No (Pregnant) Woman is an Island: The Case for a Carefully Delimited Use of Criminal Sanctions to Enforce Gestational Responsibility

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NO (PREGNANT) WOMAN IS AN ISLAND: THE CASE FOR A CAREFULLY DELIMITED USE OF CRIMINAL SANCTIONS TO ENFORCE GESTATIONAL RESPONSIBILITY†

I. INTRODUCTION

THE STATISTICS are terrifying. An estimated 375,000 children are born each year in the United States who have been exposed to illegal drugs prenatally, and that number may grow to several million per year by the turn of the century. Another 5,000 babies per year are born with fetal alcohol syndrome (FAS) and still another

† This paper was written under the supervision of Maxwell J. Mehlman, Professor of Law, Case Western Reserve University School of Law. Special thanks goes to Mr. Allan Hutt for his support and patience.

1. Clifford, Bill Would Help Drug Moms, Kids, Newsday, June 13, 1990, at 2; (citing a congressional study entitled “The Enemy Within: Crack-Cocaine and America’s Families,” which estimates there will be between 500,000 and four million drug-impaired infants born annually by the year 2000); Wagner, Cost of Maternal Drug Abuse Drawing Notice, Modern Healthcare, March 26, 1990, at 21 (citing a 1988 study by the National Association of Perinatal Addiction Research and Education, which found that eleven percent of women delivering babies in thirty-six hospitals were substance abusers). This finding, when applied to the 3.8 million births annually in the United States, translates into the 375,000 figure often quoted. Individual hospitals report widely varying percentages of pregnant substance abusers. See Houtz, Mother’s Drug Use Afflicts Infants in Snohomish County, Seattle Times, Oct. 15, 1990, at A1 (University of Washington study found that 9% of women delivering babies at four Seattle hospitals admitted to using cocaine); Lee, Pregnant Drug Abusers Find Hope in Program, N.Y. Times, Dec. 17, 1990, at B3, col. 1 (reporting that 12% of new mothers in Harlem used drugs during pregnancy); Give Junkie Moms Treatment, Not Jail, USA Today, Oct. 23, 1990, at 10A (study in Fairbanks, Alaska, showed that 14.2% of the babies born there were born to mothers who used illegal drugs during pregnancy); Skolnick, Drug Screening in Prenatal Care Demands Objective Medical Criteria, Support Services, 264 J. A.M.A. 309 (1990) (study of 1,088 patients who delivered in the Medical Center of Delaware, Newark, showed that 15.9% were substance abusers); Kirk, Committee OKs Reporting of Drug-Addicted Babies, United Press Int’l., July 11, 1990 (wire copy) (Philadelphia Perinatal Society reported that 16% of women giving birth in Philadelphia use cocaine); Gilliam, Putting Our Children First, Wash. Post, Sept. 20, 1990, at B3 (two Washington, D.C. hospitals report that 18% to 32% of pregnant women admitted to drug use); McNamara, Snared By Drugs, Haunted by Loss; Birth in the ‘Death Zones’, Boston Globe, Sept. 12, 1990, at 1 (reporting that 18% of mothers delivering at Boston City Hospital used cocaine during pregnancy); Beyette, A Second Motherhood, Family: As Their Own Children Fight Addiction, Grandmothers Take a Course on Caring for Babies Prenatally Exposed to Drugs, L.A. Times, June 24, 1990, at 1E, col. 2 (reporting that 40% of babies born at Charles Drew-Martin Luther King Jr. General Hospital in Los Angeles test positive for drug use).

2. Doctors Criticized on Fetal Problem, N.Y. Times, Dec. 11, 1990, at B10, col. 6 [hereinafter Fetal Problem] (citing National Council on Alcoholism and Drug Dependence statis-
35,000 a year arrive exhibiting "alcohol-related birth defects."\(^3\)

The effects of the drugs and alcohol on these children are equally nightmarish.\(^4\) In the first three months of gestation in a woman using cocaine the vital organs of the fetus may be deformed.\(^5\) Further, there is evidence that the fetus incurs the worst damage from maternal cocaine use during the last trimester of gestation, when the its brain fails to grow properly and the central nervous system is harmed.\(^6\) The fetus within the cocaine-using woman is at risk for intrauterine strokes, premature birth, and low birth weight; and the resulting newborn often suffers from physical, mo-
tor, and emotional developmental problems and is ten times more likely to die of crib death. In addition, the baby born drug-impaired is at extreme risk of physical abuse by parents or caretakers who cannot cope with the kaleidoscope of problems presented by the child.

The agony for the cocaine-impaired child is not short-lived. A study of 263 such children in the Chicago area, two years after birth, revealed that the children had “great difficulty organizing their responses to their surroundings”; scored lower on tests for ability to concentrate, interact with others, and play by themselves; showed emotional flatness (no strong feelings of any kind); and displayed symptoms similar to mild autism.

FAS can be identified by its victims’ characteristic facial abnormalities (small head circumference, small or slitted eyes, shortened nose, and flattened mid-face), which diagnosing doctors refer to as

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8. Effectiveness of the Administration’s Drug Strategy One Year After Its Creation: Hearing Before the Senate Judiciary Committee (Sept. 6, 1990) (statement of Joe Biden, Chair)"The bad news is that because of the particularly serious problems relating to the inability of a child to bond with a parent, as a consequence of being born addicted, that not only is there a problem at that moment and potentially a problem for the long-term development of the child, but they find that very child back in the emergency room a week, a month, a year, two years later, because the parents, whether or not they’re still on drugs, cannot handle the incessant crying, the inability to relate, on the part of the child born to drugs, and beats the living hell out of that child out of frustration, anger, hatred—whatever reason").

9. Blakeslee, Crack’s Toll Among Babies: A Joyless View, Even of Toys, N. Y. Times, Sept. 17, 1989, at 1, col. 2. Autism is a disease characterized by self-absorption, especially extreme withdrawal into fantasy. RANDOM HOUSE DICTIONARY 55 (1980). Researchers helping to prepare the New York City school system for the flood of drug-impaired youngsters it expects to have to bond with a parent, as a consequence of being born addicted, that not only is there a problem at that moment and potentially a problem for the long-term development of the child, but they find that very child back in the emergency room a week, a month, a year, two years later, because the parents, whether or not they're still on drugs, cannot handle the incessant crying, the inability to relate, on the part of the child born to drugs, and beats the living hell out of that child out of frustration, anger, hatred—whatever reason").

the FLK ("funny-looking kid") syndrome. Between 30 and 59 percent of children born with FAS have heart problems, as well as organ, joint, and limb malformations. FAS also produces intrauterine growth retardation, particularly in the third trimester of gestation, leading to low birth weight, increased infant mortality, impeded motor development, speech problems, mental retardation, hyperactivity, and slow growth after birth. Maternal consumption of alcohol is one of three leading causes of mental retardation in the United States.

The cost for caring for these impaired infants and children is enormous. It is estimated that the initial cost of caring for the 100,000 crack-impaired babies (out of the 375,000 estimated total of drug-impaired) is $20 billion per year, and that the annual cost of caring for the estimated 8,000 FAS babies totals about a third of a billion dollars. In addition, cost for the specialized education needed by these children currently amounts to more than $18,000 per year, per child, four-and-one-half times as much as for non-impaired children. The loss to the country in terms of these future adults' inability to successfully enter the work force or provide for their own daily needs is incalculable.

Separating the drug-impaired newborns from their mothers via custody or dependency hearings has become a growing norm in many jurisdictions. Recently, however, the generals in the "War on Drugs," the prosecutors, have added a new weapon to their arsen-

12. Id., at 1213 (citing E.L. Abel, supra note 11, at 83).
13. Id., at 1214 (citing Gal & Sharpless, Fetal Drug Exposure—Behavioral Teratogenesis, 18 Drug Intelligence & Clinical Pharmacy 186, 188 (1984)).
14. Wagner, supra note 1 (citing a report by the inspector general's office of the Health and Human Services Dept). This total includes "costs of delivery, perinatal care and foster care, as well as developmental, educational and additional health services for the children through age 5. See also, Hoye, Fear of Jail Keeps Pregnant Addicts from Seeking Help, Ariz. Daily Star, Sept. 28, 1990, at 1B, col. 1. The annual cost of the hospital bills for treating drug-impaired babies alone amounts to $21 million in Florida, $60 million in Illinois and $1 billion in California.
17. Typical of this trend is Ventura County, California, where the county's social services department's record of asking for court custody of newborns jumped from seven in 1985
nal, aimed at combating prenatally drug- and alcohol-impaired children. Using a tactic which apparently is supported by a majority of the people in the United States, several dozen women have been charged with an assortment of criminal offenses for using illegal drugs or alcohol during their pregnancies.

