hospital Authority*,[56] an expectant mother had religious objections to a forced caesarian. Doctors at the hospital estimated that her complete *placenta previa*, which put the child's chances of dying during delivery at

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52 Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).
53 42 N.J. 421, *cert. denied* 377 U.S. 985 (1964).
54 *Id.* at 423.
55 *Id.*
56 247 Ga. 86, 274 S.E.2d 457 (1981).

99% and the mother's at 50%, necessitated a caesarian section and blood transfusion. A caesarian delivery gave the child a near-100% chance of survival. The hospital sought, and the Superior County Court granted, an order forcing the caesarian and transfusions. The Georgia Supreme Court affirmed in a one-page opinion.

The court noted instances in which a patient may refuse treatment. Following the reasoning of *Anderson*, it held that the interest in saving the life of the unborn child trumped the mother's objections to treatment.

> In denying the stay of the trial court's order and thereby clearing the way for immediate reexamination by sonogram and probably for surgery, we weighed the right of the mother to practice her religion and to refuse surgery on herself, against the unborn child's right to live. We found in favor of her child's right to live.[57]

The decision makes no attempt to analyze the basis for fetal rights, beyond restating *Roe*'s declaration of the government's ability to ensure the "protection of potential life." It did not, as did the lower court, cite statutory authority for its ruling.[58]

In *In re A.C.*,[59] the District of Columbia Court of Appeals ruled on the case of a woman who was 26 weeks pregnant and suffering from leukemia. She was not expected to survive long enough for the fetus to reach "viability." The hospital sought a declaratory order granting it permission to perform the caesarian. The court granted the request. The mother and child died shortly thereafter.

Although more replete with legal citation for its position than *Anderson* and *Jefferson*, the *A.C.* decision rested on the same basic principle, with a utilitarian slant:

> It can be argued that the state may not infringe upon the mother's right to bodily integrity to protect the life or health of her unborn child unless to do so will not significantly affect the health of the mother and unless the child has a chance at being born alive. Performing Caesarian sections will, in most instances, have an effect on the condition of the mother. . .

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57 *Id.* at 90.

58 GA. CODE ANN. § 24A-401(8)(A) (1981), the state's child abuse and neglect statute, defined a "deprived child" as one who "is without proper parental care as required by law, or other care or control necessary for his physical, mental, or emotional health or morals."

59 533 A.2d 611 (D.C. App. 1987); *vacated* 539 A.2d 203 (D.C. App 1988); *rehearing en banc* 573 A.2d 1235 (D.C. App. 1990).

> Even though we recognize these considerations, we think they should not be dispositive here. The Caesarian section would not significantly affect A.C.'s condition because she had, at best, two days left of sedated life; the complications arising from the surgery would not significantly alter that prognosis. The child, on the other hand, had a chance of surviving delivery, despite the possibility that it would be born handicapped. Accordingly, we rule that the trial judge did not err in subordinating A.C.'s right against bodily intrusion to the interests of the unborn child and the state . . .[60]

Upon rehearing, the court softened the harsh pragmatism of its earlier decision and held that the patient had the final say in refusing medical treatment. On appeal, the court held that the trial court erred in presuming A.C. to be incompetent and further erred by not using "substituted judgment" to determine her wishes in light of her presumed incompetency.[61] Instead, the trial court and the appellate court (in its initial opinion) erroneously used a "balancing test."[62] On review, the court did not find *A.C.'s* case to be one where, though she has made a competent refusal of treatment, a state interest could be so compelling as to override her wishes entirely.[63]

Upon examination, forced-treatment cases do not provide precedent for prosecutions of PSA. First, the considerations of *Anderson* and *Jefferson* focused on the mother's religious objections, which are based upon the Free Exercise Clause of the First Amendment. Both courts chose the child's over the mother's right to practice her religion. In reported cases of PSA, religion has never been an issue in legal intervention.[64]

Furthermore, forced treatment has overtones of discrimination in its application. In a 1987 study of obstetrical interventions against maternal wishes (21 total), the women were predominantly (81%) black, Hispanic or Asian. Half (44%) were unmarried. A quarter did not speak English as a first language.[65]

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60 533 A.2d at 617.

61 573 A.2d at 1247.

62 *Id.*

63 *Id.* at 1252.

64 Were it to become an issue, it is likely that courts would sanction it on First Amendment grounds. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (Supreme Court upheld dismissal of two employees for use of peyote in Native American Church rituals; no violation of Free Exercise Clause was involved, as enforcement of laws against socially harmful conduct cannot depend upon subjective beliefs of an individual).

65 Veronica E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192 (May 7, 1987). The study admitted the possibility of sampling bias, as it was conducted at public or "teaching" hospitals.

Some evidence indicates that this bias influences reports on drug use during pregnancy.[66]

IV. Case Law to Date

As of late 1992, there were roughly thirty reported appellate decisions dealing directly with PSA. Most were neglect proceedings and custody determinations for children born to mothers who abused drugs during pregnancy and several were criminal cases. However, considering the concern over criminalizing the conduct in question, one might expect there to have been more appeals of criminal proceedings.

The decision's holdings demonstrate three distinctive schools of thought. In the first school, the "hands-off" approach, courts reject the claim on jurisdiction on all grounds. In the second, more common school of thought, courts protect the infant only after its birth. In the third school, a prevention-oriented one, courts act before the child's birth.

1. No Jurisdiction

Courts unwilling to find jurisdiction usually do so on one simple fact: The statutes under which the state brings its case, i.e., regular child abuse and neglect laws, do not by their own terms cover unborn children. Although critics claim that such a narrow view is blind to the realities of the situation, the courts reply that it is not their business to legislate from the bench.

Roe held that a fetus was not a "person" for purposes of the Fourteenth Amendment. Propriety of borrowing from abortion law aside, most states have followed that admonition and not passed laws specifically giving the fetus the status of a person, at least insofar as abuse and neglect laws are concerned.

In *Reyes v. Superior Court*,[67] a California appellate court refused to find a woman who used heroin and gave birth to addicted children guilty of felony child endangerment. Its reasoning was that, in order to have child endangerment, there must first be "a living child susceptible to care of custody."[68] Giving the statute its plain meaning, the court found no explicit legislative intent to include unborn children within the law.

More recently, a New York court dismissed child endanger-

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66 *See* notes 99-101 and accompanying text.
67 75 Cal. App.3d 214 (1977).
68 *Id.* at 218.

ment charges against a mother in *People v. Morabito*.[69] The court found that since the first endangerment statute in the 1870s, the law had never applied to the unborn. "[W]hen our Legislature enacts laws concerning unborn children, it says so explicitly."[70] To hold otherwise would be a violation of due process.

Mindful of the extent to which state intrusion might go once allowed, another New York court threw out a neglect petition in *Matter of Fletcher*.[71] Aside from defects in the pleading which failed to specifically allege particular instances of drug use, the court rejected the notion that prenatal conduct alone could constitutute neglect under the law, after the child is born.[72]

Furthermore, the nagging question of just where to draw the line in regulation behavior troubled the court, and forced it to err on the side of the mother.

> . . .To carry the Law Guardian's argument to its logical extension, the State would be able to supercede a mother's custody right to her child if she smoked cigarettes during pregnancy, or ate junk food, or did too much physical labor and did not exercise enough. The list of potential intrusions is long and constitute entirely unacceptable violations of the bodily integrity of women.[73]

2. *Prenatal Harm, Postnatal Action*

By entertaining jurisdiction over the mother and child only after birth for acts which took place before birth, most courts take a supposedly pragmatic approach between two extremes. It does allow a more concrete link to be established between the drug ingestion and any harm caused, and is more protective of the mother's liberties. But it also raises serious questions about policy goals, i.e., prevention versus retribution.

Some courts are willing to base a neglect petition solely upon a mother's prenatal conduct in taking drugs, either as an analogy to tort law, or as a general principle of child welfare laws.[74] However, such prenatal conduct will not become an issue until after birth, when a toxicology test is performed.[75] Courts

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69 580 N.Y.S.2d 843 (City Ct. of Geneva, Ontario County 1992).
70 *Id.* at 846.
71 141 Misc.2d 333 (N.Y. Fam. Ct. 1988).
72 *Id.* at 336.
73 *Id.* at 337.
74 *In re* Fathima Ashanti K.J., 558 N.Y.S.2d 447 (Fam. Ct. 1990); *In re* Valerie D., 595 A.2d 922 (Conn. App. 1991) *rev'd*, 613 A.2d 748 (Conn. 1992).
75 Department of Social Services v. Felicia B., 543 N.Y.S.2d 637, 638 (Fam. Ct. 1989).

then will be able to avoid running afoul of legislative intent behind child welfare laws and claim that the neglect is not "with respect to the fetuses but rather to children born with a positive toxicology for cocaine."[76]

An alternative method, sometimes used in tandem with the toxicology screens, is to hold the drug use as probative evidence of future neglect, turning the focus away from the child and placing it on the parent(s). Where prenatal conduct alone will not suffice to form a basis for a neglect petition, a court will ask whether the child is in imminent danger of physical harm or neglect through parental inattention caused by drug use, as opposed to presently suffering any actual physical harm (such as withdrawal, FAS, etc.).[77] Placing the child with the parent, unreformed in his or her drug use, so the argument goes, would run counter to the child's best interests.[78]

Taking a split view of the child, where it becomes susceptible of full legal protection only after birth, makes little physiological sense. The most serious harm to the infant's health occurs during this period of legal uncertainty. Under a punitive model, if the primary goal is punishment and prevention by deterrence, without regard to the harm to a particular child, then this approach makes sense. If, however, the aim is prevention, little good inures to the child who is permanently damaged by its mother's drug use. Sending a message to society, be it either by criminal prosecution or civil neglect hearings, is essentially a backward-looking approach.

3. Prenatal Intervention

In *Matter of Baby X*,[79] the Michigan Court of Appeals heard an appeal of a neglect order entered against a mother, on behalf of an infant who underwent withdrawal shortly after birth. The court first cleared the jurisdictional block by noting that although a fetus was not, as the mother claimed, a "person" under *Roe*, it is such under tort and probate laws. "This limited recognition of a child *en ventre sa mere* as a child *in esse* is appropriate when it is for the child's best interests."[80]

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[76] *In re* Stefanel Tyesha C., 556 N.Y.S.2d 280, 285 (App. Div. 1990); *In re* Troy D., 263 Cal. Rptr. 869 (1989).

[77] *In re* Male R., 102 Misc.2d 1 (N.Y. Fam. Ct. 1979).

[78] *In re* Milland, 146 Misc.2d 1 (N.Y. Fam. Ct. 1989). The judge in the case applied the reasoning to both the mother and the father, both chronic alcoholics who exhibited erratic behavior and refused treatment for alcoholism.

[79] 97 Mich. App. 111 (1980).

[80] *Id.* at 115.

