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# ARTICLES

## PROTECTING THE FETUS FROM MATERNAL DRUG AND ALCOHOL ABUSE: A PROPOSAL FOR TEXAS

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## I. INTRODUCTION

"Laura" is a young woman from a comfortable middle-class, upwardly mobile family that has traditional values and a strong Christian faith. Her relatives are white-collar professionals, close-knit, and career oriented. Her mother describes Laura as "feisty" and strong

willed. Laura's father is dead. Laura's incorrigibility, chronic school absenteeism, alcohol abuse, and alleged promiscuity were manifest by age twelve, when she was placed in an alcoholic rehabilitation center. At seventeen, she was jailed as a runaway. Laura then established an entrenched pattern, living from one impromptu situation to the next.

Laura's first child, a boy, was born late in 1986. Six months later, Laura left her grandparents, with whom she and the baby had been living, and went to work as a dancer at a topless bar. Not long afterwards, she and her son entered a battered women's shelter following a beating from her boyfriend.

In 1988, during the fourth month of her second pregnancy, Laura was arrested for prostitution. This was her third prostitution-related offense. Upon release from jail, Laura left her first child with a family she met at a bowling alley.

During the sixth month of her pregnancy, Laura received a terrible beating from her boyfriend. She suffered severe bleeding, cramping, and was hospitalized. Nonetheless, Laura several months later gave birth to another son, who at birth exhibited symptoms of drug withdrawal.

Laura was arrested on a fourth prostitution charge in 1988 and left her two sons with her grandmother, who contacted the police. They took the boys to the local children's shelter and the state human services department assumed custody.

Caseworkers thoroughly informed Laura about how she could regain custody of her sons. However, she would disappear for weeks, occasionally call her grandmother, but refuse to disclose her whereabouts. Today, she insists that caseworkers, the district court judge, and her court-appointed attorney were actively conspiring to sell her sons.

Early in 1989, Laura was alleged to be living in a part of her city infamous for its drug culture. This is where she became pregnant for the third time, allegedly by a man who raped and beat her while her pimp held her captive at gunpoint. She also was the victim of several major beatings.

Laura, upon the insistence of an advocate with the local AIDS task force, was taken to a public hospital for treatment of festering leg lacerations. At the hospital, the blood tests revealed that cocaine was in her system. During this period, Laura refused to attend prenatal counselling sessions. Later, in the seventh month of her third pregnancy, Laura again was arrested for prostitution.

Laura subsequently delivered a girl at a local hospital. The next day, the district court issued an emergency order to remove the baby from the mother. This was accomplished with the assistance of the police department and hospital staff and was extremely traumatic for all. At the follow-up hearing held after the issuance of the emergency order, Laura appeared and was arrested on an outstanding prostitution warrant. She remains in jail.

It is behavior like that of the hypothetical "Laura" that we address in this article. Like many chronic cocaine/crack addicts, women such as "Laura" have not matured during drug addiction and are themselves still children. Addiction has not only left them unable to deal with underlying psychiatric problems, but has enhanced their paranoia and distrust of authority. Although subpoenaed, they appear in court only when attached or arrested. When offered drug treatment services and prenatal care or education, they promise to attend until transportation is offered and then stare icily back in silent refusal. Commitment under the state mental health code as drug-addicted individuals is not workable.

"Laura's" case, and thousands like it, demonstrate that it often is possible for the state to show a compelling interest in a viable fetus borne by an irresponsible mother and that intervention is necessary to prevent serious injury to the fetus. Texas must allow intervention by the least invasive means available, balancing maternal and fetal rights in favor of the viable fetus. When the fetus is not viable, or when there is no risk of serious injury, the mother's constitutional rights to privacy and liberty will often prevail. However, we can no longer ignore or refuse to confront behavior such as Laura's.

Historically, the American legal system has regarded the fetus[1] as a mere part of the mother and has accorded it no rights apart from those enjoyed by the mother.[2] In 1973, the United States Supreme

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1. This article will continually refer to the unborn as a "fetus." Although various terms — such as potential child, unborn child, and unborn — are employed to describe the fetus, "[i]t can be said that referring to a fetus as a child carries with it an appeal to the emotional attachment felt by adults toward young children and babies." Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1, 1 (1984). Therefore, in the interests of objectivity and readability the term "fetus" will be used.

2. *See* Dietrich v. Inhabitants of Northhampton, 138 Mass. 14, 17 (1884). In *Dietrich*, a pregnant woman brought an action after she slipped and fell on a negligently maintained city sidewalk. *Id.* at 14-15. As a result of the fall, the woman suffered a miscarriage of her five-month old fetus. Writing for the Massachusetts Supreme Court, Justice Oliver Wendell Holmes disallowed the mother's recovery for the wrongful death of the fetus and stated, "[A]s

Court adopted this view in its controversial *Roe v. Wade*[3] decision, which conferred upon women a constitutional right to obtain an abortion.[4] The *Roe* decision, however, has generated many challenges, the majority of which are based on the belief that the fetus is a person deserving of legal protection.[5] Indeed, as the medical profession improves its ability to detect, treat, and prevent prenatal injuries,[6] a troublesome question has arisen over whether the law should recognize a fetus as a legal entity with separate protectable rights.[7]

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the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by [the mother]." *Id.* at 17; *see also* Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 599 (1986)(our legal system historically treated fetus as part of woman bearing it and afforded it no rights separate from hers); Comment, *A New Crime, Fetal Neglect: State Intervention to Protect the Unborn—Protection at What Cost*, 24 CAL. WEST. L. REV. 161, 161 (1988) [hereinafter *A New Crime*] ("Historically, the fetus has not had rights apart from or conflicting with those of the mother").

3. 410 U.S. 113 (1973).

4. *Id.* at 154. In *Roe*, the Supreme Court held that a fetus is neither a person under, nor comes within the protection of, the fourteenth amendment. *Id.* at 158. The Court further held that a woman enjoys a constitutional right to determine whether to terminate or continue her pregnancy. *Id.* at 154. In reaching this conclusion, the Court observed that "the 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." *Id.* at 161.

5. *See* Comment, *Unborn Child: Can You Be Protected?*, 22 U. RICH. L. REV. 285, 285 (1988) [hereinafter *Unborn Child*] (since *Roe*, abundant controversy ensued regarding state's legal ability to protect fetus); *see also* Note, *Lifesaving Medical Treatment For the Nonviable Fetus: Limitations on State Authority Under* Roe v. Wade, 54 FORDHAM L. REV. 961, 961 (1986) [hereinafter *Limitations on State Authority*] (*Roe* challenges grounded in belief fetus is a person). During the years since *Roe* was decided, the Court has heard more than 15 cases concerning the constitutionality of municipal, state, and federal legislative acts regulating abortion. Note, *Livesaving Medical Treatment For The Nonviable Fetus: Limitations On State Authority Under* Roe v. Wade, 54 FORDHAM L. REV. 961, 961 n.2 (1986) [hereinafter *Limitations on State Authority*]. Some of the more direct federal challenges include a proposal for a "human life amendment" which would broaden the definition of "person" under the fourteenth amendment to include the fetus from the point of conception. *Id.* at n.3.

The most recent challenge to *Roe* is the Missouri case of *Webster v. Reproductive Health Servs. of Missouri*, which the Supreme Court decided last summer. __ U.S. __, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). The *Webster* case involved the constitutionality of a Missouri statute which defines life as beginning the moment of conception and places extensive restrictions on public hospitals, public employees and doctors performing abortions. *Id.* at __, 109 S. Ct. at 3047, 106 L. Ed. 2d at 418.

6. *See* Note, *Constitutional Limitations On State Intervention In Prenatal Care*, 67 VA. L. REV. 1051, 1051 (1981) [hereinafter *Limitations on State Intervention*].

7. A survey of recent literature in the area of fetal rights reveals that a number of commentators have posed this formidable question. *See, e.g.*, Stearns, *Maternal Duties During Pregnancy: Toward a Conceptual Framework*, 21 NEW ENG. L. REV. 595, 595 (1985-86) [hereinafter *Maternal Duties*] (as medical science improves treatment of fetal maladies, courts

Currently, the state may prohibit abortion of a viable fetus.[8] In post-viability abortions the state's interest in potential life is compelling and state regulation protective of the fetus is legally justified.[9] The state may not, however, protect the viable fetus at the expense of the mother's life or health.[10] Although current medical evidence of maternal health risks and fetal viability is inconsistent with the *Roe* trimester framework for state regulation, viability remains the point at which the state may prevent abortion unless the mother's life or health is in jeopardy.[11] Because the rigid trimester analysis has proved to be unsound in principal and unworkable in practice, the state now may require viability to be determined by a physician applying his reasonable professional judgment.[12]

Since 1973, the limits of fetal viability have been pushed backward by the progressive development of neonatal intensive care.[13] Thus far, only a few infants born at twenty-three weeks gestation with birth weights between 500 and 600 grams have survived,[14] but their numbers should increase eventually. Studies demonstrate that infants born at less than twenty-five weeks gestation with birth weights between 500 and 1250 grams have a twenty percent chance of survival.[15]

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must question whether pregnant woman is one patient or two); *Limitations on State Intervention*, *supra* note 6, at 1051 (capacity to detect and prevent birth defects and prenatal injuries raises issue of legal response when parents inadequately care for their unborn children); *Unborn Child*, *supra* note 5, at 285 (continuing medical advancement of prenatal care raises question of when state may intervene to protect unborn child from abuse and neglect).

8. Roe v. Wade, 410 U.S. 113, 163 (1973).

9. *Id.*

10. *Id.*

11. Webster v. Reproductive Health Servs. of Missouri, __ U.S. __, 109 S. Ct. 3040, 3055, 106 L. Ed. 2d 410, 434 (1989).

12. *Id.* at __, 109 S. Ct. at 3043, 106 L. Ed. 2d at 420.

13. *Id.* at __, 109 S. Ct. at 3044, 106 L. Ed. 2d at 421.

14. Dunn & Stirrat, *Capable of Being Born Alive?*, I LANCET 553, 554 (1984).

15. *Id.* at 554. The authors concluded that it is the extreme immaturity of the lungs and other vital organs before 22 weeks' gestation which makes an extremely premature infant's survival unlikely without reliance on complex technology. *Id.*; *see also* Milner & Beard, *Limit of Fetal Viability*, I LANCET 1079 (1984). Surfactant, a substance that assists the respiratory process, appears to be vital for the survival of the premature infant. J. LANGMAN, MEDICAL EMBRYOLOGY 209 (4th ed. 1981). When insufficient amounts of surfactant are present, the air-water (blood) surface membrane tension becomes high and the risk that part of the alveoli will collapse during expiration is substantial. As a result, respiratory distress may develop, which is believed a common cause of death in the premature infant. *Id.* at 209-10; *see also* Wigglesworth & Desai, *Is Fetal Respiratory Function A Major Determinant Of Prenatal Survival?*, I LANCET 264 (1982). Medical science eventually should yield heroic measures for sustaining the life of an extremely premature infant, such as insertion of artificial surfactant

The chance of survival for infants with birth weights between 750 and 1000 grams is approximately 56 percent[16] and is 85 percent for infants with birth weights between 1000 and 1500 grams.[17] Population data indicates that infants weighing less than 700 grams at birth generally are not viable.[18] By contrast, the neonatal survival rate at 26 weeks' gestation recently was reported to be 45 percent,[19] which supports the conclusion that aggressive intervention on behalf of such infants is reasonable.[20]

In recent years, some courts and a few legislators have responded to the question of fetal status by broadening the scope of protection afforded the fetus.[21] Specifically, courts have begun to recognize and act on the medical and legal beliefs that a fetus/child has a right to be born healthy and that expectant mothers have a corresponding duty to refrain from conduct that jeopardizes that right.[22] Courts have re-

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into the lungs of the neonate. Fuijwara, Maeta, Chida, Morita, Watabe & Abe, *Artificial Surfactant Therapy In Hyaline-Membrane Disease*, I LANCET 55, 59 (1980).

16. Ross, *Mortality And Morbidity In Very Low Birthweight Infants*, 12 PED. ANNALS 32, 37 table 1 (1983).

17. *Id.* at 38.

18. *Id.*; *see also* Campbell, *Which Infants Should Not Receive Intensive Care?*, 57 ARCHIVES OF DISEASE IN CHILDHOOD 569, 570 (1982); Hack, Fanaroff & Merkatz, *The Low Birth Weight Infant—Evolution Of A Changing Outlook*, 301 NEW ENG. J. MED 1162, 1164 table 2 (1979).

19. Herschel, Kennedy, Kayne, Henry & Cetrulo, *Survival Of Infants Born At 24 To 28 Weeks' Gestation*, 60 OBSTET & GYNECOL. 154, 157 (1982).

20. *Id.*; *see also* Levi, Taylor, Robinson & Levy, *Analysis of Morbidity and Outcome of Infants Weighing Less Than 800 Grams at Birth*, 77 SOUTH MED. J. 975, 977-78 (1984); Boehm, *Presidential Address: Can Society Afford Perinatal Health Care?* 76 SOUTH MED. J. 155, 156 (1983).

