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## Pursuing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse is Not the Answer- A Comparative Legal Analysis

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PURSUING THE PERFECT MOTHER:  
WHY AMERICA'S CRIMINALIZATION OF MATERNAL  
SUBSTANCE ABUSE IS NOT THE ANSWER—  
A COMPARATIVE LEGAL ANALYSIS†

*Linda C. Fentiman\**

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## INTRODUCTION

On December 21, 2007 Theresa Hernandez was sentenced in Oklahoma City to fifteen years in prison for second-degree murder, based on her delivery of a stillborn child and her admission that she

took methamphetamine while pregnant.<sup>1</sup> There is no reliable evidence linking stillbirths to methamphetamine use,<sup>2</sup> but Hernandez is only the latest of scores of American women targeted in a national crusade against “fetal abuse,” who have been prosecuted, and sentenced to lengthy prison terms based on their use of legal and illegal drugs while pregnant.<sup>3</sup> This crusade began in the late 1980s, with the prosecution of women who used cocaine while pregnant for crimes like child endangerment and delivery of drug to a minor. In the last several years this crusade has become a veritable holy war, accelerating in intensity and scope. Since 1999, more than thirty American women have been indicted for using alcohol or other drugs while pregnant—charged with crimes ranging from child abuse to first-degree murder—and have received prison sentences of up to twenty years.

The American “fetal protection” movement is unique among developed and developing nations. While other nations also have children who are born “at risk” and populations of poor pregnant women whose lives are highly dysfunctional or who are addicted to alcohol and other drugs, only in the United States are these women criminally prosecuted or civilly committed based on their conduct while pregnant.<sup>4</sup> Only in

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1. Ms. Hernandez was initially charged with first degree murder and faced a life sentence. After having been held in county jail awaiting trial for three years without being able to have her children visit her, she entered a guilty plea to second-degree murder. Dana Stone, Letter to the Editor, *Is Meth Murder Charge Useful?*, OKLAHOMAN (Okla. City), Dec. 19, 2007; see also Jay F. Marks, *For Meth Mom, A Tough Road Ahead*, DAILY OKLAHOMAN (Okla. City), Dec. 22, 2007.
  2. Stone, *supra* note 1 (citing statement by the American College of Obstetricians and Gynecologists that there is no evidence linking methamphetamine use with stillbirths). See also Kathryn Wells, *Methamphetamine and Pregnancy*, <http://www.mapspd.org/Meth%20&%20Pregnancy.htm> (last visited Feb. 16, 2009) (“[N]o true syndrome specifically linked with maternal use of Methamphetamine use in the prenatal period has been described”).
  3. The first reported effort at prosecution was in 1989 in Winnebago County, Illinois, for involuntary manslaughter, but the grand jury refused to indict. Marcella S. Kreiter, *Cocaine Mothers and Cocaine Babies*, UNITED PRESS INT’L, May 27, 1989, BC cycle. Since then, at least thirty states have charged women with murder, manslaughter, child abuse or endangerment, or drug delivery to a minor. Lynn M. Paltrow, *Punishing Pregnant Women for Their Behavior During Pregnancy: An Approach that Undermines the Health of Women and Children*, in *DRUG ADDICTION RESEARCH AND THE HEALTH OF WOMEN* 467, 468 (Cora Lee Wetherington & Adele B. Roman eds., 1998), available at [http://www.nida.nih.gov/PDF/DARHW/467-502\\_Paltrow.pdf](http://www.nida.nih.gov/PDF/DARHW/467-502_Paltrow.pdf). See Appendix A for a list of prosecutions.
  4. As the detailed comparative law analysis presented *infra* will show, there have been no efforts to criminally prosecute or civilly commit pregnant women who use alcohol or other drugs in France. In Canada, where there were two reported cases of criminal prosecution or civil commitment in the 1990s, the Canadian courts have taken a firm

the United States do prosecutors take the position that embryos and fetuses should be protected as full human beings while in utero.<sup>5</sup> At the same time, the United States stands alone among developed countries in failing to guarantee access to health care to women and children throughout their lives and in failing to provide other economic, legal, and social supports (including treatment for drug and alcohol addiction) in order to increase the chances that women can nurture and provide for their children, as well as reduce the incidence of women's addiction. Almost all the women targeted by American "fetal protection" warriors exist at the very margins of society. In addition to their alcohol or drug addiction, the overwhelming majority of these women have histories of mental illness and/or mental retardation; there is significant evidence that much of their drug use is an attempt to self-medicate for depression or other illnesses.<sup>6</sup> The targeted women are overwhelmingly women of color, and they are almost always poor.<sup>7</sup> In many cases, they are victims of childhood sexual abuse and current domestic violence.<sup>8</sup>

In this Article I will examine not only the substantive legal differences between the United States, Canada, and France, but I will also explore how these legal rules fit within a broader social, political, and religious setting. I will pursue four lines of inquiry. First, I will briefly chronicle the history of criminal prosecution of pregnant women in America and show how these prosecutions have become markedly more aggressive over the last twenty years. Second, I will situate these prosecutions in the full context of American law and culture, demonstrating

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stance against such legal actions, and none have been instituted for more than ten years. (My research has disclosed no reported cases since 1997.)