Tracking the language of such pioneering fetal rights decisions such as *Smith v. Brennan*, the court concluded that a child "has a right to begin life with a sound mind and body."[81] Left unanswered was the issue of when such a right begins—is it at conception or at viability? Subsequent cases provide little guidance.[82]

Recognition of an unborn child as deserving of protection from harm during gestation raises the prospect of treating it as a person. A New Jersey statute allows the state to make an application of neglect and, theoretically obtain custody of, an unborn child if its welfare is threatened.[83] One appellate-level decision made a fetus the object of a protective order.[84] Guardians may be appointed to represent the unborn child's interests,[85] raising difficult dilemma, giving a third person control over the health of a fetus, and therefore over the health and practices of the mother as well.[86]

V. Constitutional Obstacles to Abuse Laws

Problems with using general child abuse laws to prosecute PSA abound. To begin with, although abuse laws define an upper limit on minority jurisdiction, they fail to cover the opposite end of the spectrum. A child a day away from his eighteenth birthday may be covered, but a child a day away from birth may not be.

Neither do the laws, by their own terms, specifically cover PSA, raising questions of notice under the Due Process Clause of the Fourteenth Amendment. Criminalizing PSA, as have some prosecutors, by utilizing drug trafficking laws only raises more serious constitutional objections.[87] The only instance of a court

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81 *Id.*

82 *See In re* Ruiz, 27 Ohio Misc.3d 31 (Ohio Com. Pl. 1986) (no mention of when right to a sound mind and body accrues); *In re* Valerie D., *supra* note 74 (period of eligibility for protection under child abuse laws from prenatal injury and neglect runs from viability to birth).

83 N.J. Stat. Ann. 30:4C-11 (West 1981).

84 Gloria C. v. William C., 124 Misc.2d 313 (N.Y. Fam. Ct. 1984).

85 Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryoes*, 66 Wash. L. Rev. 503 (April 1991).

86 *See* Matter of D.K., 204 N.J. Super. 205 (1985), where court held that appointing a guardian for a nonviable fetus whose mother was institutionalized for schizophrenia was improper. It based its ruling on *Roe*, though, and stated that a viable fetus could be subject to *in personam* jurisdiction.

87 Dawn Marie Korver, *The Constitutionality of Punishing Pregnant Substance Abusers Under Drug Trafficking Laws: The Criminalization of a Bodily Function*, 32 B.C.L. Rev. 629 (May 1991). *See also* Robinson v. California, 370 U.S. 660 (1962)(punishing narcotics addiction by statute is a violation of Eighth Amendment; such a law punishes a status, not an act).

specifically addressing the wisdom of applying trafficking statutes does not bode well for such prosecutions.

In *State v. Johnson*,[88] the Florida Supreme Court reversed the well-publicized conviction of Jennifer Clarice Johnson for delivery of a controlled substance to her infant through the umbilical cord immediately after birth. The court reasoned that the trafficking law was not intended to cover delivery through the umbilical cord.[89] Further, there was no direct evidence that she had timed her ingestion of drugs so as to intentionally transmit them immediately after birth.[90] The court advised that the best solution was for the legislature to draft a law to meet this form of drug "delivery."[91]

The trafficking laws may not be confined to pregnancy, in the wake of the conviction of a California woman for killing her infant through methamphetamine-tainted breast milk. In *State v. Gillespie*, the Riverside County Superior Court accepted a guilty plea from Hannah Gillespie to three counts of child endangerment, and sentenced her to prison; the pleas let her escape a second-degree murder charge.[92]

The *Gillespie* case, if upheld on appeal, appears to be the first step in broadening prosecutions, based on trafficking laws, against women using drugs. In one sense, it resembles a traditional child neglect case, where a parent may give alcohol or a drug to a minor child. The method of transmission, directly through the mother via her breast milk, makes it a close enough fit to PSA cases for the potential broadening of jurisdiction.

The only case so far to have raised due process objections was decided against parents who claimed they had insufficient notice that cocaine use during pregnancy constituted neglect; the court reasoned that so long as the charges on the petition tracked the statute, fair warning was given.[93]

More obvious are charges of sex and racial disparity in the enforcement of neglect statutes. Fetal-protection laws enacted by corporations to prevent birth defects in women of childbearing age have been held by the Supreme Court to be unconstitu-

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88 602 So.2d 1288 (Fla. 1992).

89 *Id.* at 1290.

90 *Id.* at 1292.

91 *Id.* at 1296.

92 *Mother Gets 6 Years for Drugs in Breast Milk*, N.Y. TIMES, Oct. 28, 1992, at A11.

93 Brown v. Department of Health and Rehabilitative Services, 582 So.2d 113 (Fla. App. 3 Dist. 1991).

tional.[94] Whether or not this civil-rights analysis applies to criminal conduct (i.e., drug use) remains to be seen.

Calls for courts to examine the roles of fathers in maternal drug use may, in the future, take on a psychological as well as physiological shading. Already, some courts recognize the link between male behavior and the mother's addiction.[95] Medical investigations are uncovering possible genetic links between male drug use and transmission of birth defects through sperm;[96] paternal roles in PSA may extend to alcohol as well.[97]

Future consideration of male roles in PSA may ultimately take the same path as that now applied to mothers. Is the damage to the child from the father actual, physical harm caused by drug-induced genetic defects? Or is it behaviorally-oriented, with the drug use placing the child at future risk through neglect caused by drug use?

Racial discrimination in cases of forced obstetrical surgery is already documented.[98] Preliminary studies also indicate the same bias may exist in cases of reporting PSA. Chasnoff, Landress and Barrett (1990) found discrepancies along racial lines among physicians giving prenatal care to women in both public and private hospitals.[99] While rates of substance abuse were roughly equivalent between black and white women, black women were ten times as likely to be reported to authorities for their drug use.[100] The racial bias is most likely not confined to PSA, but merely an extension of socioeconomic bias reflected in current dispositions of most child abuse and neglect cases, with the popular image of crack addicts as poor minorities aggravating

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94 United Auto Workers v. Johnson Controls, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991).

95 *See In re* Adoption of M.A.R., 591 A.2d 1133 (Pa. Super. 1991)(father's convictions for drug dealing and use were relevant and not prejudicial in termination proceedings).

96 A Washington University study recently found preliminary evidence that cocaine may bind to sperm without affecting its motility or viability. Ricardo A. Yazigi et al., "*Demonstration of Specific Binding of Cocaine to Human Spermatoza*," 266 JAMA 1956 (October 9, 1991).

97 Ernest L. Abel, *Paternal Exposure to Alcohol*, in Sonderegger, *supra* note 6.

98 *Supra* notes 66-67 and accompanying text.

99 Ira Chasnoff, et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202 (April 26, 1990).

100 The rate for whites was 15.4%, for blacks 14.1%. Only 48 of the 4290 white women who gave birth were reported (1.1%), whereas 85 of 793 black women were (10.7%). Black women tested positive for cocaine most often, whereas white women tested positive for marijuana more frequently; Chasnoff theorized that the "drug of choice" may have been a prejudicing factor in reporting patterns, as well as social bias—white women were treated in private hospitals, and black women were most often seen in public hospitals. *Id.* at 1204-06.

the picture.[101]

In light of the Minnesota Supreme Court's decision in *State v. Russell*,[102] it may be a matter of time before challenges to PSA prosecutions raise outright racial bias claims. *Russell* was an appeal of acquittal on charges for possession, by black defendants, of crack cocaine under a 1990 Minnesota statute.[103] While only three grams of crack were needed to constitute an offense, ten grams or more of powdered cocaine were necessary for an equivalent offense.

The defense claimed, and the court ruled, that the law violated the equal protection clause of the Fourteenth Amendment. No rational basis existed for differentiating the two substances, since the state supposedly relied on "anecdotal" evidence to support evidence of increased violence and greater addictive powers of crack. It is easy to see how, in light of Chasnoff's research, and *Russell*, a future challenge to a PSA conviction might be made.

A final objection, noted above, is where to draw the line in policing prenatal activities. Ought it to be at the "hard" drugs, such as heroin, cocaine, or marijuana, and let illegality alone be the guide? Or should toxicological harm alone be the guide, allowing courts to regulate alcohol and tobacco use as well? Allowing teratogenicity to rule is a mistake, especially where some studies indicate that effects of PSA may not permanently damaging, or at least where results are mixed.[104]

It is entirely possible, however, to construct a "sliding scale" to handle degree of harm from PSA, where hard drug usage could justify civil and criminal legislation, excessive use of alcohol (to the point of serious risk of FAS) could beget similar sanctions, but other actions which are legal (smoking, authorized use of medication, or diet) would be exempt from reprimand.[105]

VI. LEGISLATION

Given the problems with the use of child abuse statutes to

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101 *See* Janet Dolgin, *The Law's Response to Parental Alcohol and 'Crack' Abuse*, 56 BROOK. L. REV. 1213 (1991); Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737 (1991)(demography of judges—white, upper-class Protestant males—may foster a 'pluralistic ignorance' as to conditions for poor inner-city minorities); Marsha Garrison, *Why Terminate Parental Rights?* 35 STAN. L. REV. 423 (1983)(juvenile courts often translate parental 'unfitness' as meaning 'poverty,' reinforcing middle-class beliefs about the lower class).

102 477 N.W.2d 886 (Minn. 1991).

103 MINN. STAT. 152.023 (2)(1).

104 *See* Barry Zuckerman & Deborah A. Frank, "*Prenatal Cocaine and Marijuana Exposure: Research and Clinical Implications*," in Zagon and Slotkin, *supra* note 5, at 142-43.

105 *See* Section VII, *infra*.

effectively define and combat the problem, some states have, not surprisingly, passed specific legislation aimed at PSA. Federal legislation, in contrast, addresses the social-welfare aspect of caring for the children after birth.[106] State responses are varied.

At one end of the spectrum, some states merely require that information on FAS and PSA be distributed by county clerks, usually to couples applying for marriage licenses.[107] Others have instituted task forces to formulate solutions.[108] In only two states to date does PSA fall under the criminal code.[109] Likewise, in only one state is involuntary commitment of a pregnant substance abuser statutorily provided for.[110]

Several states give priority of treatment to pregnant women, and provide services for their children.[111] In order to facilitate identification of mothers and children at risk, three states allow for testing of infants and mothers by hospitals.[112] Most states, though, have included FAS or drug addiction in newborns within their definition of child abuse or neglect;[113] two states mandate reporting, by health care professionals, of children born with

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106 *See* Abandoned Infants Assistance Act of 1988, 42 U.S.C. § 670, and its 1991 amendments, 105 Stat. 1812; Emergency Substance Abuse Treatment Act of 1990, 42 U.S.C. § 290aa-6, making grants available for providing drug treatment to pregnant and postpartum women and their infants. In 1989, Sen. Pete Wilson, (R-Cal), introduced S. 1444, which would have conditioned Public Health Service Act Grants (42 U.S.C. § 509H) upon a State criminalizing PSA and providing for mandatory sentencing. It was referred to the Labor and Human Resources Committee, 135 Cong.Record S9134, where it died.