21. *See* Note, *Developing Maternal Liability Standards for Prenatal Injury*, 61 ST. JOHN'S L. REV. 592, 593 (1987) [hereinafter *Maternal Liability*]; *see also* Johnsen, *supra* note 2, at 599 (in recent years courts and legislatures have "increasingly granted fetuses rights traditionally enjoyed by persons").

22. *See Limitations On State Authority, supra* note 5, at 961-66. Advancing medical technology has created a new concept adopted by some medical and legal authorities which views the fetus as a patient. "The implication of this view is that the fetus is ethically, if not legally, entitled to medical care." *Limitations on State Authority, supra* note 5, at 961-62; *see also* 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, 325 (1984)(arguing that because medical profession recognizes fetus as individual patient, courts should protect prenatal rights). Some legal commentators have proposed various standards of duty to which an expectant mother should be held. *See, e.g., Maternal Liability, supra* note 21, at 610-11 (suggesting standard of intentional or reckless disregard of life and health of fetus); Comment, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47, 90 (1978) [hereinafter *Prenatal Injury*] (arguing mother should be held to standard of reasonably prudent expectant mother). Some courts

acted either proscriptively by preventing an expectant mother from harming her fetus,[23] or have denied mothers custody of their children because of prenatally inflicted abuse.[24] As this emerging trend toward the creation and protection of fetal rights continues, courts increasingly will entertain lawsuits to enjoin maternal conduct that is likely to permanently injure or kill the fetus.[25]

Therefore, in this article we propose that society has an obligation to protect itself by ensuring that each viable fetus, when born, arrives free of preventable disabilities caused by the wilful or negligent acts of the mother. We recognize the trend of court decisions to expand fetal rights. We do not intend to enter the right to life or freedom of choice debate. We are not advocating restricting the consumption of caffeine, nicotine or social drinking by state action. We are solely concerned with pregnant women, who, like "Laura," have entered a course of behavior that subjects their fetuses to an extreme health risk. Generally, this behavior involves the use of illicit substances, the failure to take medication for mental health needs or engaging in physical acts likely to cause fetal injury with long-term consequences. Due to increased drug use among women, courts across the country are confronted with the challenge of protecting future citizens from pre-birth injuries.

Some 375,000 children this year—one in nine births—will have entered the world with cocaine, PCP, marijuana, or another drug in their systems.[26] According to a study released in September, almost 15 percent of pregnant women abuse drugs during their pregnancies.[27] Everyday in San Antonio, medical staffs work to help addicted infants withdraw from their mother's addiction.[28] Even the rendering of

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have recently responded by recognizing a duty on behalf of an expectant mother to avoid behavior that would injure her fetus. *See infra* notes 116-121 and accompanying text.

23. *See infra* notes 116-121, 180-195 and accompanying text.

24. *See infra* notes 116-121, 180-195 and accompanying text.

25. *See Maternal Duties, supra* note 7, at 595. As they face the increasing number of "fetal rights" suits, courts will be forced to address numerous legal issues. Among these will be the woman's constitutional rights to privacy, to bodily integrity, to freedom of religion, and the state's tort and equity claims on behalf of the fetus. *Maternal Duties, supra* note 7, at 595.

26. *A First: National Hospital Incidence Survey* in National Association for Perinatal Addiction Research and Education, *The Dangers of Cocaine Use in Pregnancy* Fact Sheet (Sept. 1989).

27. Sherman, *Keeping Babies Off Drugs*, Nat'l L.J., Oct. 16, 1989, at 28, col. 1.

28. Linsalata, *Area Babies Pay High Price for Cocaine Abusing Moms*, San Antonio Light, Sept. 7, 1989, at A1.

such tragedies as statistics should trouble us; these are individuals, not numbers, starting life at a disadvantage.

## II. MEDICAL EVIDENCE

Medical science in recent years has made remarkable advances toward an understanding of fetal development and prenatal care.[29] Current medical research indicates that fetal development is affected not only by heredity, but also by the pregnant woman's ingestion of particular substances known as "teratogens."[30] Teratogens are broadly defined to include "any substance that causes developmental malfunctions or monstrosities."[31] The links between maternal substance abuse through ingestion of teratogens and fetal defects are explored in the following section.

### A. *Alcohol*

Alcohol is a teratogen whose use by pregnant women can cause a variety of abnormal and devastating effects in the fetus.[32] Excessive alcohol consumption during the gestation period may result in a pattern of structural anomalies in the fetus known as "fetal alcohol syndrome" (FAS).[33] A fetus diagnosed as having FAS will characteristically suffer from mental and physical growth retardation, impairment of intellectual and behavioral development skills, and sev-

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29. *See Limitations on State Intervention, supra* note 6, at 1051 (medical profession has greatly improved its ability to detect, treat, and prevent prenatal injuries).

30. Beal, *supra* note 22, at 358-59. The period in which the fetus develops is normally referred to as the "gestation period." Beal, *supra* note 22, at 359. During this period, a fetus can be harmed by a physical injury inflicted upon the mother or by the mother's ingestion of a teratogenic agent which will be transmitted to the fetus. While the fetus has an independent physiological identity, the way it responds to its mother's anatomic and metabolic make-up is of vital importance in determining whether it will be born healthy or with congenital deformities. Beal, *supra* note 22, at 359; *see also* Johnsen, *supra* note 2, at 605-06 (virtually all acts of pregnant woman affect fetus since fetus totally dependent on mother.)

31. Beal, *supra* note 22, at 358.

32. Beal, *supra* note 22, at 360; *see also* Lipson, *Contamination of the Fetal Environment-A Form of Prenatal Abuse*, in CHILD ABUSE 42 (K. Oates ed. 1982) (reprinted in Myers, *supra* note 1, at 31 n.142). Despite references in "Greek mythology, the Bible and literature" that alcohol could be harmful to the fetus, only within the last two decades has medical science acknowledged that alcohol may have an adverse impact on the fetus. Beal, *supra* note 22, at 360.

33. *See* Note, *Maternal Substance Abuse: The Need To Provide Legal Protection For The Fetus*, 60 S. CAL. L. REV. 1209, 1211 (1987) [hereinafter *Maternal Substance Abuse*].

eral other related developmental disorders.[34]

1. Growth Retardation

Most medical experts agree that fetal growth retardation is a common characteristic associated with prenatal alcohol consumption.[35] Growth retardation can be observed in the length, weight, and head circumference of the fetus, and normally varies according to the degree of prenatal alcohol consumption.[36] Growth retardation resulting from FAS is an important concern because it heightens the risks of perinatal death, delayed motor skills development, speech disorders, sleep disturbances, mental retardation, and postnatal growth retardation.[37] Studies also have indicated both that alcohol's effect on growth retardation is most severe during the third trimester, and, that by interrupting alcohol use at any point before this time, growth retardation can be substantially reduced.[38]

2. Intellectual and Behavioral Development Skills

After Down's Syndrome and spina bifida, FAS is the third largest cause of mental retardation in the United States, and is frequently the

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34. *See Maternal Substance Abuse, supra* note 33, at 1211-12. The Fetal Alcohol Study Group of the Research Society on Alcoholism has identified three criteria for determining if an FAS diagnosis is indicated:

(1) Prenatal and/or post natal growth retardation (weight, length, and/or head circumference below the tenth percentile when corrected for gestation age).

(2) Central nervous system involvement (signs of neurological abnormality, developmental delay, or intellectual impairment).

(3) Characteristic facial dysmorphology with at least two of these three signs: (a) microcephaly (head circumference below the third percentile), (b) micro-ophthalmia and/or short palpebral fissures, (c) poorly developed philtrum, thick upper lip, and/or flattening of the maxillary area.

*Maternal Substance Abuse, supra* note 33, at 1211-12.

35. *Maternal Substance Abuse, supra* note 33, at 1211-12.

36. *Maternal Substance Abuse, supra* note 33, at 1212-13.

37. *Maternal Substance Abuse, supra* note 33, at 1212-13. While the effects of alcohol use on postnatal growth retardation are unclear, studies have demonstrated that fetal alcohol infants "tend not to thrive." *Maternal Substance Abuse, supra* note 33, at 1212-13. Furthermore, alcohol's effects on prenatal and postnatal growth retardation have been proven to be dose related. Therefore, the risk that a fetus will suffer from growth retardation rises as the mother's alcohol consumption increases. *Maternal Substance Abuse, supra* note 33, at 1212-13.

38. *Maternal Substance Abuse, supra* note 33, at 1212-13; *cf.* Beal, *supra* note 22, at 359 (mother's ingestion of teratogenic agents throughout gestation period can cause growth retardation in fetus).

most severe disorder detected in fetal alcohol infants.[39] A number of studies have indicated that I.Q. scores of FAS children are significantly lower than the average.[40] Moreover, several behavioral development problems have been observed in FAS children, including irritability, hypersensitivity to sound, hyperactivity, habituation to repetitive stimulation, and psychomotor development disorders.[41] One follow-up study involving nearly 500 children conducted to assess alcohol's effect on behavioral deficits during a child's first few years of life concluded that "alcohol-related behavioral effects are at least as strong at four years of age as at birth, indicating that *in utero* alcohol exposure has long-term consequences."[42]

3. Related Disorders

A number of other identifiable disorders have been reported in FAS children.[43] Many abnormal craniofacial characteristics appear in FAS infants, the most common of which is microcephaly or an underdeveloped skull.[44] Microcephaly reflects stunted brain growth in the fetus and frequently is associated with mental retardation.[45] Cardiac defects debilitate a large percentage of FAS children.[46] Furthermore, maternal alcohol consumption during pregnancy has been linked with spontaneous abortion and increased risks of a stillbirth.[47]

By 1979, over 600 cases of FAS were reported worldwide.[48] One study estimates that one of every 750 children born in the United States suffers from FAS.[49] Conservative calculations indicate that

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39. *Maternal Substance Abuse, supra* note 33, at 1214.

40. *Maternal Substance Abuse, supra* note 33, at 1214. A number of I.Q. studies carried out with FAS infants indicated significant variances from average I.Q.'s, "up to two standard deviations, with an average I.Q. of 65." *Maternal Substance Abuse, supra* note 33, at 1214.

41. *Maternal Substance Abuse, supra* note 33, at 1214.

42. *Maternal Substance Abuse, supra* note 33, at 1214-15.

43. *Maternal Substance Abuse, supra* note 33, at 1216.

44. *Maternal Substance Abuse, supra* note 33, at 1215; *see also* Lipson, *supra* note 32, at 42 (FAS children are underdeveloped at birth, grow poorly, and have a distorted facial appearance due to small facial bones and eyes); Beal, *supra* note 22, at 360 (heavy alcohol intake can cause physical and mental retardation in craniofacial region).

45. *Maternal Substance Abuse, supra* note 33, at 1215.

46. *Maternal Substance Abuse, supra* note 33, at 1216 n.44 (incidence of cardiac disorders ranges from 30-59 percent and varies with severity of FAS); *see also* Myers, *supra* note 1, at 31 n.142 (malformations among FAS infants include heart disease, mental retardation and cerebral palsy).

47. *Maternal Substance Abuse, supra* note 33, at 1216.

48. *Maternal Substance Abuse, supra* note 33, at 1212.

49. *Maternal Substance Abuse, supra* note 33, at 1212. In fact, many cases of FAS may

more than 1800 new FAS cases will arise annually in the United States alone.[50] Although all reported FAS statistics occurred in children born to mothers who drank excessively throughout pregnancy,[51] studies estimate that in the United States as many as nine percent of pregnant women continue to drink excessively during pregnancy.[52] Moreover, some evidence suggests that a fetus may be harmed by very small doses of alcohol during pregnancy and by excessive alcohol use that occurred prior to pregnancy.[53] With this strong correlation between heavy alcohol use and prenatal/postnatal developmental problems it seems evident that maternal alcohol abuse should be regulated.[54]

## B. *Drugs*

Illegal drugs represent another category of teratogens which, if ingested by a pregnant woman, can cause serious injury to the developing fetus.[55] Medical science has unequivocally established that certain drugs enter the mother's placenta and adversely affect the fetus.[56]

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go unreported because hospital personnel fail to accurately diagnose children with FAS, and because many of the symptoms may be difficult to diagnose at birth. *Maternal Substance Abuse*, *supra* note 33, at 1212. One researcher reported statistics of severely affected babies to be about two out of every 1,000 live births. *See* Myers, *supra* note 1, at 31 n.142.

50. *Maternal Substance Abuse*, *supra* note 33, at 1212. Children exhibiting some FAS symptoms are classified as having "possible fetal alcohol effects" or "alcohol related birth defects." *Maternal Substance Abuse*, *supra* note 33, at 1212 n.16. These cases are projected to run at a rate of 36,000 each year. *Maternal Substance Abuse*, *supra* note 33, at 1212 n.16.

51. *Maternal Substance Abuse*, *supra* note 33, at 1212.

52. *Maternal Substance Abuse*, *supra* note 33, at 1210-11 nn.5,6. (reporting statistics concluding that up to 10 percent of pregnant women drink heavily with heavy drinking defined as a minimum daily average of one and one-half drinks per day).

53. Johnsen, *supra* note 2, at 606 n.32; *see also* Beal, note 22, at 360-61.

54. *Maternal Substance Abuse*, *supra* note 33, at 1211-15.

55. *See* Beal, *supra* note 22, at 360 (medical science has repeatedly demonstrated that certain drugs harm the developing fetus).

