The Criminalization of Perinatal AIDS Transmission

Heather Sprintz
THE CRIMINALIZATION OF PERINATAL AIDS TRANSMISSION

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I. INTRODUCTION

THE SPREAD of the Acquired Immune Deficiency Syndrome has now reached epidemic proportions, sparing no gender, socioeconomic class, race, or sexual preference.1 For those who have been infected, education, prevention and treatment are three of the many issues they must face while they struggle for life. Invariably, another issue feeds on their anger and traditional notions of justice. They ask of the public, the courts and themselves: who can I blame for my death sentence? Who will be liable?

The initial response to the question of liability arose in the civil sector.2 Lawsuit after lawsuit was decided; juries awarded astronomical amounts to plaintiffs.3 In the past few years, responding to angry victims and to the failure of deterrence through civil suit, a number of states have enacted criminal penalties for the knowing transmission of the human immunodeficiency virus (HIV).4

† This note was written under the supervision of Professor Rebecca Dresser.
1. Sources of HIV infection in the cumulative total 33,245 cases of AIDS involving adults and adolescents in the United States reported to the Centers for Disease Control (CDC) as of April 6, 1987. As of April 1990, 136,204 AIDS cases have been reported. An additional 100,000 people are presumed to have AIDS-related complex (ARC), a term used to describe a condition that includes swollen glands, fever, weight loss, or a combination of these symptoms. According to the CDC, an additional 1.5 million individuals are estimated to be infected with the HIV but have no symptoms of disease. Although their blood contains antibodies to the virus, they may have no other laboratory or clinical signs of disease. Authorities estimate that 20 to 30 percent of those people will ultimately develop AIDS. Centers for Disease Control, HIV/AIDS Surveillance, (June 1990).
2. See infra notes 21-41 and accompanying text.

As of October 14, 1991, the official Public Health Service count of AIDS-related criminal cases in both civilian and military courts was more than 200. The total number of AIDS-
These statutes generally focus on modes of transmission, such as: intimate contact; donation or transfer of blood, or other bodily fluids or tissue; and sharing of needles. Some outline affirmative defenses to the transmission. One state does not even require actual HIV infection as a prerequisite to prosecution. Many of these statutes are drafted broadly, without specifying particular acts to be subject to criminal penalties. Furthermore, many fail to supply affirmative defenses, such as consent. However, they all have one thing in common: they do not exclude from prosecution transmission through pregnancy.

Under these statutes, pregnant women who transmit the virus to their children by transferring through the placenta nourishment, hormones, blood, or any other bodily fluids, can be prosecuted for felony punishable by years of imprisonment.

Part I of this note begins by discussing the existing law on the prosecution of pregnant women for harm to their fetuses. This section will discuss the creation of fetal civil rights against third parties, and against parents. It will also describe the various criminal charges available to the state, on behalf of the child. Part II discusses the criminal statutes which penalize infected individuals for infecting, or creating the risk of infecting, other individuals. This section will divide the relevant statutes into elements, and will explain how a realistic application of these statutes includes the prosecution of women who transmit the virus during pregnancy.


5. See ILL. REV. STAT. ch. 38, para. 12-16.2 (1989) (focusing on intimate contact, donation or transfer of blood, and sharing of needles). Some other statutes are much broader. See OKLA. STAT. ANN. tit. 21, § 1192.1(A) (West Supp. 1993) (making it a criminal offense to “engage in conduct” which could result in the transmission). See also ARK. CODE ANN. § 5-14-123 (Michie 1989) (making it a criminal offense to “expose another person to... viral infection... through the parenteral transfer of blood.”).


7. Id. (stating that an infection does not have to occur in order for a person's conduct to be criminal).

8. See infra note 5 and accompanying text.

9. Hereinafter referred to as “perinatal transmission.”

10. For a detailed discussion of the statutes and their application to perinatal transmission, see infra § III(A) and accompanying notes.

11. See infra notes 21-47 and accompanying text.

12. See infra notes 25-41 and accompanying text.

13. See infra notes 42-47 and accompanying text.

14. See infra notes 48-70 and accompanying text.

15. See infra notes 71-89 and accompanying text.
ishing perinatal transmission.\textsuperscript{16} This section will outline the interests of the State, the child, and the woman, and will conclude that punishing this type of transmission is unconstitutional.\textsuperscript{17} Part IV considers relevant policy concerns such as the intrusion of these laws upon all HIV-infected women and the disproportionate effect the statutes have on poor minorities.\textsuperscript{18} In Part V, it is argued that the resulting criminal penalty does not satisfy any one of the four goals of criminal justice: reformation, deterrence, incapacitation/isolation, nor retribution.\textsuperscript{19} Given the ineffectiveness of these statutes, a more humane and effective solution is posed to the increasing number of pediatric AIDS cases in Part VI. It is suggested that the statutes be redrafted to clearly define the terms "intimate" and "sexual" contact, and to expressly exclude perinatal transmission. In addition, a proposal is made to increase access to education for prospective mothers in hospitals, clinic prenatal care units, schools and community shelters. It is also suggested that voluntary HIV testing be offered to all women of childbearing age in conjunction with counseling and education. Finally, to care for the existing pediatric and maternal patients and to prevent any rise in the statistics, an increase in private, state and federal funding of prenatal care clinics, drug rehabilitation programs serving pregnant and non-pregnant women, and health care coverage is suggested.\textsuperscript{20}

II. EXISTING LAW ON THE LIABILITY OF PREGNANT WOMEN FOR HARM TO THE FETUS

The history of liability for prenatal injury begins with \textit{Dietrich v. Northampton}.\textsuperscript{21} In 1884, Justice Oliver Wendell Holmes denied a cause of action in tort for prenatal injuries to a fetus, explaining that any injury to the fetus was compensable through the mother's right to recover damages.\textsuperscript{22} \textit{Dietrich} affirmed the notion that the fetus' rights were integrated with the mother's rights, and that it therefore had no independent legal rights against third parties.\textsuperscript{23}

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\item \textit{See infra} notes 90-167 and accompanying text.
\item \textit{See infra} § IV.
\item \textit{See infra} notes 168-203 and accompanying text.
\item \textit{See infra} notes 204-16 and accompanying text.
\item \textit{See infra} notes 217-24 and accompanying text.
\item 138 Mass. 14 (1884).
\item \textit{Id.} at 17. \textit{See also} Stemmer v. Kline, 26 A.2d 489 (N.J. 1942) (dismissing a cause of action for medical malpractice which adversely affected the fetus).
\item \textit{See Dietrich, supra} note 21. \textit{See also} Allaire v. St. Luke's Hospital, 184 Ill. 359 (1900). The court there held that no action would lie for injuries to a fetus, only days away from birth, due to the negligence of the defendant hospital where the mother of the plaintiff
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trich, and until 1937, all courts in the United States agreed that there should be no cause of action for prenatal injury.24

When courts finally recognized a cause of action for prenatal injury against third parties, the right to recover was contingent upon the viability of the fetus at the time of the injury.25 In Illinois, a cause of action was recognized under the wrongful death statute for the death of a child who sustained a prenatal injury, while in a viable condition, as a result of the negligence of a third party.26 This cause of action was later extended to cover prenatal injuries to a viable fetus by a negligent third party which resulted in permanent injury, short of death.27 Finally, a wrongful death action was sustained against a negligent third party on behalf of a stillborn child who was prenatally injured after the point of viability.28

The courts abandoned the viability requirement as it proved to be a difficult element to establish.29 A cause of action was extended to a surviving infant for prenatal injuries that were inflicted during a previable state of development by a third person.30 Recovery has even been permitted in the case of a hospital which negligently administered a blood transfusion to a woman eight years prior to the conception and bearing of a child injured as a result of the blood transfusion.31

Until this point, the fetus or surviving infant could seek redress was a patient awaiting the delivery of the plaintiff-fetus. The court stated that the plaintiff, at the time of the injury, did not have a distinct and independent existence from his mother. The injury was to the mother and not to the plaintiff:

24. Womack v. Buchhorn, 187 N.W.2d 218, 220-21 (Mich. 1971) (stating that “[w]hen this Court decided Newman in 1937, there were ten jurisdictions other than Michigan denying recovery for prenatal injuries and three allowing it. Today 27 American jurisdictions allow recovery. Federal District Courts have upheld recovery in two other jurisdictions and there is favorable dictum by the state supreme court in still another jurisdiction. Only one denies recovery.”) (footnotes omitted). Id.

25. See Stallman v. Youngquist, 125 Ill. 2d 267, at 273 (1988) The court stated that “[t]he early reliance by courts on viability as a point at which with certainty it could be said that the fetus and the woman who is the mother of the fetus are two separate entities proved to be troublesome. Most courts have since abandoned viability as a requirement for a child to bring an action for prenatal injuries inflicted by third persons.” Id. at 273. See also 40 A.L.R.3d 1222 (1971).


29. 40 A.L.R.3d 1222 (1971). See also Stallman, 125 Ill. 2d at 273.


only from a third party. The doctrine of parental immunity precluded recovery against a parent for prenatal injury.\textsuperscript{32} This had its basis in the early common law cases refusing to legally separate the fetus from its mother.\textsuperscript{33} However, this doctrine was partially abrogated in \textit{Grodin v. Grodin}.\textsuperscript{34} There, the court held that a child may maintain a lawsuit against his mother, alleging ordinary negligence which resulted in brown and discolored teeth.\textsuperscript{35} \textit{Grodin} and other similar cases set the precedent for the current state of the law allowing tort actions against parents for prenatal injury.

The potential arsenal against a child's parents includes actions for wrongful death,\textsuperscript{36} wrongful birth/wrongful life,\textsuperscript{37} diminished

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\item \textsuperscript{32} Grodin v. Grodin, 301 N.W.2d 869 (Mich. App. 1980) (reversing the trial court's grant of summary judgment to defendant mother, and remanding for trial the issue of the reasonableness of the mother's conduct). \textit{See also} Plumley v. Klein, 199 N.W.2d 169 (Mich. 1972) (generally abolishing the common law rule that children cannot bring a cause of action in tort against their parents while maintaining two limited exceptions). If a parent is afforded the full protection of parent-child tort immunity, there would be no cause of action in any circumstance for any injury a child sustains as a result of a parent's intentional, reckless, or negligent conduct. However, some courts have generally abrogated this doctrine, creating a cause of action, while allowing exceptions. The \textit{Grodin} court acknowledged two exceptions of the \textit{Plumley} court. "(1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services and other care." \textit{Grodin}, 301 N.W.2d at 870, \textit{citing} Plumley v. Klein, 199 N.W.2d 169 (Mich. 1972). The policy underlying these exceptions was explained by the Wisconsin Supreme Court as follows, "within the framework of parental authority and discretion, parents must be accorded immunity from litigation which in fact would disrupt family harmony and unity. The immunity is limited to transactions which are essentially parental." Lemmen v. Servais, 158 N.W.2d 341, 344 (Wis. 1968).
\item \textsuperscript{33} \textit{See supra} notes 21-24 and accompanying text. \textit{See also} Mayberry v. Pryor, 352 N.W.2d 322 (Mich. App. 1984) (commenting that \textit{Grodin} was "incorrectly decided"), rev'd, 374 N.W.2d 683 (Mich. 1985).
\item Grodin, 301 N.W.2d at 869 (alleging that the mother was negligent in her failure to seek proper prenatal care by failing to request a pregnancy test after noticing clear signs of pregnancy, and failing to inform her doctor that she was taking tetracycline after she retained the physician's services in her seventh month of pregnancy).
\item A recovery for wrongful death lies in the argument that but for the defendant's prenatal negligence, the child would have been born healthy. Applying this reasoning to the duty owed to the child by its mother, the mother who chooses not to abort has the same duty as an outsider to avoid prenatal actions injurious to a child who would otherwise be born healthy.
\item The majority of jurisdictions allow recovery under wrongful death statutes for a post-viability stillbirth. John A. Robertson, \textit{Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth}, 69 Va. L. Rev. 405, 440 (1983) [hereinafter \textit{Procreative Liberty}]. At least one court has allowed wrongful death recovery where the prenatal conduct caused the fetus' death before viability. Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. Ct. App. 1951) (mother was two to four months pregnant at time of defendant's negligence).
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life,\textsuperscript{38} negligence,\textsuperscript{39} and intentional tort.\textsuperscript{40} The apparent advantages

\textit{See also} W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS \textsection 55, at 369-70 (5th ed. 1984).

37. This doctrine advocates that individual parents have the obligation to protect their child/fetus from every possible risk of harm, and therefore the child has the corresponding right "to begin life with a sound mind and body." Womack v. Buckhorn, 187 N.W.2d at 222. According to this theory, a parent wrongs a child if she chooses "to conceive in the face of a substantial risk of transmitting genetic or infectious diseases. Thus, if the child is likely to be born with a serious illness or disability, the parents are obligated to avoid childbearing altogether." Kathleen Nolan, Protecting Fetuses from Prenatal Hazards: Whose Crimes? What Punishment?, 9 CRI. JUST. ETHICS 13, 17 (1990) (hereinafter Protecting Fetuses).

