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Developing Maternal Liability Standards for Prenatal Injury

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NOTE

DEVELOPING MATERNAL LIABILITY STANDARDS FOR PRENATAL INJURY

INTRODUCTION

Historically, unborn children received limited legal protection and any protection afforded them was contingent upon their live birth.[1] At early common law, the unborn child was deemed part of the mother and, as such, any damages for injuries inflicted upon the fetus prior to birth were recoverable only by the mother.[2] Additionally, the unborn child could not be a murder victim unless the child was born alive and subsequently died due to the injuries

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[1] *See* Lenow, *The Fetus as Patient: Emerging Rights as a Person?*, 9 AM. J. L. & MED. 1, 3 (1983). At common law a fetus, from the time of conception, could be named an heir to a decedent's estate. The unborn child's property rights, however, only vested upon live birth. *Id.* This basic rule continues in effect today. *Cf.* UNIF. PROBATE CODE § 2-108 (1982). "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." *Id.*

Nearly all jurisdictions, prior to 1946, denied recovery under tort law for injuries inflicted upon a child prior to birth. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 367 (5th ed. 1984) [hereinafter PROSSER & KEETON]. In 1946, a federal district court held that when direct tortious injury is inflicted upon a viable fetus later born alive, the child may recover. *See* Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946). In the wake of the *Bonbrest* decision, a "rather spectacular reversal" occurred, as all jurisdictions now allow an action to recover for prenatal injuries. *See* PROSSER & KEETON, *supra*, § 55, at 368. *See also infra* notes 7-16 and accompanying text (discussion of this reversal).

For a short synopsis of the legal rights a fetus has held historically, see generally Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1, 4-14 (1984).

[2] *See* Dietrich v. Inhabitants of Northhampton, 138 Mass. 14, 17 (1884). *Dietrich* involved a claim by a pregnant woman who suffered a miscarriage when she slipped and fell upon a crack in a city sidewalk. *Id.* at 14-15. The five month old fetus died a few minutes after a premature birth had been induced by the accident. *Id.* Writing for the Supreme Judicial Court of Massachussetts, Justice Holmes denied recovery on the wrongful death action and stated that "as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by [the mother] . . . ." *Id.* at 17.

he or she received prenatally.[3] Today, however, jurisdictions are expanding the scope of legal protection afforded the unborn.[4] Courts recently have begun to recognize a duty on the part of a pregnant woman to refrain from acts that will cause harm to her fetus,[5] whereas liability for prenatal injury previously had been

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[3] *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 7.1, at 607 (2d ed. 1986). "Being 'born alive' required that the fetus be totally expelled from the mother and show a clear sign of independent vitality, such as respiration." *Id.* The rationale behind the "born alive" requirement was that a live birth, even under the best conditions, was uncertain; therefore, medical science would be unable to establish a causal connection between the criminal act and the death of the fetus. *See* Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97, 130 (1985). *See also* Keeler v. Superior Court, 2 Cal. 3d 619, 626-32, 470 P.2d 617, 620-24, 87 Cal. Rptr. 481, 484-88 (1970) (en banc) (reviewing origins of and developments in "born alive" requirement).

[4] *See, e.g.*, Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 505, 93 S.E.2d 727, 728 (1956) (child injured before birth may bring cause of action); Amann v. Faidy, 415 Ill. 422, 432, 114 N.E.2d 412, 417-18 (1953) (fetus suffered prenatal injuries, was born alive, died of those injuries—held within state's wrongful death act); Group Health Ass'n v. Blumenthal, 295 Md. 104, 117-18, 453 A.2d 1198, 1207 (1983) (recognizing general principle of right of action for prenatal injuries).

"The child, if he is born alive, is now permitted in every jurisdiction to maintain an action for the consequences of prenatal injuries, and if he dies of such injuries after birth an action will lie for his wrongful death." *See* PROSSER & KEETON, *supra* note 1, § 55, at 368 (footnotes omitted). *See also* Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV 579, 588-91 (1965) (discussing formation of rights of action for prenatal injuries and various approaches toward them); Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639, 650-56 (1980) (influence of *Roe v. Wade*); Note, *A Century of Change: Liability for Prenatal Injuries*, 22 WASHBURN L.J. 268, 270-78 (1983) (evolution of right of recovery for prenatal injury).

In the criminal context, many state legislatures have passed "feticide" statutes eliminating the "born alive" requirement. *See, e.g.*, CAL. PENAL CODE § 187 (West Supp. 1987) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); Ill. P.A. 84-1450, § 2, eff. July 1, 1987, *reprinted in* ILL. ANN. STAT. ch. 38, para. 9-1.1 (Smith-Hurd Supp. 1987) (defining crime of "feticide" and prescribing the same penalty as murder); IOWA CODE ANN. § 707.7 (West 1979) (creating class "C" felony of "feticide" includes causing death of fetus beyond second trimester or termination of a pregnancy by anyone not licensed to practice medicine). In the absence of specific legislation extending protection to the fetus, many courts continue to apply the common law rule that a fetus cannot be the victim of a murder. *See, e.g.*, State v. Gonzalez, 467 So. 2d 723, 725-26 (Fla. Dist. Ct. App. 1985) (killing of a fetus not homicide unless born alive and then died as result of injuries sustained). In contrast, other courts though have held that a fetus could be the victim of a homicide without prior legislative action. *See, e.g.*, Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324, 1330 (1984); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984). *See generally* Note, *Taking Roe to the Limits: Treating Viable Feticide as Murder*, 17 IND. L. REV. 1119, 1137-41 (1984) [hereinafter Note, *Taking Roe to the Limits*] (discussing legislative reforms and proposals).

[5] *See* Stallman v. Youngquist, 129 Ill. App. 3d 859, 862, 473 N.E.2d 400, 404 (1984) (child has cause of action against mother for prenatal injuries); Grodin v. Grodin, 102 Mich. App. 396, 401, 301 N.W.2d 869, 871 (1980) (same); *see also* Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injury to her Child Born Alive*, 21 SAN

limited to acts committed by persons other than the fetus' mother.[6]

This Note will discuss the expansion of the law to include protection of the fetus from injuries inflicted by the mother. Initially, it will begin with a brief description of the development of the law regarding third-party liability for injuries to an unborn child. The focus will then shift to analyze how the interests of the child to be born healthy, and of the state to protect the life of the unborn child, warrant an imposition of a duty on the mother to refrain from certain conduct harmful to the child she carries. Finally, this Note will suggest civil and criminal standards of duty that will protect both the child's and the state's interests without placing an oppressive burden on the mother.

EXPANSION OF THIRD-PARTY LIABILITY

Tort Law

Initially, courts denied recovery of damages to an infant for injuries suffered while in the womb.[7] *Dietrich v. Northampton*[8] established this rule in 1884 and reasoned that the unborn child was not an individual human being, but rather a part of the mother.[9] American courts followed the *Dietrich* decision until 1946 when *Bonbrest v. Kotz*[10] allowed recovery for injuries inflicted by a third-party upon a viable fetus subsequently born alive.[11] The

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DIEGO L. REV. 325, 362-67 (1984) (discussing parameters of maternal duty towards protecting fetus); Note, *A Maternal Duty to Protect Fetal Health*, 58 IND. L.J. 531 *passim* (1983) (discussing maternal duty); *infra* notes 28-70 and accompanying text (same).

[6] *See infra* notes 7-21 and accompanying text (discussing tortious and third-party liability for prenatal injuries).

[7] *See* Dietrich v. Inhabitants of Northhampton, 138 Mass. 14, 17 (1884). "This rather anomalous doctrine was announced by Mr. Justice Holmes in the leading case of *Dietrich v. Inhabitants of Northhampton*, which apparently has been relied upon as dispositive and controlling ever since." Bonbrest v. Kotz, 65 F. Supp. 138, 139 (D.D.C. 1946). For a brief description of *Dietrich*, see *supra* note 2.

[8] 138 Mass. 14 (1884).

[9] *Id.* at 17.

[10] 65 F. Supp. 138 (D.D.C. 1946).

[11] *Id.* at 142. In *Bonbrest*, a suit was brought on behalf of an infant charging that the infant was "taken from its mother's womb through professional malpractice." *Id.* at 139. Noting that "[t]he law is presumed to keep pace with the sciences and [that] medical science certainly has made progress since 1884," the *Bonbrest* court refused to follow *Dietrich* and rejected defendant's motion for summary judgment. *Id.* at 143.