107 ME. REV. STAT. ANN. tit. 19 § 61(1)(A) (West 1991 Supp.); N.H. REV. STAT. ANN. § 457:23 (1990 Supp.); R.I. GEN. LAWS § 15-2-3.1 (1991 Supp.); OR. REV. STAT. § 106.081 (1991); 1990 Cal. Legis. Serv. ch. 917 (West).

108 CONN. GEN. STAT. ANN. § 17a-659 (West 1991 Supp.); IOWA CODE § 235C.2 (1989); 1990 Alaska Sess. Laws, L.R. 88 (1990 Supp.); LA. REV. STAT. 46:2505 (West 1992 Supp.); 1991 Mich. Legis. Serv. A-3, Executive Order 1991-25 (West).

109 ILL. ANN. STAT. ch. 56 1/2 par. 1407.2 (West 1990 Supp.) and ch.56 1/2 par. 2103(b) (West 1990 Supp.) both concern delivery of drugs and paraphernalia, respectively, to a pregnant woman. OHIO REV. CODE ANN. § 2925.11(H) (Anderson 1990 Supp.) provides for suspended sentences if a woman completes a treatment program.

110 1991 Colo. Legis. Serv. ch. 298, § 4 (West), COLO. REV. STAT. § 25-1-311 (1991 Supp.).

111 1991 Ariz. Legis. Serv. ch. 93 (West)[priority of treatment]; WASH. REV. CODE ANN. § 74.09.790(1) (West 1991 Supp.)[easing access to health care for pregnant substance abusers]; 1991 Mo. Legis. Serv. No. 49, § 4 (West) [pregnant women not to be denied treatment due to their status]; 1991 Ill. Legis. Serv. P.A. 87-742 (West)[state to provide treatment for pregnant drug and alcohol abusers]; 1991 N.Y. Legis. Serv. ch. 444 (McKinney)[Mental Hygiene Law amended to provide treatment for pregnant women]; IDAHO CODE § 16-103(10)["at-risk" children eligible for early intervention services]; COLO. REV. STAT. § 25-1-311 (1991 Supp.).

112 WIS. STAT. ANN. § 146.0255 (West 1990 Supp.); MINN. STAT. ANN. § 626.5562 (West 1991 Supp.); Cal. Penal Code § 11165.13 [toxicology screen at birth not sufficient basis alone for child neglect report].

113 FLA. STAT. § 415.503(8)(2) (1987); IND. CODE ANN. § 31-6-4-3.1 (Burns 1988); MASS. GEN. LAWS ANN. ch. 119 § 51A (West 1991 Supp.); NEV. REV. STAT. § 4432B.330 (1990); ILL. REV. STAT. ch. 23, para. 2053 (1992).

FAS or drug addiction symptoms.[114]

VII. Conclusion: The Search for an Alternative Solution

While current efforts to legislate on PSA are to be commended, some generalizations and shortcomings need to be noted. First, most laws are fairly specific as to what manner of conduct is prescribed, namely hard drug and alcohol abuse. The laws do not explicitly make prenatal behavior a basis for intervention, either before or after birth. Further, the laws are, on the whole, aimed not at prevention through treatment and testing, but essentially retributive in nature, penalizing the woman for her conduct by placing the child in state custody. The side effects (harm to the child) are addressed but not ameliorated, and the root causes (underlying drug addiction) ignored.

Making treatment a priority through legislation and actually delivering it are two different propositions. In Philadelphia, the Women's Law Project recently filed suit, claiming unreasonable restrictions upon (or outright denial of) treatment to pregnant women. Similar actions are pending in New York City.[115]

The war of competing rights explored earlier underscores the emptiness of the debate. Advocates for abortion take an inapposite analogy as support for their side. *Roe* is concerned with the termination of a pregnancy; in PSA cases, the decision to abort has already been foregone, and the child carried to term. Likewise, fetal rights, by its title, may be misleading. Fetuses may not, as *Roe* held, be capable of exercising the rights of a live-born person. This is not to say that their *needs* should be ignored, however.

The problem with PSA is essentially that two entities coexist in one body, and to give each entity full "rights" apart from and exclusive of the other creates an impossible legal situation. Rights are envisioned as negative in character, as "encourag[ing] selfishness rather than altruism or community-mindedness,"[116] much less promoting harmony between a mother and her child *in utero*.

Avoiding creation of a tort-like "duty" for the mother by instead focusing on her "responsibilities" to the fetus is a recognition of the connection between the mother and child and the

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114 Utah Code Ann. § 62A-4-504 (1988 Supp.); Okla. Stat. Ann. tit. 21 § 846A (West 1989 Supp.).

115 Rorie Sherman, *Pregnant Drug Abusers Sue for Treatment*, Nat'l L.J. Nov. 2, 1992, at 9.

116 Suzanne Sherry, *An Essay Concerning Toleration*, 71 Minn. L. Rev. 963, 964 (1987).

desire to avoid harm.[117] It may require the creation of new concepts of interconnectedness and language.[118] Likewise, a new focus on fetal "needs" rather than "rights" may bestow the unborn child with some measure of protection, short of full recognition under the Fourteenth Amendment, from the moment that the woman is aware of the pregnancy. "Needs" as envisioned here would be confined to physical needs, i.e., the aversion of physical harm through prevention.

Along with a shift in emphasis to needs and prevention, future legislation should focus on preserving the family as much as possible. Legislatures, if not courts, ought to focus on the roles that *both* parents play. A Family Policy Act[119] that declares the family to be the best environment in which to solve domestic abuse and crisis situations is a first step towards keeping PSA babies with their mothers and not shuttled around a foster care system that is already overburdened.

Furthermore, the woman's drug addiction does not occur in a vacuum. She may well be influenced by her male partner to begin or continue an addiction. In evaluating PSA, courts and legislatures should word statutes and decisions to include, to the maximum extent possible, the contribution of the male partner.

The psychological factor is the most obvious, to be sure. Some studies indicate that among drug users, higher intimacy levels were recorded between male-female contacts as well as male-male contacts. The study suggested that "drug use is related to interactions with male friends, whether for males or females."[120] Recent evidence indicates a genetic link as well. Researchers at Washington University also suggest that cocaine can bind to human sperm without affecting motility or viability, thereby making possible the transmission of birth defects due to drug use by males.[121]

In addition to a family-oriented PSA policy, required by statute and implemented by courts, heightened protection for the family from government intrusion can come from a flexible, al-

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117 Note, *Rethinking Motherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1338 (1990); Katherine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988).

118 T. Brettel Dawson, *A Feminist Response to 'Unborn Child Abuse: Contemplating Legal Solutions*, 9 CAN. J. FAM. L. 157, 168 (Spring 1991).

119 *See, e.g.*, NEB. REV. STAT. § 43-532 *et seq.* (Reissue 1988).

120 Denise Kandel & Mark Davies, *Friendship Networks, Intimacy, and Illicit Drug Use in Young Adulthood: A Comparison of Two Competing Theories*, 29 CRIMINOLOGY 441 (August 1991).

121 Ricardo A. Yazigi et al., *Demonstration of Specific Binding of Cocaine to Human Sperm*, 266 JAMA 1956 (1991).

most minimalist approach regarding the activities and substances which are stigmatized. I propose the development of a "sliding scale" to gauge the legality of the parent's action. Professor Franklin E. Zimring first advocated such a three-tiered approach to conventional domestic violence situations.[122]

Zimring's first area, that of no government intervention, is named *contingent intervention*, and covers those areas where the family privacy doctrine excludes reasonable parental behavior. For example, a parent spanking his child as discipline would not be covered, as it is within the normal purview of parental discretion. Likewise, with PSA, the government would have no business prosecuting a woman for use of tobacco, for dietary practices, or for moderate alcohol consumption where there was no reason to fear imminent physical harm to the fetus.

The second area, *contingent intervention*, squares roughly with current child abuse laws, where intervention is undertaken only after a complaint is initiated by a third party. Voluntariness is at the heart of this strategy. It allows maximum utilization of admittedly scarce resources, and would uphold respect for law enforcement by preventing what may be perceived as overly-intrusive state oversight of an area believed to be a private matter. Under this category, excessive alcohol consumption likely to cause Fetal Alcohol Syndrome would be actionable. The meaning of "excessive" would necessarily be weighed against privacy of the mother, with enforcement through the juvenile courts by custody determinations or, preferably, mandated treatment.

Lastly, *compulsory intervention*, a criminal-justice approach, would cover the "hard" drugs—marijuana, cocaine, heroin, and unauthorized use of prescription medication. Family privacy would not cover hard drug use, just as it would not cover sexual or physical abuse. Courts would also have the option of mandating treatment in lieu of criminal sanctions, with recourse to criminal punishment as an absolute last resort.

This flexible, sliding scale has several advantages. First, it adopts an orderly approach to PSA based on toxicological realities, and not the all-or-nothing view of some prosecutors, where alcohol use may automatically be equated with and no different from crack use. It thereby conserves law enforcement and criminal justice resources for those cases truly needing it. It will also

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122 Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CAL. L. REV. 521 (1987). I am indebted to my colleague and sometimes co-author Dr. Alan J. Tomkins, J.D., Ph.D., Professor of Law and Psychology at the University of Nebraska-Lincoln for first suggesting this adaptation.

preserve public regard for the law, preventing it from being perceived as shouldering its way into an area held sacrosanct by a large portion of the population—pregnancy and childbirth.

This scale is not perfect, admittedly. It cannot fully address the dichotomy between the born and the unborn. If a mother may give her one-day old child alcohol, and be charged with neglect, she may, under this, be able to drink the equivalent amount one day before the child is born and not be guilty of neglect. Distinctions between the born and the unborn are always tricky, be it in abortion or PSA cases. What the scale attempts to do is minimize government intrusion, preserve families and make prevention the primary focus of efforts to combat PSA.

Society has become more aware of PSA in the last five years, as the volume of articles published in the last two years attests. Greater awareness has also brought a hardening of ideological stances into two opposing viewpoints. Future discussions and rational solution-seekers would be advised to take a different path to resolution.

PERINATAL SUBSTANCE ABUSE: A RECENT BIBLIOGRAPHY

One of the fastest-growing and controversial areas of law is that of maternal drug use during pregnancy. Unnoticed just several years ago, it is now fertile ground for legal and psychological theorists. While there is an explosion in the number of articles written on this topic (the great majority have been written since January 1990), the number of cases at the appellate level is growing slowly. This may be an area where the law follows the literature.

This bibliography identifies articles that have appeared in law reviews addressing the subject of maternal drug use during pregnancy, from the earliest works on the subject in the early 1980s, through the profusion of pieces currently published. Several works have been included which do not strictly focus on maternal drug use (such as Shaw, Robertson and Myers), but are often cited in other commentaries for their general theoretical framework on maternal/fetal conflicts. This bibliography is current through July 1992.

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Sandra A. Garcia & Ralph Segalman, *The Control of Perinatal Drug Abuse: Legal Psychological and Social Imperatives*, 15 LAW & PSYCHOL. REV 19 (1991).

