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## A Jurisprudential Analysis of Government Intervention and Prenatal Drug Abuse

Susan Saab Fortney

Texas A&M University School of Law, [susanfortney2014@gmail.com](mailto:susanfortney2014@gmail.com)

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# A JURISPRUDENTIAL ANALYSIS OF GOVERNMENT INTERVENTION AND PRENATAL DRUG ABUSE

SUSAN FORTNEY<sup>1</sup>

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## I. INTRODUCTION

Behold, thou shalt conceive, and bear a son; and now drink no strong wine or strong drink . . . <sup>2</sup>

This Biblical verse illustrates that the societal proscription against pregnant women drinking alcohol is centuries old. The recent tragedy is that substance abuse among pregnant women has dramatically increased to the point that prenatal alcohol and drug abuse is a serious public health problem. In 2001, the United States Supreme Court noted that the “problem of crack babies was perceived in the late 1980’s as a national epidemic, promoting considerable concern both in the medical

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<sup>1</sup>Associate Dean for Student Affairs and George H. Mahon Professor of Law, Texas Tech University School of Law.

<sup>2</sup>*Judges* 13:7, THE BIBLE, King James Version.

community and among the general populace.”<sup>3</sup> According to a study released by the National Institute on Drug Abuse, five percent of the four million women who gave birth in the United States in 1992 used illegal drugs during their pregnancy.<sup>4</sup> “Studies have concluded that the problem is pervasive, affecting deliveries in both public health clinics and private obstetric practices, without regard for socioeconomic classifications.”<sup>5</sup>

The problem has captured the attention of medical professionals, legislators, prosecutors, journalists, and legal scholars. A number of law review articles discuss issues related to maternal substance abuse. The majority of these articles fall into two general categories. The first group emphasizes the harms of substance abuse and the need for criminal or civil commitment statutes to curb illegal drug use by pregnant women.<sup>6</sup> The second category of commentaries focuses on a woman’s constitutional rights and the dangers of state intervention.<sup>7</sup> Many of the articles also

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<sup>3</sup>*Ferguson v. City of Charleston*, 532 U.S. 67, 70, note 1 (2001). In *Ferguson*, ten women challenged a state hospital policy that subjected some pregnant women to mandatory testing for cocaine. *Id.* at 73. Under the policy, pregnant women who tested positive for cocaine had an option to receive drug treatment or to be arrested. *Id.* at 72. The general question that the Court decided was whether the State hospital’s performance of a diagnostic test to obtain evidence of a patient’s criminal conduct for law enforcement purposes is an unreasonable search when the patient does not consent to the procedure. *Id.* at 69-70. The majority concluded that without patient consent, the searches were unreasonable in view of the law enforcement focus of the policy to arrest and prosecute drug abusing mothers. *Id.* at 81-86. According to the majority, the State interest in using the threat of criminal sanctions to deter pregnant women from using cocaine could not justify a departure from the general rule requiring a valid warrant for nonconsensual searches. *Id.* at 84-85.

<sup>4</sup>Robert Mathias, *NIDA Survey Provides First National Data on Drug Use During Pregnancy*, (Jan. 1995) available at [http://www.nida.nih.gov/NIDA\\_Notes/NNVol10N1/NIDASurvey.html](http://www.nida.nih.gov/NIDA_Notes/NNVol10N1/NIDASurvey.html). Marijuana and cocaine were the most frequently used illegal drugs, with 2.9% of the respondents reporting that they used marijuana, and 1.1% reporting that they used cocaine at some time during their pregnancies. This study was based on a survey of self-reported data from a 1992 national sample of women who gave birth in urban and rural hospitals in the United States.

<sup>5</sup>James Denison, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. CAL. L. REV. 1103, 1110 (1991) (noting that some reports reveal a higher concentration in inner cities with the highest cocaine incidence occurring among African-Americans).

<sup>6</sup>*See, e.g.*, Jacqueline Berrien, *Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures*, 2 YALE J. L. & FEMINISM 239 (1990) (questioning the punitive approach to the problem of prenatal drug use); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (analyzing the disparate impact of criminalization on women of color).

<sup>7</sup>*See, e.g.*, Denise K. Cahalane, *Court-Ordered Confinement of Pregnant Women*, 15 NEW ENG. J ON CRIM. & CIV. CONFINEMENT 203 (1989) (proposing that the government intervene and order confinement for the sake of a viable fetus); Heather M. White, *Unborn Child: Can You Be Protected?* 22 U. RICH. L REV. 285 (1988) (arguing that the unborn is a person entitled to legal protection and that the pregnant woman’s right to privacy and liberty must yield to the government action if intervention is necessary to prevent serious injury or to save the life of the unborn child).

address the issue of recognition of fetal rights and potential conflicts between the mother's rights and fetal rights.<sup>8</sup> Various authors oppose government intervention, cautioning that such intervention would lead to the recognition of fetal rights at the expense of women's right to privacy and personal autonomy.<sup>9</sup>

This article takes a different approach in considering the problem of prenatal drug abuse.<sup>10</sup> After briefly discussing government intervention and constitutional issues, this article will consider the concept of duty and correlative rights. This discussion of duty and correlative rights suggests that the government can take measures to curb prenatal drug use without recognizing fetal rights. The article concludes with a discussion of the utility of criminal legislation as compared to public health legislation that treats drug addiction as a disease requiring treatment. As formulated, the proposal for public health legislation is not based on any concept of fetal rights. Instead, it is based on the recognition of societal interests, as well as the woman's needs.

## II. THE APPROPRIATENESS AND OBJECTIVES OF GOVERNMENT INTERVENTION

### A. *Effects of Prenatal Drug Use*

An evaluation of government intervention to curb prenatal drug use requires a basic understanding of the effects of drug use by pregnant women. Given the maternal-fetal link, drugs such as cocaine directly and indirectly affect the fetus from conception to birth.<sup>11</sup> "By depriving the fetus of oxygen, cocaine use threatens fetal development."<sup>12</sup> Because cocaine freely crosses the placental barrier to the fetus and cannot re-circulate back across the placental barrier into the mother's bloodstream,

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<sup>8</sup>See, e.g., Louise B. Wright, *Fetus v. Mother: Criminal Liability for Maternal Substance Abuse*, 36 WAYNE L. REV. 1285 (1990) (discussing the conflict between the constitutional right of the fetus to life and the mother's constitutional rights to privacy and control over her own body).

<sup>9</sup>See, e.g., Caroline S. Palmer, *The Risks of State Intervention in Preventing Prenatal Alcohol Abuse and the Viability of An Inclusive Approach: Arguments for Limiting Punitive and Coercive Prenatal Alcohol Abuse Legislation in Minnesota*, 10 HASTINGS L. J. 287 (1999); Lynn Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Rowe v. Wade*, 62 ALB. L. REV. 999 (1999).

<sup>10</sup>For the purposes of this article, the term "drug" designates illegal substances, not alcohol and prescribed medications. Although gestational alcohol abuse (GAS) is very serious and widespread, this article does not discuss that problem. Legislation targeting GAS is more complicated than intervention targeting illegal drug use by pregnant women because imbibing alcohol is legal.

<sup>11</sup>Joyce Lind Terres, *Prenatal Cocaine Exposure: How Should the Government Intervene*, 18 AM. J. CRIM. L. 61, 64 (1990) (reviewing the physiological impact that the mother's drug use has on the fetus).

<sup>12</sup>Kristen Lichtenberg, *Gestational Substance Abuse: A Call for a Thoughtful Response*, 65 WASH. L. REV. 377, 379 (1990) (citing Chavez, Mulinare & Codero, *Maternal Cocaine Use During Pregnancy as a Risk Factor for Congenital Urogenital Anomalies*, 262 JAMA 795, 798 (1989)).

the fetus may become much more severely addicted than the mother.<sup>13</sup> Malformations of urogenital, cardiac and central nervous systems can also result from gestational cocaine abuse. "Neurological problems caused by cocaine can permanently affect motor skills, reflexes and coordination."<sup>14</sup> Cocaine-addicted women experience complications during labor and delivery<sup>15</sup> and deliver infants pre-term (less than 37 weeks gestation).<sup>16</sup> These babies are born with lower birth weights, shorter body lengths, and smaller head circumferences as compared to drug-free babies.<sup>17</sup> Physicians consider these babies to be medically at risk.<sup>18</sup>

After birth, the infants experience acute withdrawal from the drug. This withdrawal persists in a sub-acute form for four to six months after birth.<sup>19</sup> As a result of these complications, these infants need intensive medical care estimated to cost approximately \$100,000 per infant.<sup>20</sup> A 1992 study estimated that the direct costs related to prenatal drug exposure were \$387 million.<sup>21</sup> These figures do not reflect the costs of the long-term effects of prenatal drug exposure.<sup>22</sup>

### B. Objectives of and Basis for Government Intervention

Prosecutors and others have articulated a number of reasons that justify government intervention to curb prenatal drug use. The most common reason given is to protect the unborn child of the addicted mother.<sup>23</sup> Presumably, early intervention such as commitment or incarceration might also protect the mother.

<sup>13</sup>Michelle D. Wilkins, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L. J. 1401, 1402 (1990) (citing a telephone interview with Wayne F. Hooper, Unit Director of the Substance Abuse Unit, Northwest Georgia Regional Hospital, Rome, Georgia (March 22, 1990)).

<sup>14</sup>Lichtenberg, *supra* note 12, at 380, citing Chasnoff et al., *Temporal Patterns of Cocaine Use in Pregnancy*, 261 J. AM MED. A. 1741, 1744 (1989) (hereinafter *Temporal Patterns*).

<sup>15</sup>Terres, *supra* note 11, at 65 referring to Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 THE PEDIATRIC CLINICS OF NORTH AMERICA 1403, 1406 (Dec. 1988) (hereinafter *Parameters of Risk*).

<sup>16</sup>Terres, *supra* note 11, at 66 referring to Little, Snell, Klein & Gilstrap, *Cocaine Abuse During Pregnancy: Maternal & Fetal Implications* 73 OBSTET. & GYNECOL. 157, 158 (1989).

<sup>17</sup>Wilkins, *supra* note 13, at 1402.

<sup>18</sup>Terres, *supra* note 11, at 66 citing D. Holmes, J. Reich & J. Paternak, *THE DEVELOPMENT OF INFANTS BORN AT RISK I* (1989).

<sup>19</sup>*Id.* at 67 (citing *Parameters of Risk*, *supra* note 15, at 1405).

<sup>20</sup>Wilkins, *supra* note 13, at 1401.

<sup>21</sup>Henrick Harwood et al., *The Economic Costs of Alcohol and Drug Abuse in the United States, 1992 Health Care Costs*, NATIONAL INSTITUTE OF DRUG ABUSE, available at <http://www.nida.nih.gov/economiccosts/chapter4.html>.

<sup>22</sup>Terres, *supra* note 11, at 68. There is some indication that gestational drug use may have long-term effects on child development.

<sup>23</sup>*See, e.g.*, Sarah Letitia Kowalski, *Looking for a Solution: Determining Fetal Status for Prenatal Drug Abuse Prosecutions*, 38 SANTA CLARA L. REV. 1255, 1258 (1998) (describing arguments supporting government intervention).

A number of commentators and medical professionals have criticized this position, arguing that criminal legislation has the opposite effect of deterring women from obtaining prenatal medical care and treatment.<sup>24</sup> The critics argue that pregnant women will not seek medical care because they fear detection by physicians who are operating as agents of the state.<sup>25</sup> Nevertheless, some legislators and prosecutors still believe that actions to curb prenatal drug abuse serve community interests. In support of their position, they point to the extraordinary amount that the government pays for medical care for drug-dependent newborns. Apparently, public sentiment supports some form of government intervention, in particular criminalization.<sup>26</sup>

To address the problem of prenatal drug use, the state might use various tools including prosecution, dependency proceedings, or civil commitment.<sup>27</sup> Prosecutors in the United States have already resorted to criminal prosecutions under existing laws.<sup>28</sup> They have also presented myriad proposals to address the problem, including the adoption of new criminal statutes.

Regardless of the specific approach used, the government can rely on two sources of authority in taking action to curb prenatal drug use. First the government can use the doctrine of *parens patriae*. Second, state governments might exercise the police power preserved for the states under the United States Constitution.

*Parens patriae* is an ancient doctrine that provides states with limited paternalistic power to protect individuals who lack capacity to act in their own interest. For example, *parens patriae* authority gives the state the power to enact child abuse laws, to transfer custody of a child from a parent to the state, to order treatment for a viable fetus in utero, and to compel a woman to submit to a caesarian section. In *Prince v. Massachusetts* the United States Supreme Court recognized that the state's *parens patriae* authority empowers the state to regulate the family in the public interest.<sup>29</sup> In noting that the state may guard the general interest in the youth's well being, the United States Supreme Court explained that the state has a wide

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<sup>24</sup>See e.g. Kristen Burgess, *Protective Custody, Will It Eradicate Fetal Abuse and Lead to the Perfect Womb?* 35 HOUSTON L. REV. 227, 272 (1998) (warning that women will distrust their doctors and stop seeking treatment altogether).

<sup>25</sup>Michelle Oberman, *Mothers and Doctor's Orders: Unmasking the Doctors' Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW U. L. REV. 451, 484 (2000). One scholar maintains that physicians violate their fiduciary duty to their pregnant patients when the physicians forge "an alliance with criminal justice authorities in order to detect and punish patients who use drugs."

<sup>26</sup>See Mark Curriden, *Holding Mom Accountable*, 76 A.B.A.J. 50, 51 (Mar., 1990) (reporting survey results revealing that 71% of the 1500 people polled supported criminal penalties for pregnant women whose illegal drug use injures their babies).

<sup>27</sup>Lichtenberg, *supra* note 12, at 384.

<sup>28</sup>Suzanne D'Amico, *Inherently Female Cases of Child Abuse and Neglect: A Gender-Neutral Analysis*, 28 FORDHAM URBAN L. J. 855, 861 (2001). For example, a Florida prosecutor brought a case for delivery of drugs to a minor, asserting that the umbilical cord was used to pass drugs to the child during the seconds immediately after birth.

<sup>29</sup>321 U.S. 158, 166 (1944).

range of power for limiting parental freedom and authority in situations affecting the child's welfare.<sup>30</sup>

In addition to *parens patriae*, states utilize their police power to promote the public welfare and to prevent citizens from harming one another.<sup>31</sup> Speaking of the evils that impede the "healthy, well rounded growth of young people" the United States Supreme Court in *Prince* stated that legislation appropriately designed to reach such evils is within the state's police power.<sup>32</sup> The state has this authority notwithstanding the parents' claim to control the child.<sup>33</sup>

### C. Prosecutions under Existing Criminal Law

Prosecutors have attacked maternal substance abuse using different approaches. Between 1985 and 1998 at least 240 women in the United States have been prosecuted for using illegal drugs while pregnant.<sup>34</sup> Generally prosecutors brought cases under existing child abuse and child endangerment laws.<sup>35</sup> Many cases were eventually dismissed because the courts have been "unwilling to stretch criminal child endangerment and child support statutes beyond their most obvious purposes—to protect only already born children . . ."<sup>36</sup> The Supreme Courts of Kentucky, Nevada and Ohio have held that a mother cannot be convicted of child abuse or child endangerment for using drugs while pregnant.<sup>37</sup> In contrast to these decisions, the Supreme Court of South Carolina held that South Carolina's child abuse statute protects a viable fetus as a child.<sup>38</sup> In reaching this conclusion, the court interpreted the term "child" to include a viable fetus.<sup>39</sup> Furthermore, the court concluded that its interpretation of the word "person" to include a fetus was consistent with the

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<sup>30</sup>*Id.* at 166-67.

<sup>31</sup>*Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198-99 (1980) (discussing the use of state police power).

<sup>32</sup>321 U.S. at 168-69.

<sup>33</sup>*Id.* at 169.

<sup>34</sup>Nancy Kubasek & Melissa Hinds, *The Communitarian Case Against Prosecutions for Prenatal Drug Abuse*, 22 WOMAN'S RTS. L. REP. 1, 2 (2000).

<sup>35</sup>Kristen Barrett, Note, *Prosecuting Pregnant Addicts for Dealing to the Unborn*, 33 ARIZ. L. REV. 221, 229 (1991).

<sup>36</sup>Wilkins, *supra* note 13, at 1404. For a discussion of two California cases where the judges declined to apply the criminal statutes to unborn children, see Wilkins *supra* note 13, at 1411-15. One case was brought under the penal code section making it a misdemeanor for a parent to fail to provide necessary support for minor children and the other indictment was brought under the penal code section relating to endangering a child.

<sup>37</sup>Tara-Nicholle B. DeLouth, *Pregnant Drug Addicts as Child Abusers: A South Carolina Ruling*, 14 BERKELEY WOMEN'S L. J. 96 (1999).

<sup>38</sup>*Whitner v. State*, 492 S.E. 2d 777, 778 (S.C. 1997), *reh'g denied, cert. denied*, 523 U.S. 1145 (1998).

<sup>39</sup>*Id.* at 778.

legislature's intended purpose in enacting the child abuse statute.<sup>40</sup> The two women who were convicted challenged the court's interpretation seeking review by the United States Supreme Court. The Supreme Court refused to hear the case.<sup>41</sup>

Other prosecutions have based cases on laws prohibiting the possession of drugs and the delivery of drugs to minors.<sup>42</sup> One conviction that received national attention was the case of Jennifer Johnson, who was convicted of violating the Florida statute prohibiting delivery of drugs to minors.<sup>43</sup> Such convictions based on existing laws have been challenged on a number of grounds. In allowing these prosecutions, courts are applying to fetuses the state laws intended to protect children. In the absence of clear legislative intent, this amounts to an improper extension of the law. These prosecutions appear to violate the due process requirements of notice and fair warning because they require a novel construction of the law. Arguably, the mothers did not have the requisite notice that their drug use would later be treated as a violation of the drug distribution statutes that are intended to apply to the sale of illegal drugs, not the mere use of illegal drugs.<sup>44</sup> Furthermore, opponents of prosecutions have also asserted equal protection arguments because pregnant women are singled out for prosecution.<sup>45</sup>

#### D. New Legislation

The enactment of specific legislation criminalizing certain maternal behavior during pregnancy and imposing liability for the harmful effects of maternal drug use should satisfy the due process requirements that the legislature, rather than the courts, define criminal offenses.<sup>46</sup> Some states have reacted to the unsuccessful prosecutions by adopting legislation that directly addresses prenatal alcohol and drug abuse. For example, Minnesota has passed a comprehensive law requiring that physicians administer toxicology tests and report suspected addicts to child welfare

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<sup>40</sup>*Id.* at 780-81.

<sup>41</sup>523 U.S. 1145 (1998).

<sup>42</sup>Wilkins, *supra* note 13, at 1409 (noting that prosecutions in Georgia, Florida, Michigan, Massachusetts, and South Carolina have relied on laws prohibiting the possession of drugs and the delivery of drugs to minors).

<sup>43</sup>State v. Johnson, No. E89-890-CFA (18th Jud. Cir. Seminole County, Fla., July 13, 1989). In this slip opinion the trial judge stated, "I am convinced and find that the term 'deliver' includes the passage of cocaine or a derivative of it from the body of the mother into the body of her child through an umbilical cord after birth occurs." See Wilkins, *supra* note 13, at 1410-11 for criticism of the court's construction of the applicable Florida statute.

<sup>44</sup>Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L. J. 278, 286 (1990).

<sup>45</sup>*Id.* at 286. See also Jeffrey A. Parness, *Prospective Fathers and Their Unborn Children*, 13 U. ARK. LITTLE ROCK L. J. 165 (1991) (urging that pre-birth paternal duties be considered as pre-birth maternal duties are considered).

<sup>46</sup>Doretta M. McGinnis, *Prosecution of Mothers of Drug-exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 513 (1990).



agencies.<sup>47</sup> The child welfare agency can then seek civil commitment of a pregnant woman who is using illegal drugs if she refuses or fails recommended voluntary treatment.<sup>48</sup> Although this legislation is not criminal in nature, some authors still maintain that addicts will shun all treatment, rather than be subject to commitment.<sup>49</sup>

A few states including Illinois, Massachusetts, Nevada, Oklahoma, and Utah have expanded the definition of "neglected minor" to include babies born with drugs in their systems.<sup>50</sup> For example, the Massachusetts statute treats prenatal abuse as a criminal offense that medical providers must report once they determine that a child is physically dependent on an addictive drug.<sup>51</sup> Other states rejected legislation including more draconian measures such as those requiring that some contraceptive devise, such as Norplant, be implanted in first time drug offenders who fail to complete a drug treatment program.<sup>52</sup> While adoption of tightly drawn legislation might satisfy procedural due process requirements such as notice and fair warning, such legislation still poses other constitutional questions related to maternal interests and state interests.<sup>53</sup>

### III. BALANCING THE INTERESTS OF THE STATE AND THE MOTHER—CONSTITUTIONAL CHALLENGES TO NEW LEGISLATION

As noted above, various commentators maintain that government intervention creates a conflict between a woman's rights on one hand and the state interest and "fetal rights" on the other hand. They maintain that any intervention impinges on privacy rights recognized in *Roe v. Wade*.<sup>54</sup> In invalidating the Texas criminal statute that prohibited all elective abortions, the United States Supreme Court in *Roe* explicitly refused to extend constitutional protection to fetuses. As stated by the Court, the word "person" as used in the Fourteenth Amendment of the United States Constitution does not include the unborn.<sup>55</sup> In reaching this conclusion, the Court recognized that the privacy right regarding procreative decision-making protects a

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<sup>47</sup>For a discussion of the features of the Minnesota law, see Judith M. Nyhus Johnson, *Minnesota's "Crack Baby Law": Weapon of War or Link in a Chain?* 8 LAW & IN EQ. 485, 491 (1990).

<sup>48</sup>See Carol Gosain, *Protective Custody for Fetuses: A Solution to the Problem of Maternal Drug Use? Casenote on Wisconsin ex rel Angela v. Druziki*, 5 GEORGE MASON L. REV. 799, n. 316 (1997) (noting that the Minnesota statute has not faced a constitutional challenge).

<sup>49</sup>Wilkins, *supra* note 13, at 1429.

<sup>50</sup>*Id.*

<sup>51</sup>Kubasek & Hinds, *supra* note 34, at 6.

<sup>52</sup>*Id.* at 7 (referring to legislation defeated in Ohio).

<sup>53</sup>Some authors treat "fetal rights" as a separate category and approach the issues of prenatal drug use in terms of "fetal rights" versus maternal rights. *E.g.*, Tom Richoff, *Protecting the Fetus from Maternal Drug and Alcohol Abuse: A Proposal for Texas*, 21 ST. MARY'S L. J. 259, 286-87 (1989).

<sup>54</sup>410 U.S. 113 (1973).

<sup>55</sup>*Id.* at 158.

woman's right to terminate her pregnancy.<sup>56</sup> Applying a strict scrutiny test, the court identified two legitimate state interests that become compelling at different points during the pregnancy.<sup>57</sup>

Subsequently, in *Webster v. Reproductive Health Services*, the United States Supreme Court reaffirmed the state interest in protecting potential life, denying that the interest only came into existence at the point of viability.<sup>58</sup> Later in *Planned Parenthood v. Casey*, the Supreme Court went a step further in rejecting the trimester approach first articulated in *Roe*.<sup>59</sup>

While reaffirming the "essential holding of *Roe*" related to a woman's right to terminate her pregnancy, the *Casey* court made the following observation:

Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." That portion of the decision in *Roe* has been given too little acknowledgement and implementation by the court in its subsequent cases. (citations omitted)<sup>60</sup>

Although *Roe*, *Webster*, and *Casey* provide some framework in which to analyze conflicts between maternal privacy rights and the state's interests in protecting the fetus, the state, and maternal interests implicated by fetal abuse legislation are different from those in the abortion context. As stated in one commentary:

The maternal privacy right at issue in fetal abuse cases focuses not on a woman's decision whether to continue her pregnancy—the abortion question—but rather on her decisions regarding how to conduct her life during her pregnancy. In the fetal abuse context, the state's interests are not preservation of the mother's health and the protection of potential life against intentional termination, but the enhancement of the born child's quality of life through protection of the fetus from reckless or negligent harm. *Roe*'s holding that the state's interest in the birth of a fetus does not become compelling during the first two trimesters of pregnancy does not rule out the existence of a compelling state interest in ensuring that fetuses that will be carried to term are born unharmed. States may have a greater

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<sup>56</sup>*Id.* at 153.

<sup>57</sup>From the end of the first trimester until the point of viability, the state may regulate the abortion procedure in ways that are reasonably related to the state interest in preserving and protecting the health of the pregnant woman. From the point of viability until birth, a state interest in protecting the "potentiality of human life" allows it to proscribe all abortions except those necessary to preserve the life or health of the mother. *Id.* at 163-64.

<sup>58</sup>"The state's interest, if compelling after viability, is equally compelling before viability." 492 U.S. 490, 519 (1989).

<sup>59</sup>505 U.S. 833, 878 (1992) (adopting an undue burden test).

<sup>60</sup>*Id.* at 871.

interest in preventing future suffering of those who will be born than in ensuring that any particular fetus will be born.<sup>61</sup>

The basic argument is that the woman's right to terminate her pregnancy does not conflict with her responsibility for the life of her unborn child because the state has an interest in protecting the quality of life that will be brought to term.<sup>62</sup> As explained by one bioethics expert, Professor John A. Robertson, once a woman decides not to end her pregnancy she assumes certain obligations to refrain from causing harm to the future child.<sup>63</sup> Some authors challenge this position, arguing that it creates the proverbial slippery slope and opens the floodgates to prosecute pregnant women for any activity that might conceivably harm their fetuses.<sup>64</sup> A response to this criticism is that the floodgates will not be opened if the legislation is targeted only at conduct that is already illegal.

One commentator who advocates government intervention to curb prenatal drug use insists that parental rights can and should be expanded without the troubling characterization of the unborn as "persons".<sup>65</sup> As stated, the unborn can be protected like snaildarters or historic buildings.<sup>66</sup>

Some note that no one has a privacy right to take an illegal drug. At the same time, the state has a strong interest in curbing drug use that is closely linked to fetal distress.<sup>67</sup> Therefore, the mother's right to reproductive privacy and personal autonomy should not shield her from government intervention.<sup>68</sup>

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<sup>61</sup>Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994, 997 (1988) (citations omitted).

<sup>62</sup>Terres, *supra* note 11, at 71.

<sup>63</sup>John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 438 (1989) (arguing that a woman who chooses not to abort has a legal and moral duty to bring the child into the world as healthy as is reasonably possible). See also Molly McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277, 292 (1987-88) (asserting that a woman waives her right to autonomy and assumes a duty of self-care after she decides not to abort); Barbara Shelley, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?* 92 DICK. L. REV. 691, 713-14 (1988) (noting that the critical point of state intervention is when the woman chooses to carry the fetus for the full term and not exercise her right to abort).

<sup>64</sup>McGinnis, *supra* note 46, at 518.

<sup>65</sup>See Jeffrey A. Parness, *The Legal Status of the Unborn After Webster*, 95 DICK. L. REV. 1, 21 (1990).

<sup>66</sup>*Id.*

<sup>67</sup>*E.g.*, Note, *supra* note 61, at 1007-08.

<sup>68</sup>Obviously, the analysis of proposed legislation would be significantly different if the government undertook to regulate some conduct that would otherwise be legal if the woman was not pregnant. This is one of the obstacles the government must overcome if it seeks to control alcohol consumption by pregnant women. Government intervention in the case of gestational alcohol abuse is more complicated than intervention in the case of illegal drug use because it is normally legal for a person to imbibe alcohol. Despite the fact that the consumption of alcohol is generally legal, the government could take steps to control the

## IV. ANALYSIS OF DUTIES AND CORRELATING RIGHTS

A. *Maternal Obligations and Duties*

The debate discussed above largely turns on different views on what obligations, if any, a woman assumes after she has decided not to terminate a pregnancy. Does a pregnant woman owe any moral or common law duty to the fetus to refrain from using illegal drugs? Although members of society may recognize a moral obligation of a mother to her fetus, it does not follow that there is a legal obligation.<sup>69</sup>

The inextricable link between the pregnant woman and the fetus militates toward recognizing at least a moral duty to protect fetal health. New scientific evidence and technical developments have produced a wealth of information revealing how a pregnant woman's actions and omissions affect the fetus.<sup>70</sup> The difficulty in determining the extent of a woman's moral duty relates to the fact that practically everything a pregnant woman does conceivably affects the fetus. Should pregnant women be treated as "fetal containers" or saints whose conduct is governed by a standard based on the best interest of the fetus?<sup>71</sup> Does a woman fail to meet her obligations to the fetus when she does not take enough vitamins or takes over the counter drug? Does a woman meet her duty to the fetus if she fails to take some action that would improve fetal health, but avoids conduct that causes harm, such as smoking tobacco, drinking alcohol or using illegal drugs?<sup>72</sup> These questions illustrate the difficulty in defining the scope of a pregnant woman's moral duty to protect fetal health. Various authors have criticized perspectives and approaches that view women as if they are "fetal containers" subject to control by pregnancy police.<sup>73</sup>

To some the most troublesome issue involves reconciling such a moral duty to the fetus with a pregnant woman's right to terminate the pregnancy. Those who

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gestational alcohol abuse. Any legislation criminalizing gestational drug use could be compared to criminal legislation related to driving while intoxicated (DWI). With DWI legislation the state converts legal drinking into illegal conduct due to the fact that the conduct occurs while a person is driving a vehicle. Clearly, the difficulty in adopting similar legislation targeting gestational alcohol use is identifying and monitoring levels of consumption.

<sup>69</sup>See Patricia A. King, *Should Mom Be Constrained in the Best Interests of the Fetus?* 13 NOVA L. REV. 393, 399 (1989) (noting that courts may convert moral obligations into legal ones in an effort to coerce "the least willing members of the community to conform to moral norms").

<sup>70</sup>See *id.* at 396 (identifying an extensive list of maternal behaviors that affect a fetus).

<sup>71</sup>See *id.* at 397 (suggesting that requiring that a pregnant woman do everything in the best interest of the fetus effectively requires that she act as a "saint").

<sup>72</sup>In distinguishing conduct that could properly be regulated Professor King notes that requiring that "harm or evil not be inflicted is different from requiring that harm or evil be removed." *Id.* at 397. "The proposition that we have a greater obligation to refrain from causing harm than to promote good finds support in common notions of morality as well as law." *Id.* at 397-98.

<sup>73</sup>The term "fetal containers" appeared in the early scholarship of George J. Annas, *Pregnant Women as Fetal Containers*, 16 HASTINGS CTR. REP 13 (Dec. 1986).

oppose abortion might simply dismiss the question by saying that no reconciliation is necessary or possible. In their opinion, any termination of a pregnancy would be an immoral violation of a woman's duty to the fetus.

Another approach is to re-conceptualize the maternal duty as a duty to the unborn child, rather than to the fetus. Using this approach, a woman still can exercise her legal right to terminate a pregnancy. On the other hand, if she chooses not to terminate the pregnancy she owes a duty to the future child who has not yet been born. Basically, by electing not to terminate she assumes a moral duty to the unborn child to refrain from causing harm to the future child. In discussing the distinction between a duty to the fetus and the duty to an unborn child, one author suggested that this duty of care to refrain from doing harm to the unborn child is the same as the duty owed to any stranger.<sup>74</sup> A pregnant woman may end her duty by having an abortion.<sup>75</sup> If, on other hand, she chooses not to have an abortion, "she places herself in a special relationship with her future child, a relationship that carries certain inherent obligations similar to those of any parent toward his or her child."<sup>76</sup> Using this approach, one would have to determine the scope of parental obligations to a child. Does a parent have a moral obligation to submit to a bone marrow transplant in order to save the life of her child? Does a pregnant woman have a moral obligation to submit to fetal surgery in order to protect the health of the fetus? These questions illustrate the difficulty in defining the scope of a pregnant woman's moral obligation to the fetus.

Despite this lack of clarity on the scope of the pregnant woman's moral obligation, some advocates of "fetal rights" still insist that the moral obligation to protect fetal health should be recognized as a legal obligation. In support of this position, these advocates point to the dictum in *Roe* where the Court said that a "woman can not be left alone in her privacy."<sup>77</sup> In the context of the Court's opinion, this dictum is not very helpful in determining if a mother owes a legal duty to her fetus. Therefore, "*Roe*'s effect on the judicial refinement of the legal duty a mother owes her unborn child remains unclear."<sup>78</sup>

The *Roe* opinion has split on the question of the existence of a legal duty owed by a pregnant woman to protect fetal health.<sup>79</sup> In *Grodin v. Grodin*, the Michigan Court of Appeals found a woman liable to her child for taking tetracycline while pregnant.<sup>80</sup> In its opinion the Michigan appellate court indicated that a mother should bear the same liability as a third person would bear for negligent infliction of

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<sup>74</sup>Deborah Mathieu, *Respecting Liberty and Preventing Harm: Limits on State Intervention in Prenatal Choice*, 8 HARV. J. L. PUB. POLICY 19, 37 (1985).

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>410 U.S. at 159.

<sup>78</sup>David E. Koropp, *Setting the Standard: A Mother's Duty During the Prenatal Period*, 189 U. ILL. L. REV. 493, 505 (1989).

<sup>79</sup>Susan R. Weinberg, *A Maternal Duty to Protect Fetal Health*, 58 IND. L.J. 531, 535 (1982-83).

<sup>80</sup>301 N.W. 2d 869, 870 (Mich. Appeals 1980).

prenatal injury.<sup>81</sup> Similarly, in *Smith v. Brennan* the Supreme Court of New Jersey recognized a child's cause of action for negligent prenatal injury, stating that a "child has a legal right to begin life with sound mind and body."<sup>82</sup>

Other courts have reached different conclusions on the existence of a mother's legal duty to the fetus. In 1999, a Texas appellate court considered a child's claims against the mother for injuries resulting from the mother's illegal drug use. In a case of first impression, the Texas appellate court held that Texas state law does not recognize a cause of action in tort for injuries caused by the mother's negligent or grossly negligent conduct.<sup>83</sup> Similarly, in *Stallman v. Youngquist*,<sup>84</sup> the Supreme Court of Illinois refused to recognize that the mother had a common law duty to the fetus.<sup>85</sup> Although the *Stallman* court recognized the important state interest in fetal well being, it deferred to the legislature as the more appropriate forum.<sup>86</sup> This appears to be an invitation for legislative action to promote fetal health under the auspices of state interests.

States can adopt different types of legislation targeted at curbing prenatal drug use. For example, state legislatures could require that pregnant drug addicts obtain treatment and refrain from the use of illegal drugs. As noted above, opponents of this type of legislation fear that the creation of such a duty would interfere with the privacy and autonomy interests of the pregnant women by recognizing "fetal rights."<sup>87</sup> The following discussion of rights and correlating duties suggests that the states can adopt legislation dealing with prenatal drug use without recognizing "fetal rights."

### B. Analysis and Critique of Hohfeld's Correlatives

Wesley Newcomb Hohfeld analyzed the legal conceptions of rights and duties in his work, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*.<sup>88</sup>

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<sup>81</sup>*Id.* The appellate court remanded the case to the trial court for a determination on the "reasonableness" of the negligent conduct. *Id.* at 871.

<sup>82</sup>157 A.2d 497, 503 (N.J. 1960).

<sup>83</sup>*Chenault v. Huie*, 989 S.W. 2d 474 (Tex. Appeals—Dallas, 1999) (no pet. history). The appointed conservator for the child brought suit against the mother.

<sup>84</sup>531 N.E. 355 (Illinois 1988).

<sup>85</sup>*Id.*

<sup>86</sup>*Id.* at 361.

<sup>87</sup>*See King*, *supra* note 69 at 399 for a general discussion of privacy and equity concerns in recognizing a legal duty of a woman to her fetus.

<sup>88</sup>Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913). A continuation of the article appeared later in Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710 (1917). The references in this paper will refer to the article appearing in 23 YALE L. J. 16 (1913). Since Hohfeld's publication of this analysis, his system has been debated. Those who have adopted the Hohfeldian scheme include conservative scholars on one end of the spectrum and critical legal scholars on the other end. *See Calvin R. Massey, Law's Inferno*, 39 HASTINGS L.J. 1269, 1273, n. 11 (1988) (reviewing MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES) (1987).

Hohfeld systematically discussed legal conceptions such as rights, duties and privileges rhetorically and as a system of mutually self-defining relations.<sup>89</sup>

Hohfeld began his discussion of jural relations by noting that strictly fundamental legal relations are *sui generis* and “[that] attempts at formal definition [prove to be] unsatisfactory.”<sup>90</sup> Therefore, Hohfeld believed that the most promising line of procedure was to consider the “relations” in a scheme of opposites and correlates.<sup>91</sup> In his system of classification, Hohfeld identified eight legal conceptions: four primary legal entitlements (rights, privileges, powers and immunities) and their opposites (no-rights, duties, disabilities and liabilities).<sup>92</sup> “Rights are claims enforceable by state power that others act in a certain manner in relation to the rightholder.”<sup>93</sup> A privilege is a negation of a legal duty, as in the privilege against self-incrimination in the face of a duty.<sup>94</sup> “Powers are state-enforced abilities to change legal entitlement held by oneself or others.” An example of a power is when a property owner has the legal power to transfer the property.<sup>95</sup> “An immunity is security from having one’s own entitlement changed by others,” which amounts to a freedom from legal liability.<sup>96</sup>

In connection with the four primary entitlements, Hohfeld sets forth negations or opposites of the entitlements. These connections or references are the essence of Hohfeld’s theory. According to Hohfeld, “a legal meaning cannot be ascertained without reference to its partner, either opposite or correlative, and the relationships embodied therein.”<sup>97</sup>

Using this approach, the negations or opposites of a primary entitlement refer to the absence of entitlement. The opposite of a right is what Hohfeld deemed to be “no right.” Under Hohfeld’s scheme, a person has “no right” if he or she has no claim enforceable by state power. With this concept of opposites, a person has either one or the other of the opposites. This is different from Hohfeldian analysis of correlatives, which describes dynamic legal relations between two parties. If the state recognizes a right and confers an advantage on some party, it simultaneously creates vulnerability on the part of others.<sup>98</sup> This vulnerability or disadvantage is the

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<sup>89</sup>J. M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1120 (1990).

<sup>90</sup>Hohfeld, *supra* note 88, at 45.

<sup>91</sup>*Id.* at 30.

<sup>92</sup>*Id.*

<sup>93</sup>Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986 (1982) (analyzing Hohfeld’s fundamental legal conceptions).

<sup>94</sup>*Id.* at 40.

<sup>95</sup>*Id.* at 45.

<sup>96</sup>*Id.* at 55.

<sup>97</sup>H. Newcomb Morse, *Applying the Hohfeld System to Constitutional Analysis*, 9 WHITTIER L. REV. 639, note 1 (1988).

<sup>98</sup>Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 987 (1982).

legal correlative that is a matching interest held by at least one other person. A claim-right correlates with a legal duty. For example, a lessor has a right to receive rental payments and the lessee has a duty to make rental payments. Basically, Hohfeld believed “that rights and duties are best analyzed, not as moral absolutes owed or demanded from the whole world, but rather as different aspects of a bilateral relationship between parties.”<sup>99</sup>

Some scholars have challenged this bilateral feature of the Hohfeldian system. They note that legal relationships are in fact triadic in nature, with the sovereign and the courts as the third element in the triad.<sup>100</sup> Jural relations are triadic even when the government confronts an individual. For example, in the collection of taxes, “the government” must be divided into those officials who claim a tax and those who decide a dispute and impose sanctions.<sup>101</sup>

Other critics question whether the duties imposed by the criminal law or other areas of public law necessarily correlate with rights of individuals to claim performance of those duties. In fact some philosophers, including Jeremy Bentham and John Austin, took the view that there are some legal duties for which there were no correlative rights.<sup>102</sup>

In his LECTURES ON JURISPRUDENCE, Austin described some obligations as absolute duties, which exist independently of any correlative right. He described absolute duties as those prescribing actions toward parties other than the one obliged, who are not determinate persons, such as members generally of an independent society and mankind at large.<sup>103</sup> As indicated by the following passage, Hans Kelsen also believed that there were legal obligations that were not always connected to legal rights of individuals:

If the obligated behavior of one individual does not refer to a specifically designated other individual (that is, if it does not have to take place with respect to a specifically determined individual) but refers only to the legal community as such, then--although one sometimes speaks of a “right of the community” (especially of the state) to the behavior of the obligated individual, such as the obligation to do military service—one is satisfied in other cases to assume a legal obligation without a corresponding reflex right: for example in the case of legal norms that prescribe a certain human behavior toward some animals, plants, or inanimate objects by

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<sup>99</sup>Patrick Dooley, *The Unreasonableness of Requiring a Warrant for Searches of Non-Resident Aliens in a Foreign Country: United States v. Verdugo-urquidez*, 20 CAL. W. INT'L. L.J. 355, note 48 (1989/90).

<sup>100</sup>Perry Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 YALE L. J. 1191, 1254 n. 217 (1990) (noting that the formulation of the objection to the Hohfeld primary terms is based very loosely on R. Dworkin’s discussion of choice of law in TAKING RIGHTS SERIOUSLY (1978)).

<sup>101</sup>See JEROME HALL, FOUNDATIONS OF JURISPRUDENCE 166 (1973).

<sup>102</sup>J.W. HARRIS, LEGAL PHILOSOPHIES 81 (1980).

<sup>103</sup>Dane, *supra* note 100, at 1254, n. 217 (noting that the objection to the Hohfeld primary terms is based very loosely on R. Dworkin’s discussion of choice of law in TAKING RIGHTS SERIOUSLY (1978)).



pain or punishment. . . These are obligations that—indirectly—exist toward the legal community interested in these objects.<sup>104</sup>

The Hohfeldian response to this position would be that any judicial question still concerns two parties. In the case of a criminal statute, some person acting on behalf of the government seeks enforcement of a legal duty. The representative of the government is viewed as a person who on behalf of the government has a right to require that another person fulfill a duty. Stated differently, a claim-right asserted against the state or a claim asserted by the state is always a claim asserted by some living flesh and blood person that is empowered in some way and recognized by courts.<sup>105</sup>

Joel Feinberg takes a different approach arguing that some claim-rights do not have correlative duties. In his essays entitled "Duties, Rights and Claims," and "The Nature and Value of Rights," he examines the extent to which duties and Hohfeld's "claim-rights" are logically correlative.<sup>106</sup> Feinberg identifies classes of normative relations called "duties." These "duties include duties of indebtedness, commitment, reparation, need-fulfillment, reciprocation, respect, community membership, status and obedience." Feinberg distinguishes the classes of duties and describes why some of the duties are necessarily correlated with other people's rights while others are not.<sup>107</sup>

Under Feinberg's scheme, duties imposed by law are characterized as "duties of obedience." In discussing the example of a police officer who demands a motorist stop, Feinberg questions whether the police officer has a personal right to demand that the motorist stop.<sup>108</sup> Rather, it appears that the officer has an official right derived from the police officer's status. Noting that some duties of obedience are "owed" to impersonal authority like "the law," Feinberg concludes that some duties of obedience do not seem to entail correlative rights.<sup>109</sup>

In dialogues on duties and correlating rights, one example that is frequently used is the "duty" to give to charity. Although one may have such a duty to make charitable contributions, it does not follow that the potential donee has a right to demand the charitable contribution. For example, both the American Bar Association Model Code of Professional Responsibility ("Model Code")<sup>110</sup> and the

<sup>104</sup>HANS Kelsen, *PURE THEORY OF LAW* 128 (M. Knights trans. 1967).

<sup>105</sup>Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141, 1162 (1938).

<sup>106</sup>JOEL FEINBERG, *RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY—ESSAYS IN SOCIAL JUSTICE* 130-155 (1980). In the preface, Feinberg noted that his discussion was limited to what Hohfeld called "claim-rights."

<sup>107</sup>*See id.* at 130-39.

<sup>108</sup>*See id.* at 138.

<sup>109</sup>*Id.*

<sup>110</sup>The MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1981) states: "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer."

American Bar Association Model Rules of Professional Conduct (“Model Rules”)<sup>111</sup> include aspirational provisions urging attorneys to provide pro bono legal services as part of attorneys’ professional obligations.<sup>112</sup> This pro bono obligation or duty of attorneys has been recognized by all states that have adopted some version of the Model Code or Model Rules. Despite the provisions in legal ethics codes, indigent persons would face difficulty in establishing a right that requires attorneys to meet this professional duty.<sup>113</sup>

Whether a person agrees with Feinberg and other writers who maintain that certain duties do not create corresponding rights, or if a person takes a Hohfeldian approach, it is not necessary to recognize “fetal rights” in enacting statutes related to prenatal drug use. Under Hohfeld’s scheme, the representative of the government has a right to require compliance with statutes and the pregnant woman has the corresponding duty to comply. Using Hohfeldian analysis, the imposition of a duty by the government on a pregnant woman would not create corresponding “fetal rights” because the fetus would not be part of the legal relationship. Rather, it is a matter between the state (or a representative of the state) and the pregnant woman. The duty imposed by the state is a duty owed to the state or the community. It is not a duty owed to the fetus.

Even scholars who do not subscribe to Hohfeld’s doctrine of logical correlatives should reach a similar conclusion. Using their analysis, the government unilaterally would impose a legal duty on the pregnant woman. Once again, it is a matter between the state and the pregnant woman.

This analysis of duty and correlating rights can be used to address the concerns of women’s rights advocates who fear that any government regulation of prenatal drug use will inevitably affect a woman’s privacy rights. Many women’s rights advocates are genuinely concerned that any intervention will amount to a recognition of “fetal rights,” and ultimately affect a woman’s right to choose to terminate a pregnancy. These concerns might be allayed if the women’s rights advocates understand that the government can impose a legal duty which is owed to the state, without any recognition of “fetal rights.”

#### V. THE UTILITY AND SHORTCOMINGS OF CRIMINAL SANCTIONS

Having determined that the legislation targeting prenatal drug use does not require the recognition of fetal rights, the next step is to evaluate the advisability of

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<sup>111</sup>MODEL RULES OF PROF’S CONDUCT Rule 6.1 (1983) states, in pertinent part, that a lawyer should aspire to render at least 50 hours of pro bono publico legal services per year.

<sup>112</sup>The revised Model Rules approved by the ABA House of Delegates in 2002 expressly state that every lawyer has a “professional responsibility to provide legal services to those unable to pay.” MODEL RULES OF PROF’L CONDUCT R. 6.1 (2002).

<sup>113</sup>In Texas, farm workers filed a class action against the State Bar of Texas. The plaintiffs sought a court order requiring the State Bar to enforce a mandatory pro bono program. Among other things, the plaintiffs have based their action on the provision in the Texas Disciplinary Rules of Professional Conduct stating that lawyers should render public interest legal service. The matter was placed on the administrative docket of the Supreme Court of Texas. Janet Elliott, *Texas Has A Long Way To Go On Pro Bono Problem*, TEXAS LAWYER, Jan. 31, 2000, at 4.

adopting criminal legislation that punishes women for not getting drug treatment. As an analytical framework, the evaluation can use utilitarian theory of justice in assessing the interests served in adopting legislation criminalizing prenatal drug use.

The basic tenet of utilitarianism is "the greatest good for the greatest number." The criterion of the rightness of actions refers to the consequences.<sup>114</sup> The morality of any kind of act will then depend on whether or not it will promote consequences more favorable than those produced by some alternative.<sup>115</sup> Different versions of utilitarianism take different approaches in evaluating the consequences.

In assessing the utility of legislation relating to the maternal-fetal relationship, lawmakers should weigh the proposed benefit with the costs to the individual woman, the fetus, and society.<sup>116</sup> Undoubtedly, the state has a legitimate public health concern in facilitating the treatment of pregnant women. This treatment serves that interest, as well as the general welfare of the individual woman and the fetus.

In the case of maternal conduct, a justification for a criminal law related to the prevention of prenatal drug use would be found in the value asserted by society in condemning harmful behavior and in attempting to prevent the behavior.<sup>117</sup> Although this may be a desirable goal, the question remains as to whether a criminal statute would actually deter harmful behavior. Due to the nature of drug addiction, numerous commentators doubt that the adoption of legislation criminalizing prenatal drug use will significantly deter women from using illegal drugs.<sup>118</sup> In support of their argument, they note that drug users apparently are not deterred by the existing criminal laws relating to illicit drugs.<sup>119</sup>

Moreover, the critics maintain that the negative consequences of criminalization must be considered in weighing the costs of the legislation. Specifically, they express concern that legislation criminalizing prenatal drug use will only deter women from seeking prenatal care. The same objection has been expressed with respect to statutes that empower the government to civilly commit women for mandatory treatment.<sup>120</sup> If pregnant women fear being "turned in" by their doctors, they may not get the health-related services that they desperately need. Obviously,

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<sup>114</sup>CONRAD D. JOHNSON, MORAL LEGISLATION 1 (1991).

<sup>115</sup>KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 94 (1987).

<sup>116</sup>Elizabeth L. Thompson, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357, 365 (1988-89).

<sup>117</sup>*Id.*

<sup>118</sup>See e.g. Antoinette Clarke, *Fins, Pins, Chips & Chins: A Reasoned Approach to the Problem of Drug Use During Pregnancy*, 29 SETON HALL L. REV. 634, 659 (1994) (arguing that the deterrence does not justify the imposition of criminal penalties for prenatal drug use).

<sup>119</sup>"Current penalties for drug possession and use include prolonged imprisonment and steep fines. Enforcement of these laws does not deter addicts from using drugs during pregnancy; it is unrealistic to believe that heavier penalties will make a difference." *Id.*

<sup>120</sup>See generally Wendy Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, 266 J. AM MED. A. 1556, 1559 (1991) (discussing the general problems with mandatory treatment in both a civil and criminal context).

the failure of women to obtain adequate care will result in more fetal and maternal problems.

The American Medical Association (AMA), the largest medical society in the United States, expressed these concerns in its Amicus Curiae Brief filed in the United States Supreme Court in *Ferguson v. City of Charleston*. In asserting that criminal sanctions are ineffective in halting drug use by pregnant women, the AMA argued that criminal sanctions actually increase the risk of harm by discouraging prenatal and postnatal care and undermining the physician/patient relationship.<sup>121</sup> In its brief the AMA emphasized that drug addiction is a disease that cannot be overcome by self-discipline.<sup>122</sup> As explained, “one of the fundamental characteristics of drug dependency is the inability to reduce or control substance abuse, despite the possibility of adverse consequences.”<sup>123</sup> According to the AMA, only “consensual treatment” can overcome the illness of drug addiction.<sup>124</sup> Therefore, the AMA maintains that “criminal sanctions are unlikely to achieve the goal of deterring drug use among pregnant women.”<sup>125</sup>

Other medical groups share this view in opposing criminal prosecutions of pregnant women. The sentiments of health care providers are summarized in the following statement made by various medical groups in connection with the prosecution of one California mother:

Such prosecution is counterproductive to the public interest as it may discourage a woman from seeking prenatal care or dissuade her from providing accurate information to health care providers out of fear of self-incrimination. This failure to seek proper care or to withhold vital information concerning her health could increase the risk to herself and her baby.<sup>126</sup>

Clearly, this is a very serious concern given that the principle objective of intervention should be to curb prenatal drug use and to promote health of the mother and unborn child. If criminal legislation actually deters women from obtaining

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<sup>121</sup>Brief of Amicus Curiae American Medical Association at 1, *Ferguson v. City of Charleston*, 2000 WL 1506967, at 1-2 (No. 99-936).

<sup>122</sup>*Id.* at p. 6.

<sup>123</sup>*Id.* at 8 (referring to the DSM manual).

<sup>124</sup>*Id.* at 6. In teaching materials the National Institute on Drug Abuse expresses a different view in stating that treatment does not need to be voluntary to be effective. *Understanding Drug Abuse and Addiction: What Science Says*, National Institute on Drug Abuse, <http://www.drugabuse.gov/Teaching3/teachings5.html>.

<sup>125</sup>*Id.* at 8.

<sup>126</sup>Thompson, *supra* note 116 at 370 (quoting the Declaration of the California Medical Association, The Southern California Public Health Association, and the California Division of the American College of Obstetricians and Gynecologists, contained in the Defendant’s Motion to Dismiss in *People v. Stewart* (Cal. Mun. Ct. Feb. 23, 1987).

treatment, the only purpose criminalization serves is to punish socially undesirable conduct.<sup>127</sup> The proposal discussed below is intended to address this concern.

#### VI. PROPOSAL FOR LEGISLATION THAT TREATS DRUG ADDICTION AS A DISEASE

As noted in the introduction, the majority of the articles written on prenatal drug abuse tend to fall into one of two camps: (1) those advocating government action; and (2) those advocating a woman's right of privacy and autonomy. Authors in both camps see a conflict between women's rights and "fetal rights." This conflict is more like a battle where one party wins and the other loses. In focusing on treatment, the following proposal intended to create a "win/win" situation where the interests of the mother, the unborn child and the society are served.

The proposal is based on opinions of medical and addiction experts who urge treating drug abuse as a disease.<sup>128</sup> The United States Supreme Court has recognized drug addiction as an illness requiring treatment.<sup>129</sup> As stated by the Court, persons addicted to narcotics "are diseased and proper subject for [medical] treatment."<sup>130</sup> The proposed legislation provides meaningful assistance to addicted women, including services that may help prevent addicted women from getting pregnant. The proposed public health legislation incorporates four major components: education, testing, addiction intervention, and effective treatment. Taken together these features operate as a comprehensive government program.

The first portion of the program focuses on prevention by educating women on the dangers of prenatal drug use, as well as the importance and availability of treatment. This education should start with mandatory programs in secondary schools. Government sponsored public service announcements on television and radio can reach the general population. Finally, public health agencies can produce and distribute brochures to be made available in medical clinics and offices of physicians who provide primary medical care. All publicity and educational materials should communicate the humanistic message that the community cares about the pregnant drug user and that she should care enough to get treatment. This message will also help foster the sense of duty if the pregnant woman decides to have a child.

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<sup>127</sup>The respondents in *Ferguson v. City of Charleston* challenged the assertion that the policy of testing and prosecuting women discouraged women from seeking medical treatment. As noted by the respondents, hospital data "did not demonstrate any change in utilization patterns of their prenatal clinics nor did they identify any increase in unbooked deliveries at other regional hospitals." Brief of Respondents, at 10, *Ferguson v. City of Charleston*, 2000 WL 1341474, (No. 99-936).

<sup>128</sup>David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTING WOMEN'S L.J. 243, 244-245 (2001) (urging a multidimensional collaborative effort to dealing with maternal substance abuse).

<sup>129</sup>*Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that a state law that imprisons a drug addict as a criminal inflicts cruel and unusual punishment in violation of the Fourteenth Amendment of the United States Constitution).

<sup>130</sup>*Id.* at 667 (citing *Linder v. United States*, 268 U.S. 5, 18 (1925)).

Serious problems associated with prenatal drug use early in a pregnancy can be avoided if women get drug treatment before they know they are pregnant or take precautions not to become pregnant. This early intervention is very important because research has revealed that the most damage to a fetus occurs early in the pregnancy.<sup>131</sup>

The second feature of the government program is public health legislation providing for drug testing of pregnant women. All physicians treating pregnant women would be required to administer a test for specified drugs, unless the pregnant woman objects. In two respects this approach to testing differs from the Charleston testing program that the United States Supreme Court declared to be unconstitutional in *Ferguson v. City of Charleston*.<sup>132</sup> First, the testing proposed here effectively requires that women provide their informed consent before being tested. Second, the proposed testing would be conducted purely for medical purposes. By law the results of the tests would be confidential and unavailable to law enforcement authorities. Women would be advised that the testing would be confidential, but not anonymous.<sup>133</sup> They would be told in writing that a positive drug test would be reported to a specified public health agency that arranges for formal drug counseling with the woman.<sup>134</sup>

In his concurring opinion in *Ferguson*, Justice Kennedy appeared to endorse the validity of mandatory testing conducted for medical purposes. Justice Kennedy referred to “reputable sources” in making the following observation:

[W]e must accept the premise that the medical profession can adopt acceptable criteria for testing expectant mothers for cocaine use in order to provide prompt and effective counseling to the mother and to take proper medical steps to protect the child.<sup>135</sup>

This approach to mandatory testing of all pregnant women who do not object addresses various problems associated with discretionary testing. First, it eliminates possible discrimination that results when physicians exercise discretion.<sup>136</sup> Second, it

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<sup>131</sup>Experts view the first eight weeks as the most critical period for normal embryonic development. Janet Severson, *Stopping Fetal Abuse with No-pregnancy and Drug Treatment Probation Conditions*, 34 SANTA CLARA L. REV. 295, n.51 (1994) (citing Louis G. Keith et al., *Drug Abuse in Pregnancy*, in DRUGS, ALCOHOL, PREGNANCY AND PARENTING).

<sup>132</sup>532 U.S. 67, 88-86 (2001). See *supra* note 3.

<sup>133</sup>A similar approach is used under the Texas statute requiring that physicians test pregnant women for certain diseases, including HIV. See TEX. HEALTH & SAFETY § 81.090 (2001).

<sup>134</sup>By contrast, in Minnesota positive results are reported to a public welfare agency that can take steps to have the woman civilly committed.

<sup>135</sup>532 U.S. at 90. Justice Kennedy went on to say that the testing ought not to be invalidated if prosecuting authorities then adopt “legitimate procedures” to discover the test results and prosecution follows. *Id.*

<sup>136</sup>In *Ferguson v. City of Charleston*, the record suggested that the discretionary testing resulted in protocol that “disproportionately targeted indigent, African-American women.” Brief of Petitioners at 12, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936).

forces all physicians to deal with the drug issue with all women. Even though women have the right to refuse testing, they all benefit from receiving information on drug addiction, the effect of drugs on the fetus, and available treatment.

Trained drug counselors will contact those women who do consent to testing if their tests are positive or they indicate a desire for further counseling. The counselors conduct formal drug addiction interventions such as those commonly done to encourage addicted persons to get treatment for their disease. The counselors would also provide information on available social services that will improve the likelihood that treatment would be obtained and effective. At the time of the intervention, the counselor must evaluate the financial condition of the pregnant woman. If the counselor determines that the pregnant woman does not have the means to finance drug treatment, the counselor will certify that the woman qualifies for the government to pay the reasonable costs of drug treatment.

This leads to the most important feature of the program--government funding and support of treatment programs. After testing and intervention, comprehensive treatment must be made available. For effective treatment, facilities must be prepared to meet the medical and psychological needs of pregnant addicts and help the women deal with social service issues such as transportation and childcare.<sup>137</sup> Experts report that drug addiction can best be treated through full service treatment that combines behavior and pharmacological therapies with social service interventions.<sup>138</sup>

The government should take various steps to insure the availability of adequate treatment facilities. First, the government should require that state funded medical programs assist individuals who cannot afford drug treatment. With regard to privately funded health care, state regulators could require that health insurance policies cover the cost of treatment programs.

In connection with this legislation, steps must also be taken to eliminate all barriers to drug treatment facilities. The government should prohibit treatment centers from discriminating against pregnant women. Treatment centers that have refused to treat pregnant women claim that they cannot risk the potential liability exposure of treating pregnant women. This problem needs to be addressed.<sup>139</sup>

## VII. SIGNIFICANT ADVANTAGES OF THE PROPOSAL

The obvious advantage of this proposal is that it is intended to secure treatment for pregnant women who are addicted. This proposal approaches drug addiction as a serious public health problem that merits government intervention. Unlike "backward looking" legislation which punishes women for drug use, this proposed legislation requires drug education and facilitates treatment by providing for formal

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<sup>137</sup>See Brief of Amici Curiae National Abortion Rights League, et al., at 13-17, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936) (describing the essential elements for effective treatment of pregnant drug addicts).

<sup>138</sup>Steven Stocker, Drug Addiction Treatment Conference Emphasizes Combining Therapies, National Institute on Drug Abuse NOTES, [http://www.nida.nih.gov/NIDA\\_Notes/NNVol13n3/combining.html](http://www.nida.nih.gov/NIDA_Notes/NNVol13n3/combining.html) (last visited Nov. 5, 2003).

<sup>139</sup>One approach might be to give treatment facilities some limited form of immunity from claims relating to the complications caused by the drug dependency.

drug counseling and intervention by trained personnel. Such a proposal is consistent with a woman's duty to herself, as well as her duty to society.

Unlike civil commitment or criminal legislation that may deter treatment, the proposed legislation encourages treatment.<sup>140</sup> This is significant because pregnancy appears to be a "window of opportunity" for treating addiction. In interviews with 150 drug-using mothers in New York City, three fourths of those interviewed reported concern for their children as the major motivation for initiating treatment.<sup>141</sup> Formal intervention and counseling provided by trained persons should strengthen this motivation.

In treating drug addiction as a disease that requires medical and social service intervention, the proposal does not undermine the physician-patient relationship. Instead, the program reinforces the relationship by requiring that physicians provide information on drug addiction and treatment to improve both maternal and fetal health. As stated by the American Medical Association,

[W]hen physicians and patients work together, with a shared goal of achieving the best possible outcome for mother and child, outcomes are improved. With appropriate prenatal counseling, women will reduce the impact of their addiction on their fetuses . . . A drug-testing policy truly committed to reducing harm to children in utero would, therefore, encourage frank and full communication between patient and physician.<sup>142</sup>

In requiring counseling, consensual testing, and the availability of treatment, the proposed program is intended to foster communication and facilitate treatment. Because physicians only perform testing following client consent, physicians guard the confidences of patients, only providing information to public health authorities.<sup>143</sup> With this approach, testing is a tool of treatment, not a tool of criminal enforcement. This enables physicians to work together with their patients and public health experts in treating addiction as a disease.

Finally, the policy behind this proposal goes beyond an attempt to legislate morality. Unlike some paternalistic legislation that prevents persons from harming themselves, this proposal is designed to prevent a mother from harming society and the unborn child, who is a future member of the community. In most cases, the community has to bear the financial burden of caring for the infant who suffers the effects of prenatal drug use. In addition to the state's financial interest, the state also has an interest in prohibiting the gestational use of drugs because that behavior can cause permanent damage to future members of the community. Therefore, even

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<sup>140</sup>In the trial court in the Ferguson case, women testified that they stopped getting prenatal care because of the risk of drug testing and possible arrest. Brief of Petitioners at 10, *supra* note 136

<sup>141</sup>Proponents of "fetal rights" would also assign a value to the interests of the fetus. With such an analysis, treatment would also serve the interests of the fetus.

<sup>142</sup>Brief of Amicus Curiae American Medical Association, *supra* note 121 at 14.

<sup>143</sup>*Compare* Brief of Petitioners at 26, *supra* note 136 (arguing that mandatory nonconsensual testing is "radically at odds" with the historical obligation of the medical professional to guard the confidences of patients as a "sacred trust.").



assuming that one's own use of drugs such as cocaine is legalized, society would still have an interest in curbing drug use by pregnant women. With that approach, what is relevant is the harm to society and the unborn child, not the harm to the mother herself. In that event, the principal public policy justification is that intervention is appropriate to curb drug use that inflicts damage on society.

#### VIII. UTILITARIAN RECKONING

In consequentialist terms, the proposal appears to be beneficial in adopting a medical model to facilitate the treatment of the disease of drug addiction, while not discouraging prenatal and postnatal care. This ultimately benefits the woman and the community, as well as the unborn child. Experts report that treatment also helps the woman's other children.<sup>144</sup> In various ways, treatment also benefits the state and community. If women are treated, astronomical costs of caring for drug-addicted infants can be avoided. The avoidance of these medical costs would benefit those private insurance companies that provide medical coverage for insured persons, as well as the public assistance programs that provide funding for medical care to indigent persons. Comparing the cost of drug treatment to the costs of neonatal intensive care that averages approximately \$2,000 per day, both the insurance companies and government would be paying considerably less for drug treatment. If women get treatment, states could also avoid the continued expenses of caring for children who are more likely to be mentally and physically impaired.

In addition to reducing the specific costs associated with prenatal drug use, treatment reduces other costs associated with drug use.<sup>145</sup> For example, studies have revealed that drug treatment reduces drug use by forty to sixty percent, significantly decreasing criminal activity associated with drug use.<sup>146</sup> Conservative estimates indicate that every one dollar invested in addiction treatment programs results in a return of between four and seven dollars in reduced drug-related crime, criminal justice costs, and theft alone. Finally, the community and individuals benefit when treatment reduces interpersonal conflicts, improves workplace productivity, and reduces drug-related accidents.<sup>147</sup>

An additional feature of the legislation requiring testing and counseling intervention is that it effectively requires that the government take steps to insure that treatment be available. The legislation could only be enforced if treatment is available and affordable.

Admittedly, under the proposed legislation women may not consent to testing. Even those women who refuse testing will benefit from receiving counseling and information on drug treatment. To gauge the effectiveness of the intervention

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<sup>144</sup>In asserting that the "unique opportunity for positive intervention during pregnancy should not be lost," the AMA noted that "drug treatment, when possible, is critical for a woman's other children." Brief of Amicus Curiae American Medical Association, *supra* note 121 at 20.

<sup>145</sup>See *Understanding Drug Abuse and Addiction: What Science Says*, National Institute on Drug Abuse, <http://www.drugabuse.gov/Teaching3/teaching5.html> (last visited Nov. 5, 2003).

<sup>146</sup>*Id.*

<sup>147</sup>*Id.*

program, the legislation could require that medical providers report statistics on the number of women who refuse testing.

Opponents of legislation might still assert that any intervention infringes on a woman's liberty and personal autonomy. Given the fact that information and possible treatment would also benefit the woman, such infringement seems reasonable under the circumstances. Finally, from a communitarian perspective, community-based drug treatment programs help individuals develop as responsible members of the community.<sup>148</sup> As compared to other types of intervention or inaction, such an approach is "far less costly, far more humane, and most importantly it offers a far greater chance of success."<sup>149</sup>

#### IX. CONCLUSION

Prenatal drug use is a health care problem that merits appropriate government action. Given the societal interest in curbing drug use, such action can be taken without recognizing "fetal rights." For years the medical community has opposed criminal prosecutions and legislation targeting prenatal drug use. Instead, medical experts have urged that drug addiction be treated as a disease. The proposed legislation takes such an approach in providing education, testing, counseling intervention, and treatment services in an effort to curb prenatal drug use. The proposal can be justified on the basis of utilitarian theory in that the legislation serves the interests of both the mother and community.<sup>150</sup>

Legislators who desire to eradicate prenatal drug use must make a concerted effort to provide the treatment that mothers desperately need. In discussing the clash of rights between the pregnant woman and her fetus, one commentator states that it is difficult to determine who will emerge victorious.<sup>151</sup> All parties could emerge victorious if the government treats drug addiction as a public health problem meriting intervention.

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<sup>148</sup>Kubasek & Hinds, *supra* note 34, at 13.

<sup>149</sup>*Id.* at 14.

<sup>150</sup>Proponents of "fetal rights" would also assign a value to the interests of the fetus. With such an analysis, treatment would also serve the interests of the fetus.

<sup>151</sup>Barrett, *supra* note 35, at 237.

