

FETAL RIGHTS AND THE PROSECUTION OF WOMEN FOR USING DRUGS DURING PREGNANCY

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I. INTRODUCTION

It is a well-accepted principle in American law that a civil cause of action can be maintained for prenatal injury, at least when the injury is to a viable fetus later born alive.¹ At least twenty-seven jurisdictions in the United States have gone a step further to allow a civil cause of action for injury to a viable fetus, even when the fetus is not born alive.²

While the lines regarding fetus-related causes of actions in the civil context are relatively bright, they become somewhat hazy in the criminal context. Take, for example, a situation in which a pregnant woman is assaulted and the unborn child dies as a result. Possible criminal causes of action against the assaulter will vary from state to state depending on a variety of factors, including viability of

1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368 (5th ed. 1984).

2. See Sheldon R. Shapiro, Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411, 432-46 (1978).

the fetus, whether the child was "quick,"³ and whether the fetus was born alive.⁴ The precise criminal charge also varies from jurisdiction to jurisdiction.⁵ Some states have specific statutes for this type of crime known as feticide statutes,⁶ while other states may use first-degree murder statutes or a variety of others.⁷ At least one state even allows criminal prosecution for injury to a fetus that does not result in death.⁸

The single common factor among all jurisdictions that prosecute individuals for causing injury or death to an unborn child is the fact that those individuals prosecuted are *not* the mother of the unborn child. What was already a gray area of the law becomes even more complex when the illegal prenatal conduct of the mother is the causative factor in death or injury to the child. For example, Melissa Hamaker gave birth to one child after using illegal drugs throughout her pregnancy.⁹ A year and a half later, in 1992, she gave birth again, this time to twin daughters—both fourteen weeks premature and addicted to cocaine.¹⁰ Two days later, one of the tiny premature babies was dead and the

3. *Black's Law Dictionary* defines a "quick child" as: "One that has developed so that it moves within the mother's womb." BLACK'S LAW DICTIONARY 1247 (6th ed. 1990).

4. See, e.g., *Brinkley v. State*, 322 S.E.2d 49, 51 (Ga. 1984) (holding a child must be "quick" to sustain conviction under feticide statute); *Ranger v. State*, 290 S.E.2d 63, 66 (Ga. 1982) (concluding an injured fetus must be born alive to sustain felony-murder conviction of man who shot the mother); *Hughes v. State*, 868 P.2d 730, 736 (Okla. Crim. App. 1994) (finding viability, rather than live birth, determines liability under criminal statutes).

5. Compare GA. CODE ANN. § 16-5-80(a)-(b) (1998) (imposing a severe punishment), and IND. CODE ANN. §§ 35-42-1-6, -50-2-1 (Michie 1998) (determining a minimal sentence for a violation), with *State v. Holcomb*, 956 S.W.2d 286, 290 (Mo. Ct. App. 1997) (using the first-degree murder statute to prosecute).

6. For example, Georgia's feticide statute imposes life imprisonment for causing the death of an unborn, quick child by committing an act that would be murder if it resulted in the death of the mother. GA. CODE ANN. § 16-5-80(a)-(b). Louisiana authorizes 15 years of hard labor for "[t]he killing of an unborn child when the offender has a specific intent to kill or to inflict great bodily harm." LA. REV. STAT. ANN. § 14:32.6 (West 1997). Indiana provides a minimum two year sentence for "[a] person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus . . ." IND. CODE ANN. §§ 35-42-1-6, -50-2-1.

7. See, e.g., *Commonwealth v. Lawrence*, 536 N.E.2d 571, 575-76 (Mass. 1989) (holding a viable fetus is a person entitled to the protection of criminal statutes and sustaining conviction for common law murder of a fetus); *State v. Holcomb*, 956 S.W.2d at 290 (holding an unborn child is a person for purposes of the state's first-degree murder statute); *State v. Home*, 319 S.E.2d 703, 704 (S.C. 1984) (holding it would be "grossly inconsistent" to allow a viable fetus to be classified as a person for purposes of the civil laws and not for purposes of the criminal statutes).

8. See *State v. Kenney*, 973 S.W.2d 536, 545 (Mo. Ct. App. 1998) (holding a five-month-old fetus is a person for purposes of first-degree assault statute), *overruled on other grounds* by *State v. Withrow*, 8 S.W.3d 75 (Mo. 1999).

9. Tom Carney, *A Lethal Mix: Moms, Drugs*, DES MOINES REG., Mar. 8, 1992, at A1.

10. *Id.*

other clung to life in a neonatal intensive care unit.¹¹ Melissa's first child, who was raised by relatives, suffered from severely retarded growth and extreme irritability.¹²

Another well-publicized, but certainly not unique, situation came to head on January 14, 1996. On that day, Charisma Green was born three months premature with cocaine coursing through her tiny body.¹³ Both Charisma and her mother had tested positive for cocaine the day of the birth, but it was Charisma, weighing less than two and one-half pounds, who died fifteen days later of a massive infection.¹⁴

Both of these tragic deaths occurred in Iowa and both sparked debate about how the state should handle the problem of pregnant drug offenders.¹⁵ The case of Charisma Green, in particular, brought the national debate about the criminal aspects of maternal drug abuse to the forefront in Iowa when the state medical examiner ruled her death a homicide.¹⁶ Prosecutors searched for an existing statute that could be used to bring criminal charges against Green's mother, but soon discovered—as prosecutors around the country have—existing statutes were simply not designed to cover a mother who injures or kills her child by prenatal drug use.¹⁷

In 1993, the Iowa Legislature passed a bill intended to give state officials increased power to deal with small children with drugs in their systems.¹⁸ Targeted primarily at newborn children born to women who used drugs while pregnant, the final legislation requires physicians and other health care workers to report positive alcohol or drug tests of newborns to authorities.¹⁹ Heavy lobbying by civil libertarians²⁰ resulted in the final bill specifically prohibiting the use of a positive drug test of a newborn against the mother in criminal

11. *Id.*

12. *Id.*

13. Dan Eggen, *The Dilemma of Drug-Abusing Moms*, DES MOINES REG., Mar. 31, 1996, at A1.

14. *Id.*

15. *Id.*; see also Carney, *supra* note 9 (discussing the death of a premature baby whose mother had used illegal drugs during pregnancy).

16. Eggen, *supra* note 13.

17. Dan Eggen, *Charges Unlikely in Death of Infant*, DES MOINES REG., Apr. 27, 1996, at M1.

18. IOWA CODE § 232.77(2) (1999); see also *Statehouse Notes*, DES MOINES REG., Apr. 29, 1993, at M1 (describing the Senate approval of a bill to help children "who are found to have alcohol or other drugs in their systems").

19. *Statehouse Notes*, *supra* note 18; see IOWA CODE § 232.77(2).

20. *Statehouse Notes*, *supra* note 18.

prosecutions.²¹ However, shortly after Charisma Green's death the Iowa legislature began considering whether to modify or repeal the section of the law forbidding drug-test results in criminal prosecutions.²² To date, no change has been made in the law, and debate seems to have largely died off in the legislature despite large drug problems in the state generally and skyrocketing methamphetamine problems in particular.²³ This Note suggests Iowa should take a firm child advocacy stance and repeal the ban on criminal prosecutions based on positive infant drug tests.

There is a clear and undeniable link between gestational drug use and egregious effects on children.²⁴ Policies encouraging women to get treatment or to cut down on their illegal drug use are one step in the battle, but simply do not provide pregnant drug users with adequate incentive to quit using drugs. Those women who truly want their children to be born free of the disabling effects of gestational drug use will choose to walk the treatment path on their own. While encouraging pregnant addicts to get treatment should certainly continue, a more significant deterrent is needed.

For decades states across the country have allowed for the prosecution of third parties who cause the death of an unborn child.²⁵ However, virtually no jurisdiction will allow a mother to go to jail for killing or seriously injuring her child by way of her own illegal drug use.²⁶ This Note argues that allowing

21. IOWA CODE § 232.77(2). Once a positive newborn drug test is reported, however, it will trigger a child abuse assessment which may ultimately be used to support a petition for removal of the child from the home or for termination of parental rights. *Id.*

22. Jonathan Roos, *New Look at Drug Tests for Babies*, DES MOINES REG., Apr. 3, 1996, at M1.

23. See Jeff Zeleny, *Prisons No Cure for Meth, Iowa Told: U.S. Drug Czar Says Aggressive Prevention and Treatment Must Be the State's Tactics*, DES MOINES REG., Jan. 10, 1999, at A1 [hereinafter *Prisons No Cure*] (Iowa is second only to California in the number of people treated for drug addiction).

24. JENNIFER R. NIEBYL, *DRUG USE IN PREGNANCY* 12 (2d ed. 1988); see generally Summer J. Yaffe, *Introduction* to GERALD G. BRIGGS ET AL., *A REFERENCE GUIDE TO FETAL AND NEONATAL RISK: DRUGS IN PREGNANCY AND LACTATION* at xiv (5th ed. 1998) (recognizing that drugs used during pregnancy affects the fetus).