The authors attribute the rise in perinatal abuse not only to a societal abandonment of responsibility and glorification of hedonism, but also to a downturn in economic conditions trapping women in a permanent underclass where drug use is the only escape. The recent controversy over perinatal substance abuse reflects a growing intolerance among some elements of society for this sort of behavior.

Traditional social controls, such as prosecution, are ineffective where the addiction takes hold of and distorts the woman's rational perceptive abilities. Neither voluntary nor involuntary civil commitment is likely to solve the problem, and outpatient treatment is of questionable value as well.

Other methods, seemingly more extreme, should be included in any discussion of perinatal abuse. These include preventive detention, voluntary or mandatory sterilization for repeat offenders, and voluntary or mandatory abortion. Before such methods are used, however, policymakers must closely examine the consequences of each to the woman, the child, and to society.

Efforts must be made to rebuild societal perceptions of drug use and reproduction among high-risk women. The shortage of available treatment center beds for women leads the authors to conclude that some sort of triage is necessary; those who can be realistically helped must receive it, and other, "harder" cases left unpursued.

Andrew Bainham, *Protecting the Unborn—New Rights in Gestation?* 50 MOD. L. REV. 361 (1987).

This Note concerns a British case in which a mother was deprived of custody of her newborn infant because of her drug use during pregnancy. *See D (A Minor) v. Berkshire CC*, 1 All ER 20 (1987).

Sam S. Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209 (1987).

The state has an interest in preventing the societal costs incurred by perinatal substance abuse. This may give the state the power to prohibit conduct harmful to a child *in utero*. Proper safeguards that focus and take into account the extent and probability of harm ensure that a state's powers in the civil and criminal law will not unconstitutionally interfere with the woman's rights.

Kristen Barrett, *Prosecuting Pregnant Addicts for Dealing to the Unborn*, 33 ARIZ. L. REV. 221 (1991).

The author reviews the law of fetal protection in tort and under criminal statutes, both as to parents and third parties, and briefly reviews the interests of both the fetus and the mother. After examining the *Johnson* case in Florida, the author concludes that fetal protection in tort is a natural extension of the expansion of fetal rights and the concern over drug abuse in our society. The best interests of the mother and child may be served if the prosecution and sentencing are made to fit the individual needs of the parties involved.

Robert Batey and Sandra Anderson Garcia, *Prosecution of the Pregnant Addict: Does the Cruel and Unusual Punishment Clause Apply?* 27 CRIM. L. BULL. 99 (1991).

The authors review Supreme Court cases which declare punishment on the basis of addiction to be cruel and unusual (*Robinson v. California*, 370 U.S. 660 (1962) and *Powell v. Texas*, 392 U.S. 514 (1968)), as well as interpretations of these cases given by lower courts. The authors conclude that the conduct involved in both

cases, and in prenatal drug use, is involuntary. According to the authors, punishing the mother for drug use while pregnant is unwise, since retribution for involuntary conduct is a *non sequitur*, and treatment opportunities in the penal system are nonexistent. Using the Eighth Amendment, to strike down criminal punishment of drug use during pregnancy would still allow civil avenues of cure, such as treatment or involuntary commitment.

Barrie L. Becker, *Order in the Court: Challenging Judges who Incarcerate Pregnant, Substance-Dependent Defendants to Protect Fetal Health*, 19 HASTINGS CONST. L.Q. 235 (1991).

This Article examines the increasing use by some judges of sentencing women to jail for drug use while pregnant, explicitly for the purpose of fetal protection.

The author argues that such sentences go beyond judicial authority by creating new crimes *via* sentencing. The Article then proceeds to examine the variety of constitutional arguments that could be used to strike down these sentences.

Alternatives to jail sentences include diversion into treatment programs, subject to revocation upon failure to complete or suspension of charges upon finishing the program. Judges and attorneys should be trained to look for signs of drug addiction in all defendants, and to determine whether that person is a good candidate for voluntary treatment. The treatment would preferably be residentially-based, situated outside the home environment which fosters the addiction. The length and scope of the treatment could be determined by a multi-disciplinary board of legal and medical personnel.

Jacqueline Berrien, *Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures*, 2 YALE J.L. & FEMINISM 239 (1990).

Current legislative 'solutions' to the drug-baby problem are sensationalistic, shortsighted, and dangerous to civil rights and liberties. Although maternal drug use cuts across all race and class lines, current responses target only women who are poor and non-white. Their male counterparts are never included, despite the fact that they may be equally responsible for fetal harm. Prosecution is precisely the wrong approach, undermining the woman's relation with her physician, and leading to refusal to seek the very care which is necessary to prevent the harm. More humane alternatives include treatment centers which cater to preg-

nant addicts, extended Medicaid coverage, and increased funds for prenatal and postpartum care for the poor.

Charles Robert Burton IV, *Fetal Drug or Alcohol Addiction Syndrome: A Case of Prenatal Child Abuse?* 25 WILLAMETTE L. REV. 223 (1989).

This Note reviews the unsuccessful efforts of the Oregon Legislature to enact a 'fetal abuse' law in 1987, and examines the current state of Oregon law allowing such prosecutions under general child abuse laws.

Michael A. Shekey, Comment, *Criminal Liability of a Prospective Mother for Prenatal Neglect of a Viable Fetus*, 9 WHITTIER L. REV. 363 (1987).

This Note proposes criminalization of maternal conduct that intentionally or by omission causes harm to the unborn child. The author argues that courts should focus on "harmful" rather than "unlawful" conduct, with a tort-like "but-for" causation requirement.

Dawson, *A Feminist Response to 'Unborn Child Abuse: Contemplating Legal Solutions*, 9 CAN. J. FAM. L. 157 (1991).

This Article is in response to Dorczak's (*see below*) advocacy of legal intervention to protect unborn children from maternal drug use. Dawson takes issue with Dorczak's definition of the problem and proposed solutions. Canadian law provides no basis for granting the fetus rights. Instead of visualizing the issue in terms of the conflict between both the mother and fetus' interests, the focus should be on the common needs of both. Furthermore, since the women at the center of this debate are poor and non-white, and since they may not have control over their addictions or inability to obtain prenatal care, assigning culpability is unfair and counter-productive. Dawson advocates universal prenatal care and societal respect for a woman's informed decisions on health and treatment. In addition, court-ordered treatment should be resorted to as a last resort where the woman is hopelessly addicted, has declined voluntary treatment, and has given birth to other drug-addicted children. Even then, use of this evidence to find neglect should be forbidden.

James Denison, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. CAL. L. REV. 1103 (1991).

The author argues that tort and current child-abuse and custody laws are inadequate for the task of curing prenatal substance abuse. Additionally, he asserts that existing criminal laws were not intended to cover harm to unborn children. New laws are therefore needed. These new laws could cover illegal activities as well as legal ones (drinking and smoking) and could not be void for vagueness. However, the question of when during the pregnancy a mother should become liable arises. Furthermore, should a law punish a woman for her acts when she was pregnant, even though she did not know of her pregnancy? Should liability be premised on a woman's mere negligence, or on her reckless disregard for her fetus' health? Other objections such as equal protection and privacy would strike down fetal abuse laws under a strict scrutiny standard. The government would be unable to show less restrictive alternatives, such as treatment and prenatal care.

Janet L. Dolgin, *The Law's Response to Parental Alcohol and 'Crack' Abuse*, 56 BROOK. L. REV. 1213 (1991).

The author examines legal responses to parental drug and alcohol use which endangers children. Although it does not concern itself with the effects of this behavior on unborn children, the article is still valuable for its analysis. Most neglect statutes and cases, whether they say so explicitly or not, do not focus on harm to the child, but rather on parental misconduct. As a result, there is a disparity between the treatment afforded to poor parents and middle-class parents. Interpretations of the laws allow for wildly divergent results based on the subjective views of judges, even allowing alcohol or drug use *per se* to justify intervention. The real basis for judicial decisions is not the possibility of harm to the child, but rather the parent's unwillingness to follow "middle-class patterns of life." Such an environment, Dolgin states, is better than removal to a flawed foster-care system which may pose greater harm to the child. New statutes should focus on harm to the child, and not parental misconduct. Additionally, drug and alcohol abuse should not be referred to in statutes as factors in neglect proceedings.

Dorczak, *Unborn Child Abuse: Contemplating Legal Solutions*, 9 CAN. J. FAM. L. 133 (1991).

The author presents legal responses of Canadian law to drug use during pregnancy, and summarizes American law to date. Unlike the U.S., Canada's provinces are without power to legislate in criminal matters, but can pass health care laws. Also in contrast to the U.S., the Canadian Supreme Court has not issued a substantive counterpart to *Roe v. Wade*; the status of a fetus as a person is uncertain. Dorczak believes that pro-life sentiment in Parliament will see the enactment of a restrictive abortion bill. Dorczak would uphold intervention on the basis of a state's interest in protecting the fetus and in curbing the attendant societal costs. According to Dorczak, this could be done using the Canadian Charter of Rights and Freedoms to provide wider protection for unborn children. She advances the novel theory that since brain activity is used to define death, it should also be used to define the beginning of life.

Kevin Drendel, *When Self Abuse Becomes Child Abuse: The Need for Coercive Prenatal Government Action in Response to the Cocaine Baby Problem*, 11 N. ILL. U. L. REV. 73 (1990).

Recounting judicial and legislative responses to the cocaine baby problem, the author calls for a comprehensive solution to the crisis. Education and persuasion alone are ineffective against the power of drugs to control a life; criminal sanctions are not the answer either. They may catch a few addicts, but many more would be driven away from treatment. Post-birth application of child abuse laws does nothing to prevent harm to the child. Ultimately, the only method of curing the problem is forced prenatal care and drug treatment. The government might impose treatment as a sentence in a criminal case, or it might give juvenile courts the power to declare unborn children as abused, and consequently order confinement and treatment. This plan is not without its flaws, since it implicates fundamental constitutional rights to privacy and parental autonomy. Furthermore, equal protection questions come into play, since these laws would single out pregnant women on the basis of their sex.

Abigail English, *Prenatal Drug Exposure and Pediatric AIDS: New Issues for Children's Attorneys*, 24 CLEARINGHOUSE REV. 452 (1990).

A brief review of the issues in prenatal drug exposure is

presented: identifying the drug-exposed infants, use of criminal law to punish the mothers, dependency laws to take custody of the child, and problems in placement and discrimination against these infants.

Margarita Estevez, *FAS: A Starting Point for Protective Fetal Legislation,* 10 GLENDALE L. REV. 110 (1991).

State involvement, in the form of compelled treatment, is an effective means of curbing excessive drinking by pregnant women, and thereby preserving the state's interest in fetal health. Using abuse laws to promote fetal health is no different than current legislation which protects live-born children from their parents; such laws, however, should be narrowly drawn to be constitutionally valid. Criminal sanctions should not be discounted in those cases where the woman is unable to control her drinking, or refuses treatment.