Viability is the point in the pregnancy at which the fetus is capable of sustaining life outside the womb. *Id.* at 140 n.8. In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court apparently concluded that a fetus is viable during the last trimester of pregnancy. *See Roe*,

Bonbrest court held that at viability the fetus was a separate entity and, therefore, had standing to sue for injuries that the child would endure throughout his or her life.[12]

Bonbrest conditioned recovery for prenatal injury on two factors: first, the child must be born alive; and second, the injuries must be suffered after viability.[13] Since *Bonbrest*, courts have further expanded third-party liability for prenatal injury. An overwhelming majority of jurisdictions have dropped the "born alive" rule in tort actions, recognizing that this rule results in the anomaly that an individual whose negligence kills a fetus escapes liability while an individual who inflicts a less severe injury is held accountable.[14] Also, several states have discarded viability as an

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410 U.S. at 163-65. As medical science advances, the point at which a fetus is capable of sustaining life outside the womb becomes increasingly earlier in the pregnancy. *See* Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 457 (1983) (O'Connor, J., dissenting).

[12] *Bonbrest*, 65 F. Supp. at 140.

> As to a viable child being "part" of its mother-this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extrauterine life-and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a "part" of the mother in the sense of a constituent element-as that term is generally understood.

Id.

[13] *See id.* at 142. Adopting the rationale of the Supreme Court of Canada in an analogous case, the *Bonbrest* court stated:

> If a child *after birth* (italics supplied) has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy .... If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and *viable* (italics supplied) should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.

Id. at 141-42 (footnotes omitted) (quoting Montreal Tramways v. Leveille, 4 D.L.R. 337, 345 (1933)).

[14] *See, e.g.*, O'Grady v. Brown, 654 S.W.2d 904, 909 (Mo. 1983) (en banc) (tortfeasors who cause death should not be treated more favorably than one who causes prenatal injury. Sustaining the "born alive" rule would perpetuate "the much criticized rule of the common law which made it 'more profitable for the defendant to kill the plaintiff than to scratch him.' " Amadio v. Levin, 509 Pa. 199, 205, 501 A.2d 1085, 1087-88 (1985) (citations omitted).

Presently, thirty-five states and the District of Columbia have dropped the "born alive" rule and allow wrongful death actions to be brought on behalf of stillborn viable fetuses. *See, e.g.*, Eich v. Town of Gulf Shores, 293 Ala. 95, 98, 300 So. 2d 354, 356 (1974); Summerfield v. Superior Court, 144 Ariz. 467, 475, 698 P.2d 712, 722 (1985) (en banc); Greater Southeast Community Hosp. v. Williams, 482 A.2d 394, 397 (D.C. 1984); Volk v. Baldazo, 103 Idaho 570, 574, 651 P.2d 11, 15 (1982); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 361, 331 N.E.2d 916, 919-20 (1975); Pehrson v. Kistner, 301 Minn. 299, 300, 222 N.W.2d 334, 336 (1974); Vaillancourt v. Medical Center Hosp., 139 Vt. 138, 143, 425 A.2d 92, 95 (1980).

artificial distinction and now allow recovery for injuries received any time after conception.[15]

Criminal Law

While most courts in the tort law context have been eager to expand the protection afforded a fetus,[16] these same courts have been unwilling to change the common law rules in the criminal context. This disparity arises from the tradition that tort law is shaped by the judiciary whereas criminal law is dominated by the legislature.[17] Most courts decline to impose criminal liability for an injurious act directed towards a fetus if the statute prohibiting such conduct does not explicitly refer to the "fetus," or the statute uses the term "person."[18] Several states, though, have enacted "feticide" statutes which stipulate that the killing of a viable, unborn fetus is homicide.[19] A few courts, however, have not deferred this

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But see Hernandez v. Garwood, 390 So. 2d 357, 358-59 (Fla. 1980) (fetus not a person within wrongful death statute); Kuhnke v. Fisher, 683 P.2d 916, 919 (Mont. 1984) (same); Witty v. American Gen. Capital Distrib., 727 S.W.2d 503 (Tex. 1987) (same).

[15] *See, e.g.*, Simon v. Mullin, 34 Conn. Supp. 139, 147, 380 A.2d 1353, 1357 (Super. Ct. 1977); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 353, 367 N.E.2d 1250, 1253 (1977); Torigian v. Watertown News Co., 352 Mass. 446, 448-49, 225 N.E.2d 926, 927 (1977).

[16] *See* PROSSER & KEETON, *supra* note 1, § 55, at 368. After the decision in *Bonbrest* the "no duty" rule was generally abrogated across the country. *Id.*

[17] *See, e.g.*, State *ex rel.* Atkinson v. Wilson, 332 S.E.2d 807, 810 (W. Va. 1984). "[T]here exists a distinction between a court's power to evolve common law principles in areas in which it has traditionally functioned, i.e., the tort law, and in those areas in which the legislature has primary or plenary power, i.e., the creation and definition of crimes and penalties." *Id. See also* Keeler v. Superior Court, 2 Cal. 3d 619, 633, 470 P.2d 617, 625, 87 Cal. Rptr. 481, 489 (1970) (en banc) (similar); People v. Greer, 79 Ill. 2d 103, 116, 402 N.E.2d 203, 209 (1980) (similar); Hollis v. Commonwealth, 652 S.W.2d 61, 63-64 (Ky. 1983) (similar); People v. Joseph 130 Misc. 2d 377, 380, 496 N.Y.S.2d 328, 330 (Orange County Ct. 1985) ("[l]egislature did not intend to make the non-abortional killing of an unborn child a homicide"); People v. Amarro, 448 A.2d 1257, 1260 (R.I. 1982) (legistlature did not intend to make fetus a "person" under vehicular homicide statute). *See generally* Parness, *supra* note 3, at 123-25 (discussing liability and criminal statutes); Note, *Taking Roe to the Limit*, *supra* note 4, at 1132-37 (discussing criminal liability and legistlative intent).

[18] *See, e.g.*, People v. Guthrie, 97 Mich. App. 226, 232, 293 N.W.2d 775, 780 (1980). The Michigan Court of Appeals acknowledged that the "born alive" rule is archaic and outmoded, but refused to change the common law "born alive" requirement without express legislative action. *Id.* at 232, 293 N.W.2d at 780-81. *See also* Meadows v. State, 291 Ark. 105, ____, 722 S.W.2d 584, 586-87 (1987) (fetus not person within meaning of manslaughter statute); State v. Brown, 378 So. 2d 916, 918 (La. 1979) (killing of fetus was not homicide despite expanded definition of person); People v. Vercelletto, 135 Misc. 2d 40, 45, 514 N.Y.S.2d 177, 180 (Ulster County Ct. 1987) (duty of legislature to define crimes unknown at common law).

[19] *See, e.g.*, CAL. PENAL CODE §187 (West Supp. 1987) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); Ill. P.A. 84-1450, § 2, eff. July 1,

decision to the legislature and have judicially abolished the "live birth" requirement for homicides.[20] Relying on prior determinations that a viable fetus is a person within the wrongful death statutes, both the Massachussets and South Carolina Supreme Courts have held that a viable fetus is a "person" within the meaning of the applicable homicide statute.[21]

Two important public policies are served by expanding protections for the fetus. First, the right of a child to be born free from injury is recognized to the fullest extent possible under the law.[22] Second, the expansion reflects an exercise of the state's compelling interest in protecting potential life.[23] Significantly, the focus of the

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1987, *reprinted in* ILL. ANN. STAT. ch. 38, para. 9-1.1 (Smith-Hurd Supp. 1987) (defining crime of "feticide" and imposing criminal liability for killing of fetus).

Although the California statute does not distinguish between a "viable" and "pre-viable" fetus, the statute has been interpreted to include only "viable" fetuses. *See* People v. Smith, 59 Cal. App. 3d 751, 759, 129 Cal. Rptr. 498, 504 (1976).