The move to criminalize prenatal maternal behavior has been criticized by feminists, medical groups, and civil libertarians. On the other hand, some commentators have argued that many more activities of pregnant women should hold the potential for criminal sanctions. There seemingly is no middle ground between the view that criminalization is not only futile but invades women’s most precious Constitutional rights and the opposing view that women, by conceiving and/or failing to abort their fetuses, forfeit their claims to rights of privacy and personal autonomy and assume a legal duty to deliver whole and healthy babies.

This paper is an attempt to explore the neglected middle ground, to answer the question of whether legislation can be written that responds, constructively, to the horrors visited on children by the use of drugs and alcohol pre-birth by their mothers and yet pays due regard for the delicate, intimate territory into which the lawmakers propose to tread.

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18. Although criminal charges were brought (unsuccessfully) against a substance-abusing mother as early as 1977 (Reyes v. Superior Ct., 75 Cal. App. 3d 214, 41 Cal. Rptr. 912 (1977)), the attempted use of criminal sanctions against this group of women was rare prior to 1988.

19. Curriden, Holding Mom Accountable, A.B.A. J., March 1990, at 51. (seventy-one percent of 1,500 people in fifteen southern states polled by the Atlanta Constitution favored criminal penalties for illegal drug use by pregnant women which results in injuries to their fetuses).

20. The charges have ranged from “willful failure to provide medical attention to a minor child” (Pamela Rae Stewart, 1986); to involuntary manslaughter and supplying drugs to a minor (Melanie Green, 1989); to vehicular homicide (Josephine Pellegrini, 1989); and to assault with a deadly weapon with intent to kill (Sandra Inzar, 1990). The cases against these women are fully discussed in the section titled “Fledging Attempts at Criminalization of Maternal Behavior,” at pp——.

21. Lewin, Drug Use in Pregnancy: New Issues for the Courts, N.Y. Times, Feb. 5, 1990, at 14, col. 1. Fourteen public health groups and women’s advocacy groups, ranging from the American Public Health Association to the National Organization of Women are backing the appeal filed in the case of Jennifer Johnson, the first woman to be convicted of delivery of drugs to a minor through the umbilical cord. See Page, Jail Is No Solution For This Problem, Chi. Tribune, May 21, 1989, Prospective, at 3 (quoting Lynn Paltrow, the American Civil Liberties Union attorney who defended Pamela Rae Stewart, “Considering the shortage of medical care, threatening drug-addicted women with jail is a cruel hoax”).

To reach an answer to that question, this paper reviews: 1) the reasons for and costs of criminalization; 2) lawmaking difficulties which arise from the type of criminalization proposed; 3) current attempts to criminalize; 4) two opposing views of the Constitutional and common law proscriptions and cautions regarding controls on an individual's (and in particular, a pregnant woman's) behavior; and 5) a possible middle ground approach. Finally, this paper concludes with the components for a model law which carefully balances the rights and realities of the parties involved.

II. RATIONALES FOR AND COSTS OF CRIMINALIZATION

The rationales for criminalization of prenatal maternal behavior are divided along societal and personal interest lines. Society in general has an interest in protecting potential human life; deter:

ring the abuse of drugs and alcohol; exacting retribution from parents whose behavior results in injured children; and reducing the costs of taking care of damaged children.

On a personal level, the soon-to-be child has an interest in being born whole, unimpaired by the drug and alcohol abuse of his or her mother. The woman, too, has an interest in the "wholeness" of her child and in rehabilitation for herself.

The question, of course, is whether criminalization of prenatal maternal behavior addresses any of these concerns. And the answer, just as clearly, is that it depends on the method of criminaliza-

23. Although the historical and/or political underpinnings for the elevation of "fetal rights" are of interest as a backdrop to the issue of criminalization of maternal prenatal behavior, a delineation of those underpinnings is unnecessary to the purpose of this paper. It persuasively has been argued that the move toward recognition of "fetal rights" stems from renovations in tort law; the ability of scientists, by way of biotechnological innovation, to pierce the black veil of the womb and decipher a "person" within; the willingness of Americans to sublimate their Constitutional rights for the good of the "drug war"; an end-run attempt around Roe v. Wade by those of the anti-reproductive-choice persuasion; and/or a new eugenics movement. Supporting material on any or all of these arguments is plentiful. As a start, researchers may wish to review the following: Note, 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 (1988)(hereinafter referred to as Pregnancy Police); Gallagher, Prenatal Invasions & Interventions: What's Wrong With Fetal Rights, 10 HARV. WOMEN'S L. J. 9 (1987); Note, Of Women's First Disobedience: Forsaking a Duty of Care to Her Fetus—Is This a Mother's Crime?, 53 BROOKLYN L. REV. 807 (1987); Murphy, The Evolution of the Prenatal Duty Rule: Analysis by Inherent Determinants, 7 U. DAYTON L. REV. 351 (1982). Suffice it to say, for the purpose of this paper, the sheer numbers of impaired newborns alone is an adequate base from which to launch an exploration of a possible remedy.

tion. For instance, charging a woman with fetal abuse while she is still pregnant and incarcerating her may be a means to the ends of retribution and deterrence (of both the individual woman charged and other women who, without such example, would participate in the criminalized behavior). However, it is unlikely that any of the other interests will be solved by that use of the criminal justice system. Incarceration, typically in jails or prisons which supply no prenatal care or diet and in which the supply of drugs may be as plentiful as on the streets, does nothing to protect the potential human life, reduce the cost of caring for the resulting damaged children, encourage “wholeness,” or facilitate treatment and rehabilitation.

The costs of criminalization also split along the societal-personal line. Any attempt to criminalize the behavior of pregnant women can reasonably be expected to increase the number of abortions performed in this country. Criminalization also will erect another barrier to assuring adequate prenatal care to pregnant women. Fear of being “turned in” by their doctors and convicted by evidence and statements unearthed during prenatal care will keep some women from seeking care. The problems created by incarcerating pregnant women are illustrated by three cases filed in California, alleging deficient health care for the pregnant plaintiff inmates. In one, Louwanna Yeager claimed she was forced to deliver her baby on the floor of the Kern County Jail in Bakersfield after jail officials failed to heed her pleas for help. Yeager v. Smith, No. CV-F-87-493 (E.D. Cal.). In another, the California Institution for Women in 1987 settled a class action suit filed against it by inmates who had been pregnant while at the facility. The institution promised to provide adequate prenatal care. Harris v. McCarthy, No. 85-6002 (C.D. Cal.). In the third case, Doris Mitchell claimed that her jailers refused to give her the methadone prescribed for her and, as a result, her eight-month-old fetus died in utero from the stresses of “cold turkey” withdrawal. Jones v. Dyer, No. H-114154-0 (Cal. Super. Ct.).
from seeking it. Further, this same fear will erode the patient-physician relationship which is essential for properly monitoring the progress of a pregnancy. Another societal cost is the further harm or death to fetuses due to incarceration of their mothers. Last, there are monetary costs for detecting, prosecuting, and punishing drug and alcohol-abusing pregnant women.

At the personal level, the pregnant woman, under any criminalization statute, suffers an invasion of privacy and loss of a certain amount of autonomy and freedom. The right to privacy and personal autonomy is a cornerstone of the American way of life, emanating from the penumbra of the Bill of Rights, and entitled to the deepest respect under the common law. As the United States Supreme Court said in *Botsford*, "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others." The recognition of the right to privacy was reaffirmed in *Roe v. Wade*, in which the court held that a

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29. *Legal Interventions, supra* note 7. ("Pregnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment."); Hoye, *supra* note 14, (quoting the testimony of one former cocaine addict, who told doctors and prosecutors that, "When I found out I was pregnant, I stayed away from any kind of services because of the threat of jail"); Page, *supra* note 17 (quoting Lynn Patrow, American Civil Liberties Union attorney: "[C]ommon sense also tells us that such action (criminalization of prenatal maternal behavior) sends twin messages. One of them is this: Don't do drugs if you're pregnant or you will go to jail. That's the one we want to send. But the other message is: Don't go to a doctor if you're pregnant and doing drugs or authorities will put you in jail as a remedy.").

30. *Don't Punish the Troubled Mothers*, Texas Law., May 28, 1990, at 39, quoting excerpts from ACLU testimony at the May 17, 1990, hearing by the House Select Committee on Children, Youth, and Families, on "Law and Policy Affecting Addicted Women and Their children." ("Florida doctors report that after their pregnant patients learned that they could be reported for drug use, they "could no longer depend on the mothers to tell them the truth about their drug use . . . .").

31. *Legal Interventions, supra* note 7 "Prison health experts warn that prisons are 'shockingly deficient' in attending to the health care needs of pregnant women. Pregnant women in jail are routinely subject to conditions that are hazardous to fetal health . . . .", citing Barry, *Pregnant Prisoners*, 12 HARV. WOMEN'S L. J. 189-205 (1989); Silverman, *Combinations of Drugs Taken by Pregnant Women Add to Problems in Determining Fetal Damage*, 261 J. A.M.A. 1694 (1989). Pregnant women who abruptly and completely stop taking opiates or narcotics after using them for more than the first five months of pregnancy risk complications of their pregnancies, including the total cessation of blood flow to the placenta. *See also supra* note 27.