5. See discussion *infra* Part I.
6. See WOMEN'S LAW PROJECT, RESPONDING TO THE NEEDS OF PREGNANT AND PARENTING WOMEN WITH SUBSTANCE USE DISORDERS IN PHILADELPHIA 4, 6 (2002), available at [http://www.womenslawproject.org/reports/Pregnant\\_parenting\\_PVS.pdf](http://www.womenslawproject.org/reports/Pregnant_parenting_PVS.pdf); see also Lynn M. Paltrow, *Pregnancy, Domestic Violence, and the Law: The Interface of Medicine, Public Health, and the Law: Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 477 (2005).
7. LAURA GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 118 (1997); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 939 (1997).
8. GOMEZ, *supra* note 7, at 17; see also WOMEN'S LAW PROJECT, *supra* note 6; Paltrow, *supra* note 3, at 468–69. It is notable that domestic violence rises in connection with pregnancy. Homicide accounts for more than 11% of all deaths of pregnant women. Antonia Zerbisias, *Killings Reopen Debate on Rights of Fetuses*, TORONTO STAR, Oct. 10, 2007, at L1, available at LEXIS. Homicide is the second most common cause of death for pregnant women, following only behind auto accidents, but ahead of the death rate for any single pregnancy-related condition. *Id.*; Lynn Moriarty, Op-Ed., *Valley Voice: Pregnant Women Face Increased Violence*, DESERT SUN (Palm Springs, Cal.), June 28, 2007, at 6B, available at LEXIS.

how the fetus has received increasing legal recognition in a wide variety of circumstances. I will argue here that “fetal protection” prosecutions are part of a broader attack on women’s rights, including the right to reproductive freedom as well as the right to control their economic and private lives generally. I will examine how American law’s focus on the fetus as the sole “person” at risk, rather than on the maternal–fetal dyad, skews the legal and political arguments that take place. I will contrast the emphasis on the fetus with the failure of American government to provide adequate health care for women and children. Third, I will examine the laws of two other nations, Canada and France, for purposes of comparative legal, cultural, and economic analysis,<sup>9</sup> and will offer

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9. I have chosen Canada and France for comparative law purposes for several reasons. Both are developed democracies, with capitalist economic systems and standards of living comparable to the United States. Canada shares the United States’ common law tradition, but has a different history in regard to constitutional law in general and abortion law in particular. In many substantive areas of law, there appears to be great variation among the American states, *see, e.g.*, David C. Brody, *Criminal Procedure Under State Law: An Empirical Examination of Selective New Federalism*, 23 JUST. SYS. J. 75 (2002) (discussing the variation in state law implementation of criminal procedure reforms in light of Supreme Court decisions), perhaps more than would be expected from Canadian courts compelled to follow the Canadian Supreme Court. Canada is similar to the United States in having significant native and immigrant populations, although, unlike the U.S., Canada does not have a significant population of descendants of African slaves. Canada’s “aboriginal” population was 3.3% in the 2001 census, while its African-American or black population was only 2.2%. Statistics Canada, 2001 Census Highlight Tables: Aboriginal Peoples of Canada (Jan. 21, 2003), <http://www12.statcan.ca/english/census01/products/highlight/Aboriginal/Page.cfm?Lang=E&Geo=PR&View=1a&Code=0&Table=2&StartRec=1&Sort=2&B1=Distribution01&B2=Total>. Other “visible minorities,” excluding Aboriginals and African-Americans, constituted 11.2% of the 2001 population. Statistics Canada, 2001 Census Highlight Tables: Ethnocultural Portrait of Canada (Jan. 21, 2003), <http://www12.statcan.ca/english/census01/products/highlight/Ethnicity/Page.cfm?Lang=E&Geo=PR&View=1&Code=0&Table=2&StartRec=1&Sort=2&B1=Distribution>. In 2006, 19.8% of Canada’s population was foreign-born, compared to 12.5% of the U.S. population. STATISTICS CAN., CATALOGUE NO. 91-003-XIE, CANADIAN DEMOGRAPHICS AT A GLANCE 39 (2008), *available at* <http://www.statcan.gc.ca/pub/91-003-x/91-003-x2007001-eng.pdf>. In 2000, the U.S. population was approximately 75% white, 12.5% Hispanic or Latino, 12.3% black or African-American, 0.9% Native American or Alaskan Native, and 2.4% of two or more races. ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: OVERVIEW OF RACE AND HISPANIC ORIGIN 3 tbl.1 (2001), *available at* <http://www.census.gov/prod/2001pubs/cenbr01-1.pdf>. Canada has a system of universal healthcare, although the system has been criticized for failing to deliver on its promise of care for all. *See, e.g.*, Douglas Martin, *Healthcare in Canada: Popular System Now Rocked by Criticism*, N.Y. TIMES, Feb. 15, 1983, *available at* <http://www.nytimes.com/1983/02/15/science/health-care-in-canada-popular-system-now-rocked-by-criticism.html>; Ruth Walker, *Snags in Canada’s Healthcare*,