Janet R. Fink, *Effects of Crack and Cocaine on Infants: A Brief Review of the Literature,* 24 CLEARINGHOUSE REV. 460 (1990).

The author presents a synopsis of current toxicological and physiological studies demonstrating the harmful effects of cocaine on the fetus.

Sandra Anderson Garcia & Igno Kellitz, *Involuntary Civil Commitment of Drug-Dependent Persons with Special Reference to Pregnant Women,* 15 MENTAL & PHYSICAL DISAB. L. RPTR. 418 (1991).

A comprehensive look at civil commitment laws in the fifty states, and how they can be applied to pregnant women. Includes a state-by-state table setting out statutory citations to the laws, legislative policy, criteria for commitment, provisions for pre-commitment detention and release, due process rights, any specified locus for commitment, and provisions for discharge. Extremely informative.

Sandra A. Garcia & Ralph Segalman, *The Control of Perinatal Drug Abuse: Legal, Psychological and Social Imperatives,* 15 LAW & PSYCHOL. REV. 19 (1991).

The authors add a unique and important viewpoint to the debate on perinatal abuse. They examine sociological causes underlying the current problem, such as maladaptive behavior as a response to social decay and the backlash against such ills. Forms of social controls are discussed, from criminalization to civil commitment

(voluntary and involuntary), outpatient treatment, preventive detention, voluntary or forced sterilization and even voluntary or mandatory abortion. Unless prevention and treatment are vigorously pursued, the authors claim that no solution can be truly lasting and effective. However, even treatment may have its limits, since what motivates women to seek it is largely unknown, and many women may simply be beyond treatment. In light of this, the authors strongly push a "triage" approach to expenditure of resources—spend money on those who are most amenable to treatment.

Nancy Gertner, Viewpoint, *Woman v. Fetus* 34 BOSTON BAR J. 27 (1990).

As a counterpoint to Lisman (*see below*), Gertner argues that the focus on punitive solutions is misplaced. Prosecutions fall disproportionately on poor, minority women, who are then scared away from seeking treatment for their problems. This societal Catch-22 first deprives women of much needed treatment services, and then punishes them for failing to attempt to cure their habits.

Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 WASH. L. REV. 503 (1991).

Although not specifically addressed to drug-exposed infants, this Article covers a facet of the issue—is it allowable to appoint a guardian for an unborn child if he has been adjudicated to be neglected? The author briefly looks at several cases where unborn children exposed to drugs were declared neglected. The author concludes that allowing guardians for fetuses would force the woman to justify her conduct, in intimate detail, to a third person, and undermine her independence and competency. To do so might also give fetuses greater rights than the woman, running afoul of equal protection. The difficulty with drawing a line at which substances or practices are permissible raises serious doubts about the propriety of regulating conduct.

Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737 (1991).

The current system of prosecutorial discretion comes under heavy criticism in this Article. Greene writes that current pat-

terns of prosecution targeting minorities are the natural end result of almost unbridled prosecutorial discretion, and the urge to win the 'war on drugs.' The problem is that most prosecutors (and the judges who theoretically provide a check on their discretion) have been appointed by conservative Republican administrations, from Nixon to Bush. Thus, they tend to be upper class, white Protestant males, who tend to associate with others of their kind, and hence are never exposed to the realities of an America that is poor, non-white, and powerless. Greene labels this phenomenon 'pluralistic ignorance.'

To counter this pervasive slant, Greene proposes the creation of Prosecutorial Research Information and Reporting Boards. These boards would gather information on the handling of cases, and search for patterns of discrimination. They would have the power to demand an explanation for a particular disposition. The boards would operate in conjunction with independent criminal justice research agencies, and be composed of citizens from the prosecutor's own district. Those citizens from high-crime areas would be given more representation. Ultimately, the boards would educate not just the public, but also the prosecutors themselves about possible unintentional bias, correctable through exposure to the facts.

Harris, *A Covert Attack: The Termination of the Parental Rights of Substance Abusers and its Effect on* Roe v. Wade, 17 S.U. L. REV. 325 (1990).

The author views the conflict as one between the state's power to protect the fetus and the mother's right to rear her child free from government interference. The notion of making drug use during pregnancy 'child abuse' is contrary to the notion of a 'right to privacy' found in *Roe v. Wade*. Unborn children, under *Roe*, are not 'persons' entitled to full protection. However, it is proper for the states to protect the children from future abuse and neglect after birth, so long as the evidence of drug use is not the sole basis for neglect or termination actions.

Jan L. Holmgren, *Legal Accountability and Fetal Alcohol Syndrome: When Fixing the Blame Doesn't Fix the Problem,* 36 S.D. L. REV. 81 (1991).

The involvement of the law only exacerbates the problem of drug-exposed infants. Civil liability, creating a maternal standard of care, opens the door to potentially unlimited liability of the

parents for a variety of injuries to the child, intentional or not. Aside from the problem of defining what the standard should be, it would place too much reliance on physicians who may be anxious to avoid liability themselves. Criminalization ignores prevention of harm and treatment for addiction, and may punish women who used drugs before they knew they were pregnant, or who used drugs with a disregard for the possibility of pregnancy. Civil commitment is unworkable, in the absence of available facilities, the possibility of the woman's relapse into drug use, and its characterization of the mother as a threat to her unborn child. Holmgren advocates educational programs, outreach centers for pregnant addicts, support groups and parent training, widespread prenatal care, and identification and correction of the sociological, economic, and psychological reasons for drug use during pregnancy.

Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After* Webster, 138 U. PA. L. REV. 179 (1989).

Despite the Supreme Court's declaration in *Webster* that the Missouri statute defining conception as the beginning of life was only a "value judgment," the author shows how some state courts have taken this value judgment and applied it in concrete ways. These rulings threaten a woman's liberty, especially when viewed in a fetal protection light; prosecutions for drug use while pregnant are the most prevalent and pernicious side-effect. She argues that taken to its logical extreme, the view that a child has a right to be born with as sound a mind and body as possible could lead to liability for any imperfection in an infant, or even liability for not aborting a defective child.

Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569 (1992).

Two competing models exist in the treatment of pregnant women using drugs today—the adversarial and the facilitative models. Both are diametrically opposed, and according to Johnsen, produce dramatically different results.

The adversarial model includes the "fetal rights" movement, and its use in prosecutions of women giving birth to addicted babies. Forced-caesarian cases fall under this model, often providing precedent for government action against pregnant addicts. Johnsen argues that the lack of precedent for the

adversarial model, as well as the attendant constitutional problems (infringement of women's reproductive rights, sex and race discrimination) make the adversarial model a harmful means of attacking the issue.

The facilitative model abandons all notions of punishment for drug use in pregnancy and instead realizes that policies which are aimed at prevention are most efficacious. Women, by their own admissions, will do anything possible to have healthy babies. The facilitative model aids in overcoming obstacles to this, such as inadequate health and prenatal care and lack of drug treatment facilities aimed at pregnant women.

Judith M. N. Johnson, *Minnesota's 'Crack Baby' Law: Weapon of War or Link in a Chain?*, 8 LAW & INEQ. J. 485 (1989).

Questioning the propriety and constitutionality of Minnesota's drug-exposed infants law passed in 1989, the author raises various objections, from the "massive curtailment of liberty" of pregnant women to invasions of the physician-patient relationship, and the equating of 'fetal neglect' with child neglect. Testing of women for drugs without their informed consent violates the legal right to physical autonomy. Furthermore, as monitoring technology advances, the specter of governmental oversight of pregnancy (advocated by writers such as Shaw and Robertson) would crush most maternal liberty.

Phillip Johnson, *The ACLU Philosophy and the Right to Abuse the Unborn*, 9 CRIM. J. ETHICS 48 (1990).

The author takes the ACLU to task for its stance opposing prosecutions and other actions against pregnant women who use drugs. The excessively rights-based approach by the ACLU leads to the conclusion that women have the right to do what they will with their fetuses, including harm by drug use. The fetus has become, in effect, the sole property of the woman, amidst a general breakdown in family bonds and norms. The law cannot compel virtue, but it can reflect societal values, particularly its views on family matters. Prosecutions may not be the sole answer, but neither is a philosophy which pays no attention to anything but "rights."

Judith Kahn, *Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus—Is This a Mother's Crime?*, 53 BROOK. L. REV. 807 (1987).

The author makes an interesting and important distinction between fetal *rights* versus fetal *needs*, preferring the latter. Nevertheless, she argues that adopting a needs-based approach should not entail the creation of a new maternal "duty" which must be adhered to with strictness. She argues for liability only in those cases of extreme negligence beyond reasonable parental discretion.

Stephen R. Kandall & Wendy Chavkin, *Illicit Drugs in America: History, Impact on Women and Infants, and Treatment Strategies for Women*, 43 HASTINGS L.J. 615 (1992).

Kandall and Chavkin, M.D.s specializing in neonatal medicine, present a history of drug use in America, and attempted solutions to those earlier outbreaks. They also examine the effect of drug abuse on women, including pregnant women, throughout the twentieth century.

Societal responses to the latest drug epidemic and its effect on women and infants are mixed. Prosecution, seen as ineffective, is opposed by major medical organizations due to its adverse impact on physician-patient relationships. Putting the child in foster care does not further its best interests, and may be counterproductive. Legalization of drugs presents problems of safety with more addictive drugs such as crack. Drug treatment, combining medical and therapeutic services, education and job training, assistance with housing and day care, and long-term after care, is the most desirable and comprehensive alternative.

Mary M. Kennedy, *Maternal Liability for Prenatal Injury Arising From Substance Abuse During Pregnancy: The Possibility of a Cause of Action in Pennsylvania*, 29 DUQ. L. REV. 553 (1991).

The author explores the expansion of fetal recovery for prenatal injuries in tort, and the abrogation of parent-child immunity in tort. Combining the two, she provides a theoretical basis for a child recovering for injuries caused by the mother's drug use. A difficult element in a negligence action will be the establishment of a duty, and the setting of a standard of care. The first is solved by recognizing that parents have a duty to provide necessities after birth. Indeed, several court cases imply a duty to provide before birth as well. Kennedy expands this legal concept to in-

clude not just necessities, but a duty to prevent injury. As for the standard of care, it must balance the mother's rights against the child's interests in not being subjected to unreasonable risks *in utero*. Kennedy does not agree with the standard of a "reasonably prudent expecting parent," since such a standard is highly subjective and prone to varying interpretations by race, class, and culture. Rather, she proposes a "gross negligence" standard as the best balance between mother and child, supporting liability only where the cost of the harm is high, and the cost or difficulty of avoidance is low. She contends further that such a law is not sexually discriminatory, as it is based on the woman's status as a parent, and not on her pregnancy *per se*. Kennnedy's legal standard would be no different than other laws which restrict illegal or socially undesirable conduct for the protection of others.

Mary M. Kocsis, *Pregnant Women Abusing Drugs: A Medical-Legal Dilemma*, 37 MED. TRIAL TECH. Q. 496 (1991).