34. *Id.* at 251.
guarantee of zones of privacy for individuals does exist under the Constitution.

III. GRAPPLING WITH THE DIFFICULT SUB-ISSUES

Criminalization of prenatal maternal behavior presents some special, difficult questions which must be answered. First, what is the applicable stage of pregnancy for criminalization of the behavior and for charging the woman who commits that behavior? Second, how will the state establish a causal connection between the behavior and the harm to the fetus or child? Third, what type of criminal charge will be pressed? And, finally, which activities will be criminalized?

A. Pinpointing a Time for Criminalization and Charging

The state might choose any number of points in the pregnancy as the appropriate trigger for criminalization of behavior. Each implicates the rights of the pregnant woman in a different way. For instance, if conception is the trigger for criminalization of activity, then, as one professor of medical genetics has suggested, a woman should assume that once she has reached the mid-point of her menstrual cycle she is carrying a fetus and plan her activities accordingly.

"Quickening," and "viability," and birth all have been deemed appropriate triggers for increased concern for the fetus by the state in other contexts. Each, in turn, impacts on a woman's autonomy with less force.

36. Shaw, Conditional Prospective Rights of the Fetus, 5 J. OF LEGAL MED. 63, 84 (1984). Cf. Procreative Liberty, supra note 22, at 447: ("If she has reason to know she is pregnant—if, for example, she has been sexually active and has missed a period—but she has not yet had her pregnancy confirmed, it does not seem unreasonable to require her either to have a pregnancy test or to refrain from activities that would be hazardous to the fetus if she were pregnant.").

37. Defined as "to begin to show signs of life." RANDOM HOUSE DICTIONARY 719 (1980); "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 W. BLACKSTONE, COMMENTARIES 129 (1765).

38. Defined as "capable of living; especially said of a fetus that has reached such a stage of development that it can live outside the uterus." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (25th ed. 1974).

39. GA. CODE ANN. § 16-5-80 (1989) (defining Feticide as the killing of an unborn child "so far developed as to be ordinarily called "quick" through the murder or attempted murder of the mother); IND. CODE ANN. § 35-1-58.5-2 (Burns 1905) (restricting abortion after viability); Murphy, The Evolution of the Prenatal Duty Rule: Analysis by Inherent Determinants, 7 U. DAYTON L. REV. 351 (1982) (reviewing tort law as it affects the child who was harmed as a fetus).
Beyond the decision of when the state will declare certain activities criminal, the state also must decide when to charge the woman. Charging a woman in the midst of her pregnancy creates special concerns for her well-being and that of the fetus.\(^4\) However, waiting to prosecute women until after their babies are born eliminates the possibility of preventing or ameliorating damage to the growing fetus.

**B. Questions of Causation**

Criminalization of the behavior of pregnant women also presents some unique problems of establishing a causal relationship to the harm done to the fetus. Three problems in particular stand out. Since developing fetuses are damaged by a myriad of factors, many unknown, the state may have a difficult time proving that the damage to the newly born child was caused by drug or alcohol use.\(^4\) If a woman is charged in the midst of her pregnancy, it may be difficult or impossible to determine if the fetus actually has been harmed by the woman’s actions.\(^4\) Finally, the state may need to argue a rebuttable presumption of prenatal maternal alcohol or drug use in cases where an infant is born damaged but there is no direct evidence of the maternal substance abuse.

**C. Type of Charge and Due Process Concerns**

The state also must determine what type of charge it will use to

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40. See supra note 23.

41. Arbuckle & Sherman, *Comparison of the Risk Factors for Pre-Term Delivery and Intrauterine Growth Retardation, 3 Paediatric Perinatal Epidemiology* 115 (1989) (Canadian study revealing that the predictors for intrauterine growth retardation and preterm delivery included the height and pre-pregnancy weight of the mother; the mother’s education; the sex of the infant; and the household income level); *Protecting Unborn Babies From Lead*, Chi. Tribune, April 1, 1990, at 2. (lead can be absorbed from automobile exhaust and can damage the brain, causing learning problems and retardation in the fetus).

42. *Behavior Varies in Babies Exposed to Cocaine*, N.Y. Times, Jan. 22, 1991, at 3C, col. 1, quoting Dr. Dan Griffith, a developmental psychologist at the National Association for Perinatal Addiction Research and Education in Chicago: “[I]t’s difficult to categorize babies because there are so many different factors affecting the infant all at once.” Dr. Griffith noted that babies exposed to cocaine in the womb also may have been exposed “to other drugs, received little or no prenatal care and suffered from poor maternal nutrition during pregnancy,” all of which have an impact on the prognoses for the children. Id. See also, Griffin, *Early Care Sought For Some Kids*, Chi. Trib., Feb. 27, 1991, Chicagoland, at 4 (noting that drug-impaired babies also are “stunted . . . by the dysfunctional nature of the family into which they are born.”).

43. Note that Diane Pfannenstiel of Wyoming delivered an apparently healthy baby boy, after she had been charged with child abuse for drinking while she was pregnant. *Woman in Fetal Alcohol Case Gives Birth to Healthy Infant*, N.Y. Times, June 17, 1990, at 20, col. 4.
criminalize women's prenatal maternal behavior. Delivery of a controlled substance to a minor, fetal or child abuse, and degrees of homicide all have been used, with varying degrees of success.44

Additionally, the state must decide which activities will be criminalized. A state might make the decision to criminalize maternal use of only those substances which already are illegal (i.e., cocaine). However, the state interest in preserving potential life may be better served by criminalization based on the amount of harm rather than by illegality of use. Incorporated within this decision is the sub-issue of whether to criminalize only commissions, or omissions as well. As an example of the latter, at least one commentator argues that a woman should face criminal sanctions if she fails to submit to genetic testing.45 Also within this question is the scope of the criminalization. Since any number of activities might be harmful to a developing fetus,46 the state must determine which of them should be criminalized.

Finally, a question of due process arises on two fronts.47 First, women must be put on notice that certain behaviors during pregnancy may place them at risk of criminal sanction. Second, it is arguably fundamentally unfair to penalize women for addictions for which treatment is the only possible remedy when that treatment is unavailable to almost all pregnant women.48

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44. These charges are fully discussed in the section titled "Fledgling Attempts at Criminalization of Maternal Behavior" at pp.—.
45. Procreative Liberty, supra note 22, at 449.
46. Shaw, supra note 36, at 83. Prenatal duties early in pregnancy include "regular prenatal checkups, a balanced diet with vitamin, iron, and calcium supplementation, weight control, and judicious use of medications, tobacco, and caffeine." It is not hard to add to that list the abstinence from other possible deterrents to a pregnancy, such as working too hard or in an unhealthy or toxic environment; not getting enough rest; and having intercourse with a spouse, etc. Id.
47. In addition, the question of unequal prosecution now is being raised by civil libertarians. Haines, Sheer Racism Thwarts Efforts to Track Babies Born to Drug-addicted Mothers, United Press Int’l, Dec. 18, 1990 (wire copy), (noting that a study in one county of Florida that showed that while black and white pregnant women tested positive for drugs in the same percentages, black women were ten times more likely to be reported for that use). See also, Stone, Prosecutors Focus on Drug Use, Pregnancy, USA Today, Feb. 26, 1990, at 3A, (study by the American Civil Liberties Union tracked forty women who were prosecuted for prenatal maternal behavior. Of those forty, twenty-six were black, one was Hispanic, and six were white).
48. Hoffman, Pregnant, Addicted—and Guilty?, N.Y. Times, Aug. 19, 1990, Section 6, at 34, col. 1, citing a survey of New York City’s drug treatment programs by Dr. Wendy Chavkin, Columbia University School of Public Health, that showed that 54% excluded pregnant women and 87% would not take women whose costs were being paid by Medicaid or any other public program; also quoting Barbara A. Klingenmaier, Muskegon County, Michigan, foster-care supervisor, who said that Medicaid will only pay for seventeen days out of a typical twenty-eight-day recovery program. Also see, Drug-Exposed Infants: GAO Calls
IV. FLEDGLING ATTEMPTS AT CRIMINALIZATION OF MATERNAL BEHAVIOR

Three types of criminal statutes and one additional criminal sanction have been employed against pregnant or just-delivered women who used drugs or alcohol during pregnancy. The charges fall broadly into the categories of drug delivery, feticide or homicide, and fetus neglect/abuse. In addition, preventive detention has been used to sequester pregnant women for the duration of their pregnancies. This section will explore each of these types of charges, examining a few of the burgeoning number of cases brought within the last ten years, any applicable statutes, and the judicial response to the charge.