25. See, e.g., *People v. Kuchan*, 579 N.E.2d 1054, 1059 (Ill. App. Ct. 1991) (affirming life sentence when defendant caused death of viable fetus); *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984) (holding in the future, actions for homicide based on killing of unborn child may be maintained); see also GA. CODE ANN. § 16-5-80 (1998) (allowing life imprisonment for act causing death of unborn child which would be murder if it caused death of mother); IND. CODE ANN. § 35-42-1-6 (Michie 1998) (making feticide a Class C felony when a person intentionally causes the death of an unborn child, except for authorized abortions).

26. To date, South Carolina is the only state at the appellate level that has upheld the prosecution of a woman who used drugs during pregnancy. *Whitner v. State*, 492 S.E.2d 777, 784 (S.C. 1997). Several states have resisted the application of criminal statutes to pregnant drug-users based on a general common law doctrine of immunity for pregnant women who cause death or injury to their fetuses. See, e.g., *State v. Ashley*, 701 So. 2d 338, 338 (Fla. 1997) (finding doctrine

pregnant women immunity from acts that if performed by a third party would be criminal, diminishes the mother-child bond and is an inappropriate and ineffective solution for combating maternal drug use. A woman is infinitely more responsible for her unborn child's well-being than is a third party. Yet, a third party could spend a lifetime in prison for causing the death of a viable fetus,²⁷ while the mother is free to get pregnant again and again, subjecting more unborn children to the horrendous effects of her drug use.²⁸

This Note argues that mothers should be prosecuted for their illegal conduct, such as using illegal drugs, when such conduct results in injury to or death of her unborn child. Part II of this Note examines the medical effects of gestational drug use on children and the extent of the problem. Part III examines the constitutional background of fetal rights. Part IV examines the evolution of fetal rights in the civil arena. Part V discusses the evolution of fetal rights with respect to third parties in the criminal context. Part VI highlights the complications of expanding fetal rights in the criminal context when the offending party is the mother of the fetus. Part VII discusses arguments against criminalizing maternal substance abuse. Finally, Part VIII evaluates current Iowa law and recommends that Iowa take affirmative steps to prosecute or detain pregnant substance abusers.

II. MEDICAL AND STATISTICAL INFORMATION

Everything a mother does during pregnancy can potentially affect her unborn child.²⁹ Researchers have known for many years that drugs cross the placenta and freely enter the system of the unborn child.³⁰ Because an unborn child's organs are not fully developed until just prior to birth, he is less able to metabolize the drugs.³¹ Thus, long after the drug leaves the mother's system, it still courses through the system of the unborn child, interfering with the

of immunity for pregnant women applied to teenager charged with felony-murder for shooting herself in the abdomen during the third trimester of her pregnancy); *Gaines v. Wolcott*, 167 S.E.2d 366, 370 (Ga. Ct. App. 1969) (noting that the criminal laws were "designed primarily for the protection of . . . pregnant females").

27. See GA. CODE ANN. § 16-5-80.

28. For example, one woman gave birth to 15 children during the course of her crack addiction—four died, ten were removed to foster care and only one child was born healthy. V. Dion Haynes, *To Curb Pregnancies, Project Pays Addicts \$200 to be Sterilized*, CHI. TRIB., May 3, 1998, § 1, at 3.

29. See generally Yaffe, *supra* note 24, at xiii (stating external environment could effect fetal outcome).

30. Ira J. Chasnoff, *Perinatal Effects of Cocaine*, CONTEMP. OB/GYN, May 1987, at 163, 171; see Yaffe, *supra* note 24, at xiv.

31. Ira J. Chasnoff, *Newborn Infants with Drug Withdrawal Symptoms*, 9 PEDIATRICS IN REV. 273, 274 (1988).

formation of vital organs and brain pathways.³² If a child does not die from exposure to illegal drugs in utero, there is a significant probability of lifelong detrimental effects.³³

In 1995, the National Institute on Drug Abuse (NIDA) released the first results of a nationally representative survey of drug use by pregnant women.³⁴ The survey revealed: "More than 5 percent of the 4 million women who gave birth in the United States in 1992 used illegal drugs while they were pregnant . . ."³⁵ Other studies suggest the percentage of women who use illegal drugs during their pregnancy may be as high as eleven percent, which would suggest that over 375,000 babies are born each year having been exposed to illegal substances in the womb.³⁶

While the effects of any particular drug on a fetus can vary greatly—depending on such factors as the stage of pregnancy when the drug is taken, the frequency of drug exposure, and the level of drug exposure³⁷—it is well settled that no drug is considered to be entirely safe to unborn children.³⁸ Studies show that cocaine, as well as other illegal drugs, has been linked to strokes while still in the womb or shortly after birth, difficulties in bonding and habituation, attention deficit disorder, impaired growth, and a variety of physical deformities that may result when constriction of blood vessels decreases the transmission of nutrients from mother to unborn child.³⁹ Heroin, a drug that has made a significant resurgence in recent years,⁴⁰ has been linked to congenital abnormalities, jaundice, respiratory distress syndrome, low birth weight, low Apgar scores, impaired cognitive and behavioral development, and a high likelihood of complications resulting from withdrawal.⁴¹ Studies have even shown that ingestion of marijuana—a drug long thought to be harmless to unborn

32. *Id.*

33. *Id.*

34. See *Pregnancy and Drug Use Trends* (visited Mar. 28, 1999) <<http://www.nida.nih.gov/Infofax/pregnancytrends.html>>.

35. *Id.* The survey estimated in 1992, at least 221,000 women used some type of illegal drug during their pregnancies. *Id.* Approximately 119,000 women admitted using marijuana while pregnant and another 45,000 women admitted cocaine use while pregnant. *Id.*

36. S. REP. NO. 101-336, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 686, 691.

37. NIDA Conference on Women and Drug Abuse, 110 PUB. HEALTH REP. 517, 517-18 (1995).

38. See generally NIEBYL, *supra* note 24 (discussing the affects of drugs taken by mother while pregnant).

39. March of Dimes, *Cocaine Use During Pregnancy: Public Health Education Information Sheet* (visited Apr. 14, 2000) <http://noah.cuny.edu/pregnancy/march_of_dimes/substance/cocaine.html>.

40. See *Trends in Drug Use: Winter 1997* (visited Mar. 14, 2000) <<http://www.whitehousedrugpolicy.gov:80/drugfact/pulsechk/winter97/trend1.html>>.

41. BRIGGS ET AL., *supra* note 24, at 502-03.

children—during pregnancy may result in “increased behavioral problems and decreased performance on visual perceptual tasks, language comprehension[,] sustained attention[,] and memory.”⁴²

If the drug-exposed fetus lives long enough to be born, continued problems are common.⁴³ Often these children have low birth weights, short birth lengths, and small head circumference.⁴⁴ Infants repeatedly exposed to drugs in utero often go through painful withdrawals that can cause physical damage, mental retardation, or death.⁴⁵ Withdrawal from narcotics, such as heroin, can last as long as four to six months, and the child may have to be placed on a methadone maintenance program.⁴⁶ Withdrawal from drugs other than narcotics may take a shorter period of time, but children are often restless, irritable, have poor feeding habits, have difficulty bonding with parents and caregivers, and are more likely to die from Sudden Infant Death Syndrome.⁴⁷

Yet another concern involves the risk of mothers transmitting HIV, the virus that causes AIDS, to their unborn children as a result of intravenous drug use.⁴⁸ In the United States, most women infected with AIDS initially contracted the disease by injecting illegal drugs.⁴⁹ The surgeon general estimated that in 1993, about twenty-five percent of babies born to HIV infected mothers contracted the virus either before or during birth.⁵⁰ Today, better medical techniques—particularly the use of the drug zidovudine (AZT)—have reduced the incidence of mother to child transmission from twenty-five percent to approximately eight percent.⁵¹ The risk of mother-to-child transmission of the HIV virus is still substantial, however, particularly if the disease is not diagnosed early enough to allow adequate medical intervention.⁵²

42. Drug Watch Oregon, *Marijuana Research Review* (visited Jan. 29, 1999) <<http://www.sarnia.com/GROUPS/ANTIDRUG/research/23-96-03.html>>.

43. See Chasnoff, *supra* note 30, at 176.

44. Ira J. Chasnoff et al., *Prenatal Drug Exposure: Effects on Neonatal and Infant Growth and Development*, 8 *NEUROBEHAV. TOXICOLOGY & TERATOLOGY* 357, 357-60 (1986).

45. Chasnoff, *supra* note 30, at 176.

46. National Ass'n for Perinatal Addiction Research & Educ. (NAPARE), *Perinatal Drug Abuse Occurs in All Social Classes*, in *BORN HOOKED: POISONED IN THE WOMB* 13-15 (G. McCuen ed., 1989).