The child's burden of proof lies in establishing that his parents knew that the child was a foreseeable victim of disease or disability if they conceived or continued a pregnancy, and that irrespective of this information, the parents chose to give birth. He can establish his claim by proving that "it would be rational for . . . a representative of his or her "best interests" to prefer nonexistence to the child's ever having been born. In other words, a "reasonable person" concerned about the child's welfare would conclude that, if all of his or her important interests are doomed from the very start, it would be irrational to prefer the birth of such a child to nonexistence." John D. Arras, AIDS and Reproductive Decisions: Having Children in Fear and Trembling, 68 MILBANK Q. 353 (1990) (hereinafter Fear and Trembling).

In applying this theory of relief to the context of perinatal AIDS transmission, "[b]y far the most powerful argument . . . would be that such a choice [to have children] places future offspring at unacceptable risk of catastrophic harm . . . [This harm would be] so great that no one would want to live such a life." However, it is very difficult to argue that all (or at least the vast majority) of infected children will have lives so brief and so filled with suffering that they qualify as "wrongful." \textit{Id.}, at 364-65. Since only a small percentage of those born HIV infected fit the worst case scenario, and two-thirds of the children born to HIV infected mothers will not even contract the virus, a claim of wrongful life will be very hard to sustain given these optimistic statistics which refute foreseeability.

See, e.g., Womack v. Buckhorn, 187 N.W.2d 218 (holding that a child may sue for negligently inflicted prenatal injuries sustained in an automobile accident); Cur lender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) (holding the "wrongful-life" cause of action to be "the right of . . . [a] defective child to recover damages for the pain and suffering to be endured during the limited life span available to such a child . . . any special pecuniary loss resulting from the impaired condition and possibly even punitive damages"). For a general discussion of the wrongful birth theory, see Lynn D. Fleischer, Wrongful Births: When Is There Liability for Prenatal Injury? 141 A. M. J. DISEASES CHILDREN 1260 (1987).

38. Advocates of this theory concede "the low risk of wrongful life, but insist that the overall harm/probability ratio remains grim for HIV-infected children, [given the statistics] . . . . Even though many of these children will have lives that are 'minimally decent' or 'worth living,' the decision to have them might still be faulted under certain circumstances." Arras, supra note 37, at 366-67. These children did not have any alternative "to either nonexistence or this particular 'minimally decent' life," and the decision of its parents to carry the pregnancy to term thereby exposing them to a high risk of great suffering was irresponsible and wrong. \textit{Id.} See also Sam S. Balisy, Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus, 60 S. CAL. L. REV. 1209 (1987). This author advocates creating a cause of action to recover the value of the lost quality of life against both parents of substance-abused infants.

39. \textit{See supra} notes 25-35 and accompanying text.

40. As heinous as it may seem, there are rare but troubling cases of intentional infliction of prenatal injury. \textit{See} John T. Condon, The Spectrum of Fetal Abuse in Pregnant Women, 174 J. NERVOUS & MENTAL DISEASE 509 (1986).
of chipping away at the parental immunity doctrine, such as compensating a child for prenatal injuries sustained due to his mother’s drug addiction or his father’s battery, are offset by a host of negative ramifications. This newly created cause of action imposes an endless list of duties upon a pregnant woman that transforms her from an autonomous woman to the guarantor of the mind and body of her child. Failure of any one of her responsibilities may result in infinite liability. The legal separation of the mother’s rights from the child’s rights, coupled with the institution of legal remedies for parental misconduct, has effectively resulted in the distortion of the mother-child relationship. Mother and child have become legal adversaries from the moment of conception until birth.

Until now, this note has only discussed the history of parental tort liability. Many states are considering enacting criminal statutes penalizing women for harm to their fetuses, in addition to recognizing a civil cause of action. Many courts have held that a viable fetus is a person for purposes of protection under the State’s vehicular homicide statute. A newly created class of felons have been targeted under child abuse, drug trafficking and manslaughter statutes for perinatal delivery of drugs. One innovative state has even

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41. For a discussion of the constitutional and policy-based arguments against perinatal transmission, see infra § IV and § V.

42. Recently in Ohio, the Supreme Court held that a parent may not be prosecuted for child endangerment for substance abuse occurring before the birth of the child under a statute which provided that “No person, who is the parent . . . of a child under eighteen years of age . . . shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support.” State v. Gray, 584 N.E.2d 710, 711 (Ohio 1992) (quoting Ohio R.C. § 2919.22(A)). However, the court stated that, “[t]he legislature is an appropriate forum to discuss public policy, as well as the complexity of prenatal drug use, its effect upon an infant, and its criminalization. . . . [t]he Ohio Legislature currently has before it S.B. No. 82, which, if passed, would create the new crime of prenatal child neglect to handle situations such as those at bar. ‘A court should not place a tenuous construction on [a] statute to address a problem to which the legislative attention is readily directed and which it can readily resolve if in its judgment it is an appropriate subject of legislation.’” Id.

43. See, e.g., Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984). In struggling with the concept of personhood, the Illinois Appellate Court affirmed the conviction of a man for reckless homicide where the defendant hit a pregnant woman in a car accident. An emergency delivery was then performed. After only a few heartbeats, the baby died. The court found that the child was born alive and was therefore a person for purposes of the criminal statutes. Id. See also People v. Bolar, 440 N.E.2d 639 (Ill. 1982) (holding that the fetus was a person for the purpose of applying a reckless homicide statute).

44. Case law has been inconsistent on the subject. In People v. Melanie Green, Melanie Green’s child was born cocaine addicted, and died two days later. A complaint was filed against Melanie Green for involuntary manslaughter and delivery of a controlled substance. The Grand jury refused to indict her. Tom Hundley, Infants: A Growing Casualty of the Drug Epidemic, CHI. TRIB., Oct. 16, 1989, at 1. However, in People v. Jennifer Clarice Johnson, the baby was born addicted to cocaine and survived. Ms. Johnson was prosecuted, and
attempted to draft a statute which narrowly applies to pregnant drug-users. In fact, the prosecutors of one case admitted that the defendant's "non-criminal behaviors were the basis for the prosecution because drugs had little if anything to do with the baby's injuries." However, prosecuting mothers for harm to their fetuses is by no means limited to illegal drug use. Mothers may be prosecuted for child abuse if they drink (not necessarily "abuse") alcohol while pregnant, or even if they fail to follow medical advice. Failing to seek prenatal care, smoking, eating non-nutritious foods, and taking over-the-counter medications could also be covered under fetal endangerment statutes.

III. CRIMINAL PENALTY FOR THE PERINATAL TRANSMISSION OF THE HIV VIRUS

The historical and legal progression of fetal rights has developed at the close of her bench trial she was found guilty of delivery of a controlled substance to a minor. The judge found that delivery of the drug occurred through the umbilical cord after the birth of the child and before the cord was severed. No. 89-1765 (Fla. Dist. Ct. App., 5th Dist., 1989) (decision quashed, question answered, and case remanded). See also State v. Gray, supra note 42, where the Ohio Supreme Court held that a woman could not be prosecuted for delivery of drugs to her unborn child under a child endangerment statute.

45. Legislation before the Illinois legislature is House Bill 2835 which represents the first attempt to specifically address the prosecution of drug-abusing pregnant women. The act would establish a new criminal statute which provides that any woman who is pregnant and without a prescription knowingly or intentionally uses a dangerous drug or narcotic, and her child is born addicted or the drug is detected as present in the child's blood or urine, commits an offense entitled "Conduct Injurious to a Newborn." HB 2835, 86th General Assembly, State of Illinois (1989 and 1990) amending ch. 38, new § 12-4.7.


There is no question that a state could prohibit actions by a pregnant woman that might reasonably be thought to kill a viable fetus in utero or cause it to be born in a damaged state. Laws that prohibited pregnant women from obtaining or using alcohol, tobacco, or drugs likely to damage the fetus would be constitutional, even if these laws applied only to pregnant women. . . . A statute forbidding pregnant women the use of alcohol or tobacco in order to minimize risks to their fetuses would pass the courts' 'rational basis' test.

Similarly, states could amend or interpret child abuse, feticide, or abortion laws to include a wide range of behavior by pregnant women that is likely to cause harm to their unborn children. Under such statutes, it would be possible to punish a woman who refused to take a necessary medication or who knowingly exposed herself to teratogenic substances or environments."

Id. at 442-43. See also Developments - Medical Technology and the Law, 103 HARV. L. REV. 1519, 1564 (1990) [hereinafter Med Tech] ("Attempts by states to intervene in pregnancy could involve 'enormous intrusions' into the woman's privacy, including regulation of her eating, drinking, smoking, or sexual habits.").
from mere co-existence with maternal rights, to the existence of fetal rights wholly independent from those of the mother. As discussed above, the unborn child has the right to redress in the civil and criminal arenas, consistent with the concept that it has the right to be free from harm imposed by either third parties or its parents.

Recently, a new criminal cause of action has been established against any individual who has exposed others to the HIV virus. Since unborn children have been granted rights equal, if not superior, to those of infants and adults, pregnant women have been subject to an increasing variety of claims of prenatal injury by, and on behalf of, their children, and the perinatal transmission of AIDS satisfies the elements of the new HIV-specific statutes, a new cause of action has been inadvertently added to a child's stockpile against its mother. The State can effectively prosecute a mother for perinatally transmitting the HIV virus to her unborn child.

48. See § IV(8)(A), n. 152-54 and accompanying text. See also § II, n. 33-42 and accompanying text and accompanying notes. At the time this note was written, Roe v. Wade had not yet been overturned or partially abandoned. However, the Supreme Court of the United States had recently accepted a Pennsylvania case on writ of certiorari which reasserts the issue of the legality of abortion. Planned Parenthood v. Casey, 60 USW 4795 (1992).

In the abortion context, the state has a compelling interest in protecting the life of a fetus after the point of viability has been proven by tests that are medically prudent and useful. Webster v. Reproductive Health Servs., 192 U.S. 490 (1989) (plurality opinion). Therefore, with regard to abortion, a fetus earns rights separate from its mother after viability, even though with regard to prenatal injury or fetal endangerment, the issue of viability has been abandoned. Roe v. Wade, 410 U.S. 113 (1973).

49. See supra § II and accompanying notes.


51. See infra § IV(8)(A), n. 152-54 and accompanying text. See also § II, n. 33-42 and accompanying text and accompanying notes (implying that the child's right to be born with a sound mind and body, free from harm inflicted by its parents, is superior to the right to privacy and bodily autonomy which all other individuals except pregnant women are afforded).

52. Id.

53. See infra § III and accompanying notes.

54. Scott H. Isaacman, Are We Outlawing Motherhood for HIV-Infected Women? 22 Loy. U. Chi. L.J. 479, 485 n.43 (1991) (Through his own research, Isaacman discovered that with regard to the Illinois statute, "[t]he bill's sponsor in the Illinois House, State Representative Penny Pullen, takes complete credit for its drafting and states that the intended purpose was to respond to HIV-infected prostitutes who continue to work.... A review of the bill's legislative history reveals no input from health professionals, and the comments fail to address perinatal transmission.... A representative of the Illinois State Medical Society confirmed that his organization was never consulted by the legislature and did not participate in drafting the bill.... Similarly, the Illinois Department of Public Health and Illinois Hospital Association were not consulted and did not participate in the bill's formulation....")
A. History of Liability for Transmitting the HIV Virus

There are two general categories of legal remedies for an individual who has contracted the HIV virus—civil liability and criminal liability. Civil liability is the primary monetary remedy for the individual. Criminal liability is action by the State in the interest of the individual and the public health.

There are at least twenty-four states that have enacted criminal statutes to deal with the problem of an individual who knowingly creates the risk of transmitting the HIV virus. For example, Illinois makes it unlawful to knowingly engage in intimate contact; transfer, donate or provide blood, tissue, semen, organs, or other potentially infectious body fluids for transfusion, transplantation, insemination or other administration to another; or dispense, de-

55. This note will not fully analyze the available civil remedies. However, as a brief overview, there are four causes of action one can pursue in the civil arena. Battery, the first common law cause of action, has been a very successful claim. Battery is the intentional, harmful or offensive, and unprivileged contact with the person of another. RESTATEMENT (SECOND) OF TORTS § 13, 18 (1965). Negligence, the second cause of action, is defined as conduct that falls below the standard established by law for the protection of others against the unreasonable risk of harm. Id. See Crowell v. Crowell, 105 S.E. 206, 208 (N.C. 1920) (It is a well-settled proposition of law that "a person is liable if he negligently exposes another to a contagious or infectious [venereal] disease."). See also Duke v. Houser, 589 P.2d 334, 340 (Wyo. 1979) (where the court held that “[o]ne who negligently exposes another to an infectious or contagious disease, which such other person thereby contracts, can be held liable in damages for his actions.”) Fraud or Deceit is the third cause of action. Its elements include 1) a false representation by the defendant 2) the defendant’s knowledge or belief of the falsity of the representation or the absence of any reasonable basis for the defendant to believe in its truth 3) the defendant’s intention to induce the plaintiff to act in reliance on the misrepresentation 4) the plaintiff’s justifiable reliance on the misrepresentation and 5) damage to the plaintiff resulting from the reliance. RESTATEMENT (SECOND) OF TORTS § 13, 18 (1965). This cause of action is a less sound basis for liability than battery or negligence. Third Party Actions are the final category of civil suit. A third party action is a negligence action brought by the plaintiff against the defendant for infecting X who then infected plaintiff. See Jaffee v. Dills, No. 84 CI - 02139 (Ky. Cir. Ct. 1984) (as discussed in Jonathon Dalton, The Consequences of an Uninformed Menage a Trois Extraordinaire: Liability to Third Parties for the Nondisclosure of Genital Herpes Between Sexual Partners, 29 St. Louis U. L. J. 787, 802-03, 807-08, (1985)). This type of civil action may feasibly be brought on behalf of a child against the person who infected the child's mother.