A. Drug Delivery

The first U.S. criminal conviction of a mother who gave birth to a drug-exposed infant arose from a charge of delivery of a controlled substance to a minor. Jennifer Johnson, a 23-year-old cocaine addict, was convicted in July, 1989, in Sanford, Florida, of having delivered cocaine to her daughter, Jessica Nicole Johnson, through her still-pulsing umbilical cord, in the sixty seconds after Jessica's birth, on January 23, 1989. Johnson was acquitted of a second charge of child abuse. Although she could have received a 30-year prison sentence, Johnson was sentenced to fifteen months for Expanded Outreach; Some Programs Deny Women Treatment, 33 Blue Sheet (Drug Research Reports) 7 (1990), citing a 1990 survey by the General Accounting Office which found that while 280,000 pregnant women in the United States needed drug treatment, less than 11% could find it. The survey noted that "concerns over legal liability" prompted many drug treatment programs to turn away pregnant women.

49. Criminal statutes specifically aimed at the problem of prenatal maternal drug use have been and are currently being reviewed by a number of states. One bill, considered and tabled in committee in Ohio last year, called for felony prosecution of women who delivered drug-impaired children, and included provisions for both mandatory and voluntary sterilization for drug dependent women, depending on the nature of the charges. Don't Punish the Troubled Mothers, Legal Times, May 21, 1990, at 20. In addition, several states—including Florida, Illinois, Oklahoma, and Rhode Island—have amended their definitions of child abuse to include drug use during pregnancy. Webb, Treatment Rather Than Jail Urged For Pregnant Drug Abusers, United Press Int'l., May 17, 1990. For an excellent overview on the status of the many attempts to pass specific legislation dealing with the problem of drug-impaired fetuses and infants, see Comment, Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches, 39 EMORY L.J. 1401 (1990).

50. Where citations to case numbers are unavailable, citations to newspaper and magazine articles are made.


52. Davidson, supra note 51.
probation and completion of a drug treatment program.\textsuperscript{53}

Jeff Deen, Seminole County Assistant State Attorney, called the case "a good test."\textsuperscript{54} He said that he had been looking for a way to prosecute the growing number of women delivering drug-exposed babies in his counties and chose Johnson because she previously had given birth to two other drug-exposed babies.\textsuperscript{55} Johnson unwittingly aided in her prosecution by applying to enter a treatment center (she was refused because of a fear her fetus would not survive withdrawal) and twice telling emergency room doctors that she was an addict who feared for her fetus.\textsuperscript{56}

The statute Johnson was convicted of violating was written with the intention of prosecuting drug dealers. But Judge O.H. Eaton said that it was his belief that use of the statute was appropriate "to establish that pregnant women have a responsibility to their unborn children."\textsuperscript{57}

In January, 1990, Beverly Black of Pensacola became the first Florida woman to be sentenced to prison for distributing cocaine to her newborn child.\textsuperscript{58} Black was convicted of passing cocaine to her son on September 19, 1989, through the umbilical cord, after she admitting to snorting cocaine in hopes of inducing labor.\textsuperscript{59} She was sentenced to eighteen months in prison and three years probation.\textsuperscript{60}

In Massachusetts on August 21, 1989, Josephine Pellegrini, of Brockton, was arrested and charged with delivering cocaine to a minor.\textsuperscript{61} Pellegrini's son, Nathan, was born healthy on July 2, but with traces of cocaine in his urine.\textsuperscript{62} Pellegrini claimed she used cocaine only twice, the last time at a party two days before the birth of her son.\textsuperscript{63} The woman faced a minimum three-year prison sentence, if convicted; however, Judge Suzanne V. DelVecchio dismissed the charge, ruling that it violated Pellegrini's right to privacy.\textsuperscript{64}

\textsuperscript{53.} Id.
\textsuperscript{54.} Id.
\textsuperscript{55.} Id.
\textsuperscript{56.} Id.
\textsuperscript{57.} Id.
\textsuperscript{58.} Jailed Mom Passed Coke to Unborn, Wheeling Intelligencer, Jan. 5, 1990.
\textsuperscript{59.} Id.
\textsuperscript{60.} Id.
\textsuperscript{62.} Coakley & Richard, supra note 61.
\textsuperscript{63.} Id.
\textsuperscript{64.} Woman Cleared in Drug Case, Wash. Times, Oct. 18, 1990, at B8. In the judge's 16-
In Michigan, defense attorney Lynn Ellen Bremer was charged with drug trafficking for allegedly manufacturing and delivering less than fifty grams of cocaine derivative to her daughter in the seconds after her birth on April 10, 1990. The charges against Bremer were filed concurrently with identical charges against another Michigan woman, Kimberly Hardy, who admitted to smoking crack cocaine hours before delivering her son two months prematurely on August 20, 1989. The charges against Bremer were dismissed on February 4, 1991, when Judge Thomas Eveland ruled that the law under which Bremer was charged was not intended to apply to mothers who use illegal substances during their pregnancies. On April 1, 1991, Judge William B. Murphy of the Michigan Court of Appeals ruled to drop the charges against Ms. Hardy. The legislature did not intend to target pregnant women who take controlled substances.

In a third Michigan case, against Cheryl Cox, a charge identical to the one filed against Bremer was thrown out by a judge who ruled that the decision to criminalize prenatal maternal behavior should be made by the state legislature instead of prosecutors using existing drug laws.

Finally, in North Carolina, Sandra Inzar is awaiting trial on her indictment for delivery of a controlled substance to a minor and assault with a deadly weapon with intent to kill, inflicting serious injury. Inzar allegedly smoked crack the day before she gave birth to her daughter on Aug. 3, 1989, causing premature labor and severe brain damage to the child. The trafficking charge carries a

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67. Judge Drops Charges of Delivering Drugs to an Unborn Baby, N.Y. Times, Feb. 5, 1991, at B6, col. 4. The judge also ruled that the charges violated her right to privacy "by intruding into her relationship with her fetus without a compelling reason to do so," and violated her due process rights because she had no notice that the law under which she was charged could apply to her behavior. Id.
70. Warren, supra note 65.
71. Mother Faces Drug Charges in Baby's Birth, United Press Int'l., April 18, 1990 (wire copy).
72. Id.
maximum penalty of thirty years in prison, while the assault charge carries a maximum of twenty years.\textsuperscript{73}

B. Feticide/Homicide

In a very early case, the details of which are unclear, Deborah Wright, a 26-year-old woman from Westville, New Jersey, pleaded guilty on September 21, 1982, to a charge of manslaughter after she admitted that her use of drugs during her pregnancy caused the death of her infant.\textsuperscript{74} Of interest in this case is the fact that both Wright and the child's father were indicted on manslaughter charges after their four-month-old son died in September, 1981.\textsuperscript{75} The boy's death was attributed to "failure to thrive." Wright faced up to ten years in prison.\textsuperscript{76} The final disposition of this case is unknown.

Melanie Green, a 24-year-old woman from Rockford, Illinois, was charged on May 8, 1989, with involuntary manslaughter and supplying drugs to a minor after her daughter, Bianca, died two days after birth from oxygen deprivation prenatally caused by Green's use of cocaine.\textsuperscript{77} Less than three weeks later, on May 26, a grand jury refused to indict Green for the crime.\textsuperscript{78}

In July, 1989, Elizabeth Levey, a 29-year-old Massachusetts woman, was charged with vehicular homicide after she allegedly drove while under the influence of alcohol and ran her car into a tree.\textsuperscript{79} Her near full-term fetus was stillborn the following day. Levey was convicted of driving under the influence of alcohol in March, 1987.\textsuperscript{80} If convicted on the vehicular homicide charge, Levey faced up to fifteen years in prison. The charge was dropped in March, 1990.\textsuperscript{81}

In 1984, the Massachusetts Supreme Judicial Court, in \textit{Commonwealth v. Cass}, held that a viable fetus is a person for purposes

\textsuperscript{73} Id.

\textsuperscript{74} National News Briefs, United Press Int'l., Sept. 22, 1982 (wire copy).

\textsuperscript{75} Id.

\textsuperscript{76} Id.


\textsuperscript{78} Id.


\textsuperscript{80} Daly, supra note 79.

of the vehicular homicide statute. However, the Levey case was the first anywhere in the country where a woman has been charged with vehicular homicide in the death of the fetus she was carrying.

C. Fetus Abuse/Neglect

Pamela Rae Stewart, a 27-year-old El Cajon, California, woman was charged in October, 1986 with failing to provide medical care for her fetus through her alleged taking of drugs during her pregnancy and failing to obey her doctor's orders, which included abstinence from sexual relations with her husband. She was charged under an obscure "child abuse" statute intended to ensure child support payments to women carrying their ex-husbands' fetuses. Stewart suffered from placenta previa. When her son was born in November, 1985, he lacked brain activity, but was maintained on life support systems until January 1, 1986. Notably, traces of methamphetamine were found in the boy's system at birth.