47. *Id.* at 15-17.

48. See NIEBYL, *supra* note 24, at 207.

49. Marian Segal, *Women and AIDS* (visited Apr. 14, 2000) <http://webmd.lycos.com/content/dmk/dmk_article_5462567.html>.

50. *Id.*

51. *Id.*

52. *Id.*

Methamphetamine, the newest drug craze in the United States, may cause similar problems.⁵³ "According to the 1996 National Household Survey on Drug Abuse, an estimated 4.9 million people (2.3 percent of the population) have tried methamphetamine at some time in their lives."⁵⁴ It is probably not a leap to assume that at least a portion of methamphetamine users are pregnant women. The effects of methamphetamine on an unborn child have not been heavily researched as of yet. However, preliminary research "indicates that methamphetamine abuse during pregnancy may result in prenatal complications, increased rates of premature delivery, and altered neonatal behavioral patterns, such as abnormal reflexes and extreme irritability. Methamphetamine abuse during pregnancy may be linked also to congenital deformities."⁵⁵

In Iowa, methamphetamine use is becoming a particularly serious problem.⁵⁶ "[F]ederal statistics from 1996, the most recent year available, show more people were treated for addiction in Iowa than any state but California. Meanwhile, the number of meth lab seizures in Iowa soared from 63 in 1997 to 320 [in 1998]."⁵⁷ A 1994 study in Iowa found approximately 1500 children—four percent of the nearly 37,500 infants born in the state that year—were exposed to illegal substances during gestation.⁵⁸ At one central Iowa hospital, it was estimated methamphetamine exposed babies account for nearly half of all drug-exposed newborns admitted.⁵⁹ With numbers of methamphetamine users on the rise in Iowa, it is likely that we will begin to see more children born addicted to or with methamphetamine related complications. Iowa Governor Tom Vilsack and several leaders of the Iowa Legislature have recently been pushing for drastically more severe penalties for methamphetamine dealers who deal to children.⁶⁰ While Iowa lawmakers work to impose harsher sanctions on methamphetamine dealers, it seems the only way to ensure consistency is to impose at least some sort of criminal penalty on mothers who, by way of their

53. NIDA, *Methamphetamine: Abuse and Addiction* (visited Feb. 29, 2000) <<http://www.nida.nih.gov/ResearchReports/methamph/methamph2.html#complications>>.

54. *Id.*

55. *Id.* Despite the fact that little research is complete regarding the effects of methamphetamine on unborn children, it is probably safe to assume that methamphetamine—a drug that is often made with ammonia, battery acid, and other chemicals—does cause deleterious effects if used during pregnancy. Methamphetamine Control Strategy of Arizona, *How Do You Recognize a Clandestine Lab?* (visited Mar. 9, 2000) <http://www.antimeth.com/m_howlab.html>.

56. *Prisons No Cure*, *supra* note 23.

57. *Id.*

58. Tom Carney, *Thousands in the Womb Exposed to Illicit Drugs*, DES MOINES REG., Aug. 24, 1996, at A1.

59. Shirley Salemy, *Meth Explosion Now Harming Iowa's Youngest*, DES MOINES REG., Mar. 8, 1998, at A1.

60. Jeff Zeleny, *Life Terms for Meth Reconsidered but Some Legislators Keep Pushing Prison Proposal*, DES MOINES REG., Jan. 27, 1999, at M1.

illegal methamphetamine or other drug use, essentially "deal" drugs to their unborn children.

III. FETAL RIGHTS

In 1973, the United States Supreme Court established a woman's constitutional right to have an abortion in *Roe v. Wade*.⁶¹ Although the Court did not resolve the difficult question of when life begins, it did state "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."⁶² At ultimate issue in *Roe* was when the state's "interest in protecting the potentiality of human life"⁶³ is sufficiently compelling to outweigh the mother's constitutional right to privacy.⁶⁴

The Court reaffirmed the central holding in *Roe* in the 1992 case, *Planned Parenthood v. Casey*,⁶⁵ where it stated: "[V]iability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."⁶⁶ Once again, however, the Court did not accept the notion that a viable, unborn child had rights entitled to constitutional protection.⁶⁷ Rather, the compelling interest at the point of viability is that of the state in protecting potential life, though even that interest does not outweigh considerations for the health or life of the mother.⁶⁸

IV. EVOLUTION OF FETAL RIGHTS IN THE CIVIL CONTEXT

Despite the fact the Court has not recognized a fetus as a "person" within the meaning of the Fourteenth Amendment,⁶⁹ the protections known as fetal rights have evolved significantly in areas other than constitutional law since common law.⁷⁰ Historically, a fetus was considered part of the woman until such time as it was actually born and entered the outside world.⁷¹ Inheritance law was

61. *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

62. *Id.* at 158.

63. *Id.* at 162.

64. *Id.* at 154.

65. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

66. *Id.* at 860.

67. *Id.* at 860-61.

68. *Id.* at 876.

69. *Roe v. Wade*, 410 U.S. at 158.

70. See VALERIE GREEN, *DOPED UP, KNOCKED UP, AND LOCKED UP?: THE CRIMINAL PROSECUTION OF WOMEN WHO USE DRUGS DURING PREGNANCY* 3-10 (1993).

71. See Patricia A. Sexton, Note, *Imposing Criminal Sanctions on Pregnant Drug Users: Throwing the Baby Out with the Bath Water*, 32 WASHBURN L.J. 410, 414 (1993).

the first area to recognize a limited fetal right under the law.⁷² "[A] fetus existing at the time of the testator's death was entitled to receive an inheritance . . . provided that the fetus was born alive."⁷³

Common law in the field of torts saw the next stage in the evolution of fetal rights.⁷⁴ In *Dietrich v. Inhabitants of Northampton*,⁷⁵ the Massachusetts Supreme Judicial Court refused to allow damages for injury to a four to five month old fetus, later born alive, when the mother tripped on a poorly constructed sidewalk.⁷⁶ This rule denying recovery for injury to a fetus remained intact until *Bonbrest v. Kotz*⁷⁷ in 1946.⁷⁸ *Bonbrest* involved a malpractice suit for injuries sustained by a viable fetus.⁷⁹ The district court rested its decision on the medical fact that a fetus is a separate person from its mother, as well as on the inconsistency and injustice of denying legal personhood to a fetus under negligence law while recognizing it as a separate entity under property law.⁸⁰ Today, every jurisdiction in the United States has recognized a cause of action for prenatal injury, at least when the injury is to a viable fetus later born alive.⁸¹ Most jurisdictions have gone a step further and allow a personal representative to sue on behalf of an injured viable fetus who is not born alive but would have accrued a cause of action had it been born alive.⁸²

72. Regina M. Coady, Comment, *Extending Child Abuse Protection to the Viable Fetus: Whitner v. State of South Carolina*, 71 ST. JOHN'S L. REV. 667, 671 (1997).

73. *Id.*

74. *Id.* at 672.

75. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884).

76. *Id.* at 14-15.

77. *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.C. Cir. 1946).

78. *See id.* at 138.

79. *Id.* at 139.

80. *Id.* at 140-41.

81. W. PAGE KEETON ET AL., *supra* note 1, § 55, at 368.

82. At least 27 jurisdictions allow a civil cause of action for injury to a viable fetus, even when the fetus is not born alive. Shapiro, *supra* note 2, at 422-23. *See generally* Greater Southeast Community Hosp. v. Williams, 482 A.2d 394, 397 (D.C. 1984) (reasoning if a viable fetus is a person at the time of the injury, it must be a person at the time it dies of those injuries, whether before or after birth); Volk v. Baldazo, 651 P.2d 11, 15 (Idaho 1982) (holding a cause of action exists for wrongful death of viable unborn fetus stemming from injuries sustained in automobile accident); Jarvis v. Providence Hosp., 444 N.W.2d 236, 238-39 (Mich. Ct. App. 1989) (holding wrongful death action could be maintained on behalf of fetus not viable at time of hospital's negligent conduct, but which was viable at time of injury resulting from the negligence); Werling v. Sandy, 476 N.E.2d 1053, 1055-56 (Ohio 1985) (allowing wrongful death action when viable fetus was stillborn due to medical negligence). Approximately 13 jurisdictions hold a contrary view. Shapiro, *supra* note 2, at 424-25; *see, e.g.*, Chatelain v. Kelley, 910 S.W.2d 215, 219 (Ark. 1995) (holding fetus is not a person for purposes of Arkansas wrongful death statute); Endresz v. Friedberg, 248 N.E.2d 901, 905 (N.Y. 1969) (reasoning that because the law's protection of fetal property rights is contingent upon the child being born alive, a wrongful death action should also be contingent on a live birth).