56. See infra § IV(A).


58. See Molly McNulty, Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses, 16 REV. OF LAW & SOC. CHANGE 277 (1987) (“A criminal statute designed to punish reckless or negligent behavior creating a substantial risk of harm to the fetus (an objective standard of care) effectively would result in a strict liability crime that would disregard a woman’s economic situation, person values, and individual health needs . . . a narrower statute targeting intentional or knowing imposition of harm (a subjective standard of care) might avoid the problems inherent in an objective standard. . . .”). Id. at 318.
liver, exchange, sell or in any other way transfer to another any nonsterile intravenous or intramuscular drug paraphernalia.\textsuperscript{59} Arkansas has enacted a broad yet cursory statute which makes it a criminal offense to "expose another to HIV if the person knows he or she has tested positive for HIV and exposes another person to such viral infection through the parenteral transfer of blood . . . ."\textsuperscript{60} Oklahoma has done the same by making it "unlawful for any person knowing that he or she has [AIDS] or is a carrier of [HIV] and with intent to infect another, to engage in conduct reasonably likely to transfer . . . blood [or] bodily fluids . . . ."\textsuperscript{61}

In a separate clause, the Illinois statute defines "HIV" and "intimate contact." "HIV" includes the full-blown symptomatic case, as well as HIV-positive (seropositive) or any other agent of HIV.\textsuperscript{62} This implies that a person who has recently tested HIV-positive, but currently has no symptoms and may not have any symptoms of AIDS for five to ten years, may still be considered a culpable individual under this statute.\textsuperscript{63} "Intimate contact" is defined as exposure of the body of one person to a bodily fluid of another person in a manner which could result in the transmission of HIV.\textsuperscript{64} This implies that any kind of contact which could pose a risk of transmitting the virus can satisfy the "act" required to invoke the penalty. This contact could include spitting,\textsuperscript{65} sweating,\textsuperscript{66} bleeding,\textsuperscript{67} kissing,\textsuperscript{68} or perinatal contact since all of these actions involve, or

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\item \textsuperscript{59} ILL. REV. STAT. ch. 38, para. 12-16.2 (1989).
\item \textsuperscript{60} ARK. STAT. ANN. § 5-14-123 (1989). The term "parenteral" refers to any transfer that is not through the mouth, or the gastrointestinal tract. This includes the perinatal transfer of blood.
\item \textsuperscript{61} OKLA. STAT. ANN. tit. 21, § 1192.1(A) (West Supp. 1993).
\item \textsuperscript{62} ILL. REV. STAT. ch. 38, para. 12-16.2 (1989).
\item \textsuperscript{63} Id. (expressly stating that " 'HIV' means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome.")
\item \textsuperscript{64} Id.
\item \textsuperscript{65} State v. Haines, 545 N.E.2d 834, 838 (Ind. Ct. App. 1989) (reinstating conviction of attempted murder supported by evidence that the defendant carried the AIDS virus, was aware of his infection, believed it to be fatal, and intended to infect others with the disease by spitting, biting, scratching and throwing blood).
\item \textsuperscript{66} Magic Johnson's recent discovery and announcement that he tested positive for the AIDS antibody sparked a nation-wide discussion on the possibility of transmitting the virus through his sweat on the basketball court.
\item \textsuperscript{67} See Haines, 545 N.E.2d at 838 (mere bleeding of an AIDS-infected patient is not sufficient to trigger an attempted murder charge, in Haines the defendant was "throwing blood," apparently taking substantial steps to infect others).
\item \textsuperscript{68} There has been some discussion and research to determine whether the virus can be found in saliva, since it is a body fluid. The conclusion can only be determined by finding out whether the saliva contains T-cells, which are susceptible to the virus.
\end{itemize}
could involve, the intermingling of bodily fluid, conceivably creating a risk of transmission.

It must be noted that at least two states, Illinois and Missouri, penalize the individual for merely creating the risk of transmission. They require knowledge of infection, but specify that an individual may be prosecuted under the statute even if HIV infection does not result from the exposure.

B. How These Statutes can be Applied to Pregnant Women who Transmit the Virus to Their Fetuses

The language of these statutes makes it possible to prosecute a woman for transmitting the virus to her unborn fetus through the placenta and umbilical cord during pregnancy, or even during the sixty to ninety seconds after birth before the umbilical cord is cut. The woman satisfies the first element of the offense if she discovers that she is HIV positive prior to or during pregnancy.

In Illinois, the requisite "act" that creates the risk of transmission could be either "engaging in intimate contact with another," or

69. ILL. REV. STAT. ch. 38, para. 12-16.2 (1989) (stating that intimate contact is the exposure of the body of one person to a bodily fluid of another in a manner which could result in the transmission of HIV); see also Mo. STAT. ANN. § 191.677 (1991) (making it "unlawful for any individual knowingly infected with HIV to . . . [d]eliberately create a grave and unjustifiable risk of infecting another with HIV . . . when an individual knows that he is creating that risk").

The Illinois and Missouri legislatures have taken on the burden of determining the level of risk to which an HIV infected individual may justifiably expose other persons. One must keep in mind that a level of risk that some find prohibitive might be quite tolerable to others. In the case of HIV infected women, the inquiry is even more complex, when legislatures attempt to weigh the justifiability of having children. In general, the greater the magnitude and probability of predicted harm, the less justifiable it is to have children. Applying this formula has effectively been avoided in Illinois by criminalizing any risk of transmission. In Missouri, the legislature decided on a "grave and unjustifiable" standard. However, it remains to be seen whether the Missouri courts will construe this term narrowly or broadly.

70. ILL. REV. STAT. ch. 38, para. 12-16.2 (1989) (proposing that an infection does not have to occur for the above conduct to be criminal); see also Mo. STAT. ANN. § 191.677 (1991) (where there is no discussion of an actual transmission or infection; only the risk of transmission is clearly delineated).

71. See Johnson v. State, 602 So.2d 1288 (Fla. 1992). (Johnson had been convicted and sentenced to 15 years on probation, and required to abstain from drug and alcohol use if pregnant and to comply with prenatal care recommendations after she "delivered illegal drugs" to a minor via the umbilical cord in the moment after her child was born and before the cord was clamped). Id. at 1290-91. The Florida Supreme Court reversed this conviction, stating that the statute "does not encompass 'delivery' of an illegal drug derivative from womb to placenta to umbilical cord to newborn after a child's birth. If that is the intent of the legislature, then this statute should be redrafted to clearly address this problem of passing illegal substances from mother to child in utero, not just in the birthing process." Id. at 1296.

transferring, donating or providing blood, tissue, semen, organs, or other potentially infectious body fluids for transfusion, transplantation, insemination, or other administration.\textsuperscript{73} In Missouri, the requisite act is merely “deliberately creating a grave and unjustifiable risk of infecting another with HIV through sexual or other contact.”\textsuperscript{74} Oklahoma and Arkansas contain similar language to Missouri’s statute.\textsuperscript{75} A pregnant woman infected with HIV would satisfy any one of these exculpatory clauses.

In Illinois, “sexual conduct” is defined in a preceding Code section as “any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, for the purpose of sexual gratification or arousal of the victim or the accused.”\textsuperscript{76} In drafting the HIV statute, the legislature expressly used the term “intimate contact,” not “sexual contact.” Since they defined sexual contact in the preceding section, intimate contact must have a different meaning.\textsuperscript{77} “Intimate contact” must implicitly include sexual and non-sexual contact.\textsuperscript{78} Transplacental contact is non-sexual contact which exposes “the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV.”\textsuperscript{79}

Under any of the above mentioned statutes, transplacental exposure to HIV would be considered criminal conduct.

Tying both elements together, under these statutes a woman would be guilty of creating a grave and unjustifiable risk of infecting her fetus with HIV through placental blood transfer,\textsuperscript{80} if she knew that she was infected with the virus prior to or during pregnancy.\textsuperscript{81}

A “plain meaning” analysis of the statute points to the conclu-

74. Mo. ANN. STAT. § 191.677(2) (Vernon 1990) (emphasis added).
75. See supra notes 60-61 and accompanying text.
77. Id.
78. See ILL. REV. STAT., ch. 38, para. 12-16.2(b) (1989) (defining “[(i)n]imate contact with another” [as] . . . the exposure of the body of one person to a bodily fluid of another in a manner that could result in the transmission of HIV.”)
79. Id.
80. However, in actuality, there is only a 20-30\% chance that a woman who is HIV positive will give birth to a child that is HIV positive. Carol Levine & Nancy N. Dubler, Uncertain Risks and Bitter Realities: The Reproductive Choices of HIV-infected Women, 68 MILBANK Q. 321, 327 (1990) [hereinafter Reproductive Choices].
81. It is the act of getting pregnant when the woman knowingly is infected, or even intentionally getting pregnant, that satisfies culpability. The consequences are irrelevant in these statutes - the focus is on the knowledge that an individual is creating the risk of transmission.
sion that a woman who is HIV positive, and who transfers the virus to her unborn fetus, may be charged with a felony upon the birth of the child. Looking beyond the four corners of the statute, it can also be argued that since no specific exception for perinatal transmission was included, the legislature must have contemplated this extension of liability and its silence constitutes implicit approval of this liability.

Advocates of prosecution may also argue that the policy rationale behind the statute encourages liability in these cases. The statute was enacted to curb the growing spread of AIDS through specific and general deterrence. By allowing women to escape liability when they infect their children, there would be no incentive for these women not to add to the growing population of AIDS victims. By creating another person with the HIV virus, it is as if they have added another number to the statistics.

Given the facts that fetal infection satisfies the broad language of the statute, that there is no exception for fetal infection, that the infection rate has risen to epidemic proportions, that the fetus has rights separate and independent from the mother, and that the State has an increasing interest in protecting the fetus, it is clear that childbearing could become a felony under these statutes.

IV. CONSTITUTIONAL ARGUMENTS FOR AND AGAINST PUNISHING PERINATAL AIDS TRANSMISSION

There are many different reasons for a legislature to enact criminal statutes limiting individual freedom. Some are designed for or-
der, such as traffic laws. Other acts are criminalized because they impair another individual's freedom, such as kidnapping or homicide. Yet another group of penalties exist due to paternalism; the government wishes to protect the individual from himself. These laws are exemplified by statutes prohibiting the use and possession of drugs, statutes mandating that a helmet be worn while riding a motorcycle, and statutes mandating that seatbelts be worn in an automobile.

The particular criminal statutes addressed in this note were drafted because the act of transmitting the HIV virus impairs another individual's freedom - freedom to continue life free from intentional harm. The motive behind the enactment of these statutes is the same as that of murder, manslaughter, and assault.90 We, as members of society, owe a duty to others that share our world; we all must respect each other's freedom. This raises more questions, such as, does a fetus in a mother's womb have the same rights as that of another human being? Does it have a right to life, and do we owe a duty to ensure that life?91 Or, is the duty merely to give a fetus a clean slate, free from hazards, if the mother chooses to continue the pregnancy to term?

This section will attempt to define and balance the constitutional interests of the State, child, and mother. This note discusses the stage of development at which the State has a compelling interest in the health and welfare of a developing fetus, as balanced against the mother's right to privacy and bodily autonomy. This discussion is imperative to the issue of whether women should be punished for transmitting the virus to their unborn children. If there is no duty owed to the child, mandating morality in this case would be the same as transforming functioning members of society (with full rights) into incubators, subject to extreme state control for nine months. Only after we have answered these constitutional questions can we legitimately move on to consider whether judgments about personal morality should enter the realm of public policy and police.

In order for the State to regulate or intrude upon a fundamental

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90. Another reason a duty is imposed on pregnant women is "society's reluctance to have children born with genetic disease, HIV infection, or perinatal drug addiction may be motivated as much by economics as by any concern that bearing such children is morally wrong." Nolan, supra note 37, at 18.