The crime with which Stewart was charged was a misdemeanor and carried the stipulation that, for purposes of the statute, a child conceived but not yet born was a person. The municipal court judge dismissed the charge after finding that the California legislature intended the law to be used solely for child support purposes and not to "impose a duty upon the pregnant woman." Stewart would have faced a maximum sentence of one year in jail and a $2,000 fine had she been convicted. She spent a week in jail before obtaining bail.


83. Daly, supra note 79. Four states have feticide statutes. GA. CODE ANN. § 16-5-80 (1989); IND. CODE ANN. § 35-42-1-6 (Burns 1979); IOWA CODE § 707.7 (1989); 1989 LA. ACTS 777. However, the language of the Georgia and Louisiana statutes precludes their use against the mother of the destroyed fetus. The Georgia statute applies only to deaths of fetuses caused during the murder or attempted murder of the mother. The Louisiana act requires that the offending act, procurement, or omission be committed by a person "other than the mother of the unborn child."


85. No title, supra note 84.

86. Id.

87. Id.

88. Id.

89. Id.

90. Id.
On August 1, 1989, in Middleton, Connecticut, Nellie Baez was arrested and charged with causing a risk of injury to a minor, her four-month-old fetus. The charge arose when Baez swallowed a quarter-ounce of cocaine as she was being arrested in late July. Baez was hospitalized, but both she and the fetus apparently were unharmed. The chief state’s attorney said he doubted the charge would stand, since Connecticut state case law holds that a fetus is not a person.

In Ohio, a prosecutor is continuing his more than three-year battle to convict Tammy Gray of endangering the health of her newborn baby. Gray was first indicted in March 1987, after she and her baby tested positive for cocaine. An appeals court, however, dismissed the charge because recklessness had not been alleged. Prosecutor Anthony Pizza has vowed to take the case to the state supreme court, attempting to argue that the child endangering occurred in the ninety seconds after birth, prior to cutting the umbilical cord.

In May, 1990, Bonnie Welch O’Neal of Kentucky, was sentenced to five years in prison for her conviction on a criminal abuse charge. O’Neal, who had been addicted for seventeen years, most recently to Percodan and Dilaudid, two powerful painkillers, was criminally charged when her son went into withdrawal after being born in December, 1989.

Two Nevada women were charged in February, 1990, with child abuse due to their use of drugs prior to delivery of their babies. Regina Mae Bloxham allegedly used methamphetamine two days before her daughter was born Nov. 10, 1989. Another woman, whose name is unavailable, was charged after cocaine and marijuana were found in the urine of her newly born son on Dec. 10,

92. Id.
93. Id.
95. Id.
96. Id.
97. Id.
98. Junkie Moms, supra note 1.
100. Miller, Charges Filed Against Drug Mothers, Gannett News Serv., Feb. 10, 1990 (wire copy).
101. Id.
In addition to these specifically named cases, prosecutors in two South Carolina counties and in Clark County, Nevada, have charged more than three dozen women with child abuse, alleging prenatal maternal drug use.\(^\text{103}\)

In a first case of its kind, Diane Pfannenstiel, a 29-year-old woman from Laramie, Wyoming, on January 2, 1990, was charged with felony child abuse for drinking alcohol during her pregnancy.\(^\text{104}\) She was four months pregnant at the time the charges were filed. Pfannenstiel was under a court order not to drink during her pregnancy, as she previously had given birth to a FAS child.\(^\text{105}\) The charges were filed after she fled her home and attempted to file a complaint of domestic battery against her husband.\(^\text{106}\) In the process of having her bruises photographed at the police station and being given medical treatment at the hospital, Pfannenstiel was tested for alcohol consumption and arrested.\(^\text{107}\)

The charge against Pfannenstiel was dismissed a week later because the prosecutor failed to prove that her drinking had harmed the fetus.\(^\text{108}\) The court did not rule out the possibility that charges could be refiled should Pfannenstiel deliver another FAS baby\(^\text{109}\); however, Pfannenstiel subsequently delivered “an apparently healthy boy.”\(^\text{110}\)

**D. Preventive Detention**

In one of only a few nationally publicized cases of preventive detention\(^\text{111}\), Brenda A. Vaughan was sentenced to six months in jail by a District of Columbia Superior Court judge solely on the
basis of her pregnancy. Vaughan was arrested February 5, 1988, on a felony check-forging charge, and pleaded guilty to a lesser charge of second-degree theft. At her May 24 sentencing, Vaughan revealed that she was pregnant and was ordered to take a drug test, which returned positive for cocaine.

Ignoring the state’s agreement that Vaughan should receive probation, Judge Peter H. Wolf sentenced her to six months in jail, subject to a motion for time reduction after her baby was born. Three months later, after the mayor issued an emergency order to reduce the sentences of prisoners because of overcrowding in the jails of the jurisdiction, Wolf stayed the release of only one prisoner: Vaughan. Vaughan was released from jail one day before her baby was born, on September 15, 1988.

V. NO COMMON GROUND: TWO MUTUALLY-EXCLUSIVE RESPONSES TO CRIMINALIZATION OF PRENATAL MATERNAL BEHAVIOR

Legal commentators writing on the issue of criminalizing prenatal maternal behavior generally have fallen into one of two diametrically opposing camps: those supporting the concept of state-defined and mandated behavior for pregnant women and those to whom the idea is an anathema. Although each side presents a panoply of rationales and benefits for its stance, undergirding all the arguments is a fundamental disagreement about the existence and extent of a pregnant woman’s right to personal autonomy and integrity. This section compares the arguments of two commentators, John A. Robertson, a professor of law at the University of Texas, and Molly McNulty, an attorney who specializes in the area of reproductive rights.

A. Robertson: A Duty to Deliver “Whole” Babies

Robertson argues that a woman has, “if she conceives and
chooses not to abort, a legal and moral duty to bring the child into
the world as healthy as is reasonably possible.”118 This duty may
include abstinence from drugs, alcohol, and tobacco; appropriate
intake of necessary medication; avoidance of toxic substances or en-
vironments; and submission to tests and surgery for fetal therapy.119
Robertson suggests that the requirements of this duty can be en-
forced by the state through child abuse, feticide, or abortion laws.120

In support of his view that there is an enforceable duty to de-
 deliver healthy babies, Robertson attacks constitutional critics on four
levels. First, he writes, while “[f]ull freedom in procreation in-
cludes a woman’s freedom to make the myriad decisions she faces in
gestating and giving birth to the child . . .,” it is possible to distin-
guish “management” of a woman’s pregnancy from the true right to
freedom of procreation.121 This can be accomplished by redefining
behavior and choices during pregnancy as impacting only upon
bodily integrity, not upon procreative rights.122 This redefinition is
vitally important to Robertson’s proposals, because it shields
criminalization of prenatal maternal behavior from the “strict scru-
tiny” required where procreative freedom is implicated.123

To complete this line of reasoning, Robertson intertwines the
second of his arguments with his first:

Restrictions on pregnancy management may significantly limit a
woman’s freedom of action and even lead to forcible bodily intru-
sions to protect the unborn child. But they do not affect her de-
cision to procreate. She has already exercised her right to
procreate by conceiving and has waived her right not to procre-
ate by failing to abort the fetus prior to viability. Although she is
under no obligation to invite the fetus in or to allow it to remain,
one she has done these things she assumes obligations to the
fetus that limit her freedom over her body.124

Thus, Robertson contends not only that regulating a pregnant wo-
man’s behavior does not interfere with her right to procreate, but
that although it does interfere with her right to bodily integrity and
autonomy, she waives those rights by continuing to carry the

118. Procreative Liberty, supra note 22, at 438.
119. Id. at 443 and 445.
120. Id. at 443. 121. Id. at 437.
122. Id. (“The maternal-fetal conflicts that arise in managing pregnancy do not involve
the woman’s right to procreate, but rather her right to bodily integrity in the course of
procreating. Whereas restrictions on conception would prevent a woman from using her
physiological capacity to reproduce, restrictions on her conduct during pregnancy only affect
how she will behave in carrying the child to term.”).
fetus.\footnote{125} Subsidiary to the first two of Robertson's assertions, are two others: That a woman has no fundamental right to use illegal drugs and, therefore, a state need not show a compelling reason for restricting their use; and, that even use of legal substances, such as alcohol or tobacco, can be restricted for health reasons under a "rational basis" test.\footnote{126} These are consistent with Robertson's contention that something less than "strict scrutiny" is applicable to infringements on a woman's management of her pregnancy (as distinguished from procreative decisions).