V. EVOLUTION OF FETAL RIGHTS IN THE CRIMINAL CONTEXT

While the evolution of fetal rights has been significant in the civil context, its progress has been more constrained in the criminal context. Just as in the civil context, criminal common law required that a fetus injured during gestation be born alive before any criminal charges could be brought against the person—other than the mother⁸³—who caused the injury.⁸⁴ It is generally conceded “that this view was based on the limitations of medical knowledge from the sixteenth through the nineteenth centuries.”⁸⁵ As late as the nineteenth century, “it was virtually impossible for either the woman, a midwife, or a physician to confidently know that the woman was pregnant, or, it follows, that the child in utero was alive” prior to the point of quickening.⁸⁶ However, as medical technology began to progress at an unprecedented rate, people were able for the first time to see that a child inside the woman is actually *alive*, even prior to the point of quickening.⁸⁷ Many jurisdictions rejected the so-called “Born Alive Rule” and adopted instead, a theory allowing criminal sanctions for causing the death of an unborn child, if the child had reached the gestational point of viability.⁸⁸ Prosecutions under existing homicide statutes have been successful in both state and federal courts when a viable fetus dies due to the actions of a third party.⁸⁹

The first court to explicitly reject the born alive rule for criminal liability was the Massachusetts Supreme Judicial Court in *Commonwealth v. Cass*.⁹⁰ There, a driver struck “a female pedestrian who was eight and one-half months pregnant.”⁹¹ The viable fetus died of internal injuries while still in the womb and prosecutors charged the driver with vehicular homicide in the fetus’s death.⁹²

83. See *infra* Part VI for a discussion of criminal liability with respect to the mother of the unborn child.

84. See Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 580-95 (1987) (discussing the historical development of criminal liability for the injury to a fetus during gestation and the born alive rule).

85. Annissa R. Obasi, *Protecting Our Vital Organs: The Case for Fetal Homicide Laws in Texas*, 4 TEX. WESLEYAN L. REV. 207, 211 (1998).

86. Forsythe, *supra* note 84, at 573 (emphasis omitted).

87. See *id.* at 576-80 (summarizing medical advancements in fetology).

88. Obasi, *supra* note 85, at 212-13.

89. See generally Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R.5th 671 (1998) (reviewing convictions for killing an unborn child).

90. *Commonwealth v. Cass*, 467 N.E.2d 1324, 1329 (Mass. 1984).

91. *Id.* at 1325.

92. *Id.* The Massachusetts vehicular homicide statute reads in part: “Whoever . . . operates a motor vehicle while under the influence . . . or . . . recklessly or negligently . . . and by any such operation causes the death of another *person*, shall be guilty of homicide by a motor vehicle” MASS. GEN. LAWS ANN. ch. 90, § 24G(b) (West 1989) (emphasis added).

The court held a viable fetus would prospectively be considered a person for purposes of the vehicular homicide statute.⁹³

Similarly, the Oklahoma Court of Criminal Appeals held a fetus, viable at the time of injury, was a human being who may be the victim of a homicide under a first-degree manslaughter statute in *Hughes v. State*.⁹⁴ The court reasoned “[i]f a person were to commit violence against a pregnant woman and destroy the fetus within her, we would not want the death of the fetus to go unpunished.”⁹⁵ The court also found that defining a viable fetus as a human being for purposes of the homicide statute accords with the plain meaning and intent of the statute: “The purpose of [the homicide statute] is, ultimately, to protect human life. A viable human fetus is nothing less than human life.”⁹⁶

The Supreme Court of South Carolina reached the same conclusion with regard to a viable fetus’s status in the context of a voluntary manslaughter conviction.⁹⁷ The court reasoned that it would be “grossly inconsistent” to allow liability for civil wrongful death without a similar criminal classification.⁹⁸ Rejecting the notion that it is up to the legislature to determine if statutory language was meant to encompass unborn children not later born alive,⁹⁹ the court concluded it had “the right and the duty to develop the common law of South Carolina to better serve an ever-changing society as a whole.”¹⁰⁰

The Missouri Court of Appeals went a step beyond simple abandonment of the born alive rule by ruling a fetus can be the victim of first degree murder even *before* the point of viability.¹⁰¹ The court founded its decision, in part, on a 1986

93. Commonwealth v. Cass, 467 N.E.2d at 1324.

94. Hughes v. State, 868 P.2d 730, 734 (Okla. Crim. App. 1994). The statute Hughes was convicted under read in part: “Homicide is manslaughter in the first degree . . . [w]hen perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor.” OKLA. STAT. tit. 21, § 711(1) (1998). Hughes was also convicted of driving under the influence. Hughes v. State, 868 P.2d at 731.

95. Hughes v. State, 868 P.2d at 733 (quoting Commonwealth v. Cass, 467 N.E.2d at 1329).

96. *Id.* at 734.

97. See State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984).

98. State v. Horne, 319 S.E.2d at 704.

99. See, e.g., State v. Anonymous, 516 A.2d 156, 159 (Conn. Super. Ct. 1986) (finding it beyond the purview of the court to interpret murder statute as including unborn children absent clear statement of legislative intent to do so); State v. Gyles, 313 So. 2d 799, 801-02 (La. 1975) (holding the common law definition of murder incorporated the born alive rule absent a legislative statute expressly changing the common law); Atkinson v. Wilson, 332 S.E.2d 807, 812 (W. Va. 1984) (declining to change by judicial decree common-law principles requiring a live birth for criminal murder prosecution).

100. State v. Horne, 319 S.E.2d at 704.

101. State v. Holcomb, 956 S.W.2d 286, 289-90 (Mo. Ct. App. 1997). Like Missouri, South Dakota offers criminal law protections for “unborn child[ren]” beginning at “fertilization.” Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 790 (S.D. 1996). California requires only that the

legislative enactment providing: "[T]he laws of [Missouri] shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States"102 The court further stated: "The fact that a mother of a pre-born child may have been granted certain legal rights to terminate the pregnancy does not preclude the prosecution of a third party for murder in the case of a killing of a child not consented to by the mother."¹⁰³

As indicated, arguments raised by courts that have held a fetus is *not* a person for purposes of traditional criminal statutes include: lack of legislative intent to include fetuses within the definition of person in criminal statutes,¹⁰⁴ refusal to declare by judicial fiat that a fetus is a person when the statute in question simply codifies the common law,¹⁰⁵ and tension between abortion statutes and criminal homicide laws.¹⁰⁶ To combat this problem, many states have revised existing criminal statutes to include unborn children within their purview.¹⁰⁷ Other states have written new statutes specifically making it a crime to cause death or injury to an unborn child without the consent of the mother—feticide statutes.¹⁰⁸ Some states, "including Minnesota, Pennsylvania, North

fetus be past the stage of embryonic development. *People v. Davis*, 872 P.2d 591, 602 (Cal. 1994). Minnesota indicted a criminal defendant for murdering an embryo only 28 days old. *State v. Merrill*, 450 N.W.2d 318, 320 (Minn. 1990).

102. *State v. Holcomb*, 956 S.W.2d at 289 (citing MO. REV. STAT. § 1.205(2) (1994)).

103. *Id.* at 291.

104. *See, e.g., Keeler v. Superior Court*, 470 P.2d 617, 622 (Cal. 1970) (finding that a fetus was not within the legislative purview of the word "person" when the statute was drafted). In response to *Keeler*, in 1970 the California legislature amended the murder statute to read: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." *See* CAL. PENAL CODE § 187(a) (West 1999) (emphasis added). Thus, in *People v. Davis*, the court held viability was not an element of fetal homicide under § 187 as long as it could be conclusively shown that the fetus had developed past the embryonic stage of development. *People v. Davis*, 872 P.2d at 602.

105. *See, e.g., Hughes v. State*, 868 P.2d 730, 732 (Okla. Crim. App. 1994) (abandoning the common law born alive rule).

106. *See, e.g., People v. Greer*, 402 N.E.2d 203, 209 (Ill. 1980) (noting that Illinois Abortion Act did not treat any offense under the Act as murder except the killing of a fetus aborted alive).

107. *See, e.g., CAL. PENAL CODE § 187(a)* ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.").

108. *See, e.g., GA. CODE ANN. § 16-5-80* (1998) ("A person commits the offense of feticide if he willfully kills an unborn child so far developed as to be ordinarily called 'quick' by any injury to the mother of such child, which would be murder if it resulted in the death of such mother."); *IND. CODE ANN. § 35-42-1-6* (Michie 1998) ("A person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus commits feticide.").