56. Beal, *supra* note 22, at 360; *see also Prenatal Injury*, *supra* note 22, at 73-74 (placental membrane permeable to passage of illegal, prescription and non-prescription drugs). Although the focus of this article is on illegal drugs, it should be noted that the pregnant woman's ingestion of prescription and non-prescription drugs can also severely damage the developing fetus. *Prenatal Injury*, *supra* note 22, at 73. Quinine and its derivatives can cause deafness; antibiotics can disrupt bone development; cough medicines can cause congenital goiter or liver or brain damage; and laxatives can cause kidney or brain damage. Even sleeping medications and aspirin can be dangerous. Although many prescription drugs are dispensed at dosages appropriate for an expectant mother, the dosages may greatly exceed that which a fetus can tolerate. *Prenatal Injury*, *supra* note 22, at 73-78. Consequently, a fetus can be overdosed resulting in deformities or death. *Prenatal Injury*, *supra* note 22, at 74; *see also* Beal, *supra*

While congenital fetal defects caused by the mother's illegal drug usage usually occur in the first trimester, the risk of internal organ damage exists throughout the pregnancy.[57] Subacute withdrawal symptoms in the newborn child represent the most visible indications of maternal drug abuse and addiction, and usually vary in intensity according to the type of drug used.

1. Heroin and Related Substances

There is no dispute as to the teratogenic effect that heroin has on the developing fetus.[58] Children born to heroin-addicted mothers usually will exhibit withdrawal symptoms immediately upon birth,[59] with such symptoms continuing for as long as six months after birth.[60] These symptoms commonly include neurological and behavioral disorders, lack of attention span, cognitive defects, vomiting, shrill crying, seizures, and even death.[61] Prematurity and mortality are extremely high among children born to women addicted to heroin.[62] The small number of infants who do survive also have low birth weights.[63]

The adverse effects on the developing fetus from illegal drugs other than heroin have been tentatively established. One recent study revealed that many women abuse cocaine and PCP throughout their pregnancies.[64] Cocaine-addicted infants are lethargic or catatonic

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note 22, at 360 (medical research has conclusively established that sedatives, tranquilizers, morphine, methadone, and even aspirin can all lead to mental disorders in a child).

57. Beal, *supra* note 22, at 360.

58. *Prenatal Injury*, *supra* note 22, at 74.

59. *Prenatal Injury*, *supra* note 22, at 74.

60. Bolton, *Maternal Drug Abuse As Child Abuse: Potential Liability For Health Care Professionals*, 15 W.S.U. L. REV. 281, 282 (1987).

61. *Id.* at 282. The American Academy of Pediatrics refers to drug withdrawal in newborns "with the mnemonic W.I.T.H.D.R.A.W.A.L. which describes its symptoms: W=wakefulness; I=irritability; T=tremulousness, temperature variation, tachypnea; H=hyperactivity, high-pitched persistent cry, hypertonus; D=diarrhea, diaphoresis, disorganized suck; R=respiratory distress, rhinorrhea; A=apneic episode, autonomic dysfunction; W=weight loss or failure to gain weight; A=alkalosis (respiratory); and L=Lacrimation." *Id.* Other minor symptoms include hiccups, stuffy nose, sneezing and yawning. *Id.*; *see also Maternal Substance Abuse, supra* note 33, at 1217 (describing various neo-natal withdrawal symptoms).

62. *Prenatal Injury*, note 22, at 74.

63. *Prenatal Injury*, note 22, at 74.

64. *Maternal Substance Abuse*, *supra* note 33, at 1217 (summarizing results of 1985 hearing before Los Angeles County Board of Supervisors); *see also A First: National Hospital Incidence Survey* in National Association for Perinatal Addiction Research and Education, *The*

upon birth and some exhibit signs of congenital malformation.[65] Professionals caring for PCP infants have detected many neonatal withdrawal symptoms and have noted signs of subsequent developmental problems, such as emotional disorders and sensory system impairment.[66] Finally, although medical experts disagree over the effect of marijuana on fetal development,[67] the drug has been linked to decreased fetal growth, and some warn that it should not be eliminated as a potential teratogen.[68]

A recent study reported that in the United States more than 9,000 infants are born annually to women addicted to narcotics.[69] In 1986, Los Angeles County witnessed a 350 percent increase over the previous five years in the number of reported cases of infants suffering from neonatal withdrawal.[70] As noted, these infants exhibit symptoms ranging from very mild to severe manifestations, including death.[71] Of those afflicted infants that survive, many will suffer from withdrawal symptoms which can persist for a period of months after birth.[72] One study reported that infants born to narcotic-addicted women may suffer from an abnormally high rate of Sudden Infant Death Syndrome.[73] Clearly, the immediate and potential consequences of neonatal drug withdrawal, coupled with the alarming rise

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*Dangers of Cocaine Use in Pregnancy Fact Sheet* (Sept. 1989). One in ten infants born in urban areas of the United States have been "exposed to cocaine in the womb" according to a study conducted at the Prenatal Center for Chemical Dependence at Northwestern Memorial Hospital, Chicago. *Id.*

65. *Maternal Substance Abuse, supra* note 33, at 1217; *see also A First: National Hospital Incidence Survey* in National Association for Prenatal Addiction Research and Education, *The Dangers of Cocaine Ues in Pregnancy Fact Sheet* (Sept. 1989). Cocaine use during pregnancy not only places the infant at least "ten times more at risk of Sudden Infant Death Syndrome," but can also cause strokes, premature delivery, spontaneous abortion or miscarriage and growth impairment/deformities. *Id.*

66. *See Maternal Substance Abuse, supra* note 33, at 1217 (long term outcome for cocaine and PCP infants not optimistic).

67. *See Prenatal Injury, supra* note 22, at 74. *But see Maternal Substance Abuse, supra* note 33, at 1218 (recent studies on effects of marijuana use on fetus consistently failed to detect malformation in children born to marijuana smokers).

68. *Maternal Substance Abuse, supra* note 33, at 1218.

69. Bolton, *supra* note 60, at 282.

70. Bolton, *supra* note 60, at 282.

71. Bolton, *supra* note 60, at 282.

72. *See Maternal Substance Abuse, supra* note 33, at 1217-18 (immediate and long term impact of withdrawal on newborn can be devastating).

73. Bolton, *supra* note 60, at 282. The incidence of Sudden Infant Death Syndrome "has been positively correlated with the severity of the infants' withdrawal symptoms while in the nursery." Bolton, *supra* note 60, at 282-83.

in the number of infants affected, make readily apparent the need for regulation of maternal drug abuse.

2. Tobacco

Tobacco, when smoked, is another teratogen whose use during pregnancy may harm the fetus. The adverse effects of smoking on the fetus have been recognized for some time.[74] A strong correlation has been found between smoking and both prematurity[75] and perinatal mortality.[76] Moreover, it is known that smoking results in reduced birth weight, which not only increases the risk of hypoglycemia and jaundice, but has also been correlated with "spontaneous abortions, neonatal infancy deaths, Sudden Infant Death Syndrome, and measurable deficiencies in the child's physical growth, behavior, and intellectual and emotional development."[77]

C. *Diet, Disease and Other Hazards*

1. Diet

A strong relationship exists between a pregnant woman's diet and the health of the developing fetus. One commentator maintains that nutrition is the most significant exogenous influence in the developing fetus' life.[78] In fact, one study reported that 40 percent of a group of women who had given birth to deformed babies had inadequate diets

74. *See Maternal Substance Abuse*, *supra* note 33, at 1218 (researchers have recognized for some time that tobacco, when smoked by pregnant woman, injures the fetus). It is a medical fact, for example, that because smoking decreases the level of oxygen in the blood, a fetus' oxygen supply is decreased when the mother smokes. *See Prenatal Injury*, *supra* note 22, at 74.

75. *See Prenatal Injury*, *supra* note 22, at 74. Indeed, one commentator, in support of his argument that current medical literature has conclusively established that smoking drastically increases the risk of prematurity, reports research findings that women who smoke in excess of a pack of cigarettes a day are at a 60 percent risk of delivering prematurely. *See Maternal Substance Abuse*, *supra* note 33, at 128 n.61.

76. *See Prenatal Injury*, *supra* note 22, at 74 n.225 (reporting statistics from a 1979 Surgeon General's Report on Smoking which linked smoking during pregnancy to miscarriage and infant mortality); *see also* Beal, *supra* note 22, at 361 (smoking during pregnancy impairs fetus' chance for successful birth and may lead to severe complications or injuries to child which can be fatal during delivery).

77. *Maternal Substance Abuse*, *supra* note 33, at 1218. It is known that smoking during pregnancy tends to result in lower birth weight babies. Beal, *supra* note 30, at 361. It is also known that smoking disrupts fetal growth, and that as smoking increases so does the degree of impairment to the fetus. Beal, *supra* note 30, at 361; *accord Prenatal Injury*, *supra* note 22, at 74 (single cigarette smoked during pregnancy may disrupt fetal heartbeat).

78. *Prenatal Injury*, *supra* note 22, at 73.

during pregnancy. Researchers also have found that substandard nutrition or protein-deficient diets during pregnancy may impair fetal brain development and can result in low birth weight babies.[79]

2. Disease

The adverse fetal effects resulting from the pregnant women's exposure to infectious diseases before, during, or after conception also are well-established.[80] If the disease is particularly virulent, congenital defects, developmental abnormalities, and even death may occur.[81] Similarly, sexually transmitted diseases contracted by the pregnant woman can seriously endanger the fetus' life. Both syphilis and herpes genitalia are known to cause severe developmental disorders in the fetus.[82]

3. Workplace Hazards

A pregnant woman also can harm the fetus by exposing herself to teratogenic substances while at home or in the workplace. Researchers have verified that regular exposure to many common organic or inorganic compounds can cause congenital deformities in the developing fetus.[83] Not surprisingly, some employers have excluded women from working with teratogenic chemicals in an effort to avoid potential liability for prenatal defects.[84]

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79. *See Prenatal Injury, supra* note 22, at 73 (low birth-weight babies have significantly higher rate of physical and mental defects, and higher mortality rate).

80. *See Prenatal Injury, supra* note 22, at 74-75 (exposure to infectious diseases endangers fetal health and impairs normal development).

81. *See Prenatal Injury, supra* note 22, at 75; *see also* Beal, *supra* note 22, at 361. A number of diseases contracted by a pregnant woman can cause congenital defects. Beal, *supra* note 22, at 361. Rubella (german measles), if contracted in the first trimester, has been shown to result in congenital abnormalities. Furthermore, doctors highly recommend that prospective mothers be vaccinated before conception to prevent the chance of contracting certain diseases. Beal, *supra* note 22, at 361.

82. *See* Beal, *supra* note 22, at 361 (sexually transmitted diseases pose high probability of negative effect upon fetal development).

83. *See* Beal, *supra* note 22, at 362 (normal fetal development may be endangered if excessive amounts of cooking gas, lead, mercury, copper, phosphorous or iodide enter a woman's body on a regular basis).

84. Johnsen, *supra* note 2, at 607 n.34. *See generally* Note, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 577 (1986)(discussing interrelationship between women's employment rights and fetal hazards in workplace).

4. Other Dangers

There are several other ways in which a pregnant woman can injure her unborn fetus.[85] If the woman engages in strenuous exercise or sexual intercourse late in pregnancy, the trauma may cause premature labor.[86] A mother also may injure her child by deciding to use general anaesthesia or drugs to induce labor during delivery.[87] Finally, a woman may endanger the fetus by using oral contraceptives before discovering her pregnancy.[88]

D. *Summary*

From this research we conclude that the medical and legal community together have an obligation to care for two patients, two clients after viability: the mother and the fetus. Many serious professional ethical dilemmas are posed every day by angry and uncooperative addicted mothers prior to birth. Only through consideration of the health needs of both patients and only with the ability of courts to intervene effectively can medical staffs feel comfortable in managing the pregnancies of their patients. What if a pregnant woman were to refuse treatment and attempt to leave the hospital immediately before labor? The hospital could face a lawsuit by the family for institutional negligence if either the mother or fetus died or were injured. Would the hospital violate the mother's right to privacy if it continued to treat her after she refused needed treatment? It is evident that courts should be willing and able to intervene, free the parties from unnecessary liability, and make the difficult choices necessary to protect the viable fetus.

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85. *Prenatal Injury*, *supra* note 22, at 75. For example, amniocentesis, which is a procedure to determine fetal sex or to detect fetal disorders, entails a high risk of fetal injury. Simon, *supra* note 60, at 75.

86. *Prenatal Injury*, *supra* note 22, at 75. Furthermore, one study found that "[a] pregnant woman's engaging in sexual intercourse is more dangerous to the fetus than the combined effects of her use of alcohol and cigarettes [sic] . . . due to a bacterial infection known as chorioamnionitis which is apparently transmitted to the womb by semen." Johnsen, *supra* note 2, at 607 n.35 (quoting Chicago Tribune, June 13, 1981, at 22, col. 1).

87. *Prenatal Injury*, *supra* note 22, at 75 n.236 (drugs administered before or during delivery can reduce child's oxygen supply which can cause cerebral palsy, epilepsy, or mental illness).

88. *See* Beal, *supra* note 22, at 361 (congenital defects in fetus may occur if woman uses oral contraceptives at beginning of gestation period).