91. This is of course, another topic in and of itself, which will not be discussed in this note.
right, its intervention must be subjected to strict scrutiny. The State's interest must be deemed "compelling" before it can override the fundamental right of an individual. The following discussion attempts to set forth the interests of the State, the child, and the woman. As any discussion in the realm of reproductive freedom is never truly settled, the conclusion to this section is merely consistent with logic, and with the current Supreme Court determination of the point at which the State's interest becomes compelling. This section walks through the integral discussion of whether the State can "mandate maternal responsibility"; this corresponds with the child's interest in being born free from harm, or, at least, being born with a sound mind and body.

1. State's Interests

The change in the law granting the fetus independent rights has led to the increased scope of the State interest. Not only does the State have an interest in prohibiting abortion after the point of viability; it now has asserted an interest in protecting the fetus' right to be born with a sound mind and body, and in enforcing a legal maternal duty.

93. Id. at 482.
94. See Roe v. Wade, 410 U.S. 113 (1973) (setting the legal standard regarding the issue, although this holding has been the subject of continued debate since 1973).
95. See Stallman v. Youngquist, 125 Ill. 2d, 267, 278 (1990). ("Logic does not demand that a pregnant woman be treated in a court of law as a stranger to her developing fetus").
96. See Roe, 410 U.S. 113.
97. Id. But see Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 416 (1982) (holding that "[w]hile a State's interest in health regulation becomes compelling at approximately the end of the first trimester, the State's regulation may be upheld only if it is reasonably designed to further that interest. If during a substantial portion of the second trimester the State's regulation departs from accepted medical practice, it may not be upheld simply because it may be reasonable for the remaining portion of the trimester. Rather, the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest may be furthered.").
98. Womack v. Buchhorn, 187 N.W.2d at 222 (holding that "justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child.").
99. For a discussion of the existing law on the liability of pregnant women for harm to the fetus, see § II supra and accompanying notes. A practical argument for allowing the state to enforce the maternal duty not to harm her fetus, is rooted in the state's pecuniary interest in preventing the birth of severely handicapped children who will place great demands on society's resources. Med Tech, supra note 47, at note 51. See also Smith, The Dangers of Prenatal Cocaine Use, 13 MATERNAL-CHILD NURSING J. (May/June 1988).
According to traditional constitutional analysis of due process rights, if a government regulation impinges upon a fundamental right, it is subjected to essentially the same type of strict scrutiny applicable to fundamental rights issues under the Equal Protection Clause.\textsuperscript{100} This means that the regulation is invalid unless it is found to be \textit{necessary}, and narrowly drawn, for achieving a \textit{compelling} government interest.\textsuperscript{101} Since the right to procreate has been legally identified as a fundamental right,\textsuperscript{102} the government's interest in enacting these statutes must be compelling.

After the first trimester of pregnancy, the State's interest in the mother's health (not the fetus') becomes sufficient enough to justify reasonable regulation of the abortion decision.\textsuperscript{103} The State's interest in the "potentiality of human life" becomes compelling once the fetus reaches viability.\textsuperscript{104} At this stage, greater regulation is permitted in the interest of protecting the fetus from harm.\textsuperscript{105} Some would argue that once a pregnant woman has abandoned her right to abort and has decided to carry the fetus to term, the State has an interest in ensuring that the fetus is born as healthy as possible.\textsuperscript{106} This argument has been accepted in one jurisdiction, but has not gained nation-wide acceptance.\textsuperscript{107}

States have asserted a compelling interest in the general welfare of a viable fetus without substantiating this interest.\textsuperscript{108} When the State tries to prosecute a woman for the delivery of illegal drugs to her fetus, it bases the prosecution on protecting of the interests of the child.\textsuperscript{109} It has been argued that "[r]ather than promoting any

\textsuperscript{100} Laurence H. Tribe, American Constitutional Law 1000 (1st ed. 1978).
\textsuperscript{101} Id. at 1002. See also 410 U.S. at 155; 381 U.S. at 485; Kramer v. Union Free School Dist., 395 u.s. 621, 627 (1969).
\textsuperscript{102} Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that the right to procreate is "one of the basic civil rights of man").
\textsuperscript{103} Roe, 410 U.S. 113.
\textsuperscript{104} Id. at 114.
\textsuperscript{105} Id.
\textsuperscript{106} Robertson, supra note 36 at 437.
\textsuperscript{107} It has been applied in the state of Michigan.
\textsuperscript{108} See Akron, 462 U.S. at 433-34 (holding that the state's regulation would be held unconstitutional if its rationale "depart[ed] from acceptable medical practice," or was truly a disguised imposition of a heavy and unnecessary burden on a woman's access to a relatively inexpensive, otherwise accessible, and safe abortion).
\textsuperscript{109} In reality, the motivation is economical as well as public health oriented. See Smith, The Dangers of Prenatal Cocaine Use, 13 Maternal-Child Nursing J. (May/June 1988) (The human costs related to the pain, suffering and deaths resulting from maternal cocaine use during pregnancy are simply incalculable. In economic terms, the typical intensive-care costs for treating babies exposed to drugs range from $7500 to $31,000. In some cases medical bills go as high as $150,000).
legitimate state interest, much less a compelling one, these prosecu-
tions are undermining public health, a fact reflected by the increas-
ingly outspoken opposition of public health organizations to these
prosecutions. For example, fourteen public health and public inter-
est groups . . . sought to file amicus briefs in opposition to the con-
viction of Jennifer Johnson."\textsuperscript{110}

The state of Illinois would have a difficult time feigning a "com-
pelling public interest" in the enactment of such a statute, since not
a single public health organization was consulted.\textsuperscript{111} If no organi-
zation representing the public health was even contacted, it would
be very difficult to argue that there was a compelling public health
interest behind the legislature's intent. Perhaps Penny Pullen, the
sponsor of the Illinois bill, could argue that she research statistics
herself. On the other hand, she does not appear to be thoroughly
concerned with the facts. Perhaps the sponsors could just respond
that they do not need experts to assert a compelling public interest
in this area; they are preventing the death of children through gen-
eral deterrence and the punishment of culpable women. If this is
the purpose of the statute, it is overly given the perinatal transmis-
sion statistics.

Another means invoked for regulating this criminalization is the
enforcement of an alleged legal maternal duty.\textsuperscript{112} The scope of this
duty is elusive, arguably ranging from the duty to avoid all harm to
her unborn fetus, to the duty to produce a healthy child. What kind
of duty does a pregnant woman owe? And what corresponding
duty does the State owe to the child to enforce this maternal duty?
Duty is certainly not absolute. Therefore, it is easy to understand
why many have argued for requiring a woman to protect her fetus.
Few would argue that a pregnant woman has absolutely no moral
responsibility to her developing fetus. However, violation of this
moral responsibility not to harm is being transformed into a punish-
able crime.\textsuperscript{113}

This section will present the three degrees of this maternal duty.
These range from the duty to avoid all harm to the duty to produce
a perfect child. This section will discuss each potential duty, and
will suggest which moral duty may be mandated by the State, with


\textsuperscript{111} Issacman, \textit{supra} note 45, at note 43.

\textsuperscript{112} \textit{See generally} Wendy K. Mariner et al., \textit{Pregnancy, Drugs, and the Perils of Prosecu-

\textsuperscript{113} See applicable statutes at § III(A) & (B).
its breach being punishable. Underlying the discussion is the assumption that fetal and maternal rights are being balanced.

At the farthest end of the spectrum lies the obligation to create a healthy, normal baby. One court phrased the corresponding fetal right as, the "right to begin life with a sound mind and body." This opinion spawned the "wrongful life doctrine." This doctrine advocates judging as to whether a child would have been better off if not born at all. This is an extremely dangerous position for any court to take, as there are no limits to its application, and no clearly defined methods for determining culpability. Furthermore, there exist no guidelines for determining which deviant characteristics are to be considered tragic enough to necessitate valuation of life. This is clearly an impractical and dangerous standard.

Some advocates argue that the maternal duty requires the promotion of the well-being of offspring. According to one author, "the easiest moral obligation to identify in this setting is that of a woman to promote the well-being of her offspring." This obligation appears easy to identify because "a special obligation to take care of one's offspring seems to flow naturally out of the relationship of parenting." However, there are also recognizable disadvantages to this position. "Imposing criminal liability on women for actions that fail to promote the well-being of future children embraces a presumption against accepting prenatal risks, possibly including the risk of genetic or infectious disease."

Although the duty to avoid harm is an arguably better standard to apply than the obligation to give birth to a perfect child, it is still

116. "What is the nature of the obligation that parents and possibly others owe to future children? Are fetuses to be protected from every possible risk of harm? Some have argued that individual parents have precisely this obligation, and that children have a corresponding right 'to begin life with a sound mind and body.' On this view, parents 'wrong' a child if they choose to conceive in the face of substantial risk of transmitting genetic or infectious diseases. Thus, if the child is likely to be born with a serious illness or disability, the parents are obligated to avoid childbearing altogether." Nolan, supra note 37, at 17.
117. Id. See also Mathieu, Respecting Liberty & Preventing Harm: Limits of State Intervention in Prenatal Choice, 8 HARV. J. L. & PUB. POL'Y 19 (1985); see also, John A. Robertson, Legal Issues in Prenatal Therapy, 29 CLINICAL OBSTETRICS & GYNECOLOGY 603 (1986).
118. Nolan, supra note 37, at 16.
119. Id.
120. Id. at 20.
far from applicable. The "duty to avoid harm" to a developing fetus is ambiguous. This sort of obligation could include any or all of the following: the duty to avoid all harm, the duty to prevent any risk of harm, the duty to avoid only some kinds of harm, the duty to prevent any unreasonable risk of harm, and, even, the duty to avoid causing death. Traditional tort liability is based on one, or a variety, of these standards, depending upon the circumstances. The situation at hand is unique in that the interacting individuals are not strangers. They are intimately bonded in one body. In tort theory, the closer the relationship, the greater the duty owed. The question is, how high should the standard be when the State is to enforce it through the use of criminal penalties?

Imposing the duty to avoid all harm could result in the prosecution of a woman for any harm befalling her unborn child. The woman would not be able to drive an automobile, exercise in late stages of pregnancy, or even leave her house for a walk. Harm can be lurking in every corner, including within her own body. This duty seems too great a burden to bear.

Implicit in the duty to prevent any risk of harm are the same criticisms mentioned above, except that harm would not necessarily have to result for the woman to be found to have breached her duty. Even getting out of bed could create a risk of harm to the fetus. Smoking, drinking, and driving, which are all legal activities, would be prohibited for pregnant women. Therefore, this duty is arguably too burdensome.

Perhaps a more moderate duty would require the mother to avoid only some kinds of harm, such as those that result in serious, irreversible damage. This duty could lead to punishment of women only for the actual, and not merely possible, consequences of their actions. This category has not factored out inherited genetic diseases that result in serious irreversible damage, activities which result in low birth weight, sudden infant death syndrome and premature birth and its corresponding complications. It also fails to consider refusals of treatment necessary for the safety of the fetus.

121. Similar to the HIV statutes.
122. Of course, consistent with case law, the mother reserves the right to terminate the pregnancy up to a certain stage. The duty would be imposed only after the woman made the free choice to continue the pregnancy to term.
123. See Nolan, supra note 37, at 16. (There is a "general duty of individuals to avoid injuring or harming one another. . .").
124. This duty is much like the duty to create a healthy child.
125. Referring to disease, or genetic defect.
126. See supra notes 114-25 and accompanying text.
and the necessary ingestion of medication for the benefit of the mother, which may have permanent adverse effects on the baby.\textsuperscript{127} In effect, the mother may still be punished for any serious harm to her child, regardless of the legality of the activity that caused the harm, and regardless of the degree of control she had over the source of the harm.

A more moderate approach would impose a duty to avoid unreasonable risk of harm to the fetus. This duty would factor out those risks that are practically inherent in our society, such as car accidents while driving sober, or the risk of harm from exercise or from drinking coffee. This still leaves a grey area which would include smoking, drinking moderate amounts of alcohol, and knowingly conceiving or continuing a pregnancy when there is a substantial likelihood that the child will contract Tay-Sachs or any other genetically transmitted disease.\textsuperscript{128}

As evidenced by the above discussion, there is an inherent problem in basing a standard on the consequence, or the harm, rather than on the source of the harm, human conduct. By using conduct as the measuring stick, the degree of control and knowledge can then be factored into the obligation, which is a necessary consideration in drafting criminal statutes. But how far should we go? What kind of conduct should be prohibited? In the HIV specific statutes sexual intercourse and the donation of blood are specifically mentioned as culpable acts.\textsuperscript{129} An implicitly culpable act with regard to perinatal transmission is the failure to terminate the pregnancy. Should we criminalize only conduct that is already illegal, or should we slide down the "slippery slope" and criminalize conduct during pregnancy that is normally legal for those that are not carrying a child?\textsuperscript{130} Should we criminalize all "reflexive actions" as well?