Dakota, and Louisiana, preclude prosecution of the mother" under such statutes,¹⁰⁹ while other states do not.¹¹⁰

The primary point of conflict in making it criminal to kill or harm an unborn child was best stated by one commentator:

An apparent inconsistency in the law arises when state feticide statutes co-exist with statutes that permit elective abortion during the same or similar period of fetal development. This apparent inconsistency reaches its zenith when the killer or injurer of the fetus is not a third-party, but the mother herself, and a viable fetus is killed in a state that permits partial birth abortions not premised on medical necessity. Indeed, in some cases, defendants have challenged feticide prosecutions based upon the Supreme Court's determination in *Roe v. Wade* that a nonviable fetus was not a "person" in the eyes of the law.¹¹¹

At least with regard to the prosecution of third parties for the death of a fetus, courts allowing such prosecutions reject any conflict with *Roe v. Wade*.¹¹² These courts point out *Roe* was designed to govern when there was a conflict between the rights of the mother and the interest of society in protecting potential life.¹¹³ "*Roe v. Wade* protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."¹¹⁴

The law, at least within any single jurisdiction, seems to have selected a position on the rights of the fetus with respect to third parties. Some jurisdictions retain the common-law born alive rule, while others afford varying protections to unborn children.¹¹⁵ As indicated, when the mother of the fetus is the one perpetrating the injury, conflicts with the mother's constitutional rights become a much greater concern, and states are hesitant to extend fetal protection so far.

109. Major Michael J. Davidson, *Fetal Crime and Its Cognizability as a Criminal Offense Under Military Law*, ARMY LAW., July 1998, at 23, 26; see LA. REV. STAT. ANN. § 14:32.5 (West 1997) ("Feticide is the killing of an unborn child by the act, procurement, or culpable omission of a person other than the mother of the unborn child.").

110. Davidson, *supra* note 109, at 26.

111. *Id.* at 27.

112. *Id.*

113. See *People v. Davis*, 872 P.2d 591, 597 (Cal. 1994); *State v. Merrill*, 450 N.W.2d 318, 321-22 (Minn. 1990).

114. *State v. Merrill*, 450 N.W.2d at 322.

115. Davidson, *supra* note 109, at 25.

VI. STATE OF THE LAW WITH RESPECT TO MOTHERS

Prosecutors around the country have tried to combat the problem of drug use during pregnancy by expanding fetal rights to encompass protection from the mother of the fetus as well as protection from third parties.¹¹⁶ Courts have most often rejected this effort because, they say, the evil sought to be punished—prosecution of the drug-using mother—was not within the purview of legislative intent.¹¹⁷ Or, in other cases, the victim sought to be protected—the unborn child—was not envisioned as being covered by the statute.¹¹⁸

A. Controlled Substance Statutes

The first successful prosecution of a pregnant woman who used drugs during her pregnancy came in the Seminole County Circuit Court of Florida in 1991.¹¹⁹ Jennifer Johnson was convicted of two counts of delivering a controlled substance to a minor.¹²⁰ Using a unique theory, the prosecution obtained a

116. See *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992) (stating that prosecuting women for the use of drugs during pregnancy is not an effective means of dealing with the problem); *People v. Hardy*, 469 N.W.2d 50, 51 (Mich. Ct. App. 1991) (stating that prosecuting pregnant mother for ingestion of cocaine would be tenuous application of statute); *Sheriff v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (concluding prosecution of pregnant mother for delivery of a controlled substance to fetus is a strained application of statute); *State v. Gray*, 584 N.E.2d 710, 713 (Ohio 1992) (suggesting mother's abuse of drugs during pregnancy does not fall within intent of child endangerment statute); *Whitner v. State*, 492 S.E.2d 777, 778 (S.C. 1997) (holding mother could be charged under a South Carolina statute for ingesting crack cocaine during the third trimester of pregnancy); *Collins v. State*, 890 S.W.2d 893, 898 (Tex. Crim. App. 1994) (holding that mother's abuse of drugs while pregnant was not a crime when committed); *State v. Dunn*, 916 P.2d 952, 953 (Wash. Ct. App. 1996) (affirming the dismissal of second-degree criminal mistreatment of child charges against a mother for ingesting cocaine during pregnancy).

117. See, e.g., *Reinesto v. Superior Court*, 894 P.2d 733, 735 (Ariz. Ct. App. 1995) (holding an interpretation of the criminal child abuse statute as encompassing prosecution for prenatal conduct would render it impermissibly vague); *Commonwealth v. Welch*, 864 S.W.2d 280, 282-83 (Ky. 1993) (finding criminal child abuse statute not intended to encompass maternal drug use).

118. See, e.g., *Johnson v. State*, 602 So. 2d at 1290 (holding a statute forbidding delivery of cocaine to minor not meant to include a fetus); *State v. Luster*, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992) (concluding fetus not person for purposes of delivery of controlled substance statutes).

119. *Johnson v. State*, 602 So. 2d at 1290.

120. *Id.* The pertinent Florida statute under which Johnson was convicted reads:

Except as authorized by this chapter, it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years, or to use or hire a person under the age of 18 years as an agent or employee in the sale or delivery of such a substance, or to use such person to assist in avoiding detection or apprehension for a violation of this chapter. Any person who violates this provision . . . is guilty of a felony of the first degree . . .

FLA. STAT. ANN. § 893.13(1)(c)(1) (West 1989).

conviction of Johnson by arguing that Johnson delivered cocaine derivatives to her children¹²¹ "via blood flowing through the children's umbilical cords in the sixty-to-ninety second period after they were expelled from her birth canal but before their cords were severed."¹²² While there was clear support for the theory offered by the State,¹²³ the Florida Supreme Court overturned Johnson's conviction, finding the Florida legislature "never intended for the general drug delivery statute to authorize prosecutions of those mothers who take illegal drugs close enough in time to childbirth that a doctor could testify that a tiny amount passed from mother to child in the few seconds before the umbilical cord was cut."¹²⁴

The Michigan Court of Appeals reached a similar conclusion in *People v. Hardy*.¹²⁵ There, one count of Kimberly Hardy's indictment was for delivery of a controlled substance, again based on the theory that transmission occurred through the umbilical cord.¹²⁶ Noting "a penal statute must be sufficiently definite and explicit to inform those who are subject to it what conduct will render them liable to its penalties,"¹²⁷ the court found the charge could not stand because it was unclear whether the legislature had intended for pregnant women who transmit drugs to their child via the umbilical cord to be prosecuted under the delivery statute.¹²⁸ The Supreme Court of Nevada used this same reasoning when overturning a conviction based on delivery of controlled substances through the umbilical cord.¹²⁹

121. *Johnson v. State*, 602 So. 2d at 1290. Johnson delivered a son in 1987 after using cocaine the night before delivery. *Id.* at 1291. Johnson delivered a daughter in 1989 after admitting that she had used rock cocaine that morning. *Id.*

122. *Id.*

123. *See id.* at 1291-92. Experts testified at trial that tiny amounts of cocaine metabolites could pass through the umbilical cord in the time period after birth but before the cord was cut. *Id.* There was also no contention that the child was not a "person" for purposes of the statute once outside the mother's body. *Id.*

124. *Id.* at 1294.

125. *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991).

126. *Id.* at 51-52. The statute under which Hardy was convicted reads, in part: "A person shall not manufacture, deliver . . . a controlled substance . . ." MICH. COMP. LAWS ANN. § 333.7401(1) (West 1992). Delivery of less than 50 grams of the narcotic drug substance or a mixture thereof constitutes a felony punishable by one to 20 years in prison, a fine, or life probation. *Id.* § 333.7401(2)(a)(iv).

127. *People v. Hardy*, 469 N.W.2d at 52.

128. *Id.* at 53.

129. *See Sheriff v. Encoe*, 885 P.2d 596, 597-99 (Nev. 1994) (holding that the legislature did not intend the child endangerment statute to encompass prosecution of mother for delivery of amphetamines and methamphetamines through the umbilical cord after birth but prior to severance of cord).

B. Child Endangerment and Abuse Statutes

Prosecutions of women for drug use during pregnancy become even more complex when the statutes used involve strictly in utero fetal exposure to drugs. Most cases in this category stem from a newborn's positive drug test and result in prosecution of the mother based on that test.¹³⁰ Unlike cases based on maternal transmission of drugs *after* the birth of the child, but prior to the cutting of the umbilical cord, cases in this category face the added difficulty of establishing that the unborn fetus is a "person" for purposes of a criminal statute.¹³¹

One example of this problem is evident in *State v. Dunn*.¹³² While pregnant, Selena Dunn tested positive for cocaine use twice and also admitted using heroin while pregnant.¹³³ Dunn's doctor advised her that further drug use could be severely detrimental to her child.¹³⁴ Dunn never showed up for scheduled drug treatment and when she gave birth prematurely, her daughter tested positive for cocaine and was diagnosed with growth retardation, placenta abruptio, and blindness—all associated with Dunn's cocaine use during pregnancy.¹³⁵ The Washington Court of Appeals affirmed the trial court's dismissal of second-degree criminal mistreatment charges, finding that the legislature did not intend to include unborn fetuses in the definition of a person.¹³⁶

Similarly, the Supreme Court of Ohio affirmed the dismissal of an indictment against Tammy Gray, finding that imposition of a duty of care on mothers to their fetuses must come directly and clearly from the legislature.¹³⁷ Gray was charged with child endangerment for "recklessly creat[ing] substantial risk to the health or safety of her subsequently born child, Sierra Gray, by violating a duty of care, protection, or support, by the ingestion of cocaine in the third trimester of her pregnancy"¹³⁸ Likewise, a Texas appeals court found

130. See Marcy Tench Stovall, *Looking for a Solution: In re Valerie D. and State Intervention in Prenatal Drug Abuse*, 25 CONN. L. REV. 1265, 1267-72 (1993).