## III. FETAL RIGHTS

### A. *Historical Development*

Until recently, most questions regarding the legal status of the fetus were fairly well-settled. Historically, the law declined to extend any legal rights to the fetus "except in narrowly defined situations and except when the rights [were] contingent upon live birth."[89] Because the law viewed the fetus as part of the mother, it was only after birth that the child acquired any legal rights independent from those of the mother.[90]

### B. *Property and Inheritance Rights*

The fetus first gained separate legal recognition in the area of property law.[91] Early common law recognized that the fetus, from the moment of conception, could be designated an heir to the decedent's estate.[92] The property rights of the fetus would not vest, however, unless the fetus subsequently was born alive.[93] A modern codification of this rule is found in section 2-108 of the Uniform Probate Code, which provides that "relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."[94]

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89. Roe v. Wade, 410 U.S. 113, 161 (1973).

90. *See, e.g., Unborn Child, supra* note 5, at 286-87; *Maternal Liability, supra* note 21, at 592; Johnsen, *supra* note 2, at 601.

91. *See Roe,* 410 U.S. at 162 ("[u]nborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property"); *see also* Walker & Puzder, *State Protection of the Unborn After* Roe v. Wade: *A Legislative Proposal,* 13 STETSON L. REV. 237, 258 (1984)(arguing United States adopted English common law which recognized fetus from conception with respect to many property rights). Citing Blackstone and Roman Law for support, one commentator concluded that a fetus' rights in property and inheritance law are of substantial and ancient origin. *See* Myers, *supra* note 1, at 4-6.

92. Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946) "From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as a human being, but as such from the moment of conception . . ." *Id.* The law's early recognition of the fetus in the context of property and inheritance rights "apparently was based upon the presumed oversight or inadvertence of the parent in providing for an existing or a contingent situation." Christian v. Carter, 137 S.E. 596, 597 (S.C. 1927).

93. *See Roe,* 410 U.S. at 162; *see also* Parness & Pritchard, *To Be or Not to Be: Protecting The Unborn's Potentiality of Life,* 51 U. CINN. L. REV. 257, 264 (1982)(inheritance law recognizes fetus as acquiring property rights the perfection of which are contingent upon live birth). *But see* Louisell, *Abortion, The Practice of Medicine And The Due Process Of Law,* 16 UCLA L. REV. 233, 236-37 (1969)(arguing that fetus' property rights were contingent on its very existence, rather than its subsequent live birth).

94. UNIFORM PROB. CODE § 2-108 (1982). Additionally, other sections of the code re-

### C. *Tort Law*

The legal rights of the fetus in tort law have changed dramatically over the last hundred years.[95] Generally, fetal rights under present tort laws may be directly or indirectly implicated in at least three different situations: a tort claim brought against a third party who negligently or intentionally inflicted prenatal injuries upon a fetus subsequently born alive; a wrongful death claim brought against a third party whose tortious actions caused the fetus' death; and a tort claim brought by a child against a mother for prenatally inflicted injuries.

#### 1. Third-Party Liability for Prenatally Inflicted Injuries

Initially, the law refused to recognize the fetus' right to recover damages against a third party for injuries sustained in the womb. Justice Oliver Wendell Holmes, writing for the Massachusetts Supreme Judicial Court, established this rule over a century ago in the seminal case of *Dietrich v. Inhabitants of Northhampton*.[96] In *Dietrich*, the court reasoned that the fetus was merely part of the mother and, as such, had no independent tort cause of action for prenatal injury.[97] This general rule denying the fetus a right to recover damages for prenatally-inflicted injuries, although criticized,[98] continued for some

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flect the view that a fetus' property rights are contingent upon live birth. *Id.* § 2-302 (providing that pretermitted child born after will's execution entitled to receive "a share in the estate equal in value to that which he would have received if the former died intestate"); *cf.* 2 G. BOGERT, TRUSTS AND TRUSTEES § 163, at 147 (rev. ed. 1979)(under trust law, fetus is person capable of taking property through trust only if subsequently born alive).

95. *See* Myers, *supra* note 1, at 6; *see also Unborn Child*, *supra* note 5, at 286.

96. 138 Mass. 14 (1884).

97. *Dietrich*, 138 Mass. at 17. In denying recovery, Justice Holmes observed that "no case, as far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb." *Id.* at 15. The court's asserted reason for denying recovery (lack of precedent) finds some support in the literature discussing the development of fetal rights under common law. *See, e.g.*, Morrison, *Torts Involving the Unborn-A Limited Cosmology*, 31 BAYLOR L. REV. 131 (1979). Morrison points out that although the common law generally accorded the fetus' rights under property law and criminal law, "there appears to have been no concomitant civil recognition of their rights as victims of personal injury or death." *Id.* at 133-34. Not a single English common law case exists which allowed a fetus to recover damages for personal injury. *Id.* This absence of any reported case law allowing recovery was later used as proof that a fetus had no tort remedies under common law. *Id.*

98. *See, e.g.*, Alliare v. St. Luke's Hosp., 56 N.E. 638 (Ill. 1900), *overruled*, Amann v. Faidy, 114 N.E.2d 412 (Ill. 1953). In *Alliare*, the Illinois Supreme Court held that the *Dietrich* rule controlled its decision to reject the plaintiff child's tort cause of action for prenatally-

sixty years after the *Dietrich* decision.[99]

The first opinion to expressly reject the *Dietrich* rule was not decided until 1946 when a federal district court held, in *Bonbrest v. Kotz*,[100] that a viable fetus could recover for prenatally inflicted injuries if subsequently born alive.[101] In *Bonbrest*, an action was brought against two doctors whose alleged negligence resulted in injuries to a viable fetus.[102] The court rejected the *Dietrich* rule and held the doctors liable on the theory that tort law recognizes a viable fetus as an independent legal entity capable of suing for injuries which it would suffer throughout its life.[103] To hold otherwise, the court concluded, would allow a wrong to be committed for which there was no remedy.[104]

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inflicted injuries. *Id.* at 648. In an often-quoted dissent, however, Justice Boggs argued that a lack of precedent should not dissuade the court from disregarding the *Dietrich* rule and allowing a child to recover damages for prenatal injuries suffered after viability. *Id.* at 642 (Boggs, J., dissenting). *See generally Prenatal Injury, supra* note 22, at 50-51 (discussing holding and dissent in *Alliare*).

99. *See* Bonbrest v. Kotz, 65 F. Supp. 138, 139 (D.D.C. 1946) (noting that up until 1946, the *Dietrich* rule was dispositive and controlling authority in cases involving tort recovery for fetal injury); *see also Myers, supra* note 1, at 6-7 (*Dietrich* decision became foundation for general rule precluding recovery for injury to a fetus); *Prenatal Injury, supra* note 22, at 49-50. Summarizing the development of a tort cause of action for prenatal injury, one commentator concluded as follows:

> The [Dietrich] decision . . . set the tone of judicial opinions for the next sixty years. Subsequent cases uniformly denied recovery. Courts gave the following justifications: lack of precedent, stare decisis, the belief that there is no duty owed to an unborn child inasmuch as it is part of its mother and not a separate entity, difficulty in determining the existence of any causal relation between the wrong done and the resulting malady of the child after birth, danger of fraudulent claims and the fear that if such an action could be maintained, an infant could sue its own mother for injuries caused by the mother while pregnant.

*Prenatal Injury, supra* note 22, at 49-50 (citations omitted).

100. 65 F. Supp. 138, 139 (D.D.C. 1946) (suit brought on behalf of infant alleging physicians negligently injured child while delivering it). Although most courts and commentators cite *Bonbrest* as the first case to allow a child to recover for prenatally inflected injuries, one commentator has argued that these authorities have ignored two earlier decisions reaching the same result. *See Prenatal Injury, supra* note 22, at 51 n.47. The commentator cites to *Kine v. Zuckerman* and *Scott v. McPheeters*, both of which allowed a child subsequently born alive to recover for prenatally inflicted injuries. *Prenatal Injury, supra* note 22, at 51; *see also* Scott v. McPheeters, 92 P.2d 678 (Cal. Dist. Ct. App. 1939); Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924), *overruled*, Berlin v. J.C. Penney Co., 16 A.2d 28 (Pa. 1940).

101. *See Bonbrest*, 65 F. Supp. at 142.

102. *Id.* at 139.

103. *Id.* at 140 (observing that view that viable fetus is more a part of its mother seemed a contradiction in terms).

104. *Id.* at 142. The *Bonbrest* court summarized its reasoning as follows:

Since the *Bonbrest* decision, "there has been an all but universal change in the rule"[105] disallowing recovery for prenatal injury. Today, almost every American jurisdiction allows a fetus subsequently born alive to bring a tort claim against a third party for prenatal injuries.[106] Although *Bonbrest* limited liability for prenatal injuries to circumstances where the fetus was injured after viability, subsequent cases have broadened the basis of liability by adopting conception rather than viability as the cutoff point for prenatal tort liability.[107] Several jurisdictions have gone even further and allowed a child to recover for injuries resulting from negligent acts committed by third parties against the mother prior to conception.[108] Most commentators agree

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

*Id.* (footnote omitted)(quoting Montreal Tramways v. Leveille, 4 D.L.R. 337, 345 (1933)); *see also* Keyes v. Construction Serv., Inc., 165 N.E.2d 912, 914 (Mass. 1960) (child has right to begin life without physical or mental defects caused by another's negligence).

105. RESTATEMENT (SECOND) OF TORTS § 869 comment a (1977).

106. *See, e.g., Unborn Child, supra* note 5, at 286; *Myers, supra* note 1, at 8; Johnsen, *supra* note 2, at 601; *see also* W.P. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Prosser and Keeton note that beginning with *Bonbrest*, "a rapid series of cases, many of them expressly overruling prior holdings, brought about a rather spectacular reversal of the no-duty rule. The child, if he is born alive, is now permitted in every jurisdiction to maintain an action for the consequences of prenatal injuries . . . ." W.P. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368 (5th ed. 1984)(citations omitted).

107. *See, e.g.*, Simon v. Mullin, 380 A.2d 1353, 1357 (Conn. 1977); Smith v. Brennan, 157 A.2d 497, 504 (N.J. 1960); Bennett v. Hymers, 147 A.2d 108, 110 (N.H. 1958). *See generally* Beal, *supra* note 22, at 331 (at least nine states have permitted recovery for injuries sustained after conception but before viability).

108. *See, e.g*, Bergstreser v. Mitchell, 577 F.2d 22, 26 (8th Cir. 1978)(child can assert claim for injuries resulting from a negligently conducted pre-conception operation on mother); Jorgensen v. Meade Johnsen Laboratories, Inc., 483 F.2d 237, 238 (10th Cir. 1973)(infant could assert claim for injuries resulting from mother's pre-conception ingestion of defective prescription medication); Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1256 (Ill. 1977)(infant can assert cause of action for injuries resulting from negligently conducted blood transfusion to mother nine years earlier). *But see* Albala v. City of New York, 429 N.E.2d 786, 787 (N.Y. 1981)(denying child's claim for injuries resulting from physician's negligent perforation of mother's uterus during an abortion four years earlier). *See generally* Parness & Pritchard, *supra* note 93, at 281-86 (discussing the expansion of third party liability for preconception tort).

that this extension of third-party liability for prenatal injuries comports with the underlying goals of tort law in providing compensation for victims of negligent conduct and in deterring harmful acts.[109]

2. Wrongful Death Actions

In *Bonbrest*, the court held that recovery for prenatal injury was only available if the injured fetus was subsequently born alive.[110] Since *Bonbrest*, however, a significant majority of jurisdictions have eliminated the "born alive" requirement in prenatal tort actions and have allowed wrongful death claims to be asserted on behalf of stillborn fetuses.[111] The impetus for discarding the born alive rule is judicial recognition that the rule "results in the anomaly that an individual whose negligence kills a fetus escapes liability while an individual who inflicts a less severe injury is held accountable."[112] While most of these decisions construing wrongful death statutes to include fetuses are limited to viable fetuses,[113] several jurisdictions have extended protection to pre-viable fetuses.[114] This extension is desirable in that it protects both the parents' right to compensation

109. The primary purpose of tort law is to provide compensation to persons injured as a result of the tortious conduct of another. *See* PROSSER & KEETON, *supra* note 106, at § 4. It is consistent with this purpose to allow an infant to recover damages from third parties for injuries the infant presently suffers because of tortious acts committed against the pregnant woman. Johnsen, *supra* note 2, at 602. Likewise, as commentators have forcefully and universally argued, the point at which the injury is sustained is irrelevant; the child is no less injured if the tortious conduct took place before conception or viability rather than after. *See, e.g.*, PROSSER & KEETON, *supra* note 106, at § 55; Beal, *supra* note 22, at 330-31; Myers, *supra* note 1, at 8; *Maternal Liability*, *supra* note 21, at 595-96.

110. *Bonbrest v. Kotz*, 65 F. Supp. 138, 142 (D.D.C. 1946).

111. *See Maternal Liability*, *supra* note 21, at 595, n.14 (citing cases as of 1987, author asserts that "thirty-five states and the District of Columbia have dropped the 'born alive' rule and allow wrongful death actions to be brought on behalf of stillborn viable fetuses"); *see also* Johnsen, *supra* note 2, at 602 (majority of states now recognize fetuses as "persons" under wrongful death statutes).

112. *Maternal Liability*, *supra* note 21, at 595. Many of the cases extending a wrongful death cause of action to fetuses have expressly recognized that to do otherwise would allow a tortfeasor to foreclose his liability by killing a fetus rather than merely injuring it. *See, e.g.*, O'Grady v. Brown, 654 S.W.2d 904, 909 (Mo. 1983); Vaillancourt v. Medical Center Hosp., 425 A.2d 92, 95 (Vt. 1980); Danos v. St. Pierre, 383 So. 2d 1019, 1024 (La. Ct. App. 1980)(Lottinger, J., concurring).

113. *See* PROSSER & KEETON, *supra* note 106, § 55, at 368-69 (discussing viability requirement).

114. *See, e.g.*, Group Health Ass'n, v. Blumenthal, 453 A.2d 1198, 1206 (Md. Ct. Spec. App. 1983); Presley v. Newport Hosp., 365 A.2d 748, 751 (R.I. 1967); Valence v. Louisiana Power and Light Co., 50 So. 2d 847, 849-50 (La. Ct. App. 1951).

for the wrongful destruction of their anticipated child and the state's interest in potential life.[115]

### 3. Maternal Tort Liability for Prenatal Injuries

While most of the decisions imposing liability for prenatal torts are directed at third-party tortfeasors, courts are beginning to extend liability to pregnant women whose tortious conduct causes injury to their fetuses. In *Grodin v. Grodin*,[116] the first of two reported cases in this area, a child sued his mother, alleging that her continued ingestion of tetracycline during pregnancy caused his teeth to turn brown. Although the appellate court remanded the case for a determination of the reasonableness of the mother's conduct, it held, "[The] mother would bear the same liability for injurious, negligent conduct as would a third person."[117] More recently, in *Stallman v. Youngquist*,[118] an Illinois appellate court held that a child born alive can recover damages from her mother for injuries sustained prenatally due to the mother's negligence while driving an automobile.

Both the *Grodin* and *Stallman* courts rejected the argument that the doctrine of parental tort immunity precluded the child's suit for prenatal injuries due to the mother's negligence.[119] This result is not surprising as a growing majority of jurisdictions have either rejected the doctrine entirely or have greatly limited its scope.[120] As the trend toward abrogation of the doctrine continues, it is likely that tort claims by children against parents for prenatal injuries will

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115. *See* Johnsen, *supra* note 2, at 603; *see also* Parness & Pritchard, *supra* note 93, at 275.

116. 301 N.W.2d 869 (Mich. 1980).

117. *Id.* at 870.

118. 504 N.E.2d 920, 927 (Ill. 1987).

119. *See, e.g.*, *Grodin*, 301 N.W.2d at 870; *Stallman*, 504 N.E.2d at 923-25. Parental tort immunity is "simply a judicial refusal to allow a child to sue his parents for personal torts, whether negligent or intentional." *Maternal Liability*, *supra* note 21, at 599 n.28. *See generally* Beal, *supra* note 22, at 333-57 (discussing creation and evolution of parental immunity doctrine).

120. *Maternal Liability*, *supra* note 21, at 599. Parental tort immunity is established to preserve family harmony, deter fraudulent claims, and to strengthen parental authority. Most courts now find these considerations insufficient to disallow recovery to a child harmed through his parents' negligence. The reasoning used by these courts to reject the doctrine of parental immunity applies equally in prenatal injury cases. *Maternal Liability*, *supra* note 21 at 599-600.

increase.[121]

## D. *Criminal Law*

Unlike tort law, criminal law has witnessed a slow and irregular development of fetal rights. Until recently, for example, courts uniformly applied the traditional common law rule that the intentional killing of a fetus by a third party was not homicide unless the victim subsequently was born alive before dying from the injuries inflicted.[122] Many decisions have retained this "born alive" requirement by reasoning that legislatures intended this result by drafting homicide statutes that are restricted to "persons" or "human beings" born alive or that fail to explicitly include the fetus as a possible victim.[123] More recently, however, a growing number of jurisdictions have repudiated the born alive rule and now hold third parties liable for homicide if they intentionally kill a fetus. While two jurisdictions have accomplished this result by judicial fiat,[124] others have enacted "feticide" or

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121. *See* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 441 (1983); *see also Maternal Liability*, *supra* note 21, at 600.

122. *See* Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984). The *Cass* case noted that: "Since at least the fourteenth century, the common law has been that the destruction of a fetus in utero is not a homicide . . . . [This] rule has been accepted as the established common law in every American jurisdiction that has considered the question" *Id.*; *see also* State v. Doyle, 287 N.W.2d 59, 63 (Neb. 1980); Lane v. Commonwealth, 248 S.E.2d 781, 783 (Va. 1978). Courts have consistently applied the "born alive" requirement, even in cases where the acts directed at the mother and fetus were unbelievably heinous. *See, e.g.*, Hollis v. Commonwealth, 652 S.W.2d 61, 61-62 (Ky. 1983)(pregnant mother severely injured and seven-month-old fetus delivered stillborn after defendant husband "told her he did not want a baby, and then forced his hand up her vagina intending to destroy the child and deliver the fetus"); People v. Smith, 129 Cal. Rptr. 498, 500 (Ct. App. 1976)(while kicking pregnant wife in stomach and beating her with fists in asserted attempt to kill fetus, defendant shouted, "Bleed, baby, bleed"); *Keeler v. Superior Ct.*, 87 Cal. Rptr. 481, 482 (Cal. 1970)(while kicking pregnant ex-wife in stomach in attempt to kill fetus, defendant shouted, "I'm going to stomp it out of you").

123. *See Maternal Liability*, *supra* note 21, at 596 (most courts decline to extend criminal liability for injuring fetus if criminal law does not explicitly mention "fetus" or use term "person"). Of those courts which have confronted the question, many have decided that the law should treat the intentional killing of a fetus as homicide, but "because that rule would conflict with established precedent, have concluded that establishing such a result requires legislative action". Commonwealth v. Cass, 467 N.E.2d 1324, 1327 (Mass. 1984); *see also* People v. Amarro, 448 A.2d 1257, 1260 (R.I. 1982)(legislature lacked intent to make fetus "person" within vehicular homicide statute); People v. Guthrie, 293 N.W.2d 775, 780 (Mich. Ct. App. 1980)(refusing to alter common law born alive rule following legislative inaction). *See generally* Note, *Taking Roe to the Limits: Treating Viable Feticide as Murder*, 17 IND. L. REV. 1119, 1119-42 (1984).

124. *Cass*, 467 N.E.2d at 1326; State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984); *accord*

homicide statutes which expressly include the fetus.[125]

### E. *Summary*

The expansion of third-party liability for fetal injuries reflects an increasing awareness of the independent legal rights of the fetus. This recognition serves many important societal interests. Specifically, it results in deterrence of wrongful conduct and protects parental rights and interests in their expected offspring.[126] More significantly, it promotes the right of the fetus to be born healthy and free of injury.[127]

The imposition of maternal liability for prenatal injury would promote the same interests served by protecting the fetus from third-party acts.[128] Current medical evidence indisputably demonstrates that maternal drug and alcohol abuse poses substantial risks to the health of the developing fetus. A child born suffering from injuries caused by the mother's prenatal acts is no less injured than a child born suffering from the prenatal acts of a third party; therefore, protection of fetal interests should be similar in both circumstances.

The Supreme Court's recognition that a state may protect potential life when viability is possible presents many questions, the answers to which are "political and not juridicial," in the words of Justice Scalia.[129] The central issue addressed here is that once the fetus achieves viability, a legal pre-child status may be conferred so that the

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Douglas v. Town of Hartford, 542 F. Supp. 1267, 1269-70 (D. Conn. 1982)(viable fetus is "person" with capacity to assert claim under 42 U.S.C. 1983); *see also* United States v. Spencer, 839 F.2d 1341 (9th Cir. 1988)(intentional killing of fetus a crime within federal murder statute).

125. *See, e.g.*, CAL. PENAL CODE § 187 (Deering Supp. 1986); ILL. ANN. STAT. ch. 38, para. 9-1.2 (Smith-Hurd Supp. 1988); IOWA CODE ANN. § 707.7 (West 1979); MICH. STAT. ANN. § 28.554 (Callaghan 1973); N.H. REV. STAT. ANN. § 585.13 (1986); OKLA. STAT. ANN. tit. 21, § 713 (West 1983); R.I. GEN. LAWS § 11-23-5 (1981); UTAH CODE ANN. § 76-5-201 (Supp. 1989); WASH. REV. CODE. ANN. § 9 A. 32.060(1)(b) (1988); WIS. STAT. ANN. § 940.04 (West 1982).

126. Johnsen, *supra* note 2, at 603.

127. *See Maternal Liability*, *supra* note 21, at 597-98 (law acknowledging right of fetuses to protection); *see also* Greater Southeast Community Hosp. v. Williams, 482 A.2d 394, 397 (D.C. 1984)(viable fetus independent person enjoying right to be born without prenatal injuries).

128. *See Maternal Liability*, *supra* note 21, at 598 (protecting fetus from mother's acts promotes same interests as protecting fetus from third party's acts); *see also Myers*, *supra* note 1, at 14 (policy considerations that extend personhood and protection to fetuses also mandate protection from abuse and neglect).

129. Webster v. Reproductive Health Servs. of Missouri, __ U.S. __, 109 S. Ct. 3040, 3064, 106 L. Ed. 2d 410, 445 (1989)(Scalia, J., concurring).

state may determine the extent to which it must act to preserve this pre-child. To be equipped to handle these issues, courts and legislatures must develop guidelines to determine the duties pregnant women have to prevent prenatal injury, and when and to what extent the state should intervene to enforce these duties. Whether this extension of fetal rights would be constitutionally permissible requires analysis of the countervailing maternal interests that might be implicated.

## IV. MATERNAL RIGHTS

### A. *Introduction*

Any attempt to balance maternal privacy interests against state interests in increasing protection for fetuses must again begin with an analysis of *Roe v. Wade*.[130] In *Roe*, the Supreme Court addressed the constitutionality of a Texas statute that effectively prohibited abortion except when necessary to save the mother's life.[131] Roe, a pregnant woman, petitioned the Court to declare the statute unconstitutional.[132] The state asked the Court to uphold the statute on the basis that a fetus is a "person" whose fundamental right to life is protected under the due process clause of the fourteenth amendment.[133]

Writing for the Court, Justice Blackmun first determined that a right to privacy was guaranteed by the Constitution and encompassed a woman's decision to terminate or continue her pregnancy.[134] The Court held that the Texas abortion statute unconstitutionally infringed upon this right.[135] Justice Blackmun then addressed the state's argument that the fetus as a "person" enjoyed a fundamental right to life under the fourteenth amendment. Justice Blackman observed that such a finding might override a mother's privacy right, and held for the Court that "the word [person] as used in the fourteenth amendment does not include the unborn."[136]

Despite its conclusion that a fetus is not a person for fourteenth

130. 410 U.S. 113 (1973).
131. *Id.* at 117-18.
132. *Id.* at 120.
133. *Id.* at 156.
134. *Roe*, 410 U.S. at 153.
135. *Id.* at 164.
136. *Id.* at 158. The Court's holding was partially based on its analysis of various sections of the Constitution where the word "person" was used and its conclusion that "in nearly all these instances, the use of the word is such that it has application only postnatally." *Id.* at 157; *cf.* Montana v. Rogers, 278 F.2d 68, 72 (7th Cir. 1960)(rights of citizenship under four-

amendment purposes, the Court nevertheless acknowledged that states have an "important and legitimate interest in protecting the potentiality of human life."[137] Accordingly, at some point in fetal development this interest becomes sufficiently compelling to allow states to regulate or prohibit abortions.[138] To determine when this point is reached, the Court divided fetal development into three separate trimesters. During the first trimester, a state can neither proscribe nor regulate abortions.[139] During the second trimester, a state can establish requirements reasonably related to its interest in "preserving and protecting the health of the pregnant woman."[140] At the beginning of the third trimester, the fetus is presumed viable, or able to sustain "meaningful life" outside the womb.[141] At viability, the Court held, the state's interest in potential life becomes sufficiently compelling to allow it to regulate or prohibit abortions.[142]

By holding that a state's interest in potential life becomes compelling at viability, the *Roe* Court implicitly recognized both the existence of fetal rights and a state's authority to protect these rights.[143] Thus, although the Court determined that a fetus is not a person under the fourteenth amendment, this holding in no way prevents state or federal legislatures from recognizing fetal rights in other con-

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teenth amendment attach only after birth), *aff'd sub. nom.* Montana v. Kennedy, 366 U.S. 308 (1961).

137. *Roe*, 410 U.S. at 162.

138. *Id.* at 163.

139. *Id.* at 164-65.

140. *Id.* at 162.

141. *Roe*, 410 U.S. at 163.

142. *Id.* at 163-64.