\textsuperscript{127} Grodin, 301 N.W.2d at 869.
\textsuperscript{128} The likelihood of these kinds of harm being visited on a child, and therefore proving foreseeability, can be determined by genetic testing or taking an immediate family medical history.
\textsuperscript{129} See supra notes 55-70 and accompanying text.
\textsuperscript{130} Lynn M. Paltrow, \textit{When Becoming Pregnant is a Crime}, 9 CRIM. JUST. ETHICS 41, 42-43 (1990). This author writes that "[t]reating pregnancy as a conflict between maternal and fetal rights leads inevitably down a slippery slope. Prosecutions of pregnant women cannot rationally be limited to illegal conduct because many legal behaviors cause damage to developing babies. Women who are diabetic or obese, women with cancer or epilepsy who need drugs that could harm the fetus, and women who are too poor to eat adequately or to get prenatal care could all be characterized as fetal abusers. Pregnant women engage in all sorts of behaviors that could expose their fetuses to harm, including flying to Europe and cleaning their cat's litter box. . . . In fact, these prosecutions are not limited to pregnant women who engage in illegal behavior. In Laramie, Wyoming, Diane Pfannenstiel, a pregnant woman, was arrested for child abuse when she admitted to the police that she had been
Perhaps the element of foreseeability should be referred to when trying to define the judicial standard.\textsuperscript{131} This seems to be the path taken by the states that have enacted statutes criminalizing AIDS transmission.\textsuperscript{132} If it is foreseeable that a risk of harm will come to a person exposed to the virus, and the infected individual exposes another to the virus knowing of his infection and the inherent risk, then she will be subject to criminal penalty.\textsuperscript{133} The \textit{Renslow} court reaffirmed the "utility of the concept of duty as a means by which to direct and control the course of the common law," and went on to say that "there is a right to be born free from prenatal injuries foreseeably caused by a breach of duty...."\textsuperscript{134} But this calculation could lead to infinite liability. It is foreseeable that any act or omission by a pregnant woman could impact upon fetal development.\textsuperscript{135}

Few, if any, judicially defined standards are as difficult to establish as that which a mother owes her unborn child. This inherent difficulty suggests that perhaps the issue should not be in the realm of judicial discourse at all. Justice Cunningham struggled with this issue in \textit{Stallman v. Youngquist}.\textsuperscript{136} He forcefully wrote,

\begin{quote}
It must be asked, [b]y what judicially defined standard would a mother have her every act or omission while pregnant subjected to State scrutiny? . . . Holding a mother liable for the unintentional infliction of prenatal injuries subjects to State scrutiny all the decisions a woman must make in attempting to carry a pregnancy to term, and infringes on her right to privacy and bodily autonomy. . . . Logic does not demand that a pregnant woman be treated in a court of law as a stranger to her developing fetus.\textsuperscript{137}
\end{quote}

\section{Child's Interests}

If the duty is indeed to avoid some kind of harm to the fetus, to act to protect the fetus or to refrain from intentionally causing harm to the fetus, then the duty is to the unborn child.\textsuperscript{138} In reality, in

\begin{itemize}
\item drinking alcohol. . . . And in 1985, Pamela Rae Stewart was charged with 'failing to follow her doctor's advice' to stay off her feet, to refrain from sexual intercourse . . . and seek immediate medical attention if she experienced difficulties with the pregnancy'). \textit{Id}.
\item \textsuperscript{131} Leon Green, \textit{Foreseeability in Negligence Law}, 61 \textit{COLUM. L. REV.} 1401.
\item \textsuperscript{132} \textit{See supra} notes 55-70 and accompanying text.
\item \textsuperscript{133} For a discussion of how these statutes apply to pregnant, HIV-infected women, \textit{see supra} notes 71-89 and accompanying text.
\item \textsuperscript{134} \textit{Renslow v. Mennonite Hosp.}, 67 ILL. 2d at 348, 357 (1977).
\item \textsuperscript{135} \textit{Stallman v. Youngquist}, 125 ILL. 2d at 267, 277 (1988).
\item \textsuperscript{136} \textit{Id}.
\item \textsuperscript{137} \textit{Id.} at 277-78.
\item \textsuperscript{138} However, \textit{Roe}, 410 U.S. at 158, 161, held that at no stage of development is a fetus a
criminal cases, the duty is to the State. The State acts as "guardian" of the public interest, and the individual must then answer to the State. Also, the unborn child has no other party acting in its interest; therefore, the state represents the unborn child's interest by mandating the duty.

But since the child is housed in the woman's body, the duty actually imposed upon the pregnant woman only requires that she take care of herself. This can be supported by the fact that few prosecutions of drug-using women have demonstrated that a drug actually caused harm to a newborn. What they are prosecuting is the conduct that exposed the child to risk. This suggests that it is not enough to avoid harm. The duty implied is really a duty to prevent any risk of harm. The only way to prevent any risk of harm is to take care of her body. If her body is unhealthy, so is the baby.

Contrary to the State's purported interest in the life of the fetus, the laws which criminally punish perinatal transmission of the HIV virus fail to promote the child's best interest. These laws inherently favor abortion, since this is virtually the only way the mother can avoid prosecution. Abortion is one hundred percent effective in terminating a fetus' life. In fact, the most tragic characteristic of AIDS is its deadly nature, and the corresponding lack of a cure. However, just as babies born addicted to drugs have a good chance of surviving, so do babies born HIV-positive. In AIDS cases, women infected with HIV only have a twenty to thirty percent risk of transmitting the infection to their offspring. Of those infants that

139. Akron v. Akron Ctr. for Reproductive Health Servs., 462 U.S. 416, 427, 430-31 (1983) In order for the state to interfere, it must prove that is has a compelling interest and must demonstrate that the law is narrowly tailored and furthers the asserted interest. Id.
140. Paul A. Logli, Drugs in the Womb: The Newest Battlefield in the War on Drugs, 9 CRIM. JUST. ETHICS 23, 27 (1990) ("[t]he belief that parents can best fulfill their responsibilities to their children if free from intervention is naive in the fetal abuse context. Children have separate and distinct legal rights, and are entitled to the protection of the law, even from their parents.") (citing Ill. Rev. Stat., ch. 37, 804-1 (1987)).
142. Id. at 31.
143. See infra notes 147-51 and accompanying text.
144. Philip A. Pizzo, Emerging concepts of the Treatment of HIV Infection in Children, 262 JAMA 199 (1989). Some of the HIV-infected infants are born close to death, others will sicken within the first few months of life and die quickly, and still others will have evidence of disease intermittently over the years. Nevertheless, some may remain healthy for years; some children aged five or six are only now developing symptoms of HIV illness. I. Auger et al., Incubation Periods for Pediatric AIDS Patients. 336 NATURE 575, 575-77 (1988).
Approximately 4,000-5,000 infants annually are expected to acquire HIV infection in this
are infected, some may remain asymptomatic for many years, even in the absence of treatment.\textsuperscript{145} Given these statistics, the statute acts contrary to the child's best interest.

3. Mother's Interests

Justifying state intervention in human development is not as easy as finding a compelling state interest in ensuring the interests of the child. We must also consider the rights of the pregnant woman to privacy, bodily autonomy, and equal protection of the laws. Only after we have carefully weighed these fundamental rights against the State's and child's interests can we decide that criminalizing perinatal HIV-transmission is unconstitutional.

A. Right to Privacy and a Woman's Liberty Interest

In 1973, the Supreme Court held that a woman has a legal right to decide for herself whether she shall conceive and bear a child.\textsuperscript{146} Even though this right was discovered in the context of the abortion issue, it alternatively extends to the right to procreate\textsuperscript{147} and the right to use contraception.\textsuperscript{148}

A woman has a great deal of latitude in making reproductive decisions. Consequently, the State's right to protect the fetus from harm, as well as the fetus' right to be free from harm, must strongly override the woman's right, to bear a child. This holds true even when the woman is infected with HIV.

By criminally penalizing a woman infected with HIV for bearing a child, the State would be unconstitutionally imposing upon her reproductive freedom. The State would be placing her in a no-win situation, by defining her options as 1) giving up her child

\textsuperscript{fashion. At least 15\%-20\% of infected infants will die before the age of one year, while others will have poor growth, neurologic dysfunction, and frequent infections. Ben Z. Katz, Natural History and Clinical Management of the Infant Born to a Mother Infected with Human Immunodeficiency Virus, 13 Seminars in Perinatology 27 (1989); I. Auger et al., Incubation Periods for Pediatric AIDS Patients, 336 Nature 575 (1988).

\textsuperscript{145} However, the reality of the disease is that the children who are born with the HIV virus in their systems are destined to manifest the symptoms, and eventually die of AIDS.

\textsuperscript{146} Roe, 410 U.S. 113.

\textsuperscript{147} Skinner v. Oklahoma, 316 U.S. at 541 (where the court referred to the right to procreate as one of the basic civil rights of man).

\textsuperscript{148} Griswold v. Connecticut, 381 U.S. 479, 483 (invalidating a state law that made it a crime for any person to use contraceptives, including married persons. The court held that the statute infringed upon a constitutionally protected zone of marital privacy). See also Eisenstadt v. Baird, 405 U.S. 438 (1972) (where the court reasoned that the decision whether to use contraceptives was one of individual privacy, and thus the right belonged to single as well as married people).
through abortion and avoiding prosecution, or 2) giving birth and spending the rest of her life in jail. These choices are severely restrictive as compared to those reproductive choices afforded to a woman who is not-infected with HIV.\footnote{Currenty, a woman has the freedom to contracept, to abort, to give her child up for adoption, or to bear and keep her child. And contrary to those who are HIV-infected, there are also no restrictions on her freedom to have sexual intercourse.}

The only way an HIV-infected woman can avoid violating the law is by terminating her pregnancy, because having the child violates the statute regardless of whether she actually transmitted HIV to the infant.\footnote{The reality of the social unacceptability of the disease is that many HIV-infected babies are no worse off than babies born with other severe and life-threatening birth conditions, yet there are no comparable claims that all such babies should have been aborted. Indeed, as a society we point proudly to expensive and technically elaborate neonatal intensive-care units constructed to support the imperiled lives of premature infants. See supra note 80, Levine & Dubler, at 328-29 (nondirective counseling given by genetic counselors to couples who are at risk of giving birth to abnormal children, including Tay-Sachs carriers. See also Arras supra note 37, at 367. Yet we coercively and publicly direct HIV-infected women not to have children. In December 1985, the Centers for Disease Control (CDC) publicly recommended that HIV-infected women should “be advised to consider delaying pregnancy until more is known about perinatal transmission of the virus,” and the head of the CDC AIDS program, Dr. James Curran stated in an interview that “[s]omeone who understands the disease and is logical will not want to be pregnant and will consider the test results when making family planning decisions.” Levine & Dubler, supra note 80, at 321.}

An HIV-infected woman can avoid violating the law only by surrendering reproductive autonomy, and aborting.\footnote{Even this option may be taken away from women. Abortion rights have been increasingly threatened, by prohibiting federal funds from being used to perform abortions, or even discuss the option of abortion. See Rust v. Sullivan, Ill. S.Ct. 1759 (1991). Medicaid payments for abortion can only be used in cases in which the woman’s life is endangered by her continued pregnancy. “Many states, urged on by Right to Life organizations, have limited further funding. Five states provide some limited further services and only 12 provide for general funding of poor women’s abortions. For poor women in Michigan and Nevada, abortion for the reason of a possibly HIV-infected child is not an option.” See Levine, supra note 80, at 340.}

State intervention in fetal development also invades a woman’s right to bodily autonomy. Advocates of State intervention argue that there is no invasion of bodily autonomy when a state restricts or compels activities during pregnancy, including abortion. They argue that once a woman chooses to conceive and continue the pregnancy and the State chooses to protect the fetus,\footnote{See Note, Constitutional Limitations on State Intervention in Prenatal Care, 67 Va. L. Rev. 1051 (1981) (suggesting that certain state restrictions on pregnant women would be constitutional). The state would, of course, be free to favor the woman’s autonomy over the fetus’ well-being at any point in the pregnancy, if that choice were politically acceptable.} the woman loses the liberty to act in ways that would adversely affect the fetus. They further argue that since the maternal-fetal conflicts that arise...
in managing pregnancy do not involve the woman's right to procreate, but rather only affect how she will behave in carrying the child to term, no constitutional right has been trampled.\textsuperscript{153} To the contrary, implicitly demanding an abortion is as invasive as a court order requiring a blood transfusion or fetal surgery to save the child against the mother's wishes.\textsuperscript{154}

\section*{B. Equal Protection}

Criminalizing perinatal transmission punishes women for carrying their babies to term. The State is effectively punishing a state of being, not an act. It is similar to "convicting one for being an addict, being a chronic alcoholic, being 'mentally ill or a leper'..."\textsuperscript{155} Advocates of prosecution argue that the State is punishing women for the act of transmission. However, that transmission flows from the state of being pregnant. It is a reflexive act of the condition of pregnancy. It therefore does not refute the argument that the State is punishing the state of being a pregnant, HIV-infected woman. Furthermore, the statutes prohibit the creation of a risk of infection. The state of pregnancy itself creates a risk of prenatal infection, making the condition of pregnancy punishable.\textsuperscript{156} This violates both the Eighth and Fourteenth Amendments requiring equal protection of the laws and prohibiting cruel and unusual punishment.\textsuperscript{157}