some informed speculation about the reasons why the American obsession with “fetal protection” is not matched by other nations. Here I will address four factors: 1) America’s frequent reliance on constitutional litigation as a means of achieving law change; 2) America’s federal system of government, which provides the opportunity for different legal rules to operate concurrently within the same nation; 3) the United States’ unique prosecution system, which involves government attorneys who are chosen locally by the electorate, as opposed to the Canadian and French systems in which prosecutors are appointed through a centralized national process; and 4) and the lack of a system of universal health care and other government-funded social and economic supports. I will conclude with recommendations for reforming American law to embrace the unity of interests of pregnant women and their fetuses and promote the health of both, by providing treatment, not punishment, for addicted women.

## I. TWO DECADES OF PROSECUTING PREGNANT AMERICAN WOMEN

A focus on maternal behavior as the guarantor of successful child-rearing is not new. Ever since Jean Jacques Rousseau penned *Emile*, mothers have been seen as essential to creating healthy citizens and ensuring social harmony.<sup>10</sup> In the 1950s, American women were supposed

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CHRISTIAN SCI. MONITOR, Mar. 23, 2000, available at <http://www.csmonitor.com/2000/0323/p1s3.html>.

France provides important contrasts with the United States and Canada, as it is distinguished both by its civil law system and its relatively homogeneous population. Although its history as a Catholic nation strongly influenced the development of French law, the legal system is now nominally neutral, under the French doctrine of religious secularism, “laïcité.” See, e.g., Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 346–54 (2006) (tracing the evolution of secularism, or laïcité, into a French constitutional principle); Jennifer M. Westerfield, Note, *Behind the Veil: An American Legal Perspective on the European Headscarf Debate*, 54 AM. J. COMP. L. 637, 646–48 (2002). France is currently struggling with how best to integrate a growing immigrant population, many of whom are of Muslim or other faiths. See Custos, *supra*, at 367–68 (noting that France has the largest Muslim population of any European Union country, and describing one of the goals of France’s 2004 statutory prohibition against the wearing of religiously affiliated clothing and symbols in public schools as “a means to preserve the status of public schools as neutral harbors of integration”). Like Canada, France has a system of universal, government-funded healthcare. In addition, France has a significant system of economic and other supports for families with children, reflecting a strong pronatalist position. See discussion *infra* in Part V.C.

10. In *Emile*, Jean-Jacques Rousseau urged French women to take up their duties to breastfeed their infants. He wrote, “Do you wish to bring everyone back to his first

to be at home full-time to nurture their children, but there was little focus on women's actions during pregnancy, and women routinely smoked and drank alcohol during pregnancy. In the early 1970s, maternal-infant "bonding" was announced as essential to prevent child abuse. Bonding required mothers to spend a great deal of time in close physical proximity to their infants. Critics have suggested that the scientific evidence in support of the bonding hypothesis was weak, but that its adoption as a medical and moral imperative was a response to the rise of feminism and the increased desires of many American women to have a life outside the home.<sup>11</sup> Since the late 1980s, American prosecutors, physicians, public health officials, and media have focused on the potential for children to be harmed by their mother's drug use (including alcohol, caffeine, tobacco, and other drug use) while pregnant.