131. See *id.* at 1267-70.

132. *State v. Dunn*, 916 P.2d 952 (Wash. Ct. App. 1996).

133. *Id.* at 953.

134. *Id.*

135. *Id.*

136. See *id.* at 953-55. The second degree criminal mistreatment statute requires the defendant to be a parent or guardian, the victim must be a child or dependent, the defendant must act recklessly and either create an imminent and substantial risk of death or great bodily harm, or cause substantial bodily harm by withholding of a basic necessity of life. WASH. REV. CODE § 9A.42.030(1)(a) (2000). A child is defined as "a person under eighteen years of age." *Id.* § 9A.42.010(3). The court noted that the state had also failed to allege any "withholding"—an essential element of the crime. *State v. Dunn*, 916 P.2d at 955.

137. *State v. Gray*, 584 N.E.2d 710, 713 (Ohio 1992).

138. *Id.* at 710.

that Debra Ann Collins's conviction for reckless injury to a child caused by her voluntary ingestion of cocaine while pregnant could not stand.¹³⁹ Though the State made a creative argument that the child suffered the effects of the cocaine after birth, the court emphasized that the criminal act itself must be against a child and a fetus is not a child for purposes of the reckless injury statute.¹⁴⁰ Thus, to prosecute the mother for an act committed against a fetus—the ingestion of cocaine—would be to punish her after the child's birth for conduct that was not a crime when committed.¹⁴¹ Several other courts have reached this same conclusion.¹⁴² Interestingly, many of the same courts that have concluded a fetus is not a person for most criminal statutes have held a fetus is a person when the context changes to criminal charges brought against a third party.¹⁴³

C. Other Approaches

Given the lack of success of most prosecutions under existing statutes, prosecutors and judges in some jurisdictions have gotten particularly creative in their efforts to punish women who use drugs during their pregnancy.¹⁴⁴ Preventive incarceration is one such method.¹⁴⁵ In an oft-cited case, a Washington D.C. judge sentenced Brenda Vaughan to 180 days in prison for \$721 in check forgery, even though the typical sentence was probation.¹⁴⁶ The reason for the atypical sentence was that Vaughan was pregnant and had shown traces of cocaine in a urine sample.¹⁴⁷ The judge stated, "I'm going to keep her locked up until the baby is born because she's . . . an addictive personality, and

139. Collins v. State, 890 S.W.2d 893, 895 (Tex. App. 1994).

140. *Id.* at 898.

141. *Id.*

142. See generally Reinesto v. Superior Court, 894 P.2d 733, 736 (Ariz. Ct. App. 1995) (holding interpretation of child abuse statute to include prenatal use of heroin would render statute impermissibly vague); Reyes v. Superior Court, 141 Cal. Rptr. 912, 913 (Cal. Ct. App. 1977) (finding child endangerment statute did not envision a fetus as a "child" and was not intended to include mother's ingestion of heroin during pregnancy); State v. Gethers, 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991) (concluding aggravated child abuse was not intended to cover prenatal drug use); State v. Luster, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992) (determining delivery of cocaine to unborn fetus was not a crime against a person as required by delivery statute, despite resultant harm once child was born); Commonwealth v. Welch, 864 S.W.2d 280, 284 (Ky. 1993) (holding criminal child abuse statute does not extend to mother's use of drugs while pregnant).

143. See *supra* notes 90-115 and accompanying text.

144. Debra Cassens Moss, *Pregnant? Go Directly to Jail*, A.B.A. J., Nov. 1, 1988, at 20, 20.

145. *Id.*

146. *Id.* (discussing an unpublished decision in a Washington D.C. court).

147. *Id.*

I'll be darned if I'm going to have a baby born that way."¹⁴⁸ Preventive incarceration is particularly controversial because, as was the case with Vaughan, the woman is, in essence, being punished for a crime that she was never charged with.

Another approach, employed by judges across the country, is to sentence pregnant offenders to drug treatment facilities.¹⁴⁹ One Illinois court made drug treatment a mandatory part of a pregnant cocaine user's disorderly conduct sentence.¹⁵⁰ When she failed to comply, the court ordered her confined to a drug treatment facility for the remainder of her pregnancy.¹⁵¹

Another particularly controversial approach is to place the drug-exposed fetus in protective custody, which, by necessity, requires placing the mother in custody as well.¹⁵² In *State ex rel. Angela M.W. v. Kruzicki*,¹⁵³ the Court of Appeals of Wisconsin affirmed a juvenile court order placing a woman's unborn child in protective custody.¹⁵⁴ Angela, the mother, had tested positive for cocaine use several times during her pregnancy.¹⁵⁵ Her obstetrician reported his concerns to the authorities in accordance with state statutes.¹⁵⁶ The local Department of Health and Human Services obtained a court order, based in part on an affidavit by the obstetrician, to take Angela's viable fetus into custody.¹⁵⁷ On appeal, Angela contended the juvenile court lacked jurisdiction over her or her viable fetus and that the order violated her constitutional rights to equal protection and

148. *Id.* (quoting the Hon. Peter Wolf, D.C. Super. Ct. Assoc. J.). Similarly, a judge in Waukesha County, Wisconsin, ordered a pregnant teen held in a secure facility for not following her doctor's directions. Kenneth Jost, *Mother Versus Child*, A.B.A. J., Apr. 1989, at 84, 87. A higher court found the judge's decision improper, but he issued a new detention order to protect the fetus. *Id.* The mother eventually stayed in detention. *Id.* When asked whether he violated the woman's rights, Judge James Kieffer said: "That could be debated. In my opinion, no. How it would have stood up on appeal, I don't know." *Id.* at 87-88.

149. Deborah Apple, *Drug Use During Pregnancy: State Strategies to Reduce the Prevalence of Prenatal Drug Exposure*, 5 U. FLA. J.L. & PUB. POL'Y 103, 131 (1992).

150. Edward Walsh, *Illinois Court Orders Pregnant Woman Confined to Drug Treatment Center*, WASH. POST, Apr. 12, 1991, at A3.

151. *Id.*

152. See *State ex rel. Angela M.W. v. Kruzicki*, 541 N.W.2d 482, 485 (Wis. Ct. App. 1995), *rev'd*, 561 N.W.2d 729 (Wis. 1997).

153. *State ex rel. Angela M.W. v. Kruzicki*, 541 N.W.2d 482 (Wis. Ct. App. 1995), *rev'd*, 561 N.W.2d 729 (Wis. 1997).

154. *Id.* at 497.

155. *Id.* at 485.

156. *Id.*

157. *Id.* The statute used to allow the court order for protective custody requires that a showing be made to the juvenile court that "the welfare of the child demands that the child be immediately removed from his or her present custody." *Id.* (quoting WIS. STAT. § 48.19(1)(c) (1994)).

due process.¹⁵⁸ The appellate court rejected all of these contentions, finding first that personal jurisdiction over the fetus was satisfied and second, it was not necessary for the juvenile court to obtain personal jurisdiction over Angela.¹⁵⁹ Rejecting the due process and equal protection claims, the court found that the State had adequately demonstrated a compelling interest and that its means to effect that interest were sufficiently narrowly drawn.¹⁶⁰ The compelling interest, the court pointed out, was to protect potential life, an interest specifically recognized in *Roe v. Wade*.¹⁶¹ The court rejected Angela's contention that confining a pregnant woman was "too extreme a means by which the [S]tate may accomplish its compelling interest," finding that the juvenile code allowed for lesser options, but Angela had specifically rejected all of those options in discussions with her obstetrician.¹⁶²

In a legislative affirmation of *Angela M.W.*, the Wisconsin legislature enacted specific legislation that allows for the civil detention of pregnant women who use drugs or alcohol.¹⁶³ South Dakota also effected a law on July 1, 1998, that allows "the involuntary commitment to a treatment facility for nearly the entire nine-month gestational period of a pregnant abuser of alcohol or non-prescribed drugs."¹⁶⁴ Similar bills were introduced in Alaska, California, Delaware, Georgia, Indiana, Maryland, Massachusetts, Minnesota, Tennessee, and Virginia in 1998.¹⁶⁵

158. *Id.* at 486-87.

159. *Id.* at 493-94.

160. *See id.* at 494-96.

161. *Id.* at 494-95; *see Roe v. Wade*, 410 U.S. 113, 154 (1973).

162. State *ex rel. Angela M.W. v. Kruzicki*, 541 N.W.2d at 496-97.

163. WIS. STAT. § 48.19 (1999); *see also States Look to Detention for Pregnant Drug Users*, STAR-TRIB. (Minneapolis), May 2, 1998, at 15A [hereinafter *States Look to Detention*] (reporting the Wisconsin Senate's approval of the detention of pregnant women who abuse drugs or alcohol).