143. *See Roe v. Wade*, 410 U.S. 113 (1973). This conclusion necessarily follows from two statements made by the *Roe* Court. The first acknowledged a state's "important and legitimate interest in protecting the potentiality of human life". *Id.* at 162-64. The second authorized the state to "go so far as to proscribe abortion [after viability], except when it is necessary to preserve the life or health of the mother." *Id.* At a minimum, these statements allow a state to protect its interest in potential life by defining the abortion of a viable fetus as a criminal offense. *Id.* at 164-65. Additionally, these statements allow a state to pass legislation protecting fetal life from the moment of conception as long as such legislation does not impede upon a woman's right to obtain an abortion. *See, e.g.*, MO. REV. STAT. § 1.205(1),(2) (1986)(Vernon Supp. 1988)(providing that unborn child, from moment of conception, has all rights available to other persons, subject only to U.S. Constitution and Supreme Court decisions interpreting it); ILL. REV. STAT. ch. 70, para. 2.2 (Smith-Hurd 1989)(providing wrongful death cause of action to viable fetus born dead after suffering injuries inflicted by negligent third party); CAL. PENAL CODE § 187 (Deering Supp. 1987) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought").

texts.[144] In cases of maternal substance abuse, the issue is whether a pregnant woman who has foregone her right to obtain an abortion and who has decided to carry her fetus to term, enjoys a right to use drugs and alcohol to the detriment of her fetus.[145] While *Roe* applies to these cases, its result does not control because a woman's right to obtain an abortion is not implicated.[146] The only question here, then, is whether, under a *Roe* analysis, the state can assert a sufficiently compelling interest to justify proscribing a pregnant woman's autonomy in order to protect her fetus.[147]

### B. *Balancing Maternal and Fetal Rights*

Justice and common sense require us to recognize the natural order of life. Women bear children, who are helpless at birth and owe, at that moment, no duty whatsoever. It is axiomatic that these children enjoy the right to be born free of health problems caused by the mother's misconduct, to be nurtured, and to be free from abuse at birth. The duties flow only from mother to child, not from the child to the mother. To ignore these obligations would be to ignore motherhood and the fundamental rules of nature.

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144. The *Roe* decision in no way precludes a state from legally protecting the fetus. In fact, the decision should be construed as setting forth the legal foundation upon which states can expand fetal rights. Unfortunately, as one commentator concluded, "[t]he failure to understand the *Roe* decision has led not only to Courts mistakenly denying the unborn nonfourteenth amendment protections to which the unborn are entitled, but also to the public failing to comprehend the discretion remaining to American lawmakers in characterizing personhood." Parness & Pritchard, *supra* note 93, at 258. *See generally Myers, supra* note 1, at 15.

145. *See* Connolly & Marshall, *Drug Addiction, AIDS and Childbirth: Legal Issues for the Medical and Social Services Community*, at 5 (copy on file at the Sarita Kenedy Law Library, St. Mary's University, San Antonio, Texas). The constitutional analysis applied in *Roe* is not entirely applicable to maternal substance abuse cases because the interests implicated are different. The authors also emphasize:

> The issue here is not whether a woman has the right to terminate her pregnancy and the state's interest is not in preserving maternal health . . . [r]ather the issue is whether a woman, who has decided to carry the fetus to term, can be compelled to refrain from certain conduct, e.g., drug use, that is likely to harm her child and the state's interest is in protecting the quality of the life that the child will live.

*Id.*

146. *See Maternal Substance Abuse, supra* note 33, at 1220. *Roe* addressed only the issue of women's rights to obtain abortions. *Id.* The issue in maternal substance abuse cases is "a pregnant woman's right to use alcohol, tobacco, and narcotics after she has decided not to obtain an abortion." Therefore, "there is no direct parallel between the right protected by *Roe* and that implicated here." *Maternal Substance Abuse, supra* note 33, at 1220.

147. *Maternal Substance Abuse, supra* note 33, at 1219.

Clearly, a state can demonstrate a compelling interest in fetal life that should override any privacy right a pregnant woman may have to use drugs and alcohol. The use of these substances is not a fundamental right.[148] Furthermore, their use during pregnancy can cause severe impairment or even death to a fetus.[149] Maternal substance abuse poses significant societal costs, including billions spent on medical and educational services for children suffering from FAS or other drug-related birth defects.[150] Certainly, the state's interest in avoiding these costs and in "protecting the potentiality of human life" is sufficiently compelling to allow it to intervene when there is evidence of maternal substance abuse.[151]

## V. CHILD ABUSE LAWS

### A. *Introduction*

Although "the custody, care and nurture of the child reside first in the parents," parental discretion is not immune from governmental intervention.[152] Because the state has a compelling interest in protecting the lives of children, parental conduct that substantially threatens

148. *Maternal Substance Abuse, supra* note 33, at 1220-21 (use of alcohol or tobacco a mere privilege and use of illegal drugs is a crime).

149. *See supra* notes 58-73 and accompanying text; *see also Maternal Substance Abuse, supra* note 33, at 1220. Because "[f]etal exposure to alcohol, tobacco, and drugs may result in spontaneous abortion, states with post-viability abortion . . . statutues should arguably be permitted by statutory interpretation to proscribe a pregnant woman's alcohol, tobacco and drug abuse to protect a viable fetus." *Maternal Substance Abuse, supra* note 33, at 1221.

150. *See Maternal Substance Abuse, supra* note 33, at 1221. Investigations estimated that in 1980 alone the United States incurred costs of 2.7 billion for "medical, educational, and custodial services for children born with FAS and fetal alcohol effects." *Id.* In New York state alone, lifetime costs for babies born with alcohol-related defects will exceed $155 million. Indeed, the social costs stemming from maternal substance abuse are only magnified when the money spent on drug and alcohol rehabilitation programs is factored in. *Id.*

151. *See* Myers, *supra* note 1, at 19. The state's interest in protecting potential life "would be severely undermined if it could require birth but do nothing to ensure that the life it saved was worth living." Myers, *supra* note 1, at 19.

152. Parness & Pritchard, *supra* note 93, at 293 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)). The Constitution provides parents a qualified right to raise children according to their own beliefs. Stearns, *supra* note 7, at 610 n.111. This right to parental autonomy is generally derived from the free exercise clause of the first amendment and the judicially created right to privacy. *Id.* Like the right to pursue one's own religious beliefs, however, the parental autonomy right is not unlimited. Where parental actions reflect a lack of concern for their child's welfare, the state can legitimately restrict those rights just as it could restrict an individual's right to act according to religious beliefs. Stearns, *supra* note 7, at 610 n.111; *see also* Parham v. J.R., 442 U.S. 548, 604 (1979)(finding parents do not necessarily enjoy absolute discretion to determine whether child should be institutionalized in a mental hospital); Jeffer-

a child's welfare is a legitimate basis for state intervention on behalf of the child.[153] This principle is reflected in modern child abuse and neglect statutes, which have been enacted in all fifty states[154] and by the federal government.[155] Although the vast majority of these laws do not include the fetus in the definition of "child,"[156] a handful of courts and legislatures recently have begun to interpret or expand these statutes to include the unborn.[157]

In the following section it is argued that expanding child abuse and neglect laws to include harm to the fetus is a necessary and effective means for the state to protect a fetus from the mother's harmful acts or omissions.[158] Since fetal rights should not exceed the rights of children, child abuse laws provide an upper limit of state intervention to protect fetal health.[159] The expansion of these laws to protect the unborn promotes the preventative and remedial goals inherent in abuse and neglect laws,[160] and also conforms with the increasing trend toward state and federal recognition of fetal rights.[161] Accordingly, this section will discuss how Texas laws should be amended to allow state intervention to protect the fetus from acts or omissions of the mother. First, however, is a brief discussion of both the procedural and substantive aspects of child abuse and neglect laws, and recent statutory amendments and case law applying them to fetuses.

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son v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457, 460 (Ga. 1981)(upholding court-ordered caesarian over mother's religious objection to preserve mother's and fetus' lives).

153. *See* Parness & Pritchard, *supra* note 93, at 293 (state action, including termination of parental rights, is valid when directed at parental behavior that significantly threatens the welfare of the child).

154. *See* Myers, *supra* note 1, at 24; *see also* S. KATZ, M. MCGRATH & R. HOWE, CHILD NEGLECT LAWS IN AMERICA (1976)(listing statutes).

155. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 3, 88 Stat. 4, 5 (1974)(codified at 42 U.S.C. § 5102).

156. *See Maternal Substance Abuse*, *supra* note 33, at 1225 (virtually no laws exist which protect a fetus from acts of its parents); *see also* Reyes v. Superior Ct., 141 Cal. Rptr. 912, 913 (Ct. App. 1977)(prenatal herion abuse not punishable under child endangering statute); *In Re* Dittrick Infant, 263 N.W.2d 37, 39 (Mich. 1977)(legislature did not intend definition of "child" in statute include fetus).

157. *See infra* notes 180-195 and accompanying text.

158. *See* Myers, *supra* note 1, at 29 (only reasonable mechanism to affect state interests in unborn is through present abuse and neglect statutes); *see also Limitations on State Intervention*, *supra* note 6, at 1051-52 (state intervention in maternal decision-making is most effective means of preventing fetal injury).

159. Stearns, *supra* note 7, at 615.

160. *See* Parness & Pritchard, *supra* note 93, at 294.

161. *See supra* notes 116-125 and accompanying text.

## B. *Development and Purpose of Child Abuse Laws*

State and federal statutes proscribing child abuse and neglect are of fairly recent origin.[162] Not until the early 1960's did concern over the growing incidence of child abuse increase to the level where Congress and state legislatures began to take action.[163] After legislators recognized the problem, however, they moved quickly. Between 1963 and 1965, every state and Washington, D.C., had adopted child abuse and neglect reporting statutes.[164] Although these statutes differ from state to state, nearly all have common characteristics.[165] Most statutes apply to children under a specified age, which usually is eighteen.[166] Additionally, each statute generally "authorize[s] state intervention when a child has suffered, or there is a substantial risk that a child will imminently suffer, a physical harm, inflicted non-accidently . . . which causes, or creates a substantial risk of causing disfigurement, impairment of bodily function, or other serious physical injury."[167] Finally, virtually all modern child abuse statutes contain elaborate substantive and procedural requirements that are designed to achieve an identical purpose: to maintain the family to the greatest extent possible while protecting the child from less than acceptable

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162. *See* Connolly & Marshall, *supra* note 145; *see also* Myers, *supra* note 1, at 24 (until 1975 no formal organization existed to address issues of child abuse).

163. Connolly & Marshall, *supra* note 145, at 12. Between 1875 and 1962, progress in prevention of child abuse was slow and irregular. *See* Myers, *supra* note 1, at 24. Finally, in 1962, C. Henry Kempe, M.D., and his associates published their seminal article discussing the "battered child syndrome." As a result of its publication, "a movement toward statutory prohibition of abuse exploded across the U.S." Myers, *supra* note 1, at 24.

164. Connolly & Marshall, *supra* note 145, at 12-13. While child abuse reporting laws have been enacted in every state, child abuse continues to be a significant problem in the United States. *See* Note, *Texas' Clergyman-Penitent Privilege and the Duty to Report Suspected Child Abuse*, 38 BAYLOR L. REV. 231, 237 (1986). Anywhere between 76,000 to 4.1 million cases of abuse are estimated to occur each year. *Id.* In recent years, public awareness has increased regarding the rising occurrence of sexual abuse of children in our society. *See* Watson, *Special Report: A Hidden Epidemic*, NEWSWEEK, May 14, 1984, at 30, col. 3 (between 100,000 and 500,000 American children estimated to have been sexually molested in 1984); *see also* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 806 (1985)(media has focused increased attention on growing statistics of child sexual abuse).

165. Stearns, *supra* note 7, at 615.

166. Myers, *supra* note 1, at 26 (citing various state statutes).

167. Myers, *supra* note 1, at 25 (quoting Institute of Judicial Administration, American Bar Association, Standards Relating To Abuse and Neglect (1981)). While definitions of neglect sometimes overlap abuse, neglect is a broader term which covers intentional and unintentional actions harmful to the child. Myers, *supra* note 1, at 25.

parenting.[168]

1. Substantive Requirements

Generally, child abuse laws provide for a bifurcated system of review which seeks both to protect children and to limit state interference with the family unit.[169] Under most statutes, the state can intervene only after it has demonstrated that parental conduct has fallen below the level of minimally acceptable care.[170] Therefore, the initial step in the bifurcated statutory scheme is to determine whether the parents have neglected to provide minimally acceptable care.[171] If this neglect cannot be shown, the state generally is precluded from intervening.[172] If, however, the parents have failed to meet the minimum standard of care, "the state can then substitute its judgment for the [sic] that of the parents and decides what is in the child's best interest."[173]

2. Procedural Requirements

Most state child abuse laws contain procedural requirements designed to balance the interests of the parent, the state and the child.[174] While some statutes prohibit judicial intervention unless intentional harm to the child is shown, other statutes only require proof that the child suffered harm.[175] Each statute commonly requires certain individuals to report known or suspected child abuse.[176] Failure

168. Stearns, *supra* note 7, at 615-16.

169. Stearns, *supra* note 7, at 615-16. *See generally* Pollock, *Recent Amendments to the Texas Child Abuse Statutes: An Analysis and Recommendation*, 11 ST. MARY'S L.J. 914 (1980)(analyzing and recommending changes to Texas child abuse statutes).