### A. *The Risks of Maternal Drug Use*

Approximately 5–6% of American women use illegal drugs during pregnancy, while 25% use alcohol.<sup>12</sup> Drug use is common across all ethnic groups and classes, although black women are almost ten times more likely to have their drug use reported to local health authorities.<sup>13</sup> Most scientists agree that drug use, broadly defined, during pregnancy can harm the newborn, but they disagree about both the severity and the permanence of the harm.<sup>14</sup>

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duties? Begin with mothers . . . . The whole moral order degenerates; naturalness is extinguished in all hearts [when wet nurses, and not their mothers, nourish infants] . . . . Let women once again become mothers, men will soon become fathers and husbands again." JEAN-JACQUES ROUSSEAU, *EMILE: OR ON EDUCATION* (Allan Bloom trans., Basic Books 1979) (1762). See also REBECCA KUKLA, *MASS HYSTERIA: MEDICINE, CULTURE, AND MOTHERS' BODIES* 30–35 (2005) (arguing that Rousseau's vision of "the maternal body" played a central role in Enlightenment thinking and still influences modern views of the role of mother in society).

11. See, e.g., DIANE E. EYER, *MOTHER-INFANT BONDING: A SCIENTIFIC FICTION* 1, 8 (1992).
12. *Addiction Medicine: Psychopathology of Pregnant Women with Alcohol and Drug Dependencies Examined*, *WOMEN'S HEALTH WKLY.*, Aug. 23 & 30, 2001, at 8 [hereinafter *Addiction Medicine*].
13. Ira J. Chasnoff, Harvey J. Landress & Mark E. Barrett, Special Article, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 *NEW ENG. J. MED.* 1202, 1202 (1990) (observing that black women were roughly ten times as likely as white women to be reported by their physicians for using drugs, despite approximately equal rates of positive toxicology results indicating substance abuse).
14. See, e.g., DAN STEINBERG & SHELLY GEHSAN, *NAT'L CONF. OF STATE LEGISLATURES, STATE RESPONSES TO MATERNAL DRUG AND ALCOHOL USE: AN UPDATE* (2000), <http://www.ncsl.org/programs/health/forum/maternalabuse.htm>; Janet R. Hankin,



The dangers of in utero alcohol exposure are well demonstrated, although it was not until the 1970s that the causal relationship between maternal alcohol use, fetal harm, and mental retardation became clear.<sup>15</sup> Even infants born to mothers who drink moderately while pregnant may experience deficits in IQ, learning, and attention, but the debate continues about whether minimal alcohol consumption during pregnancy is dangerous.<sup>16</sup>

It is much less clear whether, and to what extent, other drugs affect fetal development. While some researchers have found that maternal cocaine use may lead to subtle, long-lasting neurological deficits, including deficits in “the ability to habituate or self-regulate” and small deficits in IQ and language ability,<sup>17</sup> others have found that most infants exposed in utero to cocaine “catch up to their peers in physical size and health status by age 2.”<sup>18</sup> A 2001 review article concluded that cocaine had not been shown to cause any “major adverse developmental consequences in early childhood,” and that in utero cocaine exposure is much less harmful than exposure to two legal drugs—alcohol and tobacco.<sup>19</sup> Of course, many more women smoke while pregnant than use cocaine.<sup>20</sup> Caffeine, a widely used drug, has recently received substantial media attention, although the evidence of its harmful effects is quite limited and sharply contested.<sup>21</sup>

Today, methamphetamine is the illegal drug making headlines, and it is said to affect many communities across the United States. It is por-

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*Fetal Alcohol Syndrome Prevention Research*, 26 ALCOHOL RES. & HEALTH 58, 58–59 (2002).

15. Steven J. Ondersma et al., *Prenatal Drug Exposure and Social Policy: The Search for an Appropriate Response*, 5 CHILD MALTREATMENT 93, 94, 96 (2000).
16. *Id.* at 96.
17. *Id.* at 95–96.
18. STEINBERG & GEHSAN, *supra* note 14.
19. Wendy Chavkin, Commentary, *Cocaine and Pregnancy—Time to Look at the Evidence*, 285 JAMA 1626, 1626 (2001) (citing Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001)).
20. Naomi Kistin et al., *Cocaine and Cigarettes: A Comparison of Risks*, 10 PAEDIATRIC & PERINATAL EPIDEM. 269, 275–76 (1996) (noting that while children exposed to cocaine in utero were more likely to have adverse birth outcomes than children whose pregnant mothers consumed no drugs, children whose mothers used tobacco products while pregnant were at risk for the same adverse outcomes as children whose mothers used cocaine, although the magnitude of the risk was lower).
21. In January 2008 a report suggesting a link between caffeine intake and miscarriages received wide public attention, despite the statements of some scientists that the link might not be causal. See, e.g., Denise Grady, *Pregnancy Problems Tied to Caffeine: Long-Held Concerns About Miscarriages Are Focus of New Study*, N.Y. TIMES, Jan. 21, 2008, at A10.

trayed by law enforcement and the media as posing a risk of serious fetal harm; however, there is scant data demonstrating a causal relationship between exposure to methamphetamine in utero and problems of infant development.<sup>22</sup>

Recent research stresses the multiple determinants of poor birth outcomes, with important factors including maternal poverty, poor nutrition, homelessness, a history of domestic violence, and lack of prenatal care.<sup>23</sup> Because it is difficult to untangle the complex causal relationships between maternal drug use and other contributors to poor birth outcomes,<sup>24</sup> it is both simplistic and short-sighted to focus solely on drugs as the source of fetal and childhood harm.