164. S.D. CODIFIED LAWS § 34-20A-63 (Michie 1999); *see also States Look to Detention*, *supra* note 163 (reporting the signing of legislation allowing detention). Wisconsin has been particularly aggressive in trying to combat behavior by pregnant women that harms their unborn children. *See Don Terry, Drunken New Mother Charged*, DES MOINES REG., Aug. 17, 1996, at A3. For example, Deborah Zimmerman was charged with attempted murder after giving birth to a child born with fetal alcohol syndrome and reportedly telling hospital aides, "I'm just going to go home and keep drinking and drink myself to death, and I'm going to kill this thing [the unborn child] because I don't want it anyways." *Id.* While prosecution of pregnant women for alcohol or nicotine consumption is certainly on moral par with illegal drug use, it is subject to many more constitutional and other legal complications and is beyond the scope of this Note. Therefore, this Note deals exclusively with *illegal* substance use during pregnancy.

165. *States Look to Detention*, *supra* note 163.

D. A Change on the Horizon?

Clearly, prosecution of women for using drugs during pregnancy is virtually always unsuccessful. Recently, however, the South Carolina Supreme Court made a great wave in the consistent reversals of this type of conviction.¹⁶⁶ Cornelia Whitner was sentenced to eight years in prison after pleading guilty to criminal child neglect stemming from her third trimester crack cocaine use and her baby's subsequent birth with cocaine metabolites in its system.¹⁶⁷ Whitner was convicted under a statute that reads:

Any person having the legal custody of any *child* or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such *child* or helpless person, so that the life, health or comfort of such *child* or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.¹⁶⁸

A "child" is defined by the Code of Laws of South Carolina as a "person under the age of eighteen."¹⁶⁹ Finding that a viable fetus is a person for purposes of the statute, the court reasoned: "[I]t would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse."¹⁷⁰ Whitner contended that several bills introduced in the South Carolina General Assembly addressing the specific issue of criminalizing prenatal substance abuse evidenced the legislature's lack of intent to include viable fetuses as persons under the child abuse and neglect statutes.¹⁷¹ The court rejected this contention, finding that an evaluation of legislative intent was unnecessary because the language of the statute and South Carolina case law clearly supported a finding that a viable fetus is a person for purposes of criminal statutes.¹⁷² Thus, South Carolina became the first state to uphold a conviction based on a mother's use of illegal drugs during pregnancy.¹⁷³

166. See *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

167. *Id.* at 778-79.

168. S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1985) (emphasis added).

169. *Id.* § 20-7-30(1).

170. *Whitner v. State*, 492 S.E.2d at 780.

171. *Id.* at 781.

172. *Id.*

173. *Id.*

VII. ARGUMENTS AGAINST CRIMINALIZATION OF MATERNAL SUBSTANCE ABUSE AND RESPONSES

Critics have raised several arguments against prosecuting women for illegal substance use during pregnancy. The first such argument is that prosecuting the mother for illegal substance use during pregnancy cannot be reconciled with the constitutional issues surrounding abortion.¹⁷⁴ Proponents of this stance argue that

[i]t is not disputed that the decision to prosecute for fetal abuse does not create an undue burden on the right to obtain a legal abortion. . . . [H]owever, that prosecution implicates the converse principle . . . : The State should not place an undue burden on a mother's choice to give birth to her child.¹⁷⁵

The idea behind this argument is that when a woman has decided to have a child, despite her drug use, the fear of criminal prosecution unduly burdens the woman's choice to have the child because it encourages her to get an abortion to avoid criminal prosecution.¹⁷⁶ This position goes hand in hand with critics who argue that prosecuting pregnant drug users will lead to an increased number of abortions.¹⁷⁷

Concededly, this concern is a valid one. However, it must be pointed out that the burden placed on pregnant substance abusers is not the burden to *get* an abortion. Rather, the burden on the woman is to *stop using illegal drugs* once she has exercised her constitutional decision *not* to have an abortion. The fact is that abortions, while morally reprehensible to many, are a legal exercise of the mother's right to choose. Once the mother has made the choice to have a child, she must accept the consequences of that choice. One of the consequences of having children is that it creates certain duties and obligations to that child. If a woman does not fulfill those obligations, then the state must step in to prevent harm to the child. As one judge aptly pointed out, there is simply "no reason to treat a child in utero any differently from a child ex utero where the mother has decided not to destroy the fetus or where the time allowed for such destruction is

174. See Michelle D. Mills, *Fetal Abuse Prosecutions: The Triumph of Reaction over Reason*, 47 DEPAUL L. REV. 989, 1020-28 (1998).

175. *Id.* at 1026. In *Planned Parenthood v. Casey*, the Supreme Court held that any governmental restriction which places an undue burden on a woman's right to obtain a legal abortion will be held invalid. *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992).

176. Mills, *supra* note 174, at 1026-27.

177. See Janan Hanna, *Probation for Cocaine Mom: Aurora Woman Tests the Leniency of Justice System*, CHI. TRIB., Feb. 20, 1998, § 2, at 6.

past."¹⁷⁸ As long as abortion is legal, society needs to be less concerned with how many abortions women are having and more concerned with ensuring the health and well-being of those children who *are* born.¹⁷⁹

A second argument against criminalizing drug use by pregnant women is the popular "slippery slope" argument: "One of the fundamental problems with taking a hard-line stance against women who abuse substances during pregnancy is deciding where the line should be drawn when determining what behavior should be punished."¹⁸⁰ This is a valid question, particularly considering that alcohol—a legal substance—can be even more detrimental to an unborn child than many illegal substances.¹⁸¹ Also, countless prescription pharmaceuticals, cigarettes, and even some foods are known to cause damage to unborn children.¹⁸² The simplest argument here is that there is no slippery slope because there is *no constitutional right to take illegal drugs*. This is not to say that a mother who drinks and gives birth to a child with Fetal Alcohol Syndrome and a mother who uses illegal drugs and gives birth to a drug addicted child should not, at least from a moral standpoint, be equally punished. However, the law simply has never had the capacity to treat all behaviors that produce a particular outcome the same. The mere fact that some bad behaviors are beyond the reach of the legal system, due to constitutional or other factors, does not mean that society should leave unpunished bad behaviors which are within the reach of the legal

178. Tamar Lewin, *When Courts Take Charge of the Unborn*, N.Y. TIMES, Jan. 9, 1989, at A1 (quoting a Family Court judge who found that a pregnant woman's use of cocaine was an act of neglect).

179. While this may be a controversial statement, it is not the author's intent to say that more abortions are appropriate. Rather, it is the author's position, without commenting on the legal or ethical implications of abortion, that a greater concern must be afforded to a child who will be born than to a child who will not. As long as abortion is legal, the fates of aborted children cannot be a legal concern. However, once a woman has made the decision to bear a child to term, she, the state, and society have a duty to ensure that child has every opportunity for a healthy life.

180. Susan E. Rippey, *Criminalizing Substance Abuse During Pregnancy*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 69, 87 (1991).

181. See generally *FAS Characteristics: What Are the Characteristics of FAS?* (visited Apr. 14, 2000) <<http://www.azstarnet.com/~tjk/faschar.html>> (discussing the serious effects of Fetal Alcohol Syndrome caused by extensive exposure to alcohol in utero such as neurological damage, facial deformities, mental retardation, abnormal muscle tone, and heart defects).

182. See generally BRIGGS ET AL., *supra* note 24 (discussing how a variety of pharmaceuticals—including prescription tranquilizers, nitroglycerin, and even aspirin—impact the development of an unborn child); see also Judith Brown, *Commonly Asked Questions About Diet and Pregnancy* (visited Apr. 14, 2000) <http://webmd.lycos.com/content/dmk/dmk_article_3961320> (recommending that pregnant women avoid herbal teas and fish products from unknown sources because of possible detrimental effects to the fetus; Barry Herman & Susan Perry, *Cigarette Smoking and Pregnancy* (visited Apr. 14, 2000) <http://webmd.lycos.com/content/dmk/dmk_article_3961088.html> (linking cigarette smoking during pregnancy to growth retardation, mental disorders, pregnancy complications, miscarriage, and fetal death).

system. As with any legal issue, a line must be drawn somewhere, and here it can easily be drawn between legal and illegal behaviors.