After reviewing psychological data, the Article holds that *Roe* should be the standard framework for any legal remedies. Courts should not create any civil tort damages for prenatal injury due to drug use. The potential compensation is small compared to the harm, but few (if any) of the women would have the requisite insurance to subsidize awards. Criminal liability is unhelpful, as it deters treatment, and compromises the physician-patient relationship. The best solution is greater accessibility to drug treatment programs, better prenatal care, and education of the dangers of drug use to the fetus.

Dawn Marie Korver, *The Constitutionality of Punishing Pregnant Substance Abusers Under Drug Trafficking Laws: The Criminalization of a Bodily Function* 32 B.C. L. REV. 629 (1991).

Korver criticizes prosecutors who charge women with delivering drugs to their newly-born infants via the umbilical cord. This practice, while successful in several instances (notably the *Johnson* case in Florida), contradicts Supreme Court rulings which outlaw punishment of addiction as a status. If unchecked, prosecutions could extend to legal substances such as alcohol and tobacco, and may in the end drive pregnant addicts underground. In any case, prosecution will not prevent harm to the fetus, which is (or should be) the state's ultimate goal.

Deborah Krauss, *Regulating Women's Bodies: The Adverse Effects of Fetal Rights Theory on Childbirth Decisions and Women of Color*, 26 HARV. C.R.-C.L. L. REV. 523 (1991).

Two major manifestations of the expanding "fetal rights" movement today are forced obstetrical procedures (such as unwanted caesarian sections) and increasingly frequent prosecutions of women using drugs during pregnancy. Krauss abandons this rights-based approach as destructive and misleading, and instead takes a social-science approach, which focuses on the impact of these trends on low-income minority women. Such women are almost unanimously seen as poor mothers, making prosecutions easier. And since many prosecutors are elected, they can make favorable headlines in the war on drugs without threatening the white middle class. The fetal-rights basis for these interventions is flawed in two respects. First, it is grafted onto situations clearly not designed to accommodate the unborn, i.e., child abuse. Second, the argument assumes that the only way to advance fetal rights is to curtail the mother's, where in fact the two may have very similar interests in health. Prosecutions should be forbidden, or at a minimum, strict guidelines issued limiting their use. Low income women need better information and health care to make informed decisions about the conduct of their pregnancies.

Catherine Kyres, *A 'Cracked' Image of My Mother/Myself? The Need for a Legislative Directive Proscribing Maternal Drug Abuse*, 25 NEW ENG. L. REV. 1325 (1991).

Existing child abuse or drug-trafficking laws are inadequate and may cause courts to abandon judicial restraint in straining definitions to support prosecution. New legislation is clearly required. Kyres presents a model criminal statute, which she argues should be enacted in conjunction with better educational campaigns and upgrading of treatment and prenatal care facilities. The law is aimed at promoting rehabilitation over incarceration; a woman is not liable until she knows of her pregnancy, and by seeking treatment or prenatal care she may be entitled to clemency. Although under *Roe* the woman has a right to privacy, a state might, after the first trimester, act to prevent reckless behavior; thus, the statute would not violate *Roe*, as interpreted by *Webster*. The state would be justified under its *parens patriae* power in stopping the conduct when the mother is unable to stop on her own.

Marcia Levine, *The Right of the Fetus to be Born Free of Drug Addiction*, 7 U.C. DAVIS L. REV. 45 (1974).

Levine authored one of the earliest works on the problem, appearing before most case law on the subject. Levine presages many of the current issues in litigation by calling for inclusion of fetal neglect into general child-abuse laws and the right of the child to be born with a sound body. The state can use its *parens patriae* power to ensure the fetus is not harmed, even to the point of forced detoxification.

Kristen R. Lichtenberg, *Gestation Substance Abuse: A Call for a Thoughtful Legislative Response*, 65 WASH. L. REV. 377 (1990).

This Comment calls for states to follow the *Roe v. Wade* trimester approach in dealing with prenatal drug exposure. States would not be able to intervene until after the first trimester; during the first trimester, the mother would owe no legally cognizable duty of care to her fetus. Drug and alcohol abuse should also be treated equally under the law. Civil commitment and involuntary treatment are to be preferred over criminalization.

Natasha Lisman, *Substance Abuse During Pregnancy: A Case for State Intervention to Protect Children from Prenatally Caused Harm*, 34 BOSTON B.J. 26 (1990).

Lisman proposes a conventional child abuse approach to the problem as being more protective of parents' rights, both procedurally and substantively. This view would avoid inherent constitutional conflicts, would define the limits of state power, and would also eliminate illogical distinctions in the perinatal drug abuse dilemma (i.e., whether viability or birth is the earliest point of allowable state intervention).

Paul A. Logli, *The Prosecutor's Role in Solving the Problems of Prenatal Drug Use and Substance Abused Children*, 43 HASTINGS L.J. 559 (1992).

Logli, the State's Attorney for Winnebago County, Illinois, gives the other side of the story—that of the prosecutor charged with enforcing the law. It is a role often criticized by commentators, and Logli seeks to dispel myths about it.

Prosecutors are not allowed the luxury of declining involvement in a case merely because they lack the resources; in fact, given the high correlation between drug use and child abuse, it may be more harmful to do nothing. Many do their best, wading

through a mountain of conflicting social, medical, and public policy.

Logli admits the need for legislation on perinatal abuse to make it easier to define the state's role in the courts. The primary aim of legislation should be rehabilitative, not punitive, with all efforts made to persuade the woman to voluntarily undergo treatment (and a coercive clause if she did not). A multidisciplinary approach is needed, combining professionals in the law, medicine, treatment and social services.

Lee Ann Lowder, *How to Save the Children*, 14 FAM. ADVOC. 28 (1991).

Aimed at practicing attorneys who may encounter this problem in their work, this Article offers an overview of the considerations for an attorney who may find himself appointed as *guardian ad litem* for a drug-exposed child. Points covered are the possibility of parental treatment, parental ability to care for the child, and terms for a protective order releasing the newborn into the parent's care.

Doretta M. McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505 (1990).

Prosecuting women for drug use during pregnancy under general child abuse laws raises a variety of problems, but chiefly ones of notice and judicial usurpation of the legislative function to define crimes. Such prosecutions punish a woman for her status as a drug addict, which is forbidden by the Supreme Court. McGinnis posits that courts punish involuntary behavior by the woman, engender a loss of respect for the system, discourage treatment, and may ultimately be unenforceable. Non-discriminatory treatment programs offering home-based care are the preferred solution.

Molly McNulty, *Combating Pregnancy Discrimination in Access to Substance Abuse Treatment for Low-Income Women*, 23 CLEARINGHOUSE REV. 21 (1989).

Although half of the nation's alcoholics and a sizable number of its drug addicts are women, current treatment programs are overwhelmingly male-oriented, and many categorically exclude pregnant women. Federal remedies to challenge this are unavailable; Title VI applies only to racial discrimination in public ac-

commodations, and the Pregnancy Discrimination Act of 1978 applies only to employment. However, state-level remedies are available through the use of local public accommodations statutes and, in some jurisdictions, state equal-rights amendments.

Molly McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277 (1987-88).

The author reviews the growing trend towards state intervention where allegations of drug abuse in pregnancy are made. She argues that for criminal laws, an objective standard or a subjective standard of willful conduct is unworkable. Criminal 'fetal abuse' laws would be void for vagueness, highly restrictive of a woman's liberty, and would violate the equal protection clause by holding women to a higher standard of self-care than men.

Peggy Mainor, *Fetal Protection: Drugs and Pregnancy/The Legal Impact*, 23 MD. B.J. 22 (1990).

Mainor concludes that under Maryland child abuse laws pertaining to drug use by and delivery to minors, prosecution is possible only after the child has been born addicted. She favors prosecution with treatment, rather than jail time, as a mandatory sentence. Mainor also advocates changing Maryland law to allow court-ordered treatment in the third trimester of pregnancy, and declare drug-addicted babies as children in need of assistance.

Sara L. Mandelbaum, *Brief Amici Curiae in Support of Jennifer Clarise Johnson*, 13 WOMEN'S RTS. L. REP. 5 (1991).

This is a verbatim reprint of the brief filed by the American Public Health Association *et al.* in *Johnson v. Florida*, (Fl. Ct. App., Fifth Dist., April 18, 1991). The APHA's position is that Johnson's conviction distorts the plain meaning of the state statute outlawing delivery of illegal drugs to a minor. "Delivery" was not intended to include passage of drugs through the umbilical cord. By threatening incarceration, the conviction is also at odds with public policy encouraging pregnant women to seek prenatal care and drug treatment. The conviction was unconstitutional, violating the Eighth Amendment's ban on cruel and unusual punishment by penalizing a status (drug addiction), and not conduct.

Rebecca Manson & Judy Marolt, Comment, *A New Crime, Fetal Neglect: State Intervention to Protect the Unborn—Protection at What Cost?* 24 CAL. W. L. REV. 161 (1987-88).

The authors examine criminalizing as maternal negligence drug use or simple neglect. They contend that criminalization would be counterproductive, scaring women away from treatment and would also be violative of equal protection, as sex-based discrimination. The author concludes that programs aimed at treatment and prevention would ultimately be more effective.

Wendy K. Mariner, et al., *Pregnancy, Drugs and the Perils of Prosecution*, 9 CRIM. J. ETHICS 30 (1990).

Prosecutions for drug use in pregnancy are, according to the authors, based on a dangerous illusion. Society is not protecting its future generations through it, but rather punishing women as threats to their own children. Prosecutions separate the child from its mother at the time that bonding is most desperately needed.

Prosecutions erroneously assume that women owe a duty to their fetuses that men do not. The source of that duty is never adequately explained. Evidence as to direct causation between drug use and fetal harm is still contradictory. Other factors may contribute to fetal harm—deficits in health care or nourishment. By focusing on drugs, society may be paving the way for greater controls on women's activities, even legal ones, in the future.

Note, *Maternal Rights and Fetal Wrongs: The Case against the Criminalization of 'Fetal Abuse'*, 101 HARV. L. REV. 994 (1988).

This Article utilizes the Supreme Court's abortion rulings to analyze the balance between maternal privacy and state interests in fetal health. Under this approach, broad statutes modeled on general child abuse laws would be held void for vagueness, not tailored narrowly enough to survive a strict scrutiny analysis. More specific laws, describing in detail the types of conduct proscribed, would survive such a test. Laws which outlaw legal acts as harmful (such as the consumption of alcohol) would also probably survive. The author feels such criminal statutes are undesirable, since they tend to infringe on a woman's relationship with her physician, and would "dehumanize" her pregnancy.

Deborah Mathieu, *Respecting Liability and Preventing Harm: Limits of State Intervention in Prenatal Choice*, 8 HARV. J.L. & PUB. POL'Y 19 (1985).