170. Stearns, *supra* note 7, at 616; *see also* Pollock, *supra* note 169, at 915-16. When a child has suffered from or been threatened with serious harm, parental rights are subordinated to a state's interest in child protection. Pollock, *supra* note 169, at 915-16. When necessary, a state may intervene to remove a child from a harmful situation and thereby terminate any parental right to custody. Pollock, *supra* note 169, at 916.

171. Stearns, *supra* note 7, at 616.

172. Stearns, *supra* note 7, at 616.

173. Stearns, *supra* note 7, at 616-17.

174. Stearns, *supra* note 7, at 620. These procedural requirements "[r]eflect a delicate balance between efforts to maintain the family unit and efforts to protect children who may be subject to serious harm." Stearns, *supra* note 7, at 620.

175. Stearns, *supra* note 7, at 620-21.

176. *See* Connolly & Marshall, *supra* note 145, at 12-13; *see also* Stearns, *supra* note 7, at 621 (most states require certain individuals to report suspected child abuse and neglect). Congress' version of a child abuse prevention law specifically conditions receipt of federal funding

to report such abuse may be punished with civil or criminal sanctions.[177] Additionally, all statutes provide some degree of immunity from prosecution for those individuals required to report abuse.[178] Finally, virtually every statute recognizes that judicial sanctions are a last resort that should be employed only after parents have had an opportunity to alter their abusive conduct.[179]

### C. *Expansion of Child Abuse Laws to Protect the Fetus*

Despite the fact that most child abuse statutes do not explicitly include the fetus, several states have recently begun to successfully assert dependency actions predicated partially or solely upon an infant's drug or alcohol addiction at birth. *In re Baby X*[180] represents one of the first cases where a court held that "a new-born suffering narcotic withdrawal symptoms as a result of prenatal maternal drug addiction may properly be considered a neglected child."[181] In *Baby X*, the court deprived the mother of custody of her child born addicted to heroin because "a child has a legal right to begin life with a sound mind and body."[182] Since this decision, a few courts have held that evidence of withdrawal symptoms in a newborn constitutes a prima

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on a state having in effect laws that require reporting of known or suspected child abuse. *See* 42 U.S.C. §§ 5101, 5103(b)(2) (Supp. 1986).

177. Stearns, *supra* note 7, at 621; Connolly & Marshall, *supra* note 145, at 18-19. A significant majority of the states statutorily impose civil and criminal sanctions on health care providers who are required to report child abuse but fail to do so. Connolly & Marshall, *supra* note 145, at 18. Furthermore, a child abuse victim may bring a common law negligence suit against a health care practitioner who failed to report the abuse. Connolly & Marshall, *supra* note 145, at 19.

178. *See* Connolly & Marshall, *supra* note 145, at 17-18 (all states immunize individuals required to report abuse). All states immunize those persons who are required to make reports from legal actions brought by those persons who are the subject of the report. Without this immunity, reporters would be subject to "actions for slander, invasion of privacy, intentional infliction of emotional distress and the like." The states are split, however, over whether the immunity from suit is absolute or qualified by a duty of good faith in the accuracy of the report. Connolly & Marshall, *supra* note 145, at 18.

179. *See* Stearns, *supra* note 7, at 621 (before states can intervene, they must allow parents an opportunity to alter abusive conduct and must use least intrusive means to assist the child).

180. 293 N.W.2d 736 (Mich. 1980).

181. *Id.* at 739.

182. *Id.*; *see also In re* Ruiz, 500 N.E.2d 935 (Ohio 1986). Nora Ruiz, an admitted heroin addict, had used the drug throughout the remaining weeks of her pregnancy. *Id.* at 939. Her child was born premature with cocaine and heroin in his system. The Ohio Supreme Court held that the mother's use of heroin so near to the birth of her child and the child's drug dependency were sufficient evidence upon which to declare the child abused. *Id.* at 939.

facie showing of neglect.[183] These courts have extended the analysis even further and held that a fetus fits the definition of "child" under the applicable child abuse statute.[184]

Recently, several states have adopted child abuse statutes that expressly protect children born suffering from narcotic withdrawal symptoms because of maternal prenatal drug abuse. Three states, Oklahoma, Massachusetts, and Florida, specifically require that a child abuse report be filed whenever it is determined that a child is "physically dependent upon an addictive drug at birth."[185] New Jersey's child abuse statute is even broader in that it refers not only to the child's condition at birth but also to maternal conduct which may adversely affect the fetus during the pregnancy.[186] Similar attempts to expand existing child abuse statutes to encompass maternal prenatal drug abuse have met with only marginal success in other states.[187]

A few courts have criminalized maternal prenatal conduct that harms the fetus. Mothers in Arizona, California, Florida and Ohio have been indicted under criminal abuse statutes for giving birth to

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183. *See In re* Vanessa R., 351 N.Y.S.2d 337, 340 (Sur. Ct. 1974)(withdrawal symptoms prima facie evidence of neglected baby); *see also In re* Smith, 492 N.Y.S.2d 331, 334 (Fam. Ct. 1985). *Accord In re* Solomon L., 236 Cal. Rptr. 2, 3 (Ct. App. 1987)(child's drug withdrawal after birth and mother's post-natal neglect of child "clear and convincing evidence" of neglect).

184. *Compare In re* Smith, 492 N.Y.S.2d at 335 (fetus a "person" within New York's child abuse statute) *and In re* Ruiz, 500 N.E.2d at 936 (viable fetus a "child" under Ohio child abuse statute) *with* Reyes v. Superior Ct., 141 Cal. Rptr. 912, 913 (Ct. App. 1977)(fetus not "child" under California child abuse statute) *and In re* Dittrick, 263 N.W.2d 37, 39 (Mich. 1977)(fetus not "child" within Michigan child abuse and neglect statute).

185. *E.g.*, FLA. STAT. § 415.503(9)(A) (West Supp. 1989); MASS. GEN. LAWS ANN. ch. 119, § 51 A (West Supp. 1987); OKLA. STAT. ANN. title 21, § 846(a) (West Supp. 1989).

186. N.J. Stat. Ann. § 30.4 C-11 (West 1981). Section 30.4 provides:

> Whenever it shall appear that any child within this State is of such circumstances that his welfare will be endangered unless proper care or custody is provided, an application . . . may be filed . . . seeking that the Bureau of Children's Services accept and provide such care or custody of such child as the circumstances may require . . . The provisions of this section shall be deemed to include an application on behalf of an unborn child . . . .

*Id.* This is an extremely broad statute which "arguably encompasses not only prenatal drug use but many forms of other conduct as well: performing hazardous work; using legal drugs such as alcohol, caffeine or nicotine; and possibly even sexual practices which pose a threat of harm to the unborn child." Comment, *A Response to "Cocaine Babies" — Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent*, 15 FLA. ST. U.L. REV. 865, 874 (1987) [hereinafter *Cocaine Babies*].

187. *See Cocaine Babies, supra* note 186, at 881-82 (discussing proposed legislation in Florida, which later failed, that would have "criminalized the birth of a drug dependent newborn").

children who tested positive for cocaine and heroin.[188] Last May, an Illinois prosecutor sought an indictment for involuntary manslaughter against a mother who abused cocaine late in her pregnancy and therefore contributed to the death of her child two days after birth.[189]

Although the charges were dropped or the convictions reversed in most of these cases, indications are that the trend toward criminalizing maternal drug abuse during pregnancy will continue.[190] In California, for example, a senator recently introduced legislation that would amend the criminal abuse statutes to include the fetus as a victim.[191] Although this statute has not yet been enacted, one Northern California court already has announced its intent to use evidence of narcotic exposure in newborns as a basis for prosecuting their mothers for violating controlled substances laws.[192]

### D. *Prenatal Intervention*

Perhaps the most visible signs of increased state interest in protecting fetal health are those cases in which courts have allowed states to intervene prenatally to restrict maternal conduct that harms a fetus. State intervention has taken many forms, including actions to declare

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188. *See* Connolly & Marshall, *supra* note 145, at 49-52 (discussing unreported cases in Arizona, California, and Ohio where mothers criminally prosecuted for prenatal cocaine and heroin use); *see also Keeping Babies Free of Drugs*, Nat'l L.J., Oct. 16, 1989, at 28, col. 2 (discussing unreported Florida case where mother sentenced to one year in rehabilitation program in addition to 14 years probation after being found guilty of delivery of cocaine to a minor via umbilical cord.). *See generally* Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357 (1989) [hereinafter *Decisionmaking Model*].

189. *Plan Would Jail 'Fetal Abusers'*, Nat'l L.J., Nov. 21, 1988, at 1, col. 2; *see also Keeping Babies Free of Drugs*, Nat'l L.J., Oct. 16, 1989, at 28, col. 2 (discussing Massachusetts case where prosecutors charged a woman with vehicular homicide "because she 'killed' her fetus by getting into car accident while allegedly driving while drunk").

190. *See Decisionmaking Model*, *supra* note 188, at 358.

191. *Decisionmaking Model*, *supra* note 188, at 358 n.9. The amendment, S. 1070, 1987-88 Reg. Sess. (1987), would have provided that "[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, willfully commits any illegal act which causes any fetus to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, is punishable by imprisonment . . . not to exceed one year. . . ." *Decisionmaking Model*, *supra* note 188, at 358 n.9.

192. *See Plan Would Jail 'Fetal Abusers'*, Nat'l L.J., Nov. 22, 1988, at 1, col. 1. In announcing the plan, a spokesman for the court stated that women who are detected as being drug users will be given a choice between entering a drug treatment program or, if convicted, a mandatory 90-day sentence. *Id.*

a narcotic-addicted fetus a ward of the state,[193] imprisonment of pregnant women whose continued drug abuse was harming their fetuses,[194] and orders requiring a pregnant drug addict to participate in a detoxification program until she gave birth.[195] Although the relief granted was different in each case, each court awarded it for the same reason: to prevent the fetus from suffering irreparable harm as a result of its mother's substance abuse.

### E. *Summary*

The preceding discussion analyzed both the purposes of underlying child abuse statutes in general, and the case law and statutes which have applied civil and criminal sanctions against mothers whose prenatal substance abuse caused injury or death to their children. We propose that the purposes underlying Texas child abuse laws would be served by the amending these laws to apply to maternal drug and alcohol abuse. It is undisputed that a pregnant woman's substance abuse can cause many serious birth defects in her developing fetus. The societal costs resulting from maternal substance abuse are considerable. Texas' interest in avoiding these costs and in protecting potential life, coupled with a child's right "to be born with a sound mind and body, free from prenatally inflicted abuse,"[196] justifies the passage of laws regulating maternal substance abuse. These laws would not affect a woman's right to abort because restrictions on maternal conduct would apply only after the woman has decided to carry the fetus to term. Moreover, these laws would be consistent with the trend toward greater protection of fetal rights in criminal law and tort law.

## VI. STATUTORY PROTECTION OF THE FETUS IN TEXAS

Texas has a comprehensive statutory scheme for the detection, reporting and treatment of child abuse. While none of these laws directly protect the fetus, they could easily be amended to do so.

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193. *See* Connolly & Marshall, *supra* note 145, at 2 (reporting Illinois County Judge order designating a fetus of a narcotic addict a ward of the state).

194. Connolly & Marshall, *supra* note 145, at 45 (discussing unreported case where court made unborn child of female heroin addict a ward of state).

195. *See Maternal Liability*, *supra* note 21, at 607-08 (discussing unreported case where court ordered female heroin addict to participate in detoxificatoin program and weekly urinalysis testing until birth).

196. Myers, *supra* note 1, at 60.

### A. *Child Abuse Reporting Statute*

Chapter 34 of the Texas Family Code requires "[a]ny person having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by a person responsible for the child's care, custody, or welfare shall report" such abuse.[197] Section 34.02 requires the report to be made to: "(1) any local or state law enforcement agency; (2) the Texas Department of Human Services; or (3) the agency designated by the Court to be responsible for the protection of the children."[198] Section 34.03 extends civil and criminal immunity to any person whose report is not made in bad faith or with malice.[199] Section 34.04 provides that in any child abuse proceeding, "evidence may not be excluded on the ground of privileged communication except in the case of communications between attorney and client."[200] Finally, section 34.07 provides that individuals will be guilty of a Class B misdemeanor if they knowingly fail to report known or suspected child abuse.[201]

### B. *Proposal Regarding Treatment and Commitment of Mother*

Chapter 34 should be amended to require all health care professionals who know or suspect that a pregnant woman is abusing alcohol or drugs to report such abuse to the proper authorities.[202] All persons making such reports in good faith should enjoy civil and criminal immunity. Furthermore, any physician-patient privilege should be inapplicable in this context. Once a case is reported, the trial court should schedule a hearing and appoint a guardian ad litem to represent the

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197. TEX. FAM. CODE ANN. § 34.01 (Vernon Supp. 1989).

198. *Id.* § 34.02.

199. *Id.* § 34.03. Persons who report in good faith, therefore, "are not deterred by fear of being sued unjustly for libel, slander, defamation, invasion of privacy, or breach of confidentiality." Pollock, *supra* note 169, at 932.

200. TEX. FAM. CODE ANN. § 34.04. Abrogation of the attorney client privilege "would destroy the confidence and trust between an attorney and client necessary for a fair trial and could be an unconstitutional denial of the due process right to counsel." Pollack, *supra* note 169, at 932.