[20] *See* Commonwealth v. Cass, 392 Mass. 799, 807, 467 N.E.2d 1324, 1329 (1984); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984). In *Horne*, the defendant stabbed his pregnant wife and killed the full-term fetus she was carrying. *Horne*, 282 S.C. at 446, 319 S.E.2d at 703-04. In *Cass*, the defendant was charged with vehicular homicide, having hit a woman who was eight and one-half months pregnant, causing the fetus to die in the womb. *Cass*, 392 Mass. at 802, 467 N.E.2d at 1325. Both *Cass* and *Horne* held that a viable, unborn child could be the victim of a homicide, but reversed lower court convictions because a change in the interpretations of the statutes at issue could only be applied prospectively, not retroactively. *Cass*, 392 Mass. at 808, 467 N.E.2d at 1330; *Horne*, 282 S.C. at 447, 319 S.E.2d at 704.

[21] *See Horne*, 282 S.C. at 447, 319 S.E.2d at 704. "It would be grossly inconsistent for us to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Id.*

In *Cass*, the Supreme Judicial Court of Massachusetts looked to Mone v. Greyhound Lines, 368 Mass. 354, 331 N.E.2d 916 (1975), where it was held that a viable fetus would be considered a "person" under the wrongful death statute. *See Cass*, 392 Mass. at 804, 467 N.E.2d at 1325. The *Cass* court stated: "Despite the fact that *Mone* was a civil case, we can reasonably infer that, in enacting the [vehicular homicide statute] the Legislature contemplated that the term 'person' would be construed to include viable fetuses." *Id.* at 805, 467 N.E.2d at 1326.

The Supreme Judicial Court of Massachusetts rejected the assertion that the legislature intended to "crystallize" the pre-existing common law definition of "person," reasoning that it is the function of the courts to develop and redefine the meaning of the common law "in harmony with the general tendency of our law." *Id.* at 805, 467 N.E.2d at 1327 (quoting *Mone*, 368 Mass. at 365, 331 N.E.2d at 922 (Braucher, J., dissenting)).

[22] *See, e.g.*, Greater Southeast Community Hosp. v. Williams, 482 A.2d 394, 397 (D.C. 1984) ("[i]nherent in our adoption of *Bonbrest* is the recognition that a viable fetus is an independent person with the right to be free of prenatal injury"); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 353, 367 N.E.2d 1250, 1255 (1977) (right to be born free from prenatal injuries); Amadio v. Levin, 509 Pa. 199, 204, 501 A.2d 1085, 1087 (1985) (a child *en ventre sa mere* is an individual with a right to be free of prenatal injury).

[23] *See* Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985) (en banc).

law is no longer merely to compensate the mother for the loss of her pregnancy; rather, the law is recognizing the rights of the fetuses themselves to protection.[24]

Protection of a fetus from the acts of the mother serves to promote the same interests as does protection of the fetus from acts of a third party. In the fetal-maternal relationship, however, certain rights of the mother may be limited in order to achieve fetal protection.[25] As medical science becomes increasingly aware of the severe effects that maternal diet, activity and surroundings may have upon a developing fetus,[26] the question arises as to what degree a pregnant woman should be under a duty to refrain from engaging in activities that are harmful to the unborn child.[27]

"Aside from the remedial objective of compensating survivors, we also discern, in other areas of the law, a legislative goal of protecting the fetus." *Id.* at 476, 698 P.2d at 721. *See also* Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974). "A potential future human life is present from the moment of conception and the state's interest and general obligation to protect life thus extends to prenatal life." *Id.* at 99, 300 So. 2d at 357.

[24] *See, e.g., Amadio*, 509 Pa. at 206-07, 501 A.2d at 1087-89. "This Court's former view that the real objective of these lawsuits was to compensate the parents of their deceased children twice for the parents' emotional distress is not only incorrect, but if accepted, merely perpetuates the notion that a child is inseparable from its mother while en ventre sa mere." *Id.* at 206, 501 A.2d at 1088. *See* Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986). "The law no longer recognizes the fetus only in those cases where it is necessary to protect the interest of the subsequently born child and her or his parents. Rather, the law has conferred rights upon the fetus *qua* fetus." *Id.* at 603-04.

See generally Eich v. Town of Gulf Shores, 293 Ala. 95, 99, 300 So. 2d 354, 357 (1974) (state's interest and general obligation to protect prenatal life); Danos v. St. Pierre, 402 So. 2d 633, 638 (La. 1981) ("a human being exists from the moment of fertilization and implantation"); Vaillancourt v. Medical Center Hosp., 139 Vt. 138, 142, 425 A.2d 92, 94 (1980) (viable unborn child considered a living human being); Greater Southeast Community Hosp. v. Williams, 482 A.2d 394, 397 (D.C. 1984) (viable fetus independent person with right to be born free of prenatal injury).

[25] *See* Myers, *supra* note 1, at 55-59. A mother's rights of privacy; bodily integrity and personal security; and liberty and freedom from personal restraint may conflict with a child's right to be born healthy. *Id. See, e.g.*, Jefferson v. Griffin Spalding Hosp. County Auth., 247 Ga. 86, 274 S.E.2d 457 (1981) (per curiam) (full-term fetus' right to be born outweighs mother's rights to bodily integrity); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 437 (1983) (mother's freedom may be restricted to protect fetus); Special Project, *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 819 (1986) (outlining maternal and fetal rights).

[26] *See generally* Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEG. MED. 63, 66-78 (1984) (brief summary of correlation between maternal and fetal health).

[27] *Compare id.* at 116 (fetal rights outweigh maternal rights) *with* Note, *supra* note 24, at 620-25 (maternal rights should outweigh fetal rights).

MATERNAL LIABILITY—CIVIL CONTEXT

Parental Immunity

At first blush, the doctrine of parental tort immunity would appear to bar a suit by, or on behalf of, a child for injuries received in the womb due to the mother's negligence.[28] While this may be true in states that still adhere to this doctrine,[29] a majority of states have either abandoned the doctrine completely or have greatly limited the scope of the immunity.[30]

Parental tort immunity is designed to maintain family harmony, prevent fraudulent or collusive claims, and to preserve parental authority.[31] The majority of courts now find these rational-

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[28] *See generally* PROSSER & KEETON, *supra* note 1, § 122, at 904-07 (discussing parental immunity). Parental tort immunity is simply a judicial refusal to allow a child to sue his parents for personal torts, whether negligent or intentional. *See id.* The doctrine was first recognized in Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891) (suit by daughter against mother for wrongful confinement in an insane asylum disallowed). *Hewellete* was followed by McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (suit for cruel and inhuman treatment dismissed because father has right to control his child); and Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (suit by daughter against father for forcible rape dismissed to maintain family tranquility). These three cases formed the "great trilogy" of parent-child tort immunity. *See* Note, *The Child's Right to Life, Liberty and the Pursuit of Happiness: Suits by Children Against Parents for Abuse, Neglect and Abandonment*, 34 RUTGERS L. REV. 154, 162-70 (1981) (brief history of parental immunity doctrine and its abrogation). For an overview of the doctrine of parental immunity, see Beal, *supra* note 5, at 333-57.

[29] *See, e.g.*, Thomas v. Inman, 268 Ark. 221, 223, 594 S.W.2d 853, 854 (1980) (to allow child to sue parents is "repugnant to natural sentiments concerning family relations"); Vaughan v. Vaughan, 161 Ind. App. 497, 500, 316 N.E.2d 455, 457 (1974) (parents immune from liability for torts committed against unemancipated minor); McNeal v. Estate of McNeal, 254 So. 2d 521, 523 (Miss. 1971) (widow and daughter have no standing to bring tort claim against estate of deceased father). One commentator has calculated that twelve states remain loyal to the doctrine, while six other states allow a suit only if the parent's act was willful or wanton. *See* Beal, *supra* note 5, at 336-37 nn.67-68.

[30] *See, e.g.*, Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). *Goller* was the first decision to abolish the general rule of non-liability of a parent, but it retained immunity for acts involving an exercise of parental authority or parental discretion in providing care. *Id.* at 412-13, 122 N.W.2d at 198. *See also* Gibson v. Gibson, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (reasonable parent standard adopted); Gelbman v. Gelbman, 23 N.Y.2d 434, 437, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 530-31 (1969) (parental-tort immunity abolished).

One recent case has calculated that eleven states have completely abandoned the parental immunity doctrine or have failed to adopt it. *See* Rousey v. Rousey, 528 A.2d 416, 419 n.3 (D.C. 1987). Another eleven states have abandoned it in automobile negligence cases. *See id.* at 419 n.4. Five more states have abandoned the doctrine in automobile negligence cases where insurance is available to the parent. *See id.* at 419 n.5. Seven states have abandoned it but have retained an exception for exercise of reasonable parental discretion in the exercise of parental authority or in the provision of necessities. *Id.* at 420 n.6.

[31] *See* PROSSER & KEETON, *supra* note 1, § 122, at 904-07.

izations insufficient to deny recovery to a child injured through his or her parents' negligence.[32] Many courts have found that the availability of insurance, while not a justification for a cause of action in itself, has rendered parental immunity an obstacle to the maintenance of family harmony.[33] Courts reason that family harmony is best achieved by allowing the injured child to recover, thereby relieving the financial burden that the child's injury places on the family.[34] The potential for a collusive claim has been considered a weak justification by many courts because it has always been the province of the judge and jury to sift the meritorious claim from the fraudulent.[35] The reasoning behind the rejection of the foregoing rationales for parental immunity applies with equal force in the context of prenatal injury.[36] Further, the third basis underlying parental immunity, concern for parental authority, is obviously not applicable with regard to prenatal injury.[37]

Therefore, the abrogation of parental tort immunity combined with the recognition of a child's right to recover for prenatal injury creates the very real possibility that a mother could be held civilly liable for her negligent conduct during pregnancy.[38] In two jurisdictions this has become a reality.[39]

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[32] *See supra* note 30.

[33] *See* Sorenson v. Sorenson, 369 Mass. 350, 362, 339 N.E.2d 907, 914 (1975). "When insurance is involved, the action between the parent and child is not truly adversary. . . . Far from being a potential source of disharmony, the action is more likely to preserve the family unit in pursuit of a common goal — the easing of family financial difficulties stemming from the child's injuries." *Id.* at 362-63, 339 N.E.2d at 914 (footnotes omitted).

[34] *See, e.g.*, Williams v. Williams, 369 A.2d 669, 672 (Del. 1976) (when liability insurance involved, domestic tranquility argument is "hollow"); Ard v. Ard, 414 So. 2d 1066, 1067-68 (Fla. 1982) (parental immunity waived to extent of liability insurance); Nocktonick v. Nocktonick, 227 Kan. 758, 767, 611 P.2d 135, 141-42 (1980) (same); Gelbman v. Gelbman, 23 N.Y.2d 434, 438, 245 N.E.2d 192, 193-94, 297 N.Y.S.2d 529, 531-32 (1969) (compulsory automobile insurance removes argument that parental immunity preserves family harmony).

[35] *See* Rousey v. Rousey, 528 A.2d 416, 420 (D.C. 1987); Stallman v. Youngquist, 152 Ill. App. 3d 683, ___ , 504 N.E.2d 920, 926 (1987); *Nocktonick*, 227 Kan. at 769, 611 P.2d at 142; *Sorenson*, 369 Mass. at 365, 339 N.E.2d at 914-15.

[36] *See* Stallman v. Youngquist, 152 Ill. App. 3d 683, ___, 504 N.E.2d 920, 920 (1987) (rejecting parent-child tort immunity as a bar to suit by child against mother for prenatal injury); Grodin v. Grodin, 102 Mich. App. 396, 401, 301 N.W.2d 869, 871 (1980).

[37] *See Stallman*, 152 Ill. App. 3d at ___, 504 N.E.2d at 926 (suit by infant for prenatal injuries does not present issue of whether exercise of parental authority is immune).

[38] *See* Beal, *supra* note 5, at 350. The author calculated that thirty states would theoretically be amenable to suits by children against their mothers for prenatal injury. *Id.*

[39] *See Stallman*, 152 Ill. App. 3d at ___, 504 N.E.2d at 927; *Grodin*, 102 Mich. App. at 401-02, 301 N.W.2d at 871.

Third-Party Analysis

The Michigan Court of Appeals, in *Grodin v. Grodin*,[40] was the first court to recognize a duty on the part of a mother to her fetus.[41] In *Grodin*, the plaintiff-child sued his mother alleging that she was negligent in taking a prescription drug during pregnancy which resulted in the discoloration of the child's teeth.[42] Relying upon *Womack v. Buckhorn*,[43] which recognized a child's right when born to recover for prenatal injuries,[44] and *Plumley v. Klein*,[45] which limited parental immunity to acts of reasonable parental discretion in the provision of food, clothes and medicine,[46] the *Grodin* court concluded that a mother would be required to refrain from unreasonable conduct that would result in injury to the fetus.[47] Thus, she would be subject to the same liabilty to her fetus for negligent conduct as would a third person.[48]

Similarly, in *Stallman v. Youngquist*,[49] the Appellate Court of Illinois held that the public policy consideration of possible disruption of family harmony does not outweigh a child's right to be compensated for prenatal injuries received due to her mother's

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[40] 102 Mich. App. 396, 301 N.W.2d 869 (1980).

[41] *Id.* at 400-01, 301 N.W.2d at 870-71.

[42] *Id.* at 398, 301 N.W.2d at 869-70. *Grodin* involved a claim by the child and his father to recover damages for discoloration of the child's teeth due to the mother's ingestion of tetracycline during pregnancy. *Id.* The suit was brought against the mother's physician for negligently failing to determine that the mother was pregnant and the mother for failing to seek proper prenatal care and neglecting to inform the doctor that she was taking tetracycline. *Id.*

[43] 384 Mich. 718, 187 N.W.2d 218 (1971).

[44] *See id.* at 725, 187 N.W.2d at 222. *Womack* held that "justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body." *Id.* (quoting Smith v. Brennan, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960)).

[45] 388 Mich. 1, 199 N.W.2d 169 (1972).

[46] *Id.* at 8, 199 N.W.2d at 172-73.

[47] *See Grodin*, 102 Mich. App. at 398, 301 N.W.2d at 871. The *Grodin* court remanded the case for a determination of whether it was reasonable for the mother to take the tetracycline and ordered the trial court to balance the utility of the drug for the mother's health against the risk created for the plaintiff as a fetus. *Id.*

[48] *Id.* at 400, 301 N.W.2d at 870. *Womack*, the *Grodin* court stated, "refers only to wrongful conduct of another for which compensable damages are available. As a result, the litigating child's mother would bear the same liability for injurious, negligent conduct as would a third person." *Id.*

[49] 129 Ill. App. 3d 859, 473 N.E.2d 400 (1984) [hereinafter *Stallman I*]. In *Stallman I*, the plaintiff's father brought a negligence action on her behalf against her mother and another motorist (Youngquist) for injuries received in an automobile accident. *See id.* at 859, 473 N.E.2d at 400.

negligence while driving a car.[50] As in *Grodin*, the *Stallman* court also relied on prior cases that limited parental immunity and cases that recognized the right of a child when born alive to recover for prenatal injury.[51] Further, the *Stallman* court apparently adopted the *Grodin* rationale by also holding a mother to the same standard of conduct as a third party.[52]

In *Carpenter v. Bishop*,[53] the Arkansas Supreme Court was confronted with the issue of whether a mother could be liable for the wrongful death of her fetus.[54] In *Carpenter*, a mother negligently drove her automobile into a bridge abutment, killing herself and her viable fetus.[55] The father brought a wrongful death action

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[50] *See id.* at 865, 473 N.E.2d at 404. "Other jurisdictions which have abolished the parent-child tort immunity doctrine have met the family disruption argument by reasoning that the injury itself and not the consequent suit is the factor which may upset the family unit." *Id.*

[51] *See id.* at 862-64, 473 N.E.2d at 401-03. The *Stallman I* court relied on Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), which held that viability was no longer required for an action for prenatal injury. *Id.* The plaintiff in *Stallman* was a five-month-old fetus at the time of the injury and, under *Renslow*, "was a legal person for purposes of maintaining, after her birth, a lawsuit." *Stallman I*, 129 Ill. App. 3d at 862, 473 N.E.2d at 402.

The *Stallman I* court also relied on Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968), which held that the parent-child tort immunity doctrine does not bar suit for acts "wholly unrelated to the objectives or purposes of the family itself." *Id.* at 201, 241 N.E.2d at 14. The *Stallman I* court concluded that the plaintiff should be allowed to prove that her mother's negligence while driving a car "to a restaurant was not an act arising out of the family relationship and directly connected with family purposes and objectives" and remanded for a new trial. *Stallman I*, 129 Ill. App. 3d at 865, 473 N.E.2d at 404. On remand, the trial court dismissed the case on a motion for summary judgment. *See* Stallman v. Youngquist, 152 Ill. App. 3d 683, ____, 504 N.E.2d 920, 921 (1987) [hereinafter *Stallman II*]. On appeal, the *Stallman II* court once again held that a mother could be liable for injuries to her fetus caused by the mother's negligence. *Id.* at ____, 504 N.E.2d at 927. In *Stallman II*, however, the court reevaluated its prior determination that Illinois recognized the parent-child tort immunity doctrine with an exception for acts that were not connected with family purposes and objectives. *Id.* at ____, 504 N.E.2d at 924-26. Upon this reevaluation, the *Stallman II* court concluded that the Illinois Supreme Court had never expressly recognized the parental tort immunity doctrine, but rather the doctrine was merely a creature of the appellate court. *Id.* at ____, 504 N.E. 2d at 923. The *Stallman II* court then concluded that it was within its authority to completely abrogate the doctrine. *Id.* at ____, 504 N.E.2d at 925.

[52] *See Stallman II*, 152 Ill. App. 3d at ____, 504 N.E.2d at 927. The *Stallman II* court cited *Grodin* with approval and stated: "[w]e note that the Michigan Court of Appeals, applying Michigan's qualified abrogation of parental tort immunity, has held that a child's mother bears the same liability for negligent conduct, resulting in prenatal injuries, as would a third person." *Id.*

[53] 290 Ark. 424, 720 S.W.2d 299 (1986).

[54] *See id.*

[55] *Id.* at 425, 720 S.W.2d at 299-300.

against the mother's estate.[56] Since Arkansas still recognizes parental tort immunity for unintentional torts,[57] the *Carpenter* court held that a mother could not be liable to a fetus for the mother's unintentional torts.[58] Arkansas law, however, does provide an exception to parental immunity and imposes liability for willful conduct by a parent that causes injury to a child.[59] Although the *Carpenter* court mentioned this exception, it did not discuss whether such conduct by a mother would give rise to liability for prenatal injury.[60]

Following the analysis applied in both *Grodin* and *Stallman*, that is, a prior recognition of the right of a child to recover for prenatal injury and an abrogation or limitation of the scope of parent-child immunity, several states would appear to be amenable to suits by children against their mothers for prenatal injury.[61] For example, New York has recognized the right of a child born alive to recover for injuries inflicted by third parties after viability,[62] and has completely abrogated the parental immunity doctrine.[63] Therefore, applying the *Grodin* analysis, New York courts theoretically should allow a suit by a child against the mother for injuries negligently inflicted after viability.[64]

Reasonable Pregnant Woman Standard

It is submitted that the *Grodin* and *Stallman* decisions, while reaching a correct conclusion, failed to analyze fully this emerging

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[56] *Id.* at 426, 720 S.W.2d at 300. The father filed suit as next friend on behalf of the fetus and also instituted a derivative action on behalf of himself and the siblings of the fetus. *Id.* The *Carpenter* court declined to reach the issue of whether a fetus could be a "person" within the meaning of the wrongful death statute. *Id.*

[57] *See, e.g.*, Thomas v. Inmon, 268 Ark. 221, 223, 594 S.W.2d 853, 854 (1980) (reaffirmed doctrine of parental immunity for unintentional torts).

[58] *See Carpenter*, 290 Ark. at 426, 720 S.W.2d at 300.

[59] *See* Atwood v. Atwood, 276 Ark. 230, 238, 633 S.W.2d 366, 371 (1982) (parents' willful speeding while child in car gives rise to liability).

[60] *See Carpenter*, 290 Ark. at 426, 720 S.W.2d at 300. Although the court discussed *Atwood*, it did not express an opinion as to whether a mother could be liable for an intentional or willful tort that injures her fetus. *See id.*

[61] *See supra* notes 38-52 and accompanying text.

[62] *See* Woods v. Lancet, 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951).

[63] *See* Gelbman v. Gelbman, 23 N.Y.2d 434, 437, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 530-31 (1969).

[64] Under the same rationale, New York courts would dismiss wrongful death actions brought on behalf of a fetus against a mother because New York does not recognize such an action against third parties. *See* Endresz v. Friedberg, 24 N.Y.2d 478, 485-86, 248 N.E.2d 901, 905, 301 N.Y.S.2d 65, 70-71 (1961) (denying wrongful death action for fetus).

area of tort law. Holding a mother to the same standard of conduct as a third person, while representing a mechanically correct convergence of current law regarding parental immunity and recovery for prenatal injury, fails to account for the uniqueness of the fetal-maternal relationship. This becomes evident when one considers at what point the mother's duty should arise.

According to the *Grodin* and *Stallman* courts, the mother's duty arises at the time of conception.[65] Conception is an appropriate point for a third party's duty towards a fetus to arise;[66] a third party at least foresees the risk that his conduct poses toward a pregnant woman. Therefore, the injury to the fetus by a third party may be said to have been proximately caused by the breach of duty owed to the mother. However, a mother, at the time of conception, will very often be unaware that she is pregnant. Since one cannot commit a tort upon oneself, a woman who reasonably does not know that she is pregnant cannot perceive the risk at which her conduct places the fetus. Therefore, a woman's duty to refrain from acts harmful to the fetus should not arise until she knows or reasonably should know she is pregnant.[67] Stated in other terms, the third party's conduct will always be unreasonable *vis à vis* the mother, yet the mother's conduct towards herself will be unreasonable only when she knows of the pregnancy.

It is suggested that adoption of a "reasonable pregnant woman" standard, rather than a third-party standard, will cure this oversight in the *Grodin* analysis. The duty on the part of a woman under a reasonable pregnant woman standard will arise when she knows or reasonably should know that she is pregnant. Liability will be imposed for conduct by a pregnant woman that is generally known to result in injury to a fetus[68] if the utility of the mother's

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[65] *See* Grodin v. Grodin, 102 Mich. App. 396, 396-400, 301 N.W.2d 869, 870 (1980). Although the *Grodin* court did not explicitly state that the mother's duty arises at conception, it relied on *Womack* which recognized the right of a fetus to recover for injuries from the time of conception. *See* Womack v. Buckhorn, 384 Mich. 718, 725, 187 N.W.2d 218, 222 (1971). In *Stallman*, the plaintiff-child received her injuries before viability, when the mother was five months pregnant. *See* Stallman v. Youngquist, 129 Ill. App. 3d 859, 860, 473 N.E.2d 400, 402 (1984).

[66] See *supra* note 15 for a listing of jurisdictions that recognize a duty from time of conception.

[67] *See* Beal, *supra* note 5, at 365 (discussing difficulty of diagnosing early stages of pregnancy).

[68] *See* PROSSER & KEETON, *supra* note 1, § 32, at 173-75. Dean Prosser states that "[t]he standard of conduct must be an external and objective one." *Id.* at 173-74. Yet, Dean Prosser also notes a subjective element in the determination of negligence. *Id.* at 175.

conduct is outweighed by the harm to the fetus.[69] It is submitted that a reasonable pregnant woman standard best balances the rights of the fetus without unduly burdening the mother.[70]

MATERNAL LIABILITY—CRIMINAL CONTEXT

Presently, no state has held a mother criminally liable for causing injury to her fetus. Yet, increasingly, courts have invoked state regulatory powers to protect fetuses from the actions of their mothers.[71]

Prenatal Abuse and Neglect

Until recently, most child abuse statutes were not interpreted to include the unborn.[72] In *People v. Reyes*,[73] a mother who gave birth to a child addicted to heroin was convicted of child abuse, but the California appellate court reversed her conviction on the ground that the statute's use of the word "child" did not include the unborn.[74] Other courts, however, have determined that a mother's conduct toward her fetus could constitute abuse within

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> The conduct of the reasonable person will vary with the situation with which he is confronted. The jury must therefore be instructed to take the circumstances into account; negligence is a failure to do what the reasonable person would do "under the same or similiar circumstances." Under the latitude of this phrase, the courts have made allowances not only for external facts, but sometimes for certain characteristics of the actor himself, and have applied, in some respects, a more or less subjective standard.

Id. (footnote omitted).

[69] *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (Judge Learned Hand's attempt to formulate unreasonable behavior/utility-risk analysis). *See also* PROSSER & KEETON, *supra* note 1, § 31, at 173. "[T]he basis of the law of negligence is usually determined upon a risk-benefit form of analysis." *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 291 comment d (1965) (determination of unreasonableness based on risk-benefit analysis).

[70] *See* Beal, *supra* note 5, at 368. Professor Beal, although recognizing that maternal liability for prenatal torts is consistent with established tort principles, asserts that the "theoretically simple standard of 'knew or should have known' " could result in "disparate determinations of when in fact the legal duty of care attached to the woman." *Id.* It is submitted, however, that a reasonable pregnant woman standard is the only standard that can reconcile both the rights of the mother and the child.

[71] *See infra* notes 73-93 and accompanying text.

[72] *See* Reyes v. Superior Court, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912, (1977) (heroin abuse during pregnancy not within proscription of child endangering statute); *In re* Dittrick Infant, 80 Mich. App. 219, 263 N.W.2d 37 (1977) (legislature did not intend term "child" to include unborn).

[73] 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977).

[74] *See id.* at 216, 141 Cal. Rptr. at 913.

the applicable child abuse statutes.[75] In *In re Baby X*[76] and *In re Ruiz*,[77] the Michigan and the Ohio courts, respectively, deprived mothers of custody of newborns addicted to heroin, declaring these newborns to be abused children.[78] Neither the Michigan nor the Ohio child abuse statute mentions the unborn, yet the courts of both states rejected the mother's contention that a mother's conduct toward a fetus was not the type of conduct prohibited by the statute.[79] The courts based their decisions on the recognition of the state's interest in protecting potential life[80] and the right of the child "to begin life with a sound mind and body."[81]

Additionally, at least one New York court has ruled that a determination of child abuse may be based solely on the mother's conduct during pregnancy.[82] In *In re Smith*,[83] the court held that a

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[75] *See, e.g., In re* Baby X, 97 Mich. App. 111, 116, 293 N.W.2d 736, 739 (1980) (heroin-addicted newborn is "neglected" within the meaning of statute); *In re* Smith, 128 Misc. 2d 976, 979, 492 N.Y.S.2d 331, 334 (Family Ct. Monroe County 1985) (where mother's prenatal abuse of alcohol was sufficient to establish an imminent danger of impairment of physical condition to the unborn child, the child is determined to be a neglected child); *In re* Ruiz, 27 Ohio Misc. 2d 31, 35, 500 N.E.2d 935, 939 (C.P. Wood County, Juv. Div. 1986) (similar).

[76] 97 Mich. App. 111, 293 N.W.2d 736 (1980).

[77] 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (C.P. Wood County, Juv. Div. 1986).

[78] *See id.* at 35, 500 N.E.2d at 939. The Ohio court in *Ruiz* concluded that:

> [c]learly the natural mother in using heroin so close to the birth of this child did create a substantial risk to the health of said child as defined in [the child abuse statute]. Accordingly, the court reache[d] the inescapable conclusion that the allegations of the complaint alleging that the child was abused have been established.

Id. Similarly, the Michigan court in *Baby X* held "that a newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child within the jurisdiction of the probate court." *In re* Baby X, 97 Mich. App. at 116, 293 N.W.2d. at 739.

[79] *See id.* at 114-15, 293 N.W.2d at 739; *In re* Ruiz, 27 Ohio Misc. 2d at 34-35, 500 N.E.2d at 938.

[80] *See In re* Ruiz, 27 Ohio Misc. 2d at 34, 500 N.E.2d at 938. "The essence of *Roe*, the state's interest in the potential human life at the time of viability, in conjunction with Ohio's developing case law, compels a holding that a viable unborn fetus is to be considered a child under the provisions of [Ohio's child abuse statute]." *Id.*

[81] *See id.* at 35, 500 N.E.2d at 939 (quoting Womack v. Buckhorn, 384 Mich. 718, 725, 187 N.W.2d 218, 222 (1971), *originally stated in* Smith v. Brennan, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960)). The *Ruiz* court held "a child does have a right to begin life with a sound mind and body, and . . . that a viable fetus is a child under the existing child abuse statute . . . ." *Ruiz*, 27 Ohio Misc. 2d at 35, 500 N.E.2d at 939. *See also In re* Baby X, 97 Mich. App. at 115, 293 N.W.2d at 739. "Since a child has a legal right to begin life with a sound mind and body we believe it is within his best interest to examine all prenatal conduct bearing on that right." *Id.* (citation omitted).

[82] *See In re* Smith, 128 Misc. 2d 976, 492 N.Y.S.2d 331 (Family Ct. Monroe County 1985). A prior New York decision had suggested that a mother's drug use during pregnancy may support a determination of neglect since such activity indicates an inability to provide adequate care after the child is born. *See In re* Male R, 102 Misc. 2d 1, 422 N.Y.S.2d 819

mother's abuse of alcohol during pregnancy, and her failure to obtain proper prenatal medical care placed the child in " 'imminent danger' of impairment of physical condition."[84] Noting the state's interest in protecting potential life,[85] the *Smith* court concluded that a fetus came within the meaning of "child" under the child abuse and neglect laws,[86] and that those laws represented a "reasonable mechanism to implement the state's interest in the unborn."[87]

Prenatal Intervention

Some jurisdictions have approved intervention during a pregnancy in order to prevent harm to the fetus. These actions have included: ordering a pregnant heroin addict to enroll in a detoxifi-

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(Family Ct. Kings County 1979).

In *Male R*, an infant was born suffering from narcotics withdrawal. *See id.* at 2, 422 N.Y.S.2d at 820. The *Male R* court concluded that the mother's continued use of drugs after birth demonstrated that the child was under a "substantial risk of impairment." *Id.* at 8, 422 N.Y.S.2d at 822-24. However, the court concluded that it was "far from clear that such impairment, caused as it was by prenatal maternal conduct, would be sufficient, standing alone, to support a finding of neglect." *Id.* at 9, 422 N.Y.S.2d at 824.

At least one New York court prior to *Male R* stated that "[a] new-born baby having withdrawal symptoms is prima facie a neglected baby under [the child abuse and neglect laws] . . . ." *In re* Vanesa "F", 76 Misc. 2d 617, 619, 351 N.Y.S.2d 337, 340 (Sur. Ct. N.Y. County 1974). The *Male R* court, however, stated that it was unclear whether the *Vanesa F* court determined that a newborn suffering withdrawal was actually "impaired" within the meaning of the statute, or that the withdrawal symptoms provided evidence that the newborn was in imminent danger of impairment. *See Male R*, 102 Misc. 2d at 9, 422 N.Y.S.2d at 824.

[83] 128 Misc. 2d 976, 492 N.Y.S.2d 331 (Family Ct. Monroe County 1985).

[84] *See id.* at 979, 492 N.Y.S.2d at 334. In *Smith*, the mother had a severe alcohol problem and, despite the urgings of social workers during the course of her pregnancy, failed to undergo treatment for alcohol abuse. *Id.* at 977, 492 N.Y.S.2d at 332. Consequently, the baby was born prematurely and showed signs of fetal alcohol syndrome. *See id.* at 976, 492 N.Y.S.2d at 332-33.

[85] *See id.* at 980, 492 N.Y.S.2d at 335.

[86] *Id.* at 980, 492 N.Y.S.2d at 334. The court stated that the Supreme Court's decision that a fetus is not a person within the context of the fourteenth amendment, Roe v. Wade, 410 U.S. 113, 162 (1973), "should not preclude 'the states of the power to grant legal recognition to the unborn in non-14th Amendment situations.' " *Smith*, 128 Misc. 2d at 980, 492 N.Y.S.2d at 334 (quoting Myers, *supra* note 1, at 15). While "the Supreme Court has recognized that the State has 'important and legitimate interest in protecting the potentiality of human life,' " *id.* (citing Roe v. Wade, 410 U.S. at 162), the *Smith* court posited that this interest should be extended to protect the quality of life. *See Smith*, 128 Misc. 2d at 980, 492 N.Y.S.2d at 335.

[87] *Id.* "The laws relating to abuse and neglect . . . certainly afford an 'effective means to achieve prevention,' and represent a 'reasonable mechanism to implement state interests in the unborn.' " *Id.* (quoting Myers, *supra* note 1, at 29-30).

cation program and to submit to weekly urinalysis until she gave birth,[88] and requiring a mentally ill pregnant woman restrained to prevent her from harming the developing fetus.[89] A few courts have even sanctioned caesarean section delivery of infants over the objections of the mother, if the procedure was considered necessary to save the child's life.[90]

In the cases discussed to this point, courts have either acted proscriptively to prevent a mother from harming her unborn child,[91] or have deprived mothers of custody of their children on the basis of abuse inflicted prenatally.[92] Recently, California became the first state to criminally prosecute a woman for prenatal child abuse.

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[88] *See* Shaw, *supra* note 26, at 103-04 (discussing unreported case in which court ordered a female heroin addict to enroll in a detoxification program and submit to weekly urinalysis until she gave birth).

[89] *See* Robertson, *supra* note 25, at 446 n.127 (discussing case of a mentally ill pregnant woman who was civilly committed because her conduct threatened her viable fetus).

[90] *See In re* A.C., 533 A.2d 611 (1987) (caeserean section delivery of 26-week-old fetus ordered against wishes of terminally ill pregnant woman); Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 90, 274 S.E.2d 457, 459-60 (1981) (per curiam) (caesarean section delivery of full-term fetus ordered over the mother's religious objections when attending physicians deemed operation necessary to save fetus' life); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 423, 201 A.2d 537, 538 (per curiam) (blood transfusion of mother ordered over religious objections because it was necessary to protect health of viable fetus), *cert. denied*, 377 U.S. 985 (1964).

Since 1981, in at least twenty-one cases, court orders have been sought by hospital authorities to compel caeserean sections, prenatal surgery and detention of mothers when the life or health of the fetus was deemed in danger. *See* N.Y. Times, Nov. 23, 1987, at A1, col. 1 (discussing survey conducted by *New England Journal of Medicine*). In eighteen of these cases, the orders were granted. *Id.*

The Supreme Judicial Court of Massachussets has implied that, in certain situations, compelling a mother to undergo surgery to protect fetal health would be justified. *See* Taft v. Taft, 388 Mass. 331, 334, 446 N.E.2d 395, 397 (1983). Also, in an unreported Colorado case, a court ordered a cesarean section delivery to protect the fetus. *See* Myers, *supra* note 1, at 28.

In Jefferson v. Griffin Spalding County Hospital Authority, 247 Ga. 86, 274 S.E.2d 457 (1981), the concurring opinion noted the mother's religious objection to surgery and acknowledeged her right to practice her religion and her right to bodily integrity. However, Presiding Justice Hill noted that the court concluded that the state's interest in protecting potential life outweighed the mother's rights and ordered the surgery. *Id.* at 89, 274 S.E.2d at 460 (Hill, P.J., concurring). "The power of a court to order a competent adult to submit to surgery is exceedingly limited. Indeed, until this unique case arose, I would have thought such power to be nonexistent." *Id.* (Hill, P.J., concurring). "The free exercise of religion is, of course, one of our most precious freedoms." *Id.* at 91, 274 S.E.2d at 461 (Smith, J., concurring) (quoting *In re* Sampson, 65 Misc. 2d 658, 665, 317 N.Y.S.2d 641, 649 (Family Ct. Ulster County 1970)).

[91] *See supra* notes 88-90 and accompanying text.

[92] *See supra* notes 79-87 and accompanying text.

The defendant-mother, Pamela Rae Stewart Monson, suffered from placenta previa, a condition in which the placenta can become detached from the uterine wall, and was warned by her doctor that if she began to bleed, she should seek immediate medical attention.[93] She was also warned not to ingest "street drugs."[94] Ms. Monson gave birth to a full-term, severely brain damaged baby who died a few weeks later.[95] High levels of amphetamines and barbituates were found in the baby's blood and it was discovered that Ms. Monson did not seek medical help until several hours after she began hemorrhaging.[96] Ms. Monson was charged with criminal neglect under California's criminal child support statute.[97] The statute's scope, which explicitly extends to the unborn, imposes criminal sanctions on a parent for failure to provide his or her child with necessary food, clothing and medical treatment.[98]

The trial court dismissed the suit, stating that the purpose of the statute was to ensure payment of child support, "not to punish women for conduct during pregnancy."[99] However, the trial judge did assert that "[i]t would appear . . . that since (*Roe v. Wade*) gives the state a compelling interest in the health of the fetus during the last trimester, the state's legislature could pass a statute protecting the life of the unborn child under narrowly defined conditions."[100]

It is submitted that imposition of criminal liability on a mother for acts harmful to the fetus is consistent with the expansion of protection for the fetus. Criminal liability may serve as a deterrent,[101] and foster both the right of the fetus to be born healthy, and the state's interest in protecting potential life.[102] It is asserted that where the state has the authority to intervene in a

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[93] *See Are Fetal Rights Equal to Infants?*, N.Y. Times, Nov. 16, 1986, § 4, at 24, col. 1.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *See* CAL. PENAL CODE § 270 (West Supp. 1987).

[98] *Id.*

[99] *See Judge Dismisses Criminal Charges for Fetal Abuse*, L.A. Daily J., Feb. 27, 1987, at 1, col. 4.

[100] *See Woman is Acquitted in Test of Obligation to an Unborn Child*, L.A.Times, Feb. 27, 1987, at 1, col. 1.

[101] *See* W. LAFAVE & A. SCOTT, *supra* note 3, § 1.5, at 24. "[T]he sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate." *Id.*

[102] *See supra* notes 26-28 and accompanying text (discussing fetus' rights and state's interest).

pregnancy to prevent harm to the fetus, it logically follows that the state has the authority to deter that harmful conduct through the imposition of criminal sanctions.

Constitutional Considerations and Proposed Guidelines

Restricting a woman's behavior to protect the fetus raises constitutional concerns. The Supreme Court in *Roe v. Wade*[103] held that a woman's right to privacy extends to decisions regarding whether or not to continue her pregnancy.[104] The Court, though, recognized that this right is not absolute and may be overcome by a sufficiently compelling state interest.[105] The state has an interest to protect the "potentiality of life" which, at viability, becomes sufficiently compelling to prohibit a woman from terminating the pregnancy through abortion.[106] It is possible for the state's interest to be sufficiently compelling to prevent a woman from terminating her pregnancy through indirect means as well.[107] It is further conceivable to extend the state's interest to the protection of the qual-

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[103] 410 U.S. 113 (1973).

[104] *Id.* at 153. The Court stated that the right of privacy encompasses "a woman's decision whether or not to terminate her pregnancy." *Id.*

[105] *Id.* at 154.

> [A] state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it 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.

Id.

[106] *Id.* at 163. "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* The Court defined a viable fetus as one "potentially able to live outside the mother's womb, albeit with artficial aid." The Court said further that "viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id.* at 160.

> State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Id. at 163-64.

[107] *See* Robertson, *supra* note 25, at 437. Once the woman decides to "forgo abortion and the state chooses to protect the fetus, the woman loses the liberty . . . to adversely affect the fetus." *Id.* (footnote omitted).

ity of life,[108] thereby subjecting a woman to liability for reckless or intentional harm to her unborn child.

Furthermore, *Roe v. Wade* held that a fetus is not a person only within the context of the fourteenth amendment;[109] the Supreme Court did not rule out the possibility of granting protection to the fetus in a non-fourteenth amendment context.[110] If imposition of liability would not "unduly interfere" with a woman's abortion decision, liability would then be within the confines set by *Roe*.[111]

It is suggested that the following factors be considered when attempting to balance the competing interests involved in imposing criminal sanctions. First, culpability for prenatal injury by a mother would most likely need to be limited to injuries inflicted after viability, since a woman has the right to abort a pre-viable fetus.[112] Imposition of criminal liability for acts committed prior to viability would place the state in the position of indirectly encouraging women to abort to escape prosecution.

Second, the right of the mother to engage in the activity would have to be weighed against the state interest, and the right of the

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[108] *See* Parness, *supra* note 3, at 114. "[I]t follows, that when a woman has decided to carry her pregnancy to full term, the state has a legimate interest in promoting the quality of life of the unborn child." *Id. See also In re* Smith, 128 Misc. 2d 976, 980, 492 N.Y.S.2d 331, 335 (Family Ct. Monroe County 1985) (state interest extends to protecting quality of life).

[109] *Roe*, 410 U.S. at 158. "[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.*

[110] *See* Parness & Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 258 (1982).

> By holding that a fetus is not a person under the fourteenth amendment, the Supreme Court did not prohibit lawmakers from extending to the unborn the benefits of personhood in other cases. In fact, the Court noted that the state has an "important and legitimate interest in protecting the potentiality of human life." The failure to understand the *Roe* decision has led not only to courts mistakenly denying the unborn non-fourteenth amendment protections to which the unborn are entitled, but also to the public failing to comprehend the discretion remaining to American lawmakers in characterizing personhood.

Id. See also Myers, *supra* note 1, at 60. "Despite its lack of constitutional rights, the unborn child is protected by substantive non-fourteenth amendment law. The most important sources of protection are tort and child abuse and neglect laws." *Id.*

[111] *See* Maher v. Roe, 432 U.S. 464 (1977). "*Roe* did not declare an unqualified 'constitutional right to an abortion,'. . . . Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Id.* at 473-74. *See also* Robertson, *supra* note 25, at 447 n.129. "[I]f the mother has already made up her mind to carry the child to term, then the fact that the intervention occurs prior to viability arguably should not matter." *Id.* at 446-47.

[112] *See* Roe v. Wade, 410 U.S. at 154.

child to be born healthy.[113] Where the infringement on the mother's rights would be minimal, and prohibition of an act would protect the health of the fetus, its prohibition would be justified.[114] However, if proscribing an act or imposing a duty to act would intrude significantly on the mother's privacy or bodily integrity, criminal liability should arise only if permanent or severe injury would result to the fetus.[115]

Under this balancing approach, a mother who ingests harmful drugs or excessive amounts of alcohol could be criminally liable[116] since there is no fundamental right to use these substances[117] and the resulting harm to the fetus would be severe.[118] However, it is much less certain whether a mother's smoking or occasional drinking would give rise to criminal liability. While it would be possible to ban all maternal use of tobacco and alcohol,[119] it is suggested

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[113] *Cf.* Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981) (per curiam). In *Jefferson*, the Georgia Supreme Court ordered a caesarean section delivery of a fetus over the mother's religious objections when the attending physicians deemed the operation necessary to sustain the life of the unborn child. *Id.* at 90, 274 S.E.2d at 460. The court weighed the mother's right to bodily integrity against the state's interest in protecting potential life and the fetus' right to be born alive. *Id.*

[114] *See* Note, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1051, 1067 (1981). After discussing when state intervention in a pregnancy should be permissible, the author concluded:

> Certainly where infringement of individual rights is slight and governmental action is necessary to protect a fetus's health, intervention is proper. Yet where state action would intrude significantly into a woman's privacy, the importance of privacy to both the woman and her fetus strongly supports requiring the state to demonstrate that the intervention is truly necessary—that it prevents serious injury to the fetus and that no less intrusive means would afford adequate protection.

Id. See also Myers, *supra* note 1, at 69-72 (discussing when state intervention in pregnancy is justified).

[115] *See supra* note 113.

[116] *See* Shaw, *supra* note 26, at 88-89. "The fetal brain develops rapidly in the last two months of pregnancy, and a pregnant woman's alcohol and drug abuse is especially harmful to the fetus at this time. It is conceivable that an alcoholic or an addict could be institutionalized for the specific purpose of protecting her fetus." *Id.* (footnotes omitted). *See also* Nelson, Buggy & Weil, *Forced Medical Treatment of Pregnant Women: "Compelling Each to Live as Seems Good to the Rest,"* 37 HASTINGS L.J. 703, 711-12 (1986) (discussing medical risks to fetus of maternal behavior).

[117] *See* State v. Murphy, 117 Ariz. 57, 60, 570 P.2d 1070, 1073 (1977); Robertson, *supra* note 25, at 442-43 (no fundamental right to use psychoactive substances). *But see* Myers, *supra* note 1, at 76 (arguing that effects of binge drinking by mother are too speculative to warrant proscription through state intervention).

[118] *See* Shaw, *supra* note 26, at 73-75.

[119] *See* Robertson, *supra* note 25, at 442.

> 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 cause it to be born

that such a prohibition would unduly infringe upon a mother's right to privacy. The effects of smoking and occasional drinking may have a deleterious effect on the unborn but they do not imminently threaten the fetus.[120]

Holding a mother criminally liable for harming her fetus would primarily serve as a deterrent.[121] To serve as a deterrent, it is first necessary that the mother realize the danger in which she is placing the fetus, and therefore a subjective standard of knowledge should be applied.[122] It is suggested that the following elements be proven before criminal liability is imposed: that the woman actually knew she was pregnant when she committed the act;[123] that she knew her conduct posed a severe risk to the health of the unborn child; that she proceeded in reckless disregard of this knowledge; and that it was within her ability to avoid the conduct.[124] It

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> 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.

Id. at 442-43.

[120] *See* Note, *supra* note 5, at 534. Maternal smoking increases the risk of prematurity and abortion and under certain situations may be life threatening. It is possible that further medical research may establish that these activities are more damaging than presently known, and prohibition may then be appropriate. *See id. See generally* Nelson, Buggy & Weil, *supra* note 116, at 711-14 (discussing adverse consequences to fetuses resulting from maternal use of drugs, alcohol, and cigarettes).

[121] *See supra* note 107 and accompanying text. Imposing liability on pregnant women for abuse of their fetuses could also serve an educational purpose. "[C]riminal punishment serves, by the publicity which attends the trial, conviction and punishment of criminals, to educate the public as to the proper distinctions between good conduct and bad—distinctions which, when known, most of society will observe." W. LAFAVE & A. SCOTT, *supra* note 3, § 1.5, at 25.

[122] *See id.* § 3.5. According to the Model Penal Code, one acts "knowingly" as to the results of his conduct if "he is aware that it is practically certain that his conduct will cause such a result." MODEL PENAL CODE § 2.02(2)(b)(ii) (Proposed Official Draft 1962). As to the attendant circumstances, one acts "knowingly" when "he is aware . . . that such circumstances exist." *Id.* § 2.02(2)(b)(i). Some states utilize an "objective" interpretation of "knowledge" and apply a "reasonable man standard." W. LAFAVE & A. SCOTT, *supra* note 3, § 3.5, at 220.

[123] This may seem unnecessary if viability is the cut-off point, but for several reasons a woman may not be cognizant of her pregnancy prior to viability. *See, e.g.*, Grodin v. Grodin, 102 Mich. App. 396, 398, 301 N.W.2d 869, 869 (1980) (mother not cognizant of her pregnancy until the eighth month). It is submitted that while a mother's negligent failure to realize her pregnancy could give rise to civil liability, it should not give rise to criminal liability. *See supra* note 122 (discussing knowledge as an element of a crime).

[124] This last factor is designed to avoid discrimination against a woman who may not have the financial means to care for her baby. Prenatal care is, unfortunately, not as accessible in the same degree to the poor as it is to the more affluent. Also, a woman who must

is submitted that if these elements were established, criminal liability would be imposed only for wanton or reckless disregard for the life or health of the fetus.

CONCLUSION

A child's right to be born healthy and the state's interest in protecting potential life justifies the imposition of a duty on a pregnant woman to refrain from certain conduct that is injurious to the child she carries. Such a duty need not unduly burden a woman's right to privacy and personal liberty if the proper standard is applied. In the civil context, where maternal liability would serve to alleviate the suffering of the injured child through monetary compensation, it is suggested that a reasonable pregnant woman standard will properly balance these competing interests. In the criminal context, where sanctions are imposed to punish and deter, it is suggested that a more stringent standard of wanton or reckless disregard of the life and health of the fetus is necessary to preserve the mother's freedom, while still protecting the life and health of the unborn child. These standards are offered as a starting point for determining the scope of maternal liability as the law regarding the unborn continues to expand.

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work in order to support herself and her family may have no alternative but to expose the fetus to certain occupational dangers. *See* Shaw, *supra* note 26, at 70-71 (discussing risks of maternal exposure to occupational hazards on fetuses).