The author explores a child's right to be born with a "sound mind and body" and "not to be harmed." She offers the following guidelines for the state in acting to prevent harm to the fetus: the severity of the harm, its probability of occurrence, the ease with which it can be avoided, the values of the competing interests involved and whether the intervention will cause more harm than it prevents.

Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990).

The author asserts that prosecutions of mothers for drug use during pregnancy afford the fetus more rights than the woman, thus violating equal protection. Additionally, use of "trafficking" laws to prosecute women violates due process. Further, men are never included in such actions raising further discrimination claims. The prosecutions are based on erroneous assumptions that pregnant addicts are indifferent to their fetus' health, and that they willingly choose not to seek available treatment. In fact, the author provides evidence that women are concerned about the effect of their drug use on the fetus but cannot find room in crowded, male-oriented treatment programs. Since any prosecutions will have little deterrent effect, states should provide more funds for early intervention and treatment aimed at pregnant addicts.

John E. B. Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?* 23 DUQ. L. REV. 1 (1984).

The author traces the development of the law towards according the fetus recognition and rights. He argues that, based on case law, there is a duty of care owed to unborn children, and that states may act to uphold this duty and prevent a breach.

John E. B. Myers, *A Limited Role for the Legal System in Responding to Maternal Substance Abuse During Pregnancy*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 747 (1991).

Professor Myers advocates a limited role for criminal prosecutors based on a moral philosophy of a "presumption in favor of liberty." Factors to be considered in evaluating the extent of state protection for the unborn are the seriousness of the harm, its

likelihood of occurrence, balancing the interests involved, as well as the social utility and costs of prosecution. The author proposes a reformed juvenile court system to prevent after birth and before birth harm, with strict guidelines to protect the mother's rights. The philosophical outlook of the reformed juvenile court would be akin to its original mission—providing services, and finding non-adversarial solutions, rather than being a full-blown adversarial body.

James L. Nocon, *Physicians and Maternal-Fetal Conflicts: Duties, Rights and Responsibilities*, 5 J.L. & HEALTH 1 (1990-91).

The author explores the crucial physician-patient relationship which is threatened by fetal-abuse prosecutions. Exploring maternal-fetal conflicts in forced treatment, abortion, toxic work environments, and perinatal drug use, the doctor argues that the proper role of a physician in these cases is to act as an advocate, to participate in decision-making to educate parties of the risks, and to render care. Maternal-fetal conflicts are antithetical to this duty, since they tend to place the responsibility and guilt for pregnancy outcome on women alone, whereas physicians are traditionally concerned with providing care irrespective of guilt to women.

Kathleen Nolan, *Protecting Fetuses from Prenatal Hazards: Whose Crime? What Punishment?*, 9 CRIM. J. ETHICS 13 (1990).

Any moral obligation to ensure the safety of the fetus, based upon responsibility as a parent, would have to fall evenly on women as well as men. The responsibility is owed not so much to the fetus, but rather to the child who will bear the consequences of any harm during gestation. The nature of the moral obligation should encompass only those intentional acts which are either inherently wrong (such as hard drug use), or those which pose a substantial threat of harm.

Any solution will have to proceed with caution, weighing the rights of the woman against a state's interest in preventing drug use (as opposed to alcohol or tobacco use) in pregnancy. Coercion should be seen as an alternative to non-coercive means, and discouraged for its potential for far-reaching intrusions into private areas in the name of "morality."

Michelle Oberman, *Sex, Drugs, Pregnancy and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505 (1992).

Oberman criticizes current practices in reporting and prosecuting perinatal substance abuse cases as gender-based discrimination. Pregnant addicts bear the brunt of this discrimination, as they lack access to family planning and drug treatment services. Laws requiring testing of women and infants for drugs contribute to the oppression of women and drive them away from seeking cures through treatment. The proper method of solving the problem is through enhanced drug abuse treatment and prenatal care.

Lynne M. Paltrow, *When Becoming Pregnant is a Crime*, 9 CRIM. J. ETHICS 41 (1990).

Prosecutions of pregnant women deter women from receiving needed health care and treatment and are discriminatory on the basis of race and sex. They do little to further the cause of justice and may raise questions of prosecutorial ethics. Laws to criminalize drug use in pregnancy, if passed, would likely fail a strict scrutiny test utilized when a fundamental privacy right is involved.

Hon. Tom Rickhoff & Cukjat, *Protecting the Fetus from Maternal Drug and Alcohol Abuse: A Proposal for Texas*, 21 ST. MARY'S L.J. 259 (1989).

The authors argue for the expansion of existing abuse laws to protect the fetus, but not beyond those of live-born children. They believe that the Texas reporting statute (Fam. Code § 34.02) should be widened to include reports of maternal drug and alcohol abuse by a pregnant woman. Physician-patient privileges would thus be voided. The mother, after conviction, would be forced by the court to undergo treatment. If she refused, her parental rights would then be terminated by the court on the grounds of "fetal abuse". The authors would, though, limit this far-reaching intervention to cases where the drug use poses a "substantial risk of severe impairment or death" of the fetus.

Karen K. Renshaw, *A Civil Approach to a Controversial Issue: Minnesota's Attempt to Deal with the Mothers of 'Cocaine Babies'*, 11 HAMLINE J. PUB.L. & POL'Y 137 (1990).

The author presents a review and analysis of Minnesota legislation passed in 1989 which covers testing, reporting and treating

perinatal substance abuse. She concludes that, while not perfect, the legislation is a good effort at a collaborative solution by the state's various welfare agencies.

Dorothy E. Roberts, *Punishing Drug Addicts who have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

In a well-researched, historically-minded and thoughtful Article, Professor Roberts argues that punishment for neonatal addiction falls disproportionately on poor black women. She finds this is a result of a systematic and institutionalized devaluation of black motherhood having its origins in slavery, where reproductive autonomy was subverted to commercial concerns over capacity to breed. Prosecutions today continue that trend, imposing a racist standard for procreation which violates both privacy and equality.

John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983).

In an Article exploring the scope of the right to procreate, Professor Robertson touches on maternal/fetal conflicts in pregnancy management. He states that if a woman chooses to forego the abortion option, then she has a duty to avoid injury to her fetus. Any breach of this duty would subject her to state intervention and regulation.

Bonnie I. Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745 (1990).

This Article takes a new approach to the problem of state-ordered removal of drug-exposed infants from their mothers, which often occurs at birth. In the author's view, the new framework of intervention which focuses on prospective future harm to the child, as opposed to actual ability of the mother to care, is entirely misplaced. The state may remove the child, but places it in a overtaxed and flawed foster-care system. She argues for leaving the child in its mother's custody, arguing that there is no overwhelming correlation between prenatal drug use and inability to parent in general. She feels that courts and welfare agencies should concentrate on the mother's actual ability to care for the child with treatment and lays out detailed guidelines for early intervention by state agencies, including screening and report-

ing, with consideration of maternal risk factors other than drug use.

Tiffany M. Romney, *Prosecuting Mothers of Drug-Exposed Babies: The State's Interests in Protecting the Rights of a Fetus Versus the Mother's Constitutional Rights to Due Process, Privacy and Equal Protection*, 17 J. CONTEMP. L. 325 (1991).

The author argues that prosecutions to punish mothers using drugs during pregnancy is constitutionally unsound. Women are given no notice that their conduct is criminal, and are punished for their pregnant status. Practical considerations also weigh against prosecution—the unavailability of treatment and the deterrence of women from seeking prenatal care. The prosecutions also fall disproportionately on poor minority women. The threat of prosecution should be abolished, and emphasis given to treatment and prevention instead.

Laurie Rubenstein, *Prosecuting Maternal Substance Abusers: An Unjustified and Ineffective Policy*, 9 YALE L. & POL'Y REV. 130 (1991).

Seeing the problem of substance-exposed children as akin to a Rorshach ink blot, where subjective viewpoints produce varying interpretations, Rubenstein contends that *in utero* drug exposure is but one of a myriad of ills that plague these children. Lack of prenatal care, poor socialization due to continued parental drug use, poverty and violence all contribute to handicap these children, and may also lead to the mother's drug use. Additionally, since there is not a complete correlation between maternal drug use and biological harm, the focus of prosecutors on this one aspect seems particularly erroneous. Prosecutions will not coerce women into getting treatment when they are shut out of programs either by numbers or by sex. They will in fact make women less willing to seek prenatal care, and be less than candid about their drug use to their doctors when they do receive it. Meeting this widespread problem requires comprehensive treatment programs designed specifically for these women.

Nancy Ruhle, *Perinatal Substance Abuse: Personal Triumphs and Tragedies*, 43 HASTINGS L.J. 549 (March 1992).

Ruhle, a public health nurse in Santa Clara County, California, offers the perspective of the health-care worker dealing with the problem of perinatal abuse every day. She gives portraits of six

women, each of whom she dealt with personally. Their stories run the gamut from tragedy to recovery, and are an instructive lesson for those wanting to expand their knowledge of the subject beyond the legal opinions and clinical studies.

Kathryn Schierl, Note, *A Proposal to Illinois Legislators: Revise the Illinois Criminal Code to Include Criminal Sanctions against Prenatal Substance Abusers*, 23 J. MARSHALL L. REV. 393 (1990).

The author advocates criminalization of prenatal substance abusers as an alternative to ineffective education and voluntary treatment campaigns. In order to attack the problem, statutes which address the problem of drug-addicted newborns are needed. The state's police power to ensure public welfare overrides any privacy or autonomy interests of the mother. The author also proposes criminal legislation for prenatal substance abusers in Illinois.

Nancy K. Schiff, *Legislation Punishing Drug Use During Pregnancy: Attack on Women's Rights in the Name of Fetal Protection*, 19 HASTINGS CONST. L.Q. 197 (1991).

The 'fetal rights' debate as applied to drug use during pregnancy takes the form of a three-pronged attack: criminalization, testing of pregnant women for drugs, and removal of children from the mother's custody due to her drug use. Schiff points out that laws proposed and defeated in four states would have imposed much harsher sentences for pregnant women than for others convicted of the same crime. Testing laws impinge upon the Fourth Amendment's guard against unreasonable search and seizure, and the reasonable expectation of privacy in medical records and may also violate the right to privacy needed for medical treatment. Testing can also be struck down under the Equal Protection clause, which bars facially neutral statutes being applied in a racially discriminatory manner. New custody laws that remove children from their mothers when drug exposure is shown may contravene procedural due process, and foster sexual discrimination because drug use by men is not mentioned.

The author argues that to counter these deficiencies, treatment should be made available to women regardless of race or financial status. State legislatures should outlaw reporting of positive drug test results to authorities, and child-neglect laws should be amended to include in-depth parental fitness investigations before children are removed from their mothers.

Lee A. Schott, *The Pamela Rae Stewart Case and Fetal Harm: Prosecution or Prevention?*, 11 HARV. WOMEN'S L.J. 227 (1988).