Another equal protection problem arises if the HIV-transmission statutes are invoked to protect infants from perinatal infection. When discussing the issue of fetal endangerment, some people will be quick to blame the female partner for any damage. This is a natural response, given the biological necessity of the child to be

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\textsuperscript{153} Robertson, \textit{supra} note 36, at 437. \\
\textsuperscript{154} Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537, 538 (per curiam), \textit{cert. denied}, 377 U.S. 985 (1964) (ordering a blood transfusion on a twenty-three-year-old Jehovah's Witness, who was eight months pregnant and in danger of severe hemorrhaging, because the "unborn child is entitled to the law's protection." The woman left the hospital before the blood transfusion could be administered). \\
\textsuperscript{155} Powell v. Texas, 392 U.S. 514 (1968) (decision quashed by the Florida Supreme Court in 602 So.2d 1288 (Fla. 1992) the Florida Supreme Court; \textit{see also} Robinson v. California, 370 U.S. 660 (1962) (where the court held a statute invalid which made it a criminal offense to be addicted to the use of narcotics). \\
\textsuperscript{156} Johnson v. State, No. 89-1765 (Fla. Dist. Ct. App., 5th Dist., 1989) (Johnson's real crime was not delivery of drugs but the delivery of her child: "When she delivered that baby, she broke the law in the state." The court agreed with this formulation of the crime, noting that Jennifer Johnson "made a choice to become pregnant and to allow those pregnancies to come to term."). \\
\textsuperscript{157} U.S. CONST. amend. VIII, XIV § 1.
\end{flushright}
dependent upon its mother for protection, nourishment and development. However, the mother may not be the only source of harm. The definition of "perinatal" implies a connection between mother and child, not between father and child. Obviously, men can’t bear children. They may be prosecuted under this statute for infecting the mother, but the law imposes no morality upon the father on behalf of the child. Furthermore, the mother is the direct link between the virus and the child. It is essentially the woman who pulls the trigger. The father can never play this role since his blood supply is necessarily disconnected from the child’s. However, it is possible for a child to contract the HIV virus through its father’s sperm. Furthermore, women commonly contract the HIV virus from the father of the child during conception or during pregnancy. Therefore, the mother may not be entirely at fault. To blame her for the transmission may be to blame an innocent party or to ignore a guilty one.

Half of all the genetic information needed to create a child is contained in the father’s sperm. As it is a bodily fluid, the HIV

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158. See Nolan, supra note 37, at 16. “Because of the pregnant woman’s necessary collaboration in the daily developmental progress of a fetus’s prenatal growth, her role in procreation assumes a visibility and an ongoing potency that in some sense dwarf the parental responsibility of her male sex partner . . . . [F]athers would seem to share equally in any duty to prevent genetic risk or to avoid prenatal hazards that are generated within the home or through the couple’s shared activities.” Id.


160. Mary E. Guinan & Ann Hardy, Epidemiology of AIDS in Women in the United States, 257 JAMA 2039-42 (1987). These authors conducted a study of the incidence of AIDS infection in women and pediatric patients. The authors found that the major transmission category for women with AIDS (52%) was intravenous drug use and the second largest category was heterosexual contact with a person at risk for AIDS (21%). Of the 456 total reported adults in the study with AIDS whose only risk factor was heterosexual contact with a person at risk for AIDS, 381 (84%) were women. Out of these 381 women, heterosexual contact with an intravenous drug user accounted for 67% of women with AIDS, whereas 16% of contacts were bisexual men, 1% were men with hemophilia, and 16% were men with other or unreported risk factors. Id. at 2040.

Most notably, Between 1982 and 1986, the increase in the number of women with AIDS in the intravenous drug user, heterosexual contact, and unknown risk groups was paralleled in the increase in pediatric patients whose mother were in those risk groups. Id.

The authors further noted that the larger number of heterosexually acquired AIDS cases among women is most probably the result of two factors: 1) a greater proportion of men are infected, and therefore a woman is more likely than a man to encounter an infected partner; and 2) the efficiency of transmission of HIV from man to woman may be greater than from woman to man. Id. at 2041.

The authors finally note that the human immunodeficiency virus has been transmitted to women during artificial insemination when infected semen was injected directly into the uterus through a catheter. From this information they conclude that transmission of the virus presumably can occur during penile-vaginal intercourse. Id.
virus has been found in sperm. There is also some question as to whether HIV is housed in DNA, with the sperm carrying DNA to trigger the process of conception. Even if the virus was not transmitted by DNA, and was only traveling with the spermatic fluid, the father could still be at fault for infecting the mother, who in turn infects the child.

Some studies of women and AIDS have linked a substantial number of pediatric AIDS cases with fathers who are in one of the identified high-risk categories for AIDS. Yet the HIV-specific statutes do not recognize a sufficiently direct causal connection between the father and the child. This often leads to prosecution of the mother as a criminal, rather than to protection of the mother as a victim. The mother should have a right to protection by the same statute against a man who transmitted the virus not only to her, but to her unborn child.

One more equal protection problem arises; the punishment for transmitting a disease such as AIDS does not equally apply to all genetically transmitted diseases, although they may be equally as devastating. One doctor suggests that “HIV-infected women could be specifically exempted from a law restricting abortion” since the birth of an HIV-infected baby is “worse” than the birth of a baby with other illnesses. This position stems from the perception that there is an increased burden on public assistance by mothers who are poor women of color with a chronic, and ultimately lethal, disease. However, as mentioned above, mothers who give birth to babies with other devastating problems are also often poor, uninsured and in need of public assistance. “If there is to be one standard [based upon an economic or a moral argument], it should be applied equally to cystic fibrosis, Down syndrome, spina bifida, [Tay-Sachs, sickle-cell anemia] and HIV disease, and any other defects of prematurity that adequate prenatal care would

161. See supra note 159.
162. In a study done by Sheldon Landesman, Howard Minkoff, Susan Holman, Sandra McCalla, and Odalis Sijin, Serosurvey of Human Immunodeficiency Virus Infection in Parturients, 258 JAMA 2701-03 (1987), the authors found that 148 out of 602 women had a self-identified risk factor. Among the women with risk factors, 23 were past or current intravenous drug users, and 23 has sex partners who used intravenous drugs. Seventy-six women had a sexual partner from or were themselves from an area where the AIDS virus is endemic, such as Haiti or Central Africa.
163. See supra notes 162 and 160.
164. See Arras, supra note 37, at 366-67.
166. See supra note 150 and accompanying text.
prevent."¹⁶⁷

The constitutional arguments for and against punishing perinatal HIV transmission include the State’s interest in protecting the fetus from harm, and in enforcing maternal responsibilities to ensure the child’s right to be born with a sound mind and body. But these interests must be weighed against the woman’s fundamental right to reproductive freedom, which includes her rights to privacy and bodily autonomy. Furthermore, prosecuting only women for the crime of perinatal transmission ignores the reality that the father of the child may be equally culpable, and illustrates a strange form of cruel and unusual punishment in prosecuting a woman for the mere state of being pregnant.

V. POLICY ARGUMENTS FOR AND AGAINST PUNISHING PERINATAL HIV TRANSMISSION

Constitutional considerations are not the only factors which commonly weigh on a decision to mandate or penalize certain behaviors. Questions of public policy arise in the context of criminalizing perinatal HIV infection. We must consider the harmful results these statutes would have for all HIV-infected women, especially poor minorities. We must also consider whether criminalizing this type of “conduct” truly satisfies the ultimate goals of criminal penalty: reformation, deterrence (both general and specific), incapacitation/isolation, and retribution. In light of these public policy considerations, the solution to the problem of pediatric AIDS transmission lies in a solution outside of the criminal arena.

1. Intrusions/Harm to all HIV-infected Women

Since the government has made the judgment that it is better to abort an HIV-infected child than to risk carrying it to term and having it born infected, the application of the law implies that HIV-infected women should be sterilized, or prohibited from procreating entirely.¹⁶⁸ As a result of forced or coerced¹⁶⁹ abortions, in some

¹⁶⁷. Levine, supra note 80, at 346.
¹⁶⁸. The same “option” is offered to women who are drug-dependent and pregnant. One author points to the reality that “[w]hen criminal prosecution takes the place of treatment and support, the symbolism that emerges is not only that women should not use drugs while pregnant, but that women who use drugs should not become pregnant.” See Nolan, supra note 37, at 20 (emphasis in original).
¹⁶⁹. See Levine & Dubler, supra note 80, at 337. “At different times and in various ways, American society has attempted to control women’s reproductive decisions. Although some attempts were frankly coercive, such as the forced sterilization of Puerto Rican women in the
cultures, women must forego their remaining source of personal identity and social status, or act contrary to their religious beliefs.

There is much case law contradicting the prohibition of conception; in fact, there is not one Supreme Court case that allows a state or the federal government to prohibit procreation. That right is rooted in our Judeo-Christian values, and there is no possibility that this position will change given the trend of the court to limit a woman's right to abort. Prohibiting procreation is contrary to our values and our system of justice. Should such a strongly protected right be suspended in particular cases? Or is this making a value judgment regarding the quality of life?

Restricting the right to procreate can have a devastating effect on a poor woman or a woman of color. In some cultures, "the absence of alternative sources of self-realization, satisfaction, ... comfort," and love make it imperative for a woman to retain the option to become a parent. Asking them to refrain permanently from childbearing may amount to asking them to forgo their only re-

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171. See Levine & Dubler, supra note 80, at 332-34.

172. See Eisenstadt v. Baird, 405 U.S. 438, 438 (1972) (stating [i]f the right to privacy has any meaning at all, then it is the right of the individual to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child""); Skinner v. Oklahoma, 316 U.S. 535 (1942) (denying the power to sterilize repeat criminal offenders, with the Supreme Court characterizing marriage and procreation as "basic civil rights of man"); Loving v. Virginia, 388 U.S. 1 (1967) (denying the power to prohibit interracial marriage and presumably, in turn, to prohibit the procreation of mixed-race children; hence, holding state legislation that would limit or regulate procreation will be subject to the strictest of constitutional scrutiny); but see Buck v. Bell, 274 U.S. 200, 1207 (1927) (Holmes stating, "[t]hree generations of imbeciles are enough," therefore allowing Virginia law to sterilize mental defectives). However, NOWAK ET AL., HANDBOOK ON CONSTITUTIONAL LAW, at 625 suggests that "it is doubtful the Supreme Court would follow Buck v. Bell today."

173. Another well-established precedent is that there is no right to sterilize a woman without her consent. Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974), vacated by 565 F.2d 722 (D.C. Cir. 1977). Yet the legislature has the right to mandate abortion? This directly conflicts with the right to procreate.

174. Lynn M. Paltrow, When Becoming Pregnant Is A Crime, 9 CRIM. JUST. ETHICS 41, 42 (1990). (stating [b]ecause these prosecutions penalize a woman for her decision to continue a pregnancy, they violate constitutional privacy guarantees that protect the right to decide whether to bear or beget a child").

175. For a discussion of the "wrongful life" doctrine, see supra note 37.

176. Arras, supra note 37, at 368.
remaining source of personal identity and social status. Furthermore, mandating abortion may also intrude upon a woman's religious values.

These statutes also require that any HIV-infected person avoid sex entirely. Every statute which criminalizes AIDS transmission expressly prohibits sexual or intimate contact. Therefore, a woman immediately becomes criminally liable just from conceiving, because conception necessarily means there was intercourse. There is only one sexual circumstance that the Supreme Court has held is not protected by the right of privacy - homosexual sodomy. Otherwise, the right to privacy encompasses decisions regarding family, marriage and procreation. Inherent within the scope of these decisions is the choice to have sexual intercourse.

As already mentioned, the law implicitly advocates abortion rather than childbirth, to avoid the risk of prosecution. This right is constitutionally guaranteed at the present time. The State certainly has the right to encourage or, even, to fund abortion, but its traditional policy choice has always been to encourage childbirth rather than abortion. This is accomplished through funding and through restricting the right to abort. By the mere existence of

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177. One HIV-infected woman explained why she wanted to have a baby. She stated that "I really wanted something of mine, you know, mine, mine. I don't have nothing in this world . . . . nothing that I really care about." Levine & Dubler, supra note 80, at 335. Another author wrote that "[c]hildlessness is a very serious concern in communities of color. As a result of cultural norms and restricted opportunities for women to have a professional career, motherhood and family are generally valued very highly." L. Nsiah-Jefferson, Reproductive Laws, Women of Color, and Low-Income Women, in REPRODUCTIVE LAWS FOR THE 1990's, A BRIEFING HANDBOOK (S. Cohen and N. Taub eds., 1989).

178. Church and religion play a major role in many African-American women's lives. Not only are they the source of religious doctrine, which is clearly opposed to abortion, but prevention messages are confined to condemning homosexual behavior, sex outside marriage, and unnatural forms of contraception. Given these sorts of ethics, mandating abortion would be an affront to a woman's religious beliefs. See also Levine & Dubler, supra note 80, at 332-34.