An intriguing and often overlooked issue is the risk of harm accompanying the use of assisted reproductive technology (ART). Twins and other multiple births are far more likely than “singletons” to be born earlier and smaller, and they are at risk for other neurological and developmental problems as well.<sup>25</sup> One out of eight American children is

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22. See, e.g., Stone, *supra* note 1. Media stories abound concerning the risks of in utero methamphetamine exposure for the long-term development of children. See, e.g., Katie Zernike, *A Drug Scourge Creates Its Own Form of Orphan*, N.Y. TIMES, July 11, 2005, at A1; U.S. Warns of ‘Global Meth Threat,’ BBC NEWS, May 10, 2006, <http://news.bbc.co.uk/2/hi/americas/4757179.stm>. Others have criticized this media coverage as sensational and poorly informed. See, e.g., Daniel Thigpen, *Case of Lodi Baby Raises Difficult Legal Dilemma*, RECORD (Stockton, Cal.), Oct. 14, 2007, available at [http://www.recordnet.com/apps/pbcs.dll/article?AID=/20071014/A\\_NEWS/710140305](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20071014/A_NEWS/710140305) (discussing a lack of medical data showing that methamphetamine causes developmental problems in children); *Meth and Myth: Top Doctors, Scientists, and Specialists Warn Mass Media on “Meth Baby” Stories*, 397 DRUG WAR CHRON. (Stop-theDrugWar.org (Drug Reform Coordination Network), Wash., D.C.), July 29, 2005, available at <http://stopthedrugwar.org/chronicle/397/methandmyth.shtml>; see also RYAN S. KING, THE SENTENCING PROJECT, THE NEXT BIG THING? METHAMPHETAMINE IN THE UNITED STATES 16–28 (2006) (asserting that the media have failed utterly to accurately report the science and epidemiological data surrounding methamphetamine addiction); *Newborn Hair Signals Expectant Mothers’ Meth Use: Study*, CBC NEWS, Oct. 31, 2006, available at <http://www.cbc.ca/health/story/2006/10/31/meth-hair.html> (noting the difficulty in determining whether a newborn’s low birthweight should be attributed to its mother’s use of stimulants like methamphetamine and cocaine while pregnant or due to her poor nutrition and lack of “self-care” because of drug use).
23. Because many women who use illegal drugs also abuse alcohol, there is a need for comprehensive and intensive drug treatment programs that take into account the complex needs of this population, which has high “[r]ates of homelessness, poverty, unemployment, and prostitution . . . [and] histories of emotional, physical, and sexual abuse.” *Addiction Medicine*, *supra* note 12. See also Ondersma et al., *supra* note 15, at 95–97; Frank et al., *supra* note 19, at 1621.
24. See Chavkin, *supra* note 19, at 1626.
25. See Jennifer L. Rosato, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them From Harm?*, 2004 UTAH L. REV. 57, 59–61, 69–70, 77–80

born premature and with low birthweight, with the rate of preterm births rising 30% since 1981.<sup>26</sup> A large percentage of children conceived using ART are born preterm. Because both in vitro fertilization (IVF) and ovulation promotion contribute to multiple gestations, these ART processes also contribute to the incidence of preterm births.<sup>27</sup> In addition, even singleton births achieved through IVF “are twice as likely to be born preterm and die within 1 week of birth.”<sup>28</sup> Few commentators have suggested that the mothers who use ART should be criminalized or otherwise compelled to change their behavior to reduce the possibility of harm to their offspring.<sup>29</sup> Women (and their spouses and partners) who use ART are permitted complete choice in terms of the particular technology they use, as well as whether they will have multiple fertilized eggs implanted and/or engage in selective embryo reduction to reduce the chances of multiple births.<sup>30</sup>

### *B. The First Wave of Criminal Prosecutions*

In the last two decades, more than a hundred women in the United States have been criminally prosecuted for causing harm to their fetuses by using drugs while pregnant.<sup>31</sup> In the late 1980s and early 1990s, as

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(summarizing data showing that up to 10% of children born using ART may suffer some adverse consequences).

26. Press Release, Inst. of Med. