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A New Crime, Fetal Neglect: State Intervention to Protect the Unborn -- Protection at What Cost?

Rebecca Manson

Judy Marolt

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INTRODUCTION

Historically, the fetus has not had rights apart from or conflicting with those of the mother.[1] Consequently, when criminal charges were filed against a California woman for allegedly contributing to the death of her unborn child,[2] it stimulated national and international interest.[3] This case provided the catalyst for this Comment and reflects an emerging trend by courts and state legislatures to recognize that the fetus has rights which are separate and distinct from the mother's rights.[4] While recognition of separate fetal rights may serve public policy, [5] this recognition poses inherent risks to the rights of the mother.[6] The conferring of separate fetal rights without proper protection, may lead to violations of the mother's rights to privacy,[7] bodily integrity,[8] parental au-

1. "[T]he law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth." Roe v. Wade, 410 U.S. 113, 161 (1973).

2. *See infra* note 65.

3. "The criminal prosecution of Pamela Rae Stewart Monson, the 27-year old [San Diego] woman accused of contributing to the death of her baby by taking drugs and disobeying medical instructions during her pregnancy, has attracted national and international attention." Flynn, *Baby Death Case Attracts Interest*, San Diego Union, Oct. 9, 1986, at A-1, col. 2.

4. Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946) (first case allowing tort liability against a third party for damage to a fetus). The *Bonbrest* court stated: "True, it is in the womb, but it is capable now of extra uterine life . . . it is not a 'part' of the mother"; Douglas v. Town of Hartford Conn., 542 F. Supp. 1267, 1270 (D. Conn. 1982) (only case allowing a fetus to recover for damages under a civil rights statute). *See also* Vaillancourt v. Medical Center Hosp., 139 Vt. 138, 142, 425 A.2d 92, 94 (1980) (allowing tort liability against a third party for death of a fetus, stating that: "A viable unborn child is, in fact, biologically speaking, a presently existing person and living human being.").

5. *See supra* note 4. The policy of compensating parents and their children who are born damaged is served by allowing the fetus to have rights.

6. "By sometimes identifying the fetus rather than the woman as the locus of the right when there is no live birth, recent laws have reflected a dangerous conceptual move." Comment, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, & Equal Protection*, 95 YALE L.J. 599, 603 (1986).

7. *See infra* notes 104-43 and accompanying text.

8. Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.W.2d 457 (1981) (a woman was ordered by the court to have a Cesarian section against her will to preserve the health of her child.); Taft v. Taft, 388 Mass. 331, 333-34, 446 N.E.2d 395, 396 (1983). In *Taft*, the court vacated an order to require a woman to submit to a surgical procedure designed to assist in carrying her pregnancy to term. The woman objected to the procedure on religious grounds, and there was not sufficient evidence to justify burdening the woman's constitutional rights to privacy and free exercise of religion. *See also infra*

tonomy,[9] and equal protection.[10]

Advances in medical technology and changes in the law have contributed to philosophical and sociological expectations that children should be born normal and healthy. These expectations have created an ideological juxtaposition,[11] a legal and moral debate, pitting the rights of the pregnant woman against those of her unborn child.[12] The pregnant woman is at the center of the conflict. She is faced with simultaneously balancing her own rights with those of her fetus. Asserting her own rights may infringe on the elusively defined right of her fetus to be born healthy. Proponents of fetal rights feel justified in placing the rights of the fetus in a superior position to those of the pregnant woman.[13] They contend that once a woman decides to carry a child to term, she has assumed a moral responsibility and must defer her rights to the developing fetus.[14]

This Comment explores the legal and constitutional ramifications of criminal liability for prenatal negligence. First, this Comment presents a history of the development of fetal rights and the state's interest in potential life.[15] Second, it discusses the interpretation of criminal statutes as they relate to women and fetuses.[16] Third, it explores the legal, moral, and constitutional issues relating to women's rights to privacy and equal protection.[17] Finally, this Comment suggests that criminal liability is one of the most intrusive means of protecting prenatal life and is, therefore, unacceptable.[18]

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notes 62 and 118 and accompanying text.

9. *See infra* notes 93-103 and accompanying text.

10. *See infra* notes 144-70 and accompanying text.

11. *See supra* note 6 and accompanying text. *See also* Andrews, *A Delicate Condition*, STUDENT LAW. 30 (May 1985). The author questions the sufficiency of reasons to police pregnancy.

12. *See generally* Begley, Wingert, Huck, Quade, *The Troubling Question of 'Fetal Rights', Should Denying Care to the Unborn Be a Crime?*, Newsweek, Dec. 8, 1986 at 87 [hereinafter cited as Begley].

13. Dalton, *Monson Case Raises Questions on Doctor's Obligation*, San Diego Union, Oct. 9, 1986, at A-4, col. 2. Larry Alexander, a professor of constitutional law at the University of San Diego, is quoted in the article as saying that the health of the fetus warrants an intrusion into a pregnant woman's privacy. *Id.*

14. Begley, *supra* note 12, at 87.

15. *See infra* notes 19-68 and accompanying text.

16. *See infra* notes 69-83 and accompanying text.

17. *See infra* notes 84-173 and accompanying text.

18. *See infra* notes 174-78 and accompanying text.

I. HISTORY OF FETAL RIGHTS

A. Overview of Prenatal Tort Liability

The law has been slow to recognize or define the rights of an unborn child or fetus. In 1884, Justice Holmes stated that the unborn child was inseparable from the mother.[19] This concept was precedent for seventy-two years until 1946, when the viability test for the unborn was accepted.[20] This test provided that when a fetus became capable of life outside the uterus, even though unborn, it was no longer considered to be a part of the mother and was, therefore, entitled to rights as an individual.

In 1966, Rhode Island rejected the viability test and extended tort liability for negligence toward an unborn child. *Sylvia v. Gobeille*[21] held that it was not logical to premise negligence for prenatal injuries on the child's capability of maintaining a separate existence from the mother.[22] The court asserted that claims for injuries to the fetus before viability were not necessarily any less meritorious than claims for injuries occurring after viability.[23] Thus, the court expanded the scope of liability for injury to a fetus and provided for a prenatal negligence cause of action against third parties.[24]

Despite *Sylvia*, the courts have been slow to recognize a cause of action by a child against its parents. The parental immunity doctrine provides that children cannot sue their parents in tort for personal injuries arising out of a negligent act.[25] The doctrine precludes these suits because of major public policy considerations.[26]

An Appellate Court of Illinois was among the first to consider a

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19. Dietrich v. Inhabitants of Northampton, 138 U.S. 14, 17 (1884).

20. *Bonbrest*, 65 F. Supp. at 142.

21. 101 R.I. 76, 79, 220 A.2d 222, 223 (1966).

22. *Id.* at 79, 220 A.2d at 224. The court rejected the viability test of *Bonbrest*, and stated that the inquiry should go to causation. That is, the question to be answered in a negligence action is whether the damage can be traced to a wrongful act of another. It should not be based on some standard of fetal viability.

23. *Id.*

24. Another approach taken by the courts is to provide compensation to parents from third parties for prenatal injury that results in loss of enjoyment of a child rather than to allow the fetus to recover. These cases allow compensation for damages to a fetus while not granting it the legal status of a person. Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983). "[T]he parent's loss does not depend on the legal status of the child; indeed the absence of the child is the crux of the suit." *Id.* at 833.

25. Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive*, 21 SAN DIEGO L. REV. 325, 333 n.47 (1984).

26. *Id.* at 335. (among the justifications for the doctrine of immunity of parents to lawsuits by their children are "[s]ociety's concern for the preservation of the family unit . . . [s]ociety's concern for the preservation of parental authority . . . [t]he suggested analogy between the relationship of husband and wife immunity . . . [and] [t]he possibility that frivolous claims might flood the courts.").

cause of action by a child against his parent. In *Zepeda v. Zepeda*,[27] the Illinois court acknowledged injury to a child for being born illegitimate but refused to create a new tort, wrongful life.[28] The court held that because of the vast implications of such a tort, a cause of action for wrongful life should be recognized only after the consequences of such an action were fully studied.[29]

Subsequent to *Zepeda*, the Michigan Supreme Court decided *Grodin v. Grodin*[30] in which a pregnant woman took prescription medication for her own health, resulting in damage to her son's teeth.[31] The court held that the mother could be held liable for injurious neglect to her child for improper prenatal medical care.[32] This holding signaled a departure from parental immunity in tort actions and toward legal recognition of parental responsibility to the unborn child. Additionally, this holding implied that a woman is obliged to regard the health of her fetus above her own health. This concept imposes a very high duty of care upon a pregnant woman, a level of sacrifice required by neither common law nor statute.[33]

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27. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

28. *Id.* at 259, 190 N.E.2d at 858.

29. *Id.* at 260, 190 N.E.2d at 858. The court reasoned:

> That the doors of litigation would be opened wider might make us proceed cautiously in approving a new action, but it would not deter us. The plaintiff's claim cannot be rejected because there may be others of equal merit. It is not the suits of illegitimates which give us concern, great in numbers as these may be. What does disturb us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation. *Id.*

30. 102 Mich. 396, 301 N.W.2d 869 (1981).

31. *Id.* at 399, 301 N.W.2d at 870.

32. *Id.* This holding came after the Michigan Supreme Court overruled the doctrine of intrafamily tort immunity.

> We are persuaded that the modern rule best serves the interest of justice and fairness to all concerned. The case of *Elias v. Collins* . . . which provides for intra-family tort immunity is overruled. A child may maintain a lawsuit against his parent for injury suffered as a result of the alleged ordinary negligence of the parent. *Id.* (citation omitted).

Prior to the *Grodin* decision a California court, in dicta, indicated that in an appropriate case parents of a seriously impaired infant, who, with the full knowledge of the child's likely condition, make a decision to continue the pregnancy, could be held liable for the "pain, suffering and misery" which they caused their offspring. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (1980).

In response to this decision, the California Legislature enacted Civil Code section 43.6, which provides that there can be no action against a parent for deciding to conceive or failing to abort a potentially defective child. Turpin v. Sortini, 31 Cal. 3d 220, 228, 182 Cal. Rptr. 337, 342, 643 P.2d 954, 959 (1982); CALIF. CIVIL CODE § 43.6 (West 1982).

33. Not even good Samaritan statutes require such a high duty of care. The Vermont good Samaritan statute states: "(a) A person who knows that another is exposed to

B. *The State's Interest in Fetal Welfare*

Concurrent with the evolution of fetal tort causes of action has been an expansion of public awareness focusing on fetal rights. The result is that new pressures are being brought on states to implement government protection for fetal health and welfare. *Roe v. Wade*[34] is the landmark case regarding the state's interest in the pregnant woman and the unborn fetus. *Roe* recognized two important and legitimate state interests which are separate and distinct. One is the interest in protecting the health of the pregnant woman. The other is the interest in the "potentiality of human life".[35] The *Roe* Court stated that while there have been numerous moral, philosophical and legal debates over when life begins, the unborn have never been recognized in the law as "persons in the whole sense".[36] Any rights conferred on the unborn are usually premised on a subsequent live birth.[37]

A fetus has no constitutionally protected rights.[38] In *Roe*, the Court stated that no article of, or amendment to, the constitution which uses the word "person" indicates "with any assurance that it has any possible pre-natal application."[39] The Court concluded that "[t]he word 'person' as used in the Fourteenth Amendment does not include the unborn".[40] Thus, because the fetus is not constitutionally protected, it is the state's interest in fetal life, rather than the right of the fetus, which the *Roe* Court said must be examined in the abortion context.[41]

The state's interest in "potential life" becomes compelling at the point of viability.[42] The Court stated that "[t]his is so because the fetus then presumably has the capability of meaningful life outside the womb."[43] The Court failed, however, to explain the rationale supporting viability as the point when the state's interest

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grave physical harm shall, *to the extent that the same can be rendered without danger or peril to himself* . . . give reasonable assistance to the exposed person." Court Procedure, VT. STAT. ANN. tit. 12, § 519 (1973) (emphasis added).

34. 410 U.S. 113 (1973).

35. *Id.* at 162.

36. *Id.*

37. This is illustrated by the right of the unborn to inherit which presumes birth. *See, e.g.*, Cowles v. Cowles, 56 Conn. 240, 13 A. 414 (1888); Also, "[r]elatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." UNIF. PROB. CODE § 2-108 (1982).

38. Harman v. Daniels, 525 F. Supp. 798, 800 (D. Va. 1981) ("[f]etal life has no constitutional rights or protection.").

39. *Roe*, 410 U.S. at 157.

40. *Id.* at 158.

41. *Id.* at 162.

42. *Id.* at 163.

43. *Id.*

in "potential life" becomes compelling.[44]

The abortion of a viable fetus can cause legal and moral problems because it may result in the live birth of an infant, which subsequently dies.[45] Viability is significant because the fetus is being removed from the womb. Also, it may be difficult to distinguish post viability abortion from infanticide.[46]

In a nonabortion context, however, viability is immaterial because the woman does not intend to remove the fetus. Instead, she plans to carry the fetus to term and presumably to act in its best interests.[47] In an abortion context, the state has a compelling interest in preventing the death of a viable fetus. However, death of a fetus is a less likely result of prenatal neglect. Therefore, the state is proportionately less justified in protecting fetal life when mere injury, as opposed to death, is likely to occur. Fetal health can be damaged at any point during a pregnancy,[48] but the fetus is especially susceptible during the first trimester.[49] The state's interest in the *health* of future life[50] is not articulated in *Roe*. Consequently, the logic of using viability, to determine whether the state has a compelling interest in future life, breaks down in the prenatal neglect context.

Moreover, the state's interest in maternal health is at least as important as it's interest in "potential life."[51] *Roe* found maternal

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44. "The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting); "[N]othing in the Supreme Court's opinion provides a satisfactory explanation of why the fetal interest should not be overriding prior to viability," L. TRIBE, AMERICAN CONSTITUTIONAL LAW 927 (1978).

45. "[A] late-term abortion does not, or need not, always result in the destruction of the fetus. On rare occasions a fetus may emerge alive from the operation." Comment, *Medical Responsibility for Fetal Survival Under Roe and Doe*, 10 HARV. C.R.-C.L. L.REV. 444, 445 (1976). *See also* Commonwealth v. Edelin, 371 Mass. 497, 359 N.E.2d 4 (1976).

46. "A premature birth followed by the deliberate killing of what the doctor had removed or delivered would look and sound the same whether the intent to kill had been formed only after the birth was completed or had been present throughout the episode." Tribe, *The Supreme Court, 1972 Term, Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 27 (1973).

47. Comment, *supra* note 6, at 612.

48. "[T]he way in which [the fetus] responds to the mothers' anatomic and metabolic environment is of critical importance at every stage of development in determining if it will be born a healthy, normal child or with congenital deformities." Beal, *supra* note 25, at 359.

49. "The greatest danger of inducing malformations of the fetus is during the first trimester, or third, of the gestation period." *Id.*

50. "In the nonabortion context the state seeks to create fetal rights out of concern for the health of the fetus, and where these right are contingent upon live birth, the health of its future citizens." Comment, *supra* note 6, at 619 n.82.

51. "[T]his Court recognized the undesirability of any 'trade-off' between the woman's health and additional percentage points of fetal survival." Thornburgh v. American College of Obstetrics, 106 S. Ct. 2169, 2183 (1986) (quoting Colautti v. Franklin, 439

health and "potential life" to be important state interests, each becoming "compelling" at a different stage of the woman's pregnancy.[52] In the new situation involving fetal life and criminal prenatal neglect, under *Roe*, the Court would be forced to explain the significance of "potential life" and its relationship to viability. The Court may find that viable "potential life" is irrelevant in a non-abortion context.

C. *The Influence of Medical Technology on Changing Views of Fetal Rights*

Current medical research reveals that fetal development is affected when certain substances are introduced into a pregnant woman's body.[53] Because of this, legal and medical commentators advocate various intrusions into the pregnant woman's privacy to protect the fetus. One commentator[54] proposes enacting statutes which would compel health care professionals to report potential and actual fetal abuse.[55] She asserts that the courts be given broad authority to compel parents to enter drug and alcohol rehabilitation programs, to take protective custody of the fetus, and to provide for civil and criminal proceedings against parents who negligently bring a defective child to term.[56]

Another commentator[57] submits that there be laws preventing pregnant women from obtaining or using alcohol, tobacco, or

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U.S. 379, 400 (1979)).

52. "[T]he State's dual interest in the health of the pregnant woman and the potential life of the fetus were deemed sufficient to justify substantial regulation of abortions in the second and third trimesters." Maher v. Roe, 432 U.S. 464, 472 (1977) (discussing Roe v. Wade).

53. Certain congenital defects can occur as a result of heredity or from certain environmental factors called teratogens. A teratogen is any substance that causes developmental malfunctions or monstrosities. Beal, *supra* note 25, at 358.

> The voluntary introduction by a woman of teratogenic agents into her body during the gestation period constitutes one on the greatest threats [to the fetus] . . . It has been unequivocally established that many drugs cross the placenta and affect the fetus.
>
> Sedatives, tranquilizers, morphine, heroin, and methadone may all lead to physical or mental defects in a child . . . even . . . common aspirin, which was previously believed to be harmless, adversely affects the fetus.
>
> Another common "drug" which may have devastating effect is alcohol . . . the pregnant woman who smokes may also be harming the fetus . . . the effects of sexually transmitted diseases can be harmful to the fetus . . . A number of common diseases contracted by a woman prior to, at the time of, or after conception may cause congenital defects. *Id.* at 360-61.

54. Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 100 (1984).

55. *Id.*

56. *Id.*

57. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 442-43 (1983).

drugs likely to damage the fetus.[58] Others propose amending or interpreting existing child abuse statutes to include unborn children so parents can be punished for behavior which adversely affects the fetus.[59]

These proposals arise from the concept that the fetus is a separate individual with rights of its own. This view has surfaced in recent case law, raising serious questions regarding whether it is advisable to have such strong legal proscriptions affecting personal decision making. In 1981, the Georgia Supreme Court ordered that a Cesarian section be performed on a pregnant woman, to deliver her child.[60] The order was contrary to the religious beliefs of the mother, but was made to protect both the mother and the fetus. The order was based on evidence that there was a 99%-100% chance the baby would die and a 50% chance that the mother would die if vaginal delivery was attempted.[61] Despite the medical statistics, the mother ignored the court order and gave natural birth to a healthy baby.[62]

In another case, a Court detained the fetus of a pregnant California woman who had an undiagnosed psychiatric illness.[63] Accordingly, the woman was hospitalized against her will until she gave birth.[64]

Recently, criminal charges were filed against another California woman in *People v. Monson*.[65] It was alleged that she contributed

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58. *Id.*

59. *Id.*

60. *Jefferson*, 247 Ga. at 88-89, 274 S.E.2d at 459-60. A Cesarian section is a surgical incision of the walls of the abdomen and uterus for delivery of offspring. WEBSTER'S NEW COLLEGIATE DICTIONARY (1976).

61. *Id.*

62. *See* Andrews, *supra* note 11, at 33. *See also* Kolder, Gallagher, Parsons, *Court-Ordered Obstetrical Intervention*, 316 NEW ENG. J. OF MED. 1192, 1196 n.2 (1987) (quoting Berg, *Georgia Supreme Court Orders Caesarian Section—Mother Nature Reverses on Appeal*, 70 J. MED. ASSOC. GA. 451-53 (1981)).

Since this decision, there have been 13 court orders enforced for cesarian sections in 10 states. There have been hospital detentions ordered in two states and intrauterine transfusions in one. *Id.* at 1193.

These courts invoke fetal rights against pregnant women who refuse therapy. For the government to invade a woman's body to advance perceived therapeutic interest of a second patient, the fetus, is analogous to ordering an organ donation over the express refusal of a donor to donate. *Id.* at 1194.

63. *In re* Steven S., 126 Cal. App. 3d 23, 27, 178 Cal. Rptr. 525, 526 (1981).

64. *Id.*

65. People v. Pamela Rae Stewart Monson, No. M-508197 (Calif., filed May 13, 1986).

The criminal complaint formally alleged that "On or about November 23, 1985, PAMELA RAE STEWART, a parent of a minor child, did wilfully omit, without lawful excuse, to furnish necessary medical attendance or other remedial care for her child, in violation of Penal Code section 270."

The defendant suffered from a serious condition of pregnancy called placenta previa. Because the placenta blocks the cervix normal delivery of the fetus is not possible and it

to the death of her child by taking drugs and not following her doctor's orders during pregnancy.[66] This case is the first attempt to criminalize the actions of a mother in regard to her fetus. Although the charges were later dismissed because the statute under which the woman was charged was held not to apply,[67] the case represents a current opinion that the law should go to great lengths to protect the unborn child.[68]

II. CRIMINAL STATUTES

Monson indicates a definite willingness to implement the criminal process in the context of prenatal neglect.[69] However, most criminal statutes do not include the unborn in their definition of "person".[70] Because the due process clause of the U.S. Constitution requires notice to a defendant that a particular act constitutes a crime, this is significant.[71] Without including the unborn in the definition of person, there is no notice that a particular statute applies to a fetus.

The statute under which the defendant in *Monson* was

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may die. If excessive bleeding occurs the fetus may be deprived of oxygen and suffer severe distress.

Here the defendant is alleged to have used amphetamines and marijuana as recently as the morning of her Cesarian delivery, had sexual intercourse with the fetuse's father, failed to take prescribed medication, and had waited 12 hours after first hemorrhaging before seeking medical advise. Fenly, *Several Factors Were Behind Baby's Death*, San Diego Union, Oct. 9, 1986, at A-4, col. 1.

The child was born brain dead on November 23, 1985, and died January 1, 1986. Flynn, *supra* note 3.

66. Begley, *supra* note 12, at 87.

67. People v. Pamela Rae Stewart, No. M-508197 (Calif. Criminal Docket page 14, Feb. 26, 1987).

68. In a reaction to the *Monson* case, a bill has been introduced into the California state legislature by Sen. Ed Royce, R-Anaheim, to give prosecutors authority to prosecute women who harm the unborn. The author of the bill is quoted as saying, "SB 1070 will give prosecutors the language they need, and serve to protect the most vulnerable members of our society." Carson, *Bill Offered Based on Pamela Rae Stewart Baby Case*, San Diego Union, Mar. 7, 1987, at A-3, col. 1.

69. *See supra* notes 65-67.

70. One exception is the California murder statute, CAL. PENAL CODE § 187(a) (West 1987) which states: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." *See generally* Reyes v. Superior Court, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977). In this case a pregnant woman was addicted to heroin and the court held that the word "child" as used in the California child endangering statute did not apply to an unborn child and that the mother's conduct did not constitute felonious child endangering. *But see* Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984), where the court said that the vehicular homicide statute applied to fetuses even though the statute did not explicitly name them as potential victims.

71. *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

charged[72] compels parents to financially support their children and refers to a "child conceived but not yet born [as] . . . an existing person."[73] It makes it a misdemeanor for a parent to willfully fail to provide support for a minor child.[74] The legislature contemplated the obligation of providing for the unborn child's necessities by specifically including them in the statute.[75] Since the child's necessities are provided for indirectly through the mother, penalizing a father for failure to financially support the mother attempts to assure proper care for the unborn child.[76]

The statute was not enacted for the purpose of holding a woman criminally accountable for damage to her fetus,[77] and the court which discharged the defendant in the *Monson* case recognized this.[78] There is no provision in the statute specifically giving notice to a pregnant woman that she can be prosecuted for failing to follow her doctor's advice during pregnancy nor that she can be held criminally accountable for injury to her fetus.[79]

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72. CAL. PENAL CODE § 270 (West Supp. 1987). That section states:

> If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. . . . A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.

The intent of the California Legislature in drafting Penal Code section 270 was to enforce the obligation of support against the lawful parent for every child, legitimate or illegitimate, born or unborn. People v. Sorenson, 68 Cal. 2d 280, 285, 437 P.2d 495, 498, 66 Cal. Rptr. 7, 10 (1968).

73. *Id.*

74. *Id.*

75. People v. Sianes, 134 Cal. App. 355, 358-59 (1933).

76. *Id.* The court stated:

> By its plain provisions this statute has been so extended as to include this responsibility of a father [to provide financial support] to his unborn child. In our opinion it is entirely possible, under the provision of [section 270 if the Penal Code], to so word an information as to allege a public offense with reference to a failure to make the required provision for an unborn child. *Id.* at 359.

77. The language of a statute must sufficiently put a defendant on notice that certain specific conduct will subject him to criminal conviction. Cohen v. California, 403 U.S. 15, 19 (1971).

78. *See supra* note 67 and accompanying text.

79. The language of the CAL. PENAL CODE § 270, *supra* note 72, requiring a parent to "furnish medical attendance or other remedial care for her child" does not explicitly include a woman's medical treatment of herself which might affect the unborn child. A statute's language must give " 'fair notice of the practices to be avoided' " and "liberal effect is always to be given to the legislative intent when possible." *In re* Clarke, 149 Cal. App. 2d 802, 806, 309 P.2d 142, 146 (1957).

"In the limited instances in which the [California] Legislature has extended the protection of the criminal law to the unborn child, it has specially identified the object of its concern." *Steven S.*, 126 Cal. App. 3d at 28, 178 Cal. Rptr. at 527. "[W]hen the Legislature determines to confer legal personality on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms." *Id.* at 29, 178 Cal. Rptr. at 527.

Principles of penal statutory construction require statutes to be construed according to their terms to effect the object of the statute and to promote justice.[80] Accordingly, a defendant should not be required to speculate as to the meaning of a statute.[81] Statutes must be sufficiently explicit so that a reasonable person will be informed as to what behavior is expected or required.[82] Since courts have no authority to legislate, they should interpret statutes with care so as not to contradict the legislative intent behind those statutes.[83] Stretching existing legislation to create new offenses is a usurpation of legislative power and an unwise approach. The extent of state protection of prenatal life should be determined by legislatures only after careful consideration of all legal, constitutional, moral and sociological ramifications.

III. The Legal, Moral and Constitutional Ramifications of Criminalizing Prenatal Neglect

A. Moral and Legal Concerns

The institution of criminal sanctions to control the mother's behavior during pregnancy has potentially serious ethical ramifications. A woman's obstetrician could be required to report a pregnant woman for activities that might endanger her fetus.[84] The physician's role traditionally includes advising the pregnant woman that she may damage her unborn child by engaging in certain behaviors, and that she should avoid those practices that endanger her unborn child.[85] A physician should not be put in the position of coercing the pregnant patient to behave in a certain way. Requiring doctors to police women's behavior during pregnancy could lead to serious intrusions into women's lives. Not only can doctors be wrong,[86] but such policing could lead to govern-

80. *Clarke*, 149 Cal. App. 2d at 806, 309 P.2d at 146.

81. *Id.*

82. *Id.* at 807, 309 P.2d at 147.

83. *See* Keeler v. Super. Ct., 2 Cal. 3d 619, 625, 87 Cal. Rptr. 481, 483, 470 P.2d 617, 619 (1970). In that case, Keeler, who deliberately struck his pregnant wife with the intent to kill her baby, was held not to be guilty of murder because, at the time, Cal. Penal. Code § 187 did not include a fetus in the definition of human being. The court concluded that "judicial enlargement of Section 187 . . . would not have been foreseeable to [Keeler], and hence its adoption at [that] time would deny him due process of law." *Id.* at 639, 470 P.2d at 630, 87 Cal. Rptr. at 494.

84. Doctors have expressed concern that criminal prosecution for women who engage in activities which may cause damage to the fetus may cause doctors to be forced into a negative position of law enforcement. *See* Dalton, *supra* note 13.

85. *Id.*

86. *See supra* note 62 and accompanying text.

"Statistics show that smokers have a higher incidence of miscarriage and delivering underweight babies. But millions of smokers have had healthy babies. In the six known cases of court-ordered Caesareans, hospital records show that three of the women delivered a

ment intrusion into additional areas of privacy, such as a woman's sexual conduct with her husband[87] or a woman's confidential medical records.[88]

The knowledge that personal records might be disclosed could destroy a woman's trust in her doctor and cause her to conceal facts which could be vital to both her health and the health of her fetus.[89] The additional threat of criminal sanctions could actually injure the fetus by frightening the pregnant woman away from all types of prenatal care.[90]

Imposing criminal punishment on a woman for failing to maintain her own health during pregnancy will not necessarily deter her from negligent behavior.[91] When a woman is negligent in regard to her own body, it cannot be presumed that she knows, or has considered, the potential effects of her acts on her fetus. Human beings often behave imperfectly. In the case of the pregnant woman, the harm caused to the fetus by such actions could be accidental, unintended or incidental.[92] A pregnant woman is faced with daily decisions regarding her own health and the health of her fetus. Given the continuum in background, ethics and education, her autonomy in making those decisions should not be dictated by outsiders wishing to impose their values upon her choices.[93]

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healthy baby vaginally before the operation could be performed." Begley, *supra* note 12, at 88.

87. *See* Flynn, *supra* note 3, at A-4, col. 1.

88. The prosecutor in *Monson*, *see supra* note 65, sought a court order to have the defendant's hospital and medical records turned over to trace what occurred between conception and birth of the child. The order was preliminarily granted but then denied. The judge said the prosecution failed to state sufficient cause to obtain the records when balanced against the right to privacy and confidentiality of patient privilege. Himaka, *Judge Orders Release of Baby Death Data*, San Diego Union, Oct. 25, 1986, at B-3, col. 5; Himaka, *Medical Data Refused in Fetus-Abuse Case*, San Diego Union, Nov. 8, 1986, at B-3, col. 1.

89. Zimmerman, *When Mother's Rights, Unborn Child's Collide, Whose Win?*, San Diego Union, Nov. 16, 1986 at C-1, col. 2.; Begley, et al, *supra* note 12.

90. *Id.* The expectant mother's fear could deter her from seeking substance abuse assistance as well.

91. W.R. LA FAVE & A.W. SCOTT, CRIMINAL LAW 211 (1972).

"It has been suggested that the threat of punishment for negligence cannot serve to deter people from negligent conduct; one who is unaware of the risk he is creating cannot be deterred from creating it by thoughts of punishment if he creates it." *Id.*

92. *See* Dalton, *supra* note 13, at A-4, col. 2.

93. *See* Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645 (1977). This article cautions against unwarranted state intrusion into the area of parental autonomy and family privacy regarding parental decision making with regard to health care of children.

"Of all tyrannies a tyranny exercised for the good of its victims may be the most oppressive . . . [T]hose who torment us for our own good will torment us without end for they do so with the approval of their own conscience." *Id.* at 645. *Cf.* Weber v. Stony Brook Hosp., 60 N.Y.2d 208, 456 N.E.2d 1186 (1983) (party residing in another state from and un-

Our legal system presumptively favors parental autonomy and privacy over coercive state intervention in regard to raising children.[94] Nonetheless, because parents may place their children at risk, a policy of minimal state intervention is justified to protect the life of a child.[95] However, this policy does not justify the use of vague and subjective child abuse statutes giving the state unguided discretion to supervene parental decisions with regard to health care for their children.[96]

Some aspects of the policy supporting parental autonomy in child rearing can be extended to include maternal autonomy for the pregnant woman regarding decisions affecting her own body and her fetus. The most significant policy underlying parental autonomy applicable to the pregnant woman is the concern for the emotional and psychological relationship between the parent and child.[97] Since a child must remain with the mother after birth, there must be a healthy prenatal relationship between the mother and her fetus.[98] If the mother feels that having the child deprived her of her autonomy, she may unconsciously blame the child for the intrusion.[99] Further, since the mother is physiologically linked to the fetus, any emotional suffering imposed on the mother by the state will probably cause the child to suffer too.[100] Also, a mother's emotional distress can cause pregnancy disorders, premature delivery, or stillbirth.[101] Because parental autonomy is important to both the mother and her unborn child, there should be strong justifications for intervention before the state is allowed to intervene in prenatal care.[102] Great discretion must be used in any attempt to employ child abuse and similar statutes for the purpose of policing maternal behavior to protect the fetus.[103]

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known by the defendants brought an action against the parents for improper medical care of their severely handicapped infant).

94. Goldstein, *supra* note 93, at 648.

95. *Id.* at 650.

96. *Id.* at 651.

97. Comment, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1051, 1065 (1981).

98. *Id.*

99. *Id.*

100. "Psychologists have demonstrated that a mother can pass on to her fetus her sense of helplessness and shock." *Id.*

101. *Id.*

102. *Id.*

103. *Cf.* American Academy of Pediatrics v. Heckler, 561 F. Supp. 395 (D.D.C. 1983). There, the court refused to sustain a federal regulation which required that hospitals post notices stating that failure to feed and provide for handicapped infants was prohibited by law. The regulations allowed violations to be reported anonymously by a hot line, authorized immediate intervention to protect the life or health of the handicapped infant, and the institutions receiving federal aid were required to give 24-hour access to hospital records and facilities during investigation. *See also* Bowen v. American Hosp.

B. Violation of a Woman's Constitutional Right to Privacy

Justice Brandeis referred to the right to privacy when he stated: "The Makers of our Constitution . . . conferred as against the government, the right to be let alone — the most comprehensive of all rights and the most valued by civilized men."[104] The right to privacy is an integral right which, although not explicitly mentioned in the constitution, has been recognized since 1891,[105] and is found within the penumbras of the Bill of Rights.[106] *Roe v. Wade* found the right to privacy within the fourteenth amendment's concept of personal liberty and within its restrictions upon state action.[107] The right to privacy was explicitly recognized as a fundamental right in *Griswold v. Connecticut*,[108] when a statute prohibiting the use of contraceptives was held to be unconstitutional.[109] Different interests are protected by the constitutionally protected "zone of privacy".[110] As stated by the Supreme Court, "[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[111] The Supreme Court has held that the state may not unjustifiably interfere with personal decisions relating to marriage,[112] procreation,[113] contraception,[114] family relationships,[115] or child rearing and education.[116] The right to privacy also includes the right to bodily integrity.[117]

Ass'n, 106 S. Ct. 2101 (1986) (where parents consent to withholding treatment for a handicapped infant, hospitals may not be denied federal funds on the theory that the denial of treatment is discrimination against the handicapped).

104. Olmstead v. United States, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting).

105. Union Pacific R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

106. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

107. Whalen v. Roe, 429 U.S. 589, 598 n.23 (1977).

108. 381 U.S. 479 (1965). The right to privacy is "retained by the people" through the ninth amendment. *Id.* at 499 (Goldberg, J., concurring).

109. *Id.* at 485.

110. *Whalen*, 429 U.S. at 598.

111. *Id.* at 599-600 n.26.

112. Loving v. Virginia, 388 U.S. 1, 12 (1967).

113. Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

114. Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972).

115. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

116. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

117. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pacific R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

"[E]very human being of adult years and sound mind has a right to determine what shall be done with his own body." Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972) (quoting Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129, 105 N.E.2d 92, 93 (1914) (per Cardozo, J.)).

Cardinal to the private domain of bearing a child is the right to be free from governmental intrusion.[118] Criminalizing maternal behavior because certain medical evidence shows that various teratogens[119] and various maternal actions can cause potential harm to the fetus is analogous to enacting laws that provide for forced sterilization of habitual criminals.[120] Premised on scientific evidence that criminal characteristics were inherited, Oklahoma enacted a statute, later held to be unconstitutional, that provided for sterilization of habitual criminals.[121] On the presumption that sterilization would free society from people with criminal tendencies, the state felt justified in rendering criminals sexually sterile.[122]

Without the benefit of exact scientific investigation statistically demonstrating that particular criminal tendencies were inheritable for a particular class of habitual defendants, the Oklahoma law condemned to sterilization those who were guilty of certain "felonies involving moral turpitude".[123] Analogously, current medical evidence regarding dangers to fetuses, however incomplete and nonconclusive, has prompted commentators to make broad assertions that "the zone of reproductive privacy must be pierced in order for the state to gain control of fetal welfare."[124] These assertions imply that the welfare of the fetus is a sufficient interest, justifying gross intrusions into the private province of a woman's right to bear a child.[125]

When a fundamental right, such as the right to privacy, is infringed upon by the imposition of criminal sanctions, the regulation infringing on the right must withstand strict judicial scrutiny.[126] Such regulation must serve a compelling state interest [127] and must be narrowly written so that it selects the least intrusive

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118. "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis added); *Eisenstadt*, 405 U.S. at 453.

119. *See supra* note 53.

120. *Skinner*, 316 U.S. at 536-37.

121. Id.

122. *Id.* at 536-57. The statute was rejected as unconstitutional on both equal protection and due process grounds. Justice Douglas, who delivered the opinion of the court, said: "We are dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."

123. *Id.* at 536.

124. Shaw, *supra* note 54, at 100.

125. *See supra* note 118.

126. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).

127. *Griswold*, 381 U.S. at 497 (Goldberg, J., concurring) (" 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' "). *Id.* at 497 (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)).

means for the state to achieve its objectives.[128] In other words, the regulation must be necessary,[129] not merely related to serving the government's purported interest.[130]

In order to justify a statute aimed at regulating maternal behavior, the state will likely assert that it has an interest in "potential life", an interest which *Roe* says becomes compelling in the third trimester.[131] While viable "potential life" is a compelling state interest, it has not been demonstrated to be compelling in any context other than the abortion context.[132] In the context of prenatal neglect, the state's interest in potential life may be found not to be compelling at any stage of pregnancy.

Any regulation which infringes on the right to privacy must be the least restrictive means of accomplishing the state's objective.[133] If the objectives sought to be accomplished by a statute can be fulfilled by other means which are less restrictive of the right to privacy, then the statute must be held to be unconstitutional.

Criminalizing maternal behavior is one of the most intrusive means of protecting potential life.[134] It is also the means least likely to achieve this goal.[135] Criminal liability could cause many women to forego medical treatment for fear of prosecution.[136] It could destroy a woman's right to make important personal decisions regarding her body and her liberty. A woman might be forced to undergo surgical procedures against her will to protect the fetus.[137] She could also be forced to choose between the economic necessity of employment and potential criminal liability for working in an unsafe environment.[138]

There are ways of protecting the unborn child which are less restrictive and more effective than imposing criminal sanctions on the mother for her behavior. Educational programs, alerting women to the correlation between substance abuse and birth defects could be expanded.[139] Legislation could require labels on all teratogenic substances, such as alcohol and tobacco, warning that

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128. *Rodriquez*, 411 U.S. at 16.
129. *Id.* at 497 (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).
130. *Id.* at 497.
131. *Roe*, 410 U.S. at 163.
132. *See supra* notes 44-50 and accompanying text.
133. *Griswold*, 381 U.S. at 498.
134. *See supra* note 84-88 and accompanying text.
135. *Id.*
136. *See supra* notes 89-90 and accompanying text.
137. *See* Andrews, *supra* note 11, at 33-34, for a discussion of *in utero* surgery (surgery performed on the fetus while in the mother's womb) and other surgical procedures performed on the mother for the benefit of the fetus.
138. Comment, *supra* note 6, at 607 n.34.
139. Zimmerman, *supra* note 89, at C-4, col. 1.

use of those products might damage the fetus.[140] Obstetricians could be enlisted to further educate and encourage patients toward healthy practices.[141]

Depriving a pregnant woman of her autonomy is a serious and unacceptable infringement on her constitutional rights. By elevating the legal status of the fetus, it is possible that the courts and legislatures will disregard or subordinate the rights of the pregnant woman.[142] Threatening the pregnant woman with criminal sanctions in order to coerce her to take certain medications and explicitly follow her doctor's orders, would deny her the right of free choice and self-determination which is protected by the constitutional right to privacy.[143]

C. *Violation of Women's Equal Protection Rights*

The fourteenth amendment's equal protection clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[144] It protects both women and men from discrimination on the basis of sex.[145] The fourteenth amendment has been interpreted to require that statutes containing gender-based classifications or sex-based discrimination are subject to an intermediate level of judicial review.[146] Under intermediate level scrutiny, a gender-based classification "must serve important governmental objectives and must be substantially related to the achievement of those objectives"[147] in order to overcome an equal protection challenge.

In analyzing a statute which is subject to a gender based classification, the courts determine if the statute is substantially related to the achievement of government objectives in one of two ways.[148]

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140. *Id.*

141. *Id.*

142. "Given the physical reality of the fetus as part of the pregnant woman, there exists an inherent potential for conflict between the autonomy of pregnant women and any 'right' granted the fetus *qua* fetus." Comment, *supra* note 6, at 611.

143. Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 426 (1977). On the issue of the right to privacy in refusing medical treatment the court stated: "The value of life . . . is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice." *Id.*

144. U.S. CONST. amend. XIV, § 1.

145. Craig v. Boren, 429 U.S. 190, 197 (1976).

146. *Id.* This is in contrast to the strict scrutiny test required where the classification affects members of a suspect class. Race is considered to be a suspect class and is always subject to strict scrutiny. The test for strict scrutiny which is applied in cases of racial discrimination is that government objectives must be compelling and necessary to achieve statutory objectives. Korematsu v. United States, 323 U.S. 214, 216 (1944).

147. *Craig*, 429 U.S. at 197.

148. Comment, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149, 151 (1985).

Under the traditional view, the court must discern whether there is a reason to burden one group and not another.[149] If so, then the classification must be shown to be substantially related to the objective it is seeking to achieve.[150] This method of analysis is referred to as the "similarly situated" test.[151] Another view provides an additional test called the "gender-neutral test".[152] This test requires, not only pointing to some difference between men and women permitting different treatment, but requires the state to demonstrate that there are good reasons for not treating men and women identically.[153] The gender-specific statute must promote an interest that would not be promoted by a statute which is gender-neutral.[154]

A statute specifically seeking to punish a pregnant woman for causing injury to her fetus would burden only women.[155] Under an equal protection analysis using the similarly situated test, it must be discerned whether there is a reason to burden only women and not men.[156] The state would assert that a statute that punishes women who fail to adequately care for their unborn children furthers the goal of preventing harm to children. Since only women can become pregnant, then a statute which was gender specific to women would bear a substantial relationship to this interest.[157] However, asserting this justification would imply that the pregnant woman is the only person who is ever responsible for harming her fetus. Actual situations involving fetal injury may vary significantly from this scenario.

The woman might inadvertently be exposed to toxic chemicals in the work place.[158] There is also evidence that living with a cigarette smoker may adversely affect the health of a non-smoking woman and her fetus.[159] Additionally, certain medications pre-

149. *Id.* at 154.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. The introduction of environmental substances into the woman's body, either before or during pregnancy, may affect the fetus. Meier, *Companies Wrestle with Threats to Workers' Reproductive Health*, Wall St. J., Feb. 5, 1987, at 25, col.4. *Id.* It has been discovered that acid used by semiconductor makers in etching computer chips causes a significant increase in miscarriages among pregnant women workers. Other threats to reproductive health include glycol ethers and arsine gas used to produce computer chips. Video display terminals which emit certain wavelengths of ionizing radiation are also suspect. *Id.*
159. Choney, *Smoking: A Marital Minefield*, San Diego Union, Feb. 1, 1987, at D-1, col. 2. Non smokers have an increased risk of getting lung cancer just by living with

scribed for the pregnant woman's personal health can cause damage to the fetus.[160] Singling out a woman's actions, as the direct cause of harm to a fetus would be unrealistic and could be inconclusive because of the number of uncontrolled variables. Even if the woman's pregnancy is medically supervised, there is the possibility of incompetent medical supervision by doctors and health care facilities. Many factors, uncontrollable by the mother, may cause fetal damage. Therefore, burdening only women with criminal exposure is not substantially related to the protection of fetal health.[161]

Using the gender-neutral equal protection test, the state would have to justify punishing only women and not men, for causing harm to the fetus.[162] The state would have to demonstrate good reasons for not holding a man accountable for any damage that may accrue to the unborn fetus by his actions.[163] If it were shown that the man's actions caused harm to the fetus, this would be impossible. There would be no justification for punishing the woman and not punishing the man. Likewise, if punishing the woman furthered the goal of protecting the fetus, not punishing the man would hinder that goal. Any statute which would penalize only women would, therefore, fail under a gender-neutral test.[164]

There is another possibility. Statutes authorizing punishment for pregnant women who harm their fetuses could be classified on the basis of pregnancy and not gender. Discrimination on the basis of pregnancy is not sexual discrimination,[165] even though Congress has rejected this position in the context of employment discrimination.[166] If the maternal criminal liability statutes were classified

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cigarette smokers and inhaling cigarette fumes. A Danish study shows that men who smoke during their wives' pregnancies risk having their babies born at reduced weight. *Id.*

160. *See supra* notes 30-31 and accompanying text.

161. Comment, *supra* note 148, at 155.

162. *Id.* at 156.

163. In the *Monson* case, *see supra* note 65, the defendant allegedly had sexual intercourse with her husband after she started hemorrhaging, but her husband was not charged with any crime. *See also supra* note 159 (smoking by husbands linked to underweight babies).

164. Comment, *supra* note 148, at 156. Of course, statutes could always be drafted to include both sexes to prevent this argument from being made.

165. General Elec. v. Gilbert, 429 U.S. 125 (1978); Gedulig v. Aiello, 417 U.S. 484, 496-97 (1974).

166. Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1982) (codified at 42 U.S.C. § 2000e(k)). The Pregnancy Discrimination Act reads in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

on the basis of pregnancy, and not gender, they would be subject to an even lower level of judicial review than intermediate scrutiny.[167] This classification would make it difficult to show that such statutes violate equal protection.

A further equal protection implication arising from criminalizing prenatal negligence is that pregnant women could be denied the choice to refuse certain medical care. All men, even criminal suspects[168] and involuntarily committed mental patients,[169] can refuse medical care.

In the final analysis, it is conceivable, that even under the intermediate standard of review, the state would be able to show that a law which punishes a women for failing to protect the health and welfare of her fetus is substantially related to the important governmental objective of protecting potential life. It is possible that the court could uphold unequal treatment of men and women based on reproductive differences despite the potential harm to women.[170] Rather than looking to criminal liability and punishment as the means for preventing injury to unborn children, other more effective and less intrusive approaches are available.

IV. PROPOSAL

It is tragic that children are born damaged due to prenatal negligence. However, imposing criminal liability on a woman for prenatal negligence is unlikely to prevent this tragedy. For reasons often beyond their control, many women receive little or no prenatal care[171] and no education regarding the health of their unborn child. Unless all women receive prenatal care and education, they should not be held criminally liable for the damage caused by their negligence.

There are a number of programs which could be implemented to protect potential life that assist the mother as well. States could expand current comprehensive prenatal programs to include a fo-

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167. Comment, *supra*, note 148, at 150.

168. Rochin v. California, 342 U.S. 165, 172 (1952) (forcible pumping of a criminal's stomach to obtain evidence violates due process).

169. Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981), *vacated on other grounds*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d at 266, 268 (3d Cir. 1983) (reaffirming constitutional right to refuse drugs and finding that the substantial right to refuse medical treatment derives from the constitutional right to liberty and it is not extinguished when an individual is committed to a mental institution).

170. *See* Comment, *supra* note 6, at 621.

171. "Countrywide 9.5% of the women surveyed had received no prenatal care." Dalton, *Growing Crisis Seen in Lack of Prenatal Care*, San Diego Union, Apr. 2, 1987, B-12, col. 2. "As many as 15 percent of the 4000 women who have babies in [San Diego] [C]ounty have no prenatal care." Duerksen, *Area Faces Crises in Prenatal Care for the Poor*, San Diego Tribune, Sept. 25, 1986, at B-1, col. 3.

cus on the potential dangers to fetuses. Programs assisting women to overcome addictions and other unhealthy practices should be made available to all expectant mothers.[172] States could also expand educational programs in junior and senior high schools. Additionally, legislation requiring warning labels on teratogenic products, particularly alcohol could be passed. Higher standards of safety could be imposed in work places where teratogens create hazards for potential life.[173]

A pregnant woman who has chosen to carry her fetus to term usually wants a healthy baby. Penalizing a woman for negligence, caused by her ignorance, would not further the state goal of protecting the unborn. Educating a woman to avoid negligent mistakes would.

CONCLUSION

Criminal liability for prenatal neglect raises serious legal and moral issues. While one court has considered this issue,[174] there has been no legislation in this area. Criminalizing prenatal neglect threatens a woman's right to privacy,[175] bodily integrity,[176] parental autonomy[177] and equal protection.[178] Statutes which violate these rights should accordingly be subject to strict judicial scrutiny.

Even assuming that the state has a compelling interest in protecting fetal health, criminal liability is not the least intrusive means by which to achieve this interest. There are less intrusive methods of protecting the unborn. These methods include access to government funded comprehensive prenatal care and educational programs, the requirement of safe work environments for both men and women, and the use of warning labels on teratogens.

Criminal sanctions for prenatal negligence would violate women's rights and would fail to serve the purported purpose of protecting the fetus. Programs assisting both the mother and her fetus would solve problems of prenatal neglect without causing an

172. While state prenatal programs do exist many are not equipped to handle the number of women requiring their services. *See* Moore, Origel, Key, Resnik, *The Perinatal and Economic Impact of Prenatal Care in a Low-Socioeconomic Population*, 154 AM. J. OBSTET. GYNECOL. 29 (1986).

173. *See supra* note 158 and accompanying text.

174. *See supra* notes 2, 3 and 65.

175. *See supra* notes 104-43 and accompanying text.

176. *Id.*

177. *See supra* notes 93-103 and accompanying text.

178. *See supra* notes 144-70 and accompanying text.

unnecessary conflict between a mother's rights and the state's interest in the health of the unborn.

*Rebecca Manson**
*Judy Marolt***

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