180. See Id.

181. Of course, this right is limited in specific circumstances. There is no constitutional right to rape, nor to have sex with a child, nor to have a homosexual relationship. However, if the relationship is heterosexual, and the other partner consents, there are no limitations.


183. Harris v. McRae, 448 U.S. 297 (1980) (the right to terminate a pregnancy does not carry with it the right to receive public funds for such termination). See also Webster, 492 U.S. at 507, 511 (the state need not permit public employees or the use of public facilities to perform abortions).

184. The Court has invalidated state laws that require that abortions be performed only in full service hospitals, or only after approval of another doctor, or only by certification of a hospital committee. The rationale behind this ruling lies in the fact that there is no reason-
these criminalization statutes, the legislatures have clearly made a policy decision which contradicts the current implication that child-birth is a decision that should be chosen over abortion. And again, in adjudicating the cases based on these criminal statutes, the courts would be faced with contradicting well-established precedent.

The irony in mandating abortion is the fact that abortions are 100% guaranteed to ensure that the child does not survive. But the child has, at maximum, only a 30% chance of contracting the HIV virus and dying short of a normal life expectancy. In reality, suggesting abortion triples, if not ensures, the risk of infant mortality.

The reality of the situation is that if the woman is not sterilized, does not avoid procreation, does not avoid sex, or chooses not to abort if contraception fails, she is subject to prosecution. Advocates of prosecution argue that the act of getting pregnant was avoidable, and therefore the woman has voluntarily subjected herself to the punishment. Drawing an analogy to prenatal drug delivery illustrates that the policy arguments against prosecuting women with AIDS clearly outweigh the arguments in favor of this legislation.

It can be argued that, in both situations, the women had the choice whether or not to get pregnant. Therefore, if we can prosecute drug-addicted mothers, we can prosecute HIV-infected mothers for allowing themselves to get pregnant knowing their unstable and unhealthy condition. But the question then becomes whether to abort or not, and that raises issues of religion and ability to pay. Both may be considered involuntary limitations on women's free choice.

The fact of the matter is, taking drugs is voluntary. Contracting HIV is not. Since contracting HIV was involuntarily conferred

able medical basis for such regulations that bear on the mother's health. Doe v. Bolton, 410 U.S. 179 (1973); Akron, 462 U.S. 416; Thornborgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (overruled by Planned Parenthood of Southeastern Pa. v. Casey, 112 S.Ct. 2791 (1992)) (the State may not require recitation of a lengthy and rigid list of information that is designed to discourage abortion or that interferes with her physician's professional judgment).

185. See supra note 178.

186. See Nolan, supra note 37, at 18. "If women are unable to choose not to conceive or not to remain pregnant, then the involuntary nature of their relationship changes its moral character. Women whose sexual partners refuse to use contraception or who are at risk of being beaten if they seek an abortion, or women who are unable to contracept or abort because of their financial status, may stand in a different moral relation to their offspring than women who can freely choose to become pregnant and care for a child." Id.

187. The fact is that a woman is not forced unwillingly to ingest drugs. She knowingly accepts the drugs into her system. It cannot be argued that one can voluntarily or willingly contract AIDS. On one hand, the mother who has AIDS does not intentionally want to harm her fetus - she performs no act or omission which harms her baby - her condition harms
on the mother, she should not be punished for transmitting it to her child. However, advocates of prosecuting drug-addicted pregnant women argue that a crack addicted mother should be prosecuted because she had brought her drug addiction upon herself, and upon her child. Since she could have abstained from using drugs during pregnancy, and therefore, could have given birth to a healthy child, she voluntarily chose the result. Alternatively, an HIV-infected woman cannot simply "turn off" her infection during pregnancy like a woman can stop taking drugs. This difference makes HIV infection a much more difficult case to penalize, as distinguished from the prosecution of drug-addicted pregnant women.

The final problem created by these criminalization statutes is their deterrent effect upon pregnant women from seeking consistent, prenatal health care. They fear spending time in jail, and/or losing their children. This argument was originally presented with regard to prosecuting crack mothers. But it could be easily analogized to HIV-infected mothers in an even stronger manner. Generally speaking, HIV-positive women do not want to spend their last days in jail, which would waste precious time they could have spent with their child. Irrespective of the AIDS epidemic, poor, black or Hispanic pregnant women are often denied equal access to prenatal care. They are also often denied access to drug rehabilitation programs because many of the programs are not designed to deal with pregnant women. Furthermore, the pros-
pect of being forced to abort may create an additional disincentive to seek out prenatal care. Even if the woman had decided that she would abort the fetus, she may have been unable to find a clinic or physician willing to perform the procedure. Applying these criminalization laws to pregnant women will create another disincentive to seeking prenatal care, for women who are in special need of pre-partum and post-partum care.

2. Poor Disproportionately Affected

In drug-addiction cases, the mothers are often poor and, not uncommonly, black. Interestingly, one source denies that the problem of drug-addicted babies is restricted to the poor. Another men and are not set up to permit a woman with child-care responsibilities to comply with the rules).

192. A recent survey conducted by the AIDS Discrimination Division of the New York City Commission on Human Rights found a systemic barrier to abortions for women who reveal that they are HIV positive. In that study, 20 of the 30 clinics and private doctors called would not keep the appointment after the caller identified herself as an HIV patient. Twelve of the 30 providers indicated that they could not perform the procedure because of the unavailability of infection-control precautions, and not a single provider located in Brooklyn would make an appointment. Katherine M. Franke, HIV-Related Discrimination in Abortion Clinics in New York City, City of New York Commission on Human Rights, AIDS Discrimination Division, June, 1989.

Another author notes that “some abortion clinics demonstrated the same reluctance to serve HIV-infected women as did other types of medical facilities. Those clinics which did serve these women often marked charts visibly, insisted on ‘spacesuit’ infection control measures, served the HIV-infected women last during the clinic session, and kept her away from other women having procedures, thus denying her peer support. Other clinics simply refused to serve any women who, by medical and sexual history, might be at risk of HIV infection.”


193. Kathleen Nolan stated in Protecting Fetuses, supra note 37 that “[a]cts potentially harmful to a fetus cannot be defined with sufficient precision to give notice to mothers of the legal behavioral standard. The statute probably would be enforced only against poor mothers, because they often are in closer contact with government’s monitors and generally are in poorer health.” She also stated that “both cigarette use and drug use are strongly correlated with socioeconomic status” Id. at 18, and later goes on to say that “[s]ince drug use is correlated with socioeconomic status and therefore with racial background, pursuing a criminal justice approach will obviously have a disparate impact on black and Hispanic as opposed to white communities.” Id. at 20. Lynn M. Paltrow, infra note 195, illustrates a sad example of prosecution in S. Carolina. She writes, “In Charleston, women who come into the public hospital for prenatal care or delivery are selectively tested for drugs; those who test positive have their names turned over to the police. The women, who are still recovering from the delivery, are handcuffed and taken to jail and stay there until they can make bail. At least one woman arrived at the jail still bleeding from the delivery; she was told to sit on a towel.”

194. NATIONAL ASSOCIATION FOR PERINATAL ADDICTION RESEARCH AND EDUCATION (NAPARE), Update, March, 1989 enclosure, and A First: National Hospital Incidence Survey, and Substances Most Commonly Abused During Pregnancy and Their Risks to Mother
study conducted at Hutzel Hospital in Detroit’s inner city found that 42.7% of its newborn babies had been exposed to drugs while in their mothers’ wombs.\textsuperscript{195} Since the majority of maternity patients who come to a public hospital are poor and/or black or hispanic, they are often subjected to random drug testing, which would not be so readily applied in any sort of private hospital.\textsuperscript{196} Statistics clearly support the fact that, even if the actual statutes do not exclusively affect women of color, the cases which are actually prosecuted generally only involve black women. All of the recent prosecutions of pregnant women have been brought against poor women, with several of them battered women, and the majority of them women of color.\textsuperscript{197}

It has been proven that a substantial number of drug-addicted mothers are giving birth to drug-addicted babies. There is an additional life-threatening risk that may be involved with the injection of drugs. The risk of HIV infection comes along with sharing needles. These mothers who are giving birth to AIDS babies are also often poor.\textsuperscript{198} If the state were to prosecute these mothers for transmitting the virus to their children, the poor would then be disproportionately impacted by the statute, or at least by the prosecution.

Another problem that affects the disadvantaged is the fact that contraceptive services are frequently not readily available to the poor.\textsuperscript{199} When contraception is not freely available to them, they are likely to be unable to prevent pregnancy and the spread of disease.\textsuperscript{200}

\textit{and Baby} (May 1989) (indicating that the problem of maternal cocaine use during pregnancy was not restricted to urban populations or particular racial or socio-economic groups).


\textsuperscript{197} Tom Coakley, \textit{Suspect is Said to Be Battered, Frightened}, BOSTON GLOBE, Aug. 23, 1989, at 22. \textit{See also}, Paltrow, \textit{supra} note 196 (stating "[p]rosecutions of pregnant women . . . may also raise race discrimination claims or . . . issues of selective prosecution because so many of them are directed against poor women of color. A recent study conducted by NAPARE . . . found that, although the rate of drug use by Black women and white women was the same, Black women were reported for their drug use ten times more often than white women.")

\textsuperscript{198} Levine & Dubler, \textit{supra} note 80, at 325 writing that "[d]rug-using women are more likely to have an infected needle-sharing partner and thereby to contract HIV . . . [n]on-drug-using heterosexual women are more likely to have an HIV-infected sexual partner in communities with high seroprevalence rates - that is, poor inner-city neighborhoods").


\textsuperscript{200} \textit{See supra} notes 190-91 discussing clinic availability.
Finally, since abortion is the only way to avoid prosecution, a woman is further disadvantaged because she is denied information, access and governmentally subsidized abortion services. She cannot be counseled on abortion by family planning clinics that receive federal funds, even if she initiates the discussion. Generally speaking, her doctor cannot refer her to an abortion clinic; and she often cannot discuss the abortion option with her own physician. Since most of the financially disadvantaged frequent federally-funded public hospitals or clinics, they are categorically denied information and opportunity. In effect, these women will be forced to carry their children to term, risking prosecution.


This section delves into another criticism of punishing these women; such punishment does not effectively serve even one of the four purposes of the criminal justice system. The four purposes to be examined are as follows: reformation or rehabilitation, deterrence, incapacitation or isolation, and retribution.

The goal of reformation or rehabilitation is to render offenders nondangerous. Reformation cannot apply in the case of perinatal transmission because it is impossible to reform a woman who has reflexively infected her child with HIV. One cannot teach her not to reflexively infect her next child with HIV. Unlike an axe-murderer, she cannot choose to reform her behavior. She cannot cure herself, and there is no treatment a correctional institution could impose or offer that would cure her. The only reformation that could theoretically be achieved would be to convince her not to

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201. An HIV-infected woman cannot avoid prosecution by taking her chances and carrying it to term, since that would still be creating a risk of transmission. Once you are pregnant, the only way to avoid prosecution is to terminate the pregnancy.
203. Id.
204. MICHAEL MOORE, LAW AND PSYCHIATRY 234 (1984). Moore also outlines two different ways of achieving this goal. Correctional institutions may either employ harsh treatment by inmates and guards or extensive therapy. Harsh treatment results in the offender becoming penitent or no longer willing to commit crimes in order to avoid such harsh treatment in the future. Extensive therapy, which is much more expensive than harsh treatment, not only makes the offenders safe to join society again, but also makes them "flourishing, happy, and self-actualizing members. . . ." Id.
205. Although one can certainly counsel her not to have any additional children.
206. The drug azidothymidine, commonly known as AZT is currently available as a treatment which prolongs the life of an AIDS patient, but it is not a cure.
have any more children.\textsuperscript{207} However, this limited goal could be achieved outside the prison setting, at a lower cost to the State and the woman's freedom.

Another goal of punishment, general deterrence, seeks to punish some offenders in order to deter others from committing the same crime.\textsuperscript{208} Under this justification, the result of imprisoning a woman for transmitting the virus to her child would be to deter women from conceiving, or from engaging in sexual intercourse altogether, this was clearly the intent of the statute, given its express language. However, there is no guarantee that this would deter other women at all.\textsuperscript{209} In the case of drug-addicted mothers, prosecutions don't frighten women into abstaining from drug use.\textsuperscript{210} Furthermore, given the personal, cultural, social, economic and religious considerations of any individual woman, she may choose motherhood at all costs, thereby frustrating the general deterrent value of imprisoning another HIV-infected woman.\textsuperscript{211}

"Specific" or "special" deterrence is a separate goal of the criminal justice system. This theory advocates that if one prosecutes a criminal for a culpable act, the pain of punishment will deter this specific individual from committing the same crime again. As applied to perinatal transmission, prosecutions, possibly leading to a jail term, may deter the woman from having additional children. She would also be encouraged to have an abortion to avoid jail.\textsuperscript{212} Even though this theory might achieve limited success, it is almost a

\begin{footnotesize}
\textsuperscript{207}. Logically, even if the woman could be convinced to abstain from having any more children, this is not reformation. This is merely "education." According to the NEW CENTURY DICTIONARY 1503 (1953), to "reform" is to "cause (a person) to abandon wrong or evil ways of life or conduct, and to adopt right ones; bring about amendment in (a person, or his manner of life, conduct, etc.) . . ." By convincing a woman not to have any more children, she is not abandoning "wrong or evil ways," nor is she amending her status as a victim of AIDS.