201. TEX. FAM. CODE ANN. § 34.07.

202. *See* Stearns, *supra* note 7, at 628. Just as pediatricians report cases of child abuse, so too can obstetricians report fetal abuse. Arguably, some pregnant women who improperly manage their pregnancies will pursue medical attention, just as many abusive parents will take their children to a doctor. Stearns, *supra* note 7, at 628; *see also Maternal Substance Abuse*, *supra* note 33, at 1235 (laws which criminalize maternal drug and alcohol abuse could be supplemented with mandatory reporting of fetal abuse "by all hospitals and clinics").

interest of the fetus.[203] At the hearing, the court should determine whether the mother's substance abuse poses a substantial risk to the health of her unborn, *viable* fetus. If the court finds that this risk exists, the mother should be required to participate in a drug treatment program and to submit to periodic drug testing.[204] If this assistance is refused or avoided, the mother should be involuntarily committed only if an appropriate facility is available.[205] While committed, and until the child is born, the mother should be offered parenting and drug education classes.

### C. *Termination of Parent-Child Relationship*

Chapter 15 of the Texas Family Code provides that parental rights can be terminated if a court finds that a parent has engaged in statutorily proscribed conduct and that termination is "in the best interests of the child."[206] Specifically, section 15.02(1) lists eleven statutory grounds for terminating the parent/child relationship,[207] while sec-

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203. *See* TEX. FAM. CODE ANN. § 11.10 (Vernon 1986)(providing for appointment of attorney ad litem to represent interest of child); *see also Maternal Substance Abuse*, *supra* note 33, at 1230. In cases involving maternal-fetal conflicts, a guardian ad litem "can evaluate the risks to the fetus from the mother's conduct, the benefit from any intervention . . . ." *Maternal Substance Abuse*, *supra* note 33, at 1230. In short, the knowledgeable guardian ad litem "can represent to a court the best course of conduct for protecting the fetus." *Maternal Substance Abuse*, *supra* note 33, at 1230.

204. *See* Connolly & Marshall, *supra* note 2, at 55-56. Mandatory drug rehabilitative treatment is a viable alternative to criminalizing certain types of prenatal conduct. Mandatory treatment is not as intrusive as other court-ordered measures and could also benefit the mother as well as the child. Connolly & Marshall, *supra* note 2, at 55-56; *Maternal Substance Abuse*, *supra* note 33, at 1235-36 (citing unreported case where Baltimore court required drug-addicted mother to both submit to periodic urinalysis testing and enroll in drug rehabilitation program).

205. Commitment in fetal abuse cases could be achieved using the procedures set out in the Mental Health Code for committing drug dependent persons. *See* TEX. REV. CIV. STAT. ANN. art. 5561 C-1, § 1(a) (Vernon Supp. 1989)("[a]ny person found to be a drug-dependent person in accordance with the provisions of this act may be committed to a mental health facility as prescribed by this act"). Involuntary commitment in fetal abuse cases, however, should only be an available remedy for courts when the facility to which the mother is committed has an adequate drug treatment program in place. *See* Connolly & Marshall, *supra* note 145, at 56 (mandatory treatment will not be realistic alternative unless and until adequate drug rehabilitation programs are developed).

206. *See* TEX. FAM. CODE ANN. § 15.02 (Vernon 1979); *see also* Wiley v. Spratlan, 543 S.W.2d 349, 351 (Tex. 1976)(to terminate parent-child relationship, statutory grounds must exist and termination must be in best interests of child).

207. TEX. FAM. CODE ANN. § 15.02(1)(A)-(K) (Vernon 1979).

tion 15.02(2) requires the best interest finding.[208] Proof by clear and convincing evidence[209] of at least one of the eleven grounds set forth in section 15.02(1) is sufficient as long as it is coupled with a finding under section 15.02(2).[210] The child abuse provisions are found in subsections (1)(D) and (1)(E). Under the latter subsection, parental conduct which "endangers the physical or emotional well-being of the child can serve as a basis for terminating parental rights." This subsection does not require either a showing of actual injury to the child or the intent to harm the child.[211] Distant past acts toward the child are an insufficient basis for termination under subsection (1)(E) if a parent has been shown to be rehabilitated.[212]

### D. *Proposal Regarding Termination of Parental Rights*

We propose that Chapter 15 be amended to allow termination pro-

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208. *Id.* § 15.02(2). Texas courts look at many factors when determining the best interests of the child, including:

> (A) The desires of the child; (B) The emotional and physical needs of the child now and in the future; (C) The emotional and physical changes of the child now and in the future; (D) The parental abilities of the individual seeking custody; (E) The program available to assist these individuals to promote the best interests of the child; (F) The plans for the child by these individuals or by the agency seeking custody; (G) The stability of the home or proposed placement; (H) The acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) Any excuse for the acts or omissions of the parent.

Holly v. Adams, 544 S.W.2d 367, 371-72 (Tex. 1976).

209. Because termination of parental rights is such a drastic remedy, this process requires a state to justify termination with "clear and convincing" evidence of the parental misconduct. *See, e.g.*, Craddock v. Worley, 601 S.W.2d 445, 447 (Tex. Civ. App.—Dallas 1980, no writ); *In re* Hare, 599 S.W.2d 856, 858 (Tex. Civ. App.—Texarkana 1980, no writ); *In re* 6M, 596 S.W.2d 846, 847 (Tex. 1980). *See generally* L. SIMPKINS, TEXAS FAMILY LAW (Speer's 5th rev. ed. 1981).

210. TEX. FAM. CODE ANN. § 15.02(1)(E) (Vernon 1979); *see also* D__- F__- v. State of Texas, 505 S.W.2d 933, 939 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.)(both a finding under 15.02(1) and 15.02(2) required before parental rights can be terminated).

211. *See* Lane v. Jefferson County Child Welfare Unit, 564 S.W.2d 130, 132 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.)(actual injury to child need not be proven before the state can terminate parental rights); Carter v. Dallas County Child Welfare Unit, 532 S.W.2d 140, 142 (Tex. Civ. App.—Dallas 1976, no writ)(proof that parent intended to engage in endangering conduct is not required).

212. *See* Wetzel v. Wetzel, 715 S.W.2d 387, 390 (Tex. App.—Dallas 1986, no writ)(misconduct toward child in distant past, standing alone, will not support termination of parental rights). If, however, a parent has not been shown to be rehabilitated of this past conduct, the state does not have to show present or future harm to the child before terminating parental rights. *See* Carter v. Dallas County Child Welfare Unit, 532 S.W.2d 140, 142 (Tex. Civ. App.—Dallas 1975, no writ).

ceedings to be based on a showing of fetal abuse. Specifically, subsection 15.02(1)(E) should allow the state to view a newborn's drug dependency as prima facie evidence of child abuse.[213] Additionally, all health care professionals who acquire knowledge of a child's drug dependency at birth should be required to report this evidence to the proper authorities.[214] Once a case is reported, a hearing should be scheduled and a guardian ad litem should be appointed for the child.[215] At the hearing, the court should determine whether the maternal substance abuse which caused the dependency endangered the child's well-being.[216] If the court so determines, the mother should be given a choice between relinquishing parental rights immediately or participating in an available drug rehabilitation program.[217] If the later course is chosen, the court should enter a judgment dismissing the suit, contingent upon the mother's successful rehabilitation. If the mother later withdraws from the program the court should enter judgment terminating parental rights on the basis that the mother's continued substance abuse endangers the child and that termination is in the child's best interests.[218]

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213. Although worded broadly enough to encompass fetal abuse, section 15.02(1)(E) has never been interpreted in such a way. In fact, only two cases were found where Texas courts discussed the possibility of interpreting section 15.02(1)(E) to allow for termination based on maternal prenatal substance abuse. *See* Rodriguez v. Texas Dept. Human Servs., 737 S.W.2d 25, 28 (Tex. App.—El Paso 1987, no writ)(mere fact child born addicted to opiates insufficient basis for termination); *see also* G.M. v. Texas Dept. of Human Servs., 717 S.W.2d 185, 189 (Tex. App.—Austin 1986, no writ)(intravenous injection of drugs during pregnancy, which caused mother to contract hepatitis which passed to child, insufficient basis for terminating parental rights).

214. This reporting requirement could be modeled after Florida's child abuse reporting laws. That state, in 1987, amended its child abuse reporting laws to include children born drug dependent. *See* 1987 FLA. LAWS 333 (amending FLA. STAT. § 415.503(7)(a) (1985)). Section 415 now requires hospital workers to notify the Florida Department of Health and Rehabilitative Services whenever a newborn tests positive for drugs; in turn, the state must take steps to terminate parental custody on the basis of the baby's drug dependency. FLA. STAT. ANN. § 415.503 (8)(a)2 (West Supp. 1989); *see also Cocaine Babies*, *supra* note 186, at 865-66 (summarizing 1987 amendments to Florida child abuse reporting laws).

215. *See* TEX. FAM. CODE ANN. § 11.10(c) (Vernon 1986)(providing for appointment of attorney ad litem to represent interest of child).

216. This proof requirement should be in place to ensure that maternal conduct which poses only minimal risks to the health of the fetus (e.g., occasional drink) does not lay the foundation for a dependency action.

217. Again, the mother's choice here must be meaningful, i.e., an available drug rehabilitation program must be offered.

218. If a mother can not be successfully rehabilitated of her endangering conduct, termination of her parental rights is entirely consistent with the law. *See* Carter v. Dallas County Child Welfare Unit, 532 S.W.2d 140, 142 (Tex. Civ. App.—Dallas 1975, no writ).

## VII. CONCLUSION

Critics of measures similar to those we have proposed offer a number of arguments for precluding state intervention into the lives of pregnant women. These critics variously assert: (1) education, not intervention, should be used to counter the problem of maternal substance abuse; (2) state intervention will only encourage women to abort in order to avoid liability for their prenatal conduct; (3) state intervention will impair the psychological state of the mother and, in turn, harm the fetus; and (4) every aspect of a pregnant woman's life eventually will be controlled because almost all conduct can be shown to adversely affect the fetus. Close scrutiny, however, reveals these arguments to be unpersuasive.

Numerous efforts to educate the public about the dangers of maternal substance abuse have been made. Most of these efforts are aimed at informing individuals, particularly pregnant women, of the danger that alcohol and drugs pose for the developing fetus.[219] Many cities around the country require signs in clubs, restaurants, and liquor stores that warn that alcohol can harm a fetus.[220] Additionally, pending congressional proposals would require cautionary messages on all alcoholic products.[221] Despite these efforts, public awareness campaigns are not always effective.[222] More importantly, educational efforts are useless "where the pregnant woman is fully aware of the potential effect of abusing harmful substances but either simply has no control to resist, doesn't care about the consequences, or has evaluated and accepted the risks inherent in continued substance abuse."[223]

In response to the argument that state intervention would encourage women to abort, it should be pointed out that our proposal allows state intervention only after viability, when a woman no longer enjoys an unqualified right to obtain an abortion. At any rate, it can be argued that women who already have decided to carry their fetuses to term will be sufficiently committed to their fetuses' well being that any additional burden of state intervention will not encourage them to

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219. *See Maternal Substance Abuse, supra* note 33, at 1234-35.

220. *Maternal Substance Abuse, supra* note 33, at 1235 (these signs required in New York City, Washington, D.C., Columbus, and Philadelphia).

221. *Maternal Substance Abuse, supra* note 33, at 1235.

222. *Maternal Substance Abuse, supra* note 33, at 1235.

223. *Maternal Substance Abuse, supra* note 33, at 1235.

abort.[224] Even if a woman has not determined whether she ultimately will give birth, she may wish to alter her endangering conduct if doing so is less intrusive physically and emotionally than abortion itself.[225]

The argument against state intervention on the basis that it would "traumatize" the mother and indirectly harm the fetus is equally unavailing. Admittedly, because of the fetus' complete physical dependence on the mother, an adversarial hearing and compelled drug treatment may harm the fetus. Nevertheless, in severe cases involving maternal alcohol and drug abuse, the injuries received from the mother's behavior will undoubtedly exceed those sustained as a result of state intervention.[226]

Finally, in regard to the "slippery slope" argument regarding state intervention, it should be noted that our proposal in no way intends to suggest that Texas should proscribe all maternal conduct that affects, even tangentially, the health of the developing fetus. On the contrary, our proposal expressly limits state intervention to those cases in which maternal drug or alcohol abuse poses a substantial risk of severe impairment or death to the fetus.[227] When the proof requirement is incorporated, there is really very little threat that maternal acts that pose only minimal risks to the fetus will be subject to state regulation.[228]

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224. Stearns, *supra* note 7, at 627.

225. Stearns, *supra* note 7, at 627.

226. Stearns, *supra* note 7, at 627.

227. *See* Myers, *supra* note 1, at 53 (proposal limiting state intervention to those cases where maternal conduct poses high probability of serious harm or death to fetus); *see also Limitations on State Intervention*, *supra* note 6, at 1067. One commentator concludes his analysis as follows:

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

*Limitations on State Intervention*, *supra* note 6, at 1067.

228. *See* Stearns, *supra* note 7, at 629 n.290 (by incorporating substantial harm requirement into fetal abuse statutes, courts can prevent state from regulating maternal conduct that is not harmful).