Robertson completes his analysis by offering his "balancing" of the interests involved in criminalization of prenatal maternal behavior. As Constitutional scholars often say, it is not that there is a balancing that is important, but who is doing the balancing. In that regard, it is interesting to note Robertson's choice of language when arguing that various types of prenatal maternal behavior should be regulated. To reach a totally unsurprising conclusion that a pregnant woman should be required to submit to invasive fetal therapy, on pain of criminal penalty, Robertson balances the needs of the fetus against "eccentric preferences, idiosyncratic weightings of the values at issue, fear of surgery, or a desire to avoid the responsibilities of parenting" by the woman.\footnote{127} Likewise not surprising is Robertson's conclusion that a pregnant woman should be required to submit to compulsory surgery for the benefit of the fetus, since he finds such surgery merely "distasteful" to the woman and incredibly, and without any medical citation, declares that "the physical burden on her of the mandatory cesarean section is not nearly as great as the burden of abdominal surgery on a nonpregnant woman."\footnote{128}

It is clear that under Robertson's "rational basis" analysis of the interests involved in regulation of prenatal maternal behavior, bolstered by his concept of "waiver" of a woman's rights to bodily integrity and autonomy by way of pregnancy, there are few, if any, state intrusions upon a pregnant woman that Robertson would find violative of her rights.

\footnote{125} Id. at 445-57 Robertson seems to envision a state of voluntary servitude, entered into when a woman becomes pregnant and fails to abort the fetus. At that point, the woman "has chosen to lend her body to bring the child into the world," and in doing so, "waive[s] her right to resist bodily intrusions made for the sake of the fetus." Id.

\footnote{126} Id. at 442.

\footnote{127} Id. at 445.

\footnote{128} Id. at 456-57.
B. McNulty: Criminalization of Prenatal Maternal Behavior Is Bad Law

McNulty rejects criminalization of prenatal maternal behavior as unworkable from a health policy perspective and as unconstitutional, in that such state action violates prohibitions on vagueness, infringes on a woman's right to liberty, and denies a woman the equal protection of the law.\(^\text{129}\)

McNulty's first argument is one of fairness and futility. She contends that "[t]he population at which 'fetal abuse' statutes and other punitive action are targeted tend to be the victims of neglect of our health care system, often on the fringes of society, beyond the reach of concerned health care workers."\(^\text{130}\) Furthermore, while criminalization of reckless or negligent behavior "would result in a strict liability crime that would disregard a woman's economic situation, personal values, and individual health needs," a narrowly tailored statute based on intentional infliction of harm on a fetus by its mother would fail to affect the majority of drug and alcohol-using pregnant women, who abuse those substances because of addiction and not to harm their fetuses.\(^\text{131}\)

Turning to the Constitutional issues involved, McNulty contends that statutes aimed at criminalization of prenatal maternal behavior would, because of inherent vagueness, "suffer from the same constitutional infirmities which have rendered invalid the disorderly conduct and vagrancy laws of a number of jurisdictions."\(^\text{132}\) McNulty argues that vagueness in the case of criminalizing behavior of pregnant women "would give a police officer unlimited authority to


130. *Id.* at 318 (noting that low-income and minority women have limited access to prenatal care; that Medicaid is an inadequate safety net for women who live in poverty and get pregnant; that most drug treatment centers will not accept pregnant addicts; and that prison is not the appropriate environment in which to rehabilitate pregnant women).

131. *Id.*

132. *Id.* at 310. To escape a challenge of vagueness, "[a] criminal statute must define its punishable offense in a sufficiently concrete manner to give adequate notice of what conduct is prohibited or required." *Id.* As an example of one problem of vagueness, McNulty points to a New York decision, in which the court rejected the state's contention that a newborn with withdrawal symptoms had been "actually impaired" within the meaning of the state child abuse statute. That court found that because "it is clear that a child in utero may be endangered or actually harmed by a broad range of conduct on the part of a pregnant woman, it would appear necessary to limit any application of the neglect statute to prenatal maternal conduct to a narrow and clearly defined class of cases. It may be possible to identify some cases in which it is common knowledge that the maternal conduct in question creates an unreasonable risk of harm to the fetus. However, even a 'knew or should have known' standard may prove difficult to administer." *Id.* citing In re Male R, 102 Misc. 2d 1, 10 n.18, 422 N.Y.S.2d 819 (Fam. Ct. 1979).
decide when a pregnant-looking woman is doing something that in
the officer's judgment might harm the fetus . . . ."\textsuperscript{133} Vagueness
also lends itself to discriminatory enforcement, McNulty writes, be-
cause low-income women are more likely to be in contact with vari-
ous agencies of the government and, thus, are more likely to be
reported for endangering their fetuses.\textsuperscript{134}

McNulty argues that criminalization of prenatal maternal be-
behavior implicates the fundamental right to privacy, including the
right to bodily integrity, the right of parental authority against the
state, and the right to make procreative decisions.\textsuperscript{135} Finding a fun-
damental right at stake, McNulty contends that the required "strict
scrutiny" would render any such statute unconstitutional. Addition-
ally, criminalization of a pregnant woman's behavior "would
hold women to a much higher standard of self-care than men and
would infringe upon women's rights to autonomous decision-mak-
ing in a manner not required of men," thus violating women's right
to equal protection of the law.\textsuperscript{136}

VI. REJECTING THE EXTREMES: A MIDDLE GROUND
INTERPRETATION

The magnitude of the interests involved in the question of
criminalization of prenatal maternal behavior urges a rejection of
the shrillness of the extremes and an attempt to discover a middle
ground upon which a partial or whole solution may be engraved. In
order to find that area of possible consensus, the following argu-
ments are presented.

Procreation, or the bringing forth of offspring, is a continuum.
Conception cannot be distinguished from the "management" of the
pregnancy, nor from the birthing of a baby. Each is an integral part
of the whole, and that whole is protected as a fundamental right by
our Constitution.\textsuperscript{137}

\textsuperscript{133} Pregnancy Police, supra note 23 at 311.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 314.
\textsuperscript{136} Id. at 316-17 McNulty notes that biological differences "have long been used as
justification for oppression of women," and contends that "[s]tate policing of pregnancy rests
on the implicit assumption that women are less than fully moral beings who have no in-
dependent judgment." Id. Finally, she argues that "romantic paternalism" damages both
women, through discrimination, and their fetuses, because placing the blame on women shifts
the focus from other factors which play a part in producing damaged children. Id.
\textsuperscript{137} Griswold, 381 U.S. at 484; Whalen v. Roe, 429 U.S. 589 (1977) (Included as a part
of the fundamental right of privacy are "matters relating to marriage, procreation, contracep-
tion, family relationships, and child rearing and education."); Bowers v. Hardwick, 478 U.S.
The right to exercise a fundamental right is however, not absolute. A state may regulate the exercise of a fundamental right where it can demonstrate that the law is necessary, is narrowly tailored, and responds to a compelling state interest.138 Furthermore, under *Roe v. Wade*139, the state is allowed to balance the potentiality of life against the interests of a woman in exercising her procreative choice (by obtaining an abortion) in the third trimester of her pregnancy. Even in the third trimester, however, the United States Supreme Court found that the life and health of the mother outweighs that of the fetus she carries.140

The duty of a woman to refrain from harming the fetus she has decided to carry to term arises logically from the right of procreation protected by the Constitution. If a woman were no more than a reproductive "challis," denied the right to decide whether or not to bear a child, state interference in her pregnancy would amount to discrimination based on reproductive capacity alone and would be a violation of the woman's right to equal treatment under the law. However, once a woman has availed herself of her right to make procreative choices, and has decided to carry her fetus to term, the state may claim an interest in the potentiality of that fetus at some point in its development. If the state asserts that interest and intrudes on the privacy and personal autonomy of the pregnant woman, the focus then shifts to balancing those interests.

A. The "Five-Step" Balancing Analysis

Deborah Mathieu has proposed a thoughtful five-step analysis for balancing maternal autonomy with fetal needs.141 The first step requires a review of the severity and duration of harm to the future child by the maternal behavior and to the pregnant woman by the state intervention. The second step is consideration of the value of the interests involved. The third step is an assessment of the probability of the harm to the fetus by the maternal conduct. The fourth step is an assessment of the probability that the harm can be

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139. 410 U.S. at 165.
140. *Id.* Nor did the court reject that opinion in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).
prevented or ameliorated by the state action. The final step is consideration of proportionality; that is, whether the state action will create more harm than it prevents.142

In the case of prenatal maternal use of alcohol and drugs, the analysis may be as follows: First, the severity is great and the duration long for harm to the future child. However, harm to the woman is not insignificant, in that her freedom and autonomy are curtailed and she is inducted into the criminal justice system, a process which has severe and long-term consequences in and of itself. However, curtailing the length of time in which the state legitimately could involve itself in prenatal maternal decisions, providing for diversion to non-penal settings after intervention, and expungement of the woman's criminal record would in part mitigate the harm to the woman.

In the second step of the analysis, the value of the interest of a future person in being born free of biological impairment is balanced against the woman's interest in personal freedom, autonomy, and bodily integrity. Neither of these interests is amenable to accurate description; the value of each is immeasurable.143 Again, however, limiting the duration of the intrusion and consequences of the intervention could tip the scales in favor of intervention.

The third and fourth steps (assessment of the probability of harm and of prevention or amelioration) recognize the need carefully to limit the maternal activities regulated. The probability that alcohol and drug abuse during pregnancy will cause harm has been verified empirically. Likewise, the probability that cessation of the behavior (if it is accomplished within a structured plan with awareness of the special needs of a pregnant addict) will at least ameliorate the harm to the future child also has been established. In contrast, the argument of some commentators that a vast array of maternal behavior (including failure to take vitamins, to control weight gain, or to be judicious in coffee drinking) falls under the designation of prenatal maternal "duties," and that the violation of those "duties" should give rise to legal recourse144, clearly fails under this step of the analysis in combination with the first step.

142. Id.
143. Some commentators assert that the only maternal interest implicated is that of drinking or using illegal drugs and, thus, any interest of the fetus, from the moment of conception, would outweigh the interest of the woman. Procreative Liberty, supra note 22, at 442-43. This argument is fatuous, because it ignores the very real (and recognized) interest in being "let alone." Botsford, 141 U.S. 250. This interest is no weaker in a pregnant woman than in any other citizen of the United States.
144. Shaw, supra note 36, at 73.
None of these activities has been proven to cause probable severe and long-term harm to the fetus that would justify the inordinate amount of state intervention it would take to monitor and coerce women into the "correct" behavior.

Finally, the analysis of the proportionality of the intervention in pregnant women's lives leads to the conclusion that, for the duration of the pregnancy, incarcerating a woman in jail or prison causes more harm than it prevents and, therefore, should be excluded from any proposed statute. Furthermore, criminal sanctions should be written so as to give the woman, even following delivery of her child, every opportunity for rehabilitation and, if the circumstances allow, reunification with her offspring.

VII. CONCLUSION

No man is an island, entire of itself; every man is a piece of the continent, a part of the main; . . . any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.  

Donne's words ring no clearer than when applied to the relationship that develops between a pregnant woman and the late-term fetus which grows within her. From our increasing knowledge of that relationship springs all manner of vitriolic disputes concerning the degree to which a woman may be held responsible for harm arising from her connectedness with her fetus.

In this country, the dream of freedom, heavy-laden with notions of individualism, self-reliance, and self-determination, overshadows the law as it touches in its many ways the lives of people. However, personal freedom is never uncircumscribed. As the old adage teaches, a person may swing his arms at will only so long as another person's nose is not in the way. Anglo-American law, however, primarily male-centric and male-promulgated, is ill-endowed for the challenge of deciphering the intimate interconnectedness in the pregnant relationship and determining how best to protect the state's interest in potential human lives without destroying the core of self-determination which is essential to every person's freedom.

For the most part, the legal commentators who have written their reasoned opinions on the issue of gestational responsibility have served only to embitter the argument. On the one hand, commentators such as Robertson and Shaw shock and terrify even the
lukewarm libertarian by prescribing a world in which women would be obligated—under threat of civil or criminal sanctions—to bear perfect children.\footnote{These commentators' ideas are fully discussed in the section titled "Robertson: A Duty to Deliver "Whole Babies" at pp 120-122.} On the other hand, a host of commentators join McNulty in arguing that criminalizing gestational behavior violates women's right to self-determination and bodily integrity, casting pregnant women in the role of human incubators.\footnote{The commentators' ideas are fully discussed in the section titled "McNulty: Criminalization of Prenatal Maternal Behavior is Bad Law," at pp 122-123.} The most radical of these latter commentators argue that a woman owes no duty to the fetus she conceives and bears until and unless it takes its first breath outside her body.

Each of these opposing views, in its own way, denies pregnant women the rights accorded the population as a whole. The first view would, from the mid-point of each menstrual cycle, sublimate all fertile women's desires and dreams to the greater goal of producing perfect babies. There is no doubt that this view does as its critics claim—designates fertile women primarily as human incubators or two-legged wombs.

The second view, however, is equally corrosive of women's place in the world as full-fledged citizens. It presupposes that women are weak, that they should be excused from the responsibilities that accompany every right. Assuming, as the following model legislation does, that women will continue to have the right to seek birth control and abortion, it is insulting to suggest that they are incapable—physically, mentally, morally, or spiritually—of picking up the mantle of responsibility that necessarily falls on those who chose to become pregnant or remain pregnant by choice. To expect less of women in the way of shouldering responsibilities which are concurrent with the most precious of rights is, in its own way, the greatest example of sexism. One only has to look to the law and the other groups of people so shielded from responsibility—the mentally defective and children—to recognize the obvious denigration.

Babies do not arrive full-blown from the cabbage patch. They are conceived and grow to infancy within women. Nowhere else in the experience of humankind is there a greater connectedness, a greater impact upon one life (potential though it may be) by another. When pregnancy is uncoerced, and/or its termination is reasonably available to women, there is no reason to excuse pregnant women from the responsibility not to use personal freedom as a tool of destruction.
It is time to take a closer look at gestational responsibilities which may or should be required of any woman who decides to conceive or maintains her pregnancy to a certain point. It also is time for less rancor and more reason; for a recognition that a pregnant woman is neither a human incubator nor a dispassionate bystander, but rather a fully sentient being capable of understanding and responding to the requirements of her delicate relationship with the future child she is carrying.

VIII. PROPOSED ELEMENTS OF MODEL LEGISLATION

Charge:
Reckless injury and/or endangerment of a post-28-week-old fetus by use of alcohol or drugs.

COMMENT: This model statute, on its face, is self-limiting. Only reckless, not negligent, behavior on the part of the pregnant woman will bring her within the statute's purview. This will curtail attempts to enlarge the circle of prohibited activities beyond those which not only are empirically established to be harmful to a fetus, but also are known to be harmful by a reasonable adult person. However, the statute also contains a flavor of strict liability, because apparent injury does not have to be proven in order to charge a woman under this statute, as long as the empirical evidence is clear and convincing and a reasonable person would have notice of that evidence.

Specifics:

Two applicable stages of pregnancy: Prosecution under this statute may be carried out at either of two stages in the procreative process: post-28 weeks, but prior to birth; or immediately post-birth.

COMMENT: This statute specifically rejects the "quickening," "viability," and "born alive" rules as triggers for charging a woman who uses drugs or alcohol during pregnancy. Due to the scientific advances of the past several decades, none of these standards operates as an appropriate indicator of potential personhood. Rather, the statute adopts "brain birth" as the

149. See supra notes 37-38.
150. Patlak, Does the Birth of the Brain Begin a Life?, Oregonian, March 22, 1990, Sc., at 1, col. 1 "Fueled by the latest findings on fetal development, some scientists say 'brain birth' in the fetus should mark the beginning of human life, just as 'brain death' already is used to signal the end of a life." "Brain birth" is defined as the threshold in fetal development, starting at about the 28th week, in which the connections between the neurons in all parts of the neocortex are made, and the neocortex is "turned on," enabling the fetus to develop into a thinking, speaking fully-aware person. This approach also takes some support from the statistics that show that despite the increasingly sophisticated tools of neonatology, the mortality and long-term morbidity for infants of less than twenty-six weeks gestation or
threshold trigger for state intervention into prenatal maternal behavior.

In addition, this statute also may be triggered by evidence produced at the birth of a child, i.e., withdrawal or other symptoms of drug or alcohol impairment. The timing of these triggers for implementation of this statute takes into account the delicate balance between a woman's right to privacy and personal autonomy and her child's right to be born unimpaired. It is acknowledged that the triggering points drawn here will neither prevent nor ameliorate all harm to all fetuses. However, we lose much more than we gain if, in our search for "whole" babies, we fail to give adequate weight to the profound interests women have in their right to be "let alone." The 28-week trigger offers two benefits. It allows for prevention of the worst of the harm done to a fetus by drugs and alcohol\(^\text{151}\), and it pays respect to the woman’s procreative choices by not assuming "waiver" of those choices before the fetus assumes potential personhood (under the "brain birth" standard).

Causation:

Causation of harm to the fetus or newly born child to substantiate charges brought under this statute can be established in either of two ways:

1.) For post-28-week fetuses, evidence of use of either alcohol or drugs, in amounts shown empirically to cause harm to a fetus, is adequate to establish causation.

2.) For newly born babies, causation will be established if:

a.) Quantitative analysis of the infant's blood reveals levels of alcohol or drugs that hold the potential for severe and long-term harm to the child; or

b.) the child displays signs and symptoms which can be diagnosed as those caused by prenatal exposure to drugs or alcohol.