\textsuperscript{208}. SANFORD H. KADISH \& STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES (5th ed. 1989). Our present criminal justice system subscribes to this goal of punishment. However, Immanuel Kant argued against this goal by stating that "men should never be treated merely as a means to an end." Franklin Zimring \& Gordon Hawkins, Deterrence: The Legal Threat in Crime Control, 35-37 (1973) (quoting Immanuel Kant).

\textsuperscript{209}. Paltrow, supra note 196, at 44. "In reality, prosecutions and convictions deter pregnant women from getting what little health care is available." Id.

\textsuperscript{210}. Id. (stating "[i]f prosecutions actually frightened women into going cold turkey (and they don't), abrupt withdrawal from certain drugs, such as heroin, could cause fetal death").

\textsuperscript{211}. See supra notes 176-78 discussing harm to women.

\textsuperscript{212}. Rachel H. Nicholson, No (Pregnant) Woman is an Island: The Case For a Carefully Delimited Use of Criminal Sanctions to Enforce Gestational Responsibility, 1 HEALTH MATRIX 101, 107 n. 28 (stating "[w]hat the right to lifers don't realize . . . there are going to be more late abortions as women decide they don't want to go to jail").
\end{footnotesize}
moot goal since most of these HIV-infected mothers will not have the strength, nor the longevity, to bear any more children.

The third goal of criminal justice is incapacitation, or isolation. By incapacitating a criminal, we seek to reduce crime by taking the individual out of the workings of society. Perhaps this is the only viable reason to prosecute a woman for transmitting the virus to her child. If she is isolated, she, generally speaking, cannot conceive again. But isolation should be limited to extricating from society those dangerous people that cannot handle the responsibility of being HIV-positive, who intentionally infect as many people as they can find, or who continue to have unprotected sex without informing their partners. Even by incarceration, one cannot separate a mother from her fetus so that she won’t continue to infect. This is a biological impossibility.

The final justification for punishment is retribution. The definition of retributivism is as follows:

Retributivism . . . is the view that punishment is justified by the desert of the offender. The good that is achieved by punishing, in this view, has nothing to do with future states of affairs, such as the prevention of crime or the maintenance of social cohesion. Rather, the good that punishment achieves is that someone who deserves it gets it.

By applying this theory to perinatal transmission, the State would be claiming retribution against the mother on behalf of the child, for giving the child life. This argument seems to mirror that of the “wrongful life doctrine,” which cannot logically claim much support in light of the statistics regarding the actual transmission rate.

Ultimately, not one of the four purposes of punishment strongly justifies prosecute a woman for transmitting the HIV virus to her unborn child. The practical results of imprisoning these women are the overcrowded prisons, the draining of the State’s resources for

213. Katherine Bishop, *Prostitute in Jail After AIDS Report*, N.Y. TIMES, July 15, 1990, at § 1 p. 12. A police officer arrested a prostitute and charged her with attempted murder for continuing to solicit customers after appearing in a Newsweek article which reported that she continued working despite being infected with the AIDS virus. The arresting officer is reported as saying, “I don’t know if she had the formulated intent to spread the disease . . . it the matter is in the courts now. But armed with this knowledge, if you continue to do this, it’s like saying, ‘What the heck, I’m going to die anyway.’ . . . The sergeant said prostitutes infected with the virus should be removed from the streets and placed in isolation as “some form of control for those who cannot or will not control themselves.” Id.


216. *See supra* note 144 and accompanying text.
legal proceedings and maintenance, the possible denial of a seriously ill individual adequate health care, and the separation of a mother from her children. On balance, there is no compelling argument to justify imprisonment.

VI. SOLUTIONS

The constitutional and policy interests that these statutes confront illustrate that criminalizing perinatal transmission will not protect the public health interest, nor will it significantly decrease the number of HIV-infected persons. Furthermore, it will invade a woman’s reproductive freedom, will violate her constitutional right to the equal protection of the law, as well as the right to be free from cruel or unusual punishment, and will collide with well-established public policies supporting procreation and childbirth.

Using the penal system to confront the problem of pediatric AIDS is not the only solution available. This note will not suggest an alternative approach. The first step that must be taken to clean up the problems inherent in these statutes is the redrafting of the involved legislation. The language must be more specific, must clarify the legislative intent, and must add either an affirmative defense or an exclusion for perinatal transmission. To constructively combat the growing problem of pediatric AIDS, all prospective mothers should be educated, counseled and offered HIV testing in such facilities as hospitals, clinic prenatal care units, schools, and community shelters. Finally, federal and state funding of prenatal care clinics and drug rehabilitation programs, servicing both pregnant and non-pregnant women, should be increased.

A. Redrafting

The definitions of such language as “sexual,” “intimate contact,” and “parenteral transmission” must be clearly stated. In Michigan, the statute defines the culpable conduct as “sexual penetration,” which is further defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another persons’ body, but emission of semen is not required.” In considering the policy and constitutional ar-

217. Whether the listed conduct creates a grave and unjustifiable risk of transmitting the virus is for a health organization to determine, and accordingly they should be consulted on this matter. It would be beyond the scope of this note to discuss whether all of these forms of contact created a risk. However, the explicit nature of the language of this state serves as a good example of the detail needed to clarify the HIV-statutes.
guments against penalizing women for perinatal transmission, the statutes should be redrafted, like that of Michigan, to limit the culpable conduct to sexual acts or the donation of blood. If the statutes were drafted more explicitly, there would be less danger of expanding the scope of coverage to perinatal transmission.\textsuperscript{218}

An alternative to redrafting the language would be to add an affirmative defense or exclusion for perinatal transmission. The language could read, "it shall be an affirmative defense that the infection or risk of infection occurred in a perinatal relationship," or "an infection or risk of infection created in the prenatal environment shall be excluded from prosecution under this statute." Amending the statute to include an affirmative defense may still leave room for an arrest and confinement until the litigation commenced. However, an explicit exclusion would effectively preclude arrest, confinement and prosecution, and the woman would be free to spend her time and money for services, counseling and prenatal care.

B. Education

Most scholars and public policy analysts suggest that imprisoning drug-addicted mothers serves no purpose but to separate a mother from her child because of her addiction, and to leave the child to be cared for by the State or foster homes. In addition, drugs are almost always available, even in prison. Furthermore, there are very few drug treatment programs that will accept pregnant women or that will provide day care for in-patient care.\textsuperscript{219} The basic problem is the lack of access to drug treatment programs for pregnant women. Many argue we should take the money spent on reporting and prosecuting drug-abusive mothers, and spend that money on increasing drug treatment programs.\textsuperscript{220}

\textsuperscript{218}. However, there is still a chance that a zealous prosecutor will bring a case before a court to argue that the scope of the statute should be expanded to include perinatal transmission. Without an explicit affirmative defense (see discussion below), a judge could expand the scope, liberally construing legislative intent.

\textsuperscript{219}. Arras, supra note 37, at 359 (stating that "[c]learly, our society must be condemned for failing to provide HIV-infected women with decent and human medical services and more equitable social opportunities").

\textsuperscript{220}. "Real solutions would include making available reproductive health services, including abortion, sex and parenting education, and prenatal and other health care. Non-discrimination policies must be adopted and enforced in existing drug treatment programs and more funds, including the money which is presently being used to arrest women and place their children in foster care, must be made available for drug treatment and education. And finally, prosecutors and lawmakers must stop pretending that the criminal prosecution of pregnant women is a quick fix for the problems of drug addictions when we have known for years that drug abuse, like most other causes of infant mortality and morbidity, requires long-term
The concern with rehabilitation and education for drug-addicted mothers is certainly well-founded, since after treatment, they can be funneled back into the mainstream and can be made into productive and effective parents. Some would argue that this optimistic result cannot be analogized to the AIDS case. We can treat the disease, but we can’t cure it. However, drugs and AIDS go hand-in-hand. If we can educate and reform present drug-abusing women, we can possibly avoid the birth of an HIV-positive child in the future.

Focusing on drug-abuse programs is only the first step to curbing the spread of HIV to children. We must also institute meaningful education about sexuality and reproduction, starting in elementary school. These programs must strive to make the risk of AIDS real and lethal and must stress that prevention is possible and necessary. We must teach those adults who are at risk how to prevent contraction of the virus; and we must teach those who are already infected how to prevent transmission of the virus. Specifically applied to women of child-bearing years, it is the right of an infected or at-risk woman to obtain unbiased, factual and up-to-date information about birth control, safe sex techniques, pregnancy, and the outcome of pregnancy for herself and her child, as well as to have full access to supportive perinatal, pediatric and abortion services. This education must also be available to non-infected women, and women who have not identified themselves as being in an “at-risk” category. Ideally, sensitive, informed counselors should be available in inner-city, suburban and rural hospitals, in clinic prenatal care units which are separate from full service hospitals, in high schools and colleges, and in community shelters.

In addition to education and counseling, confidential HIV testing should be offered to all women of childbearing age, especially...
after an interview by a trained health care professional identifies influential risk factors. This testing should be accompanied by counseling, informed consent and appropriate provisions for privacy and confidentiality. Testing will serve two purposes: 1) it will aid health professionals in determining the current prevalence of the virus in the pediatric and female population, and 2) it will help a woman make the difficult decision whether she wishes to continue a pregnancy, terminate a pregnancy, or try to conceive.

Finally, in trying to reform the national health care system, federal and state governments, as well as private insurance companies, should increase the funding of prenatal care clinics and drug rehabilitation programs which service both pregnant and non-pregnant women. Education, counseling and testing cannot be administered if there are no forums or funds. As mentioned earlier, a substantial percentage of women contract the HIV virus from intravenous drug use, either before or during pregnancy. The waiting lists for drug rehabilitation programs are long, and there are very few programs that are equipped to deal with adult/fetal withdrawal. If the number of programs was increased, and the curriculum was redesigned to cope with the special needs of pregnant women, perhaps the pediatric infection rate could be reduced.

VI. CONCLUSION

The growing number of HIV-infected women will result in a parallel pediatric trend. There is no question that a strong preventative and educational policy must be implemented to avoid creating a new class of infected individuals. The HIV-specific transmission criminalization statutes should not be included in the solution to this problem. Application of these statutes to a pregnant, HIV-infected woman tramples on this individual's fundamental right to privacy and bodily autonomy, and on her right to equal protection of the laws. Furthermore, the application of these statutes intrudes upon the rights of all women to procreate, to have sexual intercourse and to be free from mandated abortion or sterilization.

223. Some of the risk factors include intravenous drug use, having a sex partner with a history of drug use, having a sex partner who is bisexual or a hemophiliac, having a blood transfusion, or being born in countries with predominantly heterosexual transmission.

224. Nolan, supra note 37, at 20 (stating that "[s]uch programs may be costly, but perhaps cost-effective in terms of offsetting the economic burden of maintaining women in prison and maintaining small neonates in newborn nurseries or in foster care when they do poorly at birth."). See also Chavkin, Addiction & Pregnancy: Policy Crossroads, 80 AM. J. PUB. HEALTH 483 (1990).
These statutes will have a disproportionate effect on poor women and women of color or Hispanic origin, ultimately creating one more barrier to their access to prenatal and contraceptive health care. Finally, the State will be unable to successfully argue that it satisfies even one goal of the criminal justice system. Not only is it biologically impossible to reform an HIV carrier, but incarceration serves only to isolate a woman from prenatal care and her other children. The argument that the threat of a prison term will deter other women from having children is weak, given the fact that it has not served as a deterrent to drug addicted women. Finally, it offends one’s sense of logic and fairness to think that a child could claim retribution from his mother for giving him life.

Since the solution does not lie in the penal system, the statutes should be amended and redrafted to specifically exclude perinatal transmission from punishment, or, at least, to clearly define the conduct that is subject to the statute. In addition, we must increase the amount of and access to reproductive and preventative education. We should target hospitals, clinic prenatal care units, schools, and community shelters. In conjunction with sensitive, non-coercive counseling and education, we must offer confidential HIV testing to all women of childbearing age. Most importantly, we must increase access to medical services for all HIV-infected pregnant women, whether they choose to abort or to continue the pregnancy to term. Finally, it is suggested that we increase private, state and federal funding of prenatal care clinics, drug rehabilitation programs which service all women, and health care coverage.

Asserting a position that does not allow the government, through criminal statutes, to discourage an HIV-positive woman from bearing children may be a difficult position to defend. Perhaps many women, if put in the same tragic situation, would choose not to bear a child. However, denying these women the legal right to make a reproductive decision based on the simple fact that they have a terminal disease, is a much greater “injustice” than bringing a child into the world.