Opponents to criminalizing substance use during pregnancy also argue criminal sanctions will deter pregnant women who use drugs from seeking prenatal care.¹⁸³ The impact that fear of imprisonment has on obtaining prenatal care, however, "may be exaggerated."¹⁸⁴ Other possible explanations, suggested by a New York study, for why pregnant drug users do not obtain prenatal care include the following:

[T]he use of such substances, especially addiction to alcohol and drugs, interferes with the women's ability to control their lives and to seek care and adhere to routines. Still another explanation may be that substance abuse is one of many poor health habits, which include not seeking care when appropriate.¹⁸⁵

Two other offered explanations for failing to get proper prenatal care are that women who use drugs while pregnant "may be ashamed by the fact that they are not living up to their expected obligations"¹⁸⁶ and women using drugs may not be able to afford proper medical care.¹⁸⁷ Thus, no direct causative link between threat of prosecution and deterrence from prenatal care has been established. The scant evidence supporting that theory is insufficient to justify doing nothing about the problem of pregnant drug users out of fear that women will not seek proper prenatal care.

A final argument made in opposition to criminalizing maternal drug use is such action exceeds the authority granted to states by *Roe v. Wade*. Commentators point out that *Roe* explicitly rejected a state's right to prevent a woman from having an abortion after viability in cases where "it is necessary . . . for the preservation of the life or health of the mother."¹⁸⁸ Based on this restriction of state power, commentators argue it is "incorrect to assert that *Roe* grants the state unrestricted authority to protect the viable fetus or to prohibit abortions after viability."¹⁸⁹ However, *Roe* itself says:

183. Lisa M. Noller, *Taking Care of Two: Criminalizing the Ingestion of Controlled Substances During Pregnancy*, 2 U. CHI. L. SCH. ROUNDTABLE 367, 388 (1995).

184. *Id.*

185. *Id.* (citing FRANCIS G. CARO ET AL., BARRIERS TO PRENATAL CARE: AN EXAMINATION OF USE OF PRENATAL CARE AMONG LOW-INCOME WOMEN IN NEW YORK CITY 24 (1988)).

186. *Id.*

187. *Id.*

188. *Roe v. Wade*, 410 U.S. 113, 165 (1973).

189. Lawrence J. Nelson & Nancy Milliken, *Compelled Treatment of Pregnant Women: Life, Liberty, and Law in Conflict*, 259 JAMA 1060, 1062 (1988).

[I]t is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.¹⁹⁰

In *Webster v. Reproductive Health Services*,¹⁹¹ the Court went on to say that the viability standard functions effectively to protect the constitutional rights of pregnant women while still accommodating the state interest in potential life.¹⁹² "[T]he viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the [s]tate's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling."¹⁹³ The concerns that prosecuting women for drug use during pregnancy exceeds state authority under *Roe* was addressed by the Wisconsin Court of Appeals in *State ex rel. Angela M.W. v. Kruzicki*.¹⁹⁴ The court there stated:

The commentators who espouse this narrow reading of *Roe* fail to recognize the incongruity of their position By recognizing that a state may intervene in an abortion decision after viability, *Roe* necessarily recognizes the right of the state to protect the potential life of the fetus over the wishes of the mother to terminate the pregnancy. Why then cannot the state also protect the viable fetus from maternal conduct which functionally presents the same risk and portends the same result—the death of the viable fetus? Absent a logical answer to this question, the logic of the commentators' premise is also suspect.¹⁹⁵

VIII. WHAT CAN BE DONE IN IOWA?

Case law in other states has made it clear that reliance on existing statutes to impose criminal sanctions on pregnant drug users is inappropriate.¹⁹⁶ However, specific legislation criminalizing harmful acts to unborn children has rarely been overturned on appeal. In Iowa, "[a] person who terminates a human pregnancy without the consent of the pregnant person during the commission of a

190. *Roe v. Wade*, 410 U.S. at 154.

191. *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

192. *Id.* at 553.

193. *Id.*

194. *State ex rel. Angela M.W. v. Kruzicki*, 541 N.W.2d 482, 488-93 (Wis. Ct. App. 1995), *rev'd*, 561 N.W.2d 729 (Wis. 1997).

195. *Id.* at 489 n.11.

196. *See supra* Part VI.

forcible felony is guilty of a class 'B' felony."¹⁹⁷ A variety of other circumstances allow prosecution of third parties for "serious injury to a human pregnancy."¹⁹⁸ However, the statute specifically states, "actions which cause the termination of or serious injury to a pregnancy do not apply to . . . [a]n act or omission of the pregnant person."¹⁹⁹ Iowa also specifically disallows the use of a positive infant drug test in a criminal prosecution against the mother.²⁰⁰

The Iowa legislature needs to initiate legislation that acknowledges the rights of viable fetuses to be born free of the deleterious effects of gestational drug use. Proposed legislation should encourage rehabilitation and treatment as a means for pregnant substance users to avoid incarceration. However, the legislation must also provide for severe sanctions for women who do not participate, either voluntarily or by court order, in such programs. A good faith effort to discontinue drug use by the pregnant woman should be considered a partial or complete defense to criminal prosecution.

Iowa legislators particularly opposed to criminal sanctions should consider implementing a program that allows court-ordered protective custody of viable fetuses, similar to the one upheld in *State ex rel. Angela M.W. v. Kruzicki*.²⁰¹ Such a program would allow child protective services to "take custody" of the fetus by detaining the mother in a treatment facility or hospital setting.²⁰² While this approach may seem extreme, it must be pointed out that states already have the power to confine individuals for the benefits of third persons in situations such as quarantine and other preservations of public health.²⁰³ Additionally, some courts have ordered confinement of a pregnant woman and her fetus when the woman refused to comply with lifesaving medical treatment for her fetus.²⁰⁴

Legislation designed to protect unborn children will have a beneficial impact to our community as a whole. Children born addicted to drugs or even just affected by them have significant medical, physical, and emotional handicaps that drain the resources of members of our community.²⁰⁵ We need to send a

197. IOWA CODE § 707.8(1) (1999).

198. *Id.* § 707.8(11).

199. *Id.* § 707.8(12)(a).

200. *Id.* § 232.77(2).

201. *See State ex rel. Angela M.W. v. Kruzicki*, 541 N.W.2d 482, 495-97 (Wis. Ct. App. 1995), *rev'd*, 561 N.W.2d 729 (Wis. 1997).

202. *See id.* at 493-94.

203. Cynthia L. Glaze, Comment, *Combating Prenatal Substance Abuse: The State's Current Approach and the Novel Approach of Court-Ordered Protective Custody of the Fetus*, 80 MARQ. L. REV. 793, 812 (1997).

204. *Id.* at 813 (citing BONNIE STEINBOCK, *LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES* 146-50 (1992)).

205. According to the Iowa Department of Human Services, Iowa's Medicaid costs for caring for drug and alcohol affected newborns rose from \$38,871 in 1988 to \$393,324 in 1990. Betsy Rubiner, *Costs Soar to Aid Babies Hurt by Drugs*, DES MOINES REG., Mar. 13, 1991, at M1.

clear message to pregnant women that Iowa will not tolerate gestational drug use. Clearly, offering pregnant drug users immunity from criminal prosecution does nothing to minimize the problem. Perhaps the threat of criminal sanctions, with an exception made for women who get treatment, will have a deterrent effect. At a minimum, such sanctions will provide a consistent and clear statement of values underlying the laws of a state that promotes family values above all else.

IX. CONCLUSION

It is estimated that over four million Americans will have been exposed to illegal drugs in utero by the year 2000.²⁰⁶ New drugs are hitting the streets every day and old drugs are still nearly as popular as ever. It is clear that gestational drug use is not a problem that will just go away on its own.

Roe v. Wade and its progeny held a state has a compelling interest in protecting human life after the point of viability.²⁰⁷ States can regulate or even proscribe entirely a woman's right to end the life of her unborn child once the child is considered viable.²⁰⁸ If a state is allowed to prevent a woman from killing her child via abortion, then it logically follows that a state can prevent a woman from killing her child in some other fashion, such as by using illegal drugs. And if the state has a compelling interest in protecting the health and well-being of human life, then it must also follow that the state may take affirmative legislative steps to ensure the health and well being of the most potential of human life—viable fetuses.

Undoubtedly, criminal sanctions—and even protective custody—has a negative side. Ensuring that pregnant women get treatment will always provide the best solution, because it is only when a woman stops taking illegal drugs and starts taking care of herself and her unborn child that the child can ultimately be born healthy. Unfortunately, many women who use drugs while pregnant simply do not care about the consequences to their unborn child and refuse treatment. These women, who take illegal drugs day after day, with little or no concern for the well-being of the children they are carrying deserve to be incarcerated, plain and simple.

Clearly, the problem of pregnant drug users has implications on society as a whole. Ultimately, however, there is truly only one person who can stop a pregnant woman from taking illegal drugs—the pregnant woman herself. If mothers-to-be will not stop using drugs because it is “the right thing to do,” then

206. Barry Siegel, *In the Name of the Children Get Treatment or Go to Jail, One South Carolina Hospital Tells Drug Abusing Pregnant Women*, L.A. TIMES, Aug. 7, 1994, at 14.

207. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

208. *Id.* at 153-54.

society, and more specifically the legal system, needs to provide them with more incentive via criminal consequences.

Nova D. Janssen