Schott provides a detailed analysis of the *Stewart* case, which is valuable because the decision itself is an unpublished municipal court opinion. Schott criticizes the decision's *dicta* which would allow narrowly-drawn laws to combat perinatal abuse, especially in regards to causation of harm, complete submission of the mother to medical judgment, and the inequities present in the prenatal care system which tilt the balance against poor women like Stewart. The author concludes by arguing that the ultimate decision about how to conduct her life and pregnancy should be left to the woman; but she ought to have available prenatal and health care services which would aid her in making better decisions.

Margery W. Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEG. MED. 63 (1984).

Shaw advocates a strict fetal-focus approach in weighing the conflicts between maternal and fetal rights. She concludes that the mother owes a duty of care to her unborn child, and that every possible step should be taken to protect the child by the mother, or by the state if she should fail in her duty. Shaw would give courts broad powers to order treatment for parents, and impose penalties should they engage in behavior harmful to the fetus.

Barbara Shelley, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 DICK. L. REV. 691 (1988).

The Article reviews the trends towards protection of the fetus in tort and criminal law, and then looks at the balancing between fetal and maternal rights. It concludes with a plea for criminalization, since civil tort remedies are inadequate. The Article also points out that the abolition of parental immunity and state interests after a woman forgoes the abortion option both support criminalization.

George P. Smith II, *Fetal Abuse: Culpable Behavior by Pregnant Women or Parental Immunity?*, 3 J. LAW & HEALTH 223 (1988).

Smith takes a view which favors fetal rights over the mother's. He argues that parental immunity, or privacy, must give way to the child's interests in good health at birth. Several analogies are used to support this reasoning, including tort considerations allowing for recovery due to prenatal injury by the parents, and

contractual duties not to harm a fetus imposed on surrogate mothers (which should be extended to all pregnant women). Smith further favors prosecution of women who use drugs during pregnancy, and forced sterilization for those who are repeat offenders.

11 YOUTH LAW NEWS. 1 (1990) (Special Issue on Drug Exposed Infants).

A wide range of topics concerning drug exposed infants are covered, from physiological handicaps to responses of an overburdened child protective service system.

Brian C. Spitzer, *A Response to 'Cocaine Babies'—Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent*, 15 FLA. ST. U. L. REV. 865 (1987).

Florida's legislation, the first of its kind in the nation, which makes drug dependent newborns "neglected children," is reviewed in depth. Spitzer applauds the bill, especially since criminal prosecution was dropped in favor of civil actions. One flaw in the bill was the exclusion of fetal alcohol syndrome and legal drug toxicity.

Joyce Lind Terres, *Prenatal Cocaine Exposure: How Should the Government Intervene?*, 18 AM. J. CRIM. L. 61 (1990).

Under the *parens patriae* and police powers, a state may intervene to prevent harm to an unborn child after viability. Criminal laws may place greater punishment on a pregnant woman for ingestion of drugs than a non-pregnant woman. Pregnant women may not have the requisite intent to be culpable under criminal laws. Child protection services are also inadequate to handle the glut of drug-exposed infants, without more funding and the backing of medical and social service agencies.

Ellen L. Townsend, Note, *Maternal Drug Use During Pregnancy as Child Neglector Abuse*, 93 W. VA. L. REV. 1083 (1991).

This Note reviews case law on the subject, and possible constitutional objections, i.e., privacy, autonomy and bodily integrity. The Note argues for the least restrictive alternative in sentencing, by making women enter treatment programs designed to meet their needs. This would serve the state's compelling interest in fetal and neonatal health, by making it less threatening for women to seek treatment and prenatal care before birth.

Rebecca S. Trammell, *Fetal Rights—A Bibliography*, 10 N. ILL. U. L. REV. 69 (1989).

Covering a wider topic than addressed here, this bibliography lists 102 articles dealing with fetal rights in regard to not only prenatal drug exposure, but also forced medical treatment, tort recovery for prenatal injuries, and corporate fetal protection laws.

Elizabeth L. Thompson, *The Criminalization of Maternal Conduct During Pregnancy: A Decision-Making Model for Lawmakers*, 64 IND. L.J. 357 (1988-89).

Thompson compares the benefits of criminalization (individual and general deterrence) to the costs (deterring valuable conduct such as seeking prenatal care, intrusions into the family, and the costs of enforcement). The costs, she concludes, make enforcement of neglect laws by prosecution a marginal proposition at best, which avoids the ultimate solution of treatment and prenatal care to keep the situation from arising in the first place.

Heather M. White, Note, *Unborn Child: Can You Be Protected?*, 22 U. RICH. L. REV. 285 (1988).

Beginning with the proposition that personhood for a fetus is consistent with current legal trends and good public policy, White uses forced-treatment cases to show that prevention of possible harm to a fetus may overcome a woman's privacy and autonomy rights. However, holding to *Roe*, such an intervention may occur only after viability.

Michelle D. Wilkins, Note, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401 (1990).

Prosecutions for prenatal drug use are of questionable constitutionality and social utility. They may strain definitions of child abuse and drug trafficking laws, and interfere with rights to reproductive and personal autonomy. New laws tailored to prevent prenatal abuse of illegal substances may be constitutional under strict scrutiny, but laws which attempt to restrict use of legal drugs (namely alcohol) present a different case. They may be difficult to enforce, and may punish women who drink, but are unaware of their pregnancy. Even if constitutionally proper, punitive measures fail to prevent harm to the fetus and may even ensure it by discouraging prenatal care and treatment. The only real solu-

tion is better-financed and widely-accessible prenatal care and treatment for pregnant addicts.

James M. Wilton, *Compelled Hospitalization and Treatment During Pregnancy: Mental Health Statutes as Models for Legislation to Protect Children from Prenatal Drug and Alcohol Exposure*, 25 FAM. L.Q. 149 (1991).

Wilton states that current child abuse laws do not allow for state intervention before birth to prevent harm to the fetus from the mother's drug or alcohol use; such laws were not designed to cover fetal health, and in any event they totally ignore a woman's right to bodily integrity. He advocates patterning future legislation on mental health laws which allow for involuntary commitment to treat the woman while she is pregnant. This approach would be more cognizant of the woman's rights by allowing an adversary hearing, satisfying procedural due process.

Lousie B. Wright, Note, *Fetus v. Mother: Criminal Liability for Maternal Substance Abuse During Pregnancy*, 36 WAYNE L. REV. 1285 (1990).

By distinguishing the prenatal abuse situation from abortion, the state might be able to intervene to protect the fetus. The mother's interest here is not whether to have the child, but rather her decision to use illegal substances with no medicinal benefit, which does not implicate any fundamental privacy right. As a consequence, any criminal laws would not be subject to strict scrutiny. However, criminalization should not be the first option, as it may discourage women from seeking prenatal care and treatment for drug addiction.

Gwen Wurum & Walter Lambert, *Kids, Crack, Courts and Custody: The View of Two Pediatricians*, 64 FLA. B.J. 36 (1990).

The authors of this short piece, child development specialists, believe that lawyers and courts must understand child development and needs before they attempt a solution. Drug use by the mother is only one factor, even if the child tests positive for drugs at birth. Socioeconomic factors play a crucial role in a child's emotional and intellectual growth, and may be tied to the mother's drug use. For that reason, the goal of keeping families together in custody actions may be more harmful than helpful in the absence of other measures which attack the socioeconomic woes of the family. The authors suggest, as an example, a resi-

dential drug treatment program for mothers, keeping them out of the environment which spawned the habit in the first place.

Judith Larsen et al., *Medical Evidence in Cases of Intrauterine Drug and Alcohol Exposure* 18 PEPP. L. REV. 279 (1991).

This Article provides an overview of medical indicators that can reveal prenatal drug and alcohol exposure which is used in child abuse and neglect cases litigated in family court. The author discusses the legal differences between drug and alcohol tests for infants and their mother. Also, the distinguishing neonatal responses to narcotic, cocaine, and alcohol substance are analyzed. Finally, the author examines releases of confidentiality for medical records in these neglect cases as compared to the protection offered through drug and alcohol laws on federal and state levels.

Ellen M. Barry, Note, *Pregnant, Addicted and Sentenced*, 5 CRIM. JUST. 23 (1991).

This Note discusses the growing trend toward incarcerating pregnant women who are addicted to drug or alcohol at the time of sentencing. The author attempts to dispel several myths that are commonly regarded as true based on the false premise that incarceration guarantees better maternity care. A proposal to focus on treatment and recovery of these addicted pregnant women, instead of punishment, is recommended.

Robert Holland, Note, *Criminal Sanctions for Drug Abuse During Pregnancy: The Antithesis of Fetal Health*, 8 N.Y.L. SCH. J. HUM. RTS. 415 (1991).

The author discusses the problem of imposing criminal sanctions against women who use illegal drugs during pregnancy. He suggests that the threat of punishment will discourage women from obtaining prenatal care and risk having their drug use detected by the physician. Likewise, a woman using drugs during the first trimester of her pregnancy might decide to abort in order to avoid sanctions. In either case, the result is against the interests of the mother, the child and the state. The author recommends the use of educational programs targeted at likely drug users, along with federal funding for prenatal care and drug treatment programs.

Jennifer M. Mone, Note, *Has Connecticut Thrown Out the Baby With the Bath Water? Termination of Parental Rights and In Re* Valerie D., 19 FORDHAM URB. L. J. 535 (1992).

The author discusses the recent trend toward what she considers to be the premature termination of parental rights in instances of children born to habitual drug users. Highlighted is the case of *In Re* Valerie D., 25 Conn. App. 586, 595 A.2d 922 (1991), in which a mother, despite warnings of doctors and social workers, injected cocaine during the last stages of her pregnancy. The court ruled that it was in the best interests of the child to terminate parental rights immediately, rather than waiting a year, as is standard practice. The author argues that such drastic action deprives the mother of the right to reform and makes the child a permanent ward of the state. She recommends that the state look to the best interests of the child as well as of the state.

James Bopp, Jr., J.D. & Deborah Hall Gardner, J.D., *AIDS Babies, Crack Babies: Challenges to the Law*, 7 ISSUES L. & MED. 3 (1991).

This Article examines the legal issues generated by the increasing numbers of HIV-infected and crack-exposed infants. The authors begin by exploring the epidemiology diagnosis and prognosis of pediatric HIV-Infection and prenatal cocaine exposure. The authors then review the Constitutional, federal and state protections available to disabled infants and the problems that occur when applying these protections to HIV-infected and crack-exposed infants. In conclusion, the Article emphasizes the need to reexamine the current laws to assure maximum protection of these infants.

Kary L. Moss, *Forced Drug or Alcohol Treatment for Pregnant and Postpartum Women: Part of the Solution or Part of the Problem?* 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1 (1991).

In this Article, the author discusses states' handling of women arrested and charged with drug use while pregnant. Prosecutors have been willing to trade submission to treatment for incarceration in an effort to protect the fetus. The author argues that such an agreement will not defer future drug use or promote the health of women or their children. Forced treatment denies pregnant women the right to refuse medical treatment. The author concludes that this is not a problem for the criminal justice system but rather a problem for the health care system.