COMMENT: In order to facilitate the prevention and amelioration of harm to fetuses, causation of harm in a post-28-week fetus will be presumed if the evidence shows that the pregnant mother has consumed alcohol or drugs in qualities proven to cause sub-


151. See Skolnick, *supra* note 1 ("Among the women who initially tested positive for drug use, those who stopped using drugs had babies with significantly greater birth weights and head circumferences than the babies of patients who continued abusing drugs."); Skolnick, *Cocaine Use in Pregnancy: Physicians Urged to Look for Problem Where They Least Expect It*, 264 J. A.M.A. 306 (1990) ("Binge use of cocaine at the end of pregnancy puts the baby at severe risk of in utero infarctions of the brain, the heart, and other organs, [Dr. Ira J.] Chasnoff says"); Day, Richardson, Robles, Sambamoorthi, Taylor, Scher, Stoffer, Jasperse & Cornelius, *Effect of Prenatal Alcohol Exposure on Growth and Morphology of Offspring at 8 Months of Age*, 85 PEDIATRICS 748 (1990) (alcohol use through the second and third trimesters of pregnancy is “significantly related to lower weight, length, and head circumference”).
substantial, long-term harm in most fetuses. To require direct evidence of damage to a particular fetus in order to charge its mother would render impossible the prevention or amelioration of harm to unborn fetuses.

Reporting Requirement:

It shall be the duty of physicians and other health care workers to report to the appropriate authorities properly documented evidence that a woman who is post-28 weeks in pregnancy or who newly has delivered is or has been abusing alcohol or certain illegal drugs to the detriment of her fetus or child.

COMMENT: The requirement poses some of the same risks of any reporting requirement, in that it to some extent requires doctors to violate patient-physician confidentiality. However, as in other public health and safety statutes which incorporate reporting requirements (i.e., communicable diseases or child abuse), the interests of the post-28-week fetus or newborn child sufficiently outweigh the interests of the mother in this limited context.

Recklessness Defined:

In order to fit within the definition of reckless as proposed by this model legislation, the potential for injury to a fetus from a woman’s activity must be substantial. This can be shown by clear and convincing empirical evidence to cause long-term or permanent injury to most or all fetuses. The injury so shown must be severe, not slight.152

COMMENT: This definition prevents intrusion into a pregnant woman’s personal liberty absent a real and present danger to the post-28-week fetus she is carrying. It is in answer to those who, like Robertson, would validate regulation of a myriad of the details of everyday life for a pregnant woman. Although this definition allows a legislature to expand of the list of those substances which may be proscribed, addition to that list is prohibited unless the evidence mandates placing a limit on a woman’s right to manage her pregnancy as she sees fit.

Exclusions:

Specifically excluded from the definition of reckless are those activities whose harm to the fetus is not supported by clear and

152. Under this definition, use of an illegal drug is not per se reckless, unless its use has been established as harmful to the fetus. In this regard, it is unclear whether marijuana poses a probable risk of severe and long-term harm to the fetus. Physicians conclude that marijuana is “nowhere near as damaging” as cocaine, but it is associated with low birth weights, abnormal eye-hand coordination and visual problems. Kolata, Bias Seen Against Pregnant Addicts, N.Y. Times, July 20, 1990, at 13A, col. 1, quoting Dr. Ira J. Chasnoff. However, until the probability of both severe and long-term harm unequivocally is demonstrated, marijuana would not be included within this statute. Likewise, see supra note 4, regarding the hazards of smoking.
convincing empirical evidence. Also specifically excluded from the definition of reckless are those activities about which there may be reasonable dispute among medical experts regarding their potential for harm to fetuses.

COMMENT: Again, this exclusion reiterates the point that the list of activities for which a pregnant woman may be subjected to criminal penalties must be limited to those where the interests of the fetus clearly outweigh the substantial maternal interests in freedom of activity. If there is genuine differences of opinion about the harm caused by certain substances, a pregnant woman is not reckless in using such a substance.

A physician’s advice, by itself, is not a basis for a determination of recklessness, unless that advice fits within the definition above.

COMMENT: This statute does not legitimize physician control of a pregnant woman’s life through the paternalistic and anachronistic belief that physicians always know best. It is the law in this country that competent patients have the right to make medical decisions for themselves. It is no less so for a pregnant woman.

Mitigation:

If a pregnant woman voluntarily enters and remains in a treatment program prior to being charged under this legislation, no prosecution is allowed, provided that such a woman actually completes that program. Proof that a woman attempted to enter a treatment program and was refused is an affirmative defense to prosecution under this legislation.

COMMENT: It is fundamentally unfair to penalize a woman who has attempted the only means possible to avoid breaking a law. This is especially true in the case of pregnant addicts, for whose fetuses “cold turkey” withdrawal—the only alternative to an organized treatment program—can mean death. This requirement will give communities an incentive for making sure that there is treatment available to all addicts who ask for it, including pregnant women.

Prerequisites to this statute:

This legislation will become effective and remain in effect only so long as women retain the right to decide whether to carry a fetus to term. Furthermore, prior to effect of this statute, the state must show that it has shouldered its responsibilities by providing access to birth control and abortions for all women who desire them, including financial access to birth control and abortions.\textsuperscript{153}

COMMENT: Recklessness connotes a conscious decision to

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\textsuperscript{153} At present, only sixteen states will pay for an indigent woman’s abortion; and only eighteen percent of the counties in the United States have at least one provider of abortions.
take a risk. In the case women charged under this statute, there must be two decisions: the decision to bear a child (whether to get pregnant or to maintain the pregnancy) and the decision to take substances which will harm the fetus she is carrying. If the woman is precluded by law from making a decision about becoming or maintaining her pregnancy, it is fundamentally unfair to then further restrict her life for the duration of that involuntary pregnancy. Furthermore, this statute can maintain its constitutionality under an equal protection analysis only if the basis for criminalization is a choice to carry a fetus to term and not merely a woman's reproductive capacity.

Despite what the United States Supreme Court has decided of late, a woman has a choice regarding the bearing of children only if she has the financial ability, along with the right, to terminate her pregnancy. This statute recognizes that reality and gives an incentive to the community to provide for a truly free choice for women.

Sentencing:

1.) Pre-birth: Any woman charged and convicted under this statute prior to the birth of her fetus will be diverted into an appropriate residential treatment program for the duration of her pregnancy. No woman convicted under this statute will be incarcerated in a jail or prison. Due care should be taken to accommodate (by way of family treatment centers) the familial needs of the woman so diverted, including her responsibilities to other children.

COMMENT: Diversion of a pregnant woman to a treatment center benefits both the woman and her fetus. She receives rehabilitation, and the damage to her fetus is prevented or ameliorated during the last twelve weeks of pregnancy. A woman so diverted will not attempt to withdraw from her addiction "cold turkey," and so the possible death of her fetus from such non-treatment will be prevented. Finally, the woman's pregnancy can be accommodated in the treatment center, unlike in a jail or prison, where lack of adequate diet or exercise or other living conditions may do harm to the fetus.

2.) Post-birth: Any woman charged for a first time under this statute after the birth of her child immediately shall be diverted into an appropriate residential treatment center for a minimum of one month unless her treating physicians present evidence to the court that early release is in the best interest of the woman, her family, and society.

Any woman charged for a second or subsequent time under this

Pollitt, Fetal Rights: A New Assault on Feminism; Laws Protecting the Fetus from the Mother, 250 NATION 409, (1990).
statute after the birth of her child shall be subject to the same penalties as any other crime of this degree.

COMMENT: Post-birth, the primary concern for a first-time offender under this statute will be that of rehabilitation. A treatment center is the appropriate setting for this rehabilitation. However, if a woman persists in repeated violations of this statute (in subsequent pregnancies), deterrence overtakes rehabilitation as a prime concern, and jail or prison is the appropriate setting post-birth.

Exclusivity:

No woman shall be given a longer sentence for a non-pregnancy-related crime for activities covered within this legislation.

COMMENT: Preventive detention is an inappropriate "solution" to the problem of pregnant addicts. If a woman's activities fall within the purview of this statute, those activities may not be used to justify a clearly excessive jail or prison sentence for an unrelated criminal charge.

Expungement:

Any woman who is charged under this statute during her pregnancy or for a first time after the birth of her child and who successfully completes the treatment program to which she is diverted may, after three years, petition the court for expungement of the record of this crime. Unless the petitioner has been charged under this statute in the intervening three years, the court should honor the request in all but the most unusual of cases. Prior convictions for other types of crimes shall have no effect on the court's decision to expunge the record of this crime.

COMMENT: This statute is intended as protection for fetuses. It should not be used to stigmatize forever women who once have been charged under it. There is no state interest in maintaining a record of a woman's first conviction under this statute if she subsequently has abstained from violating it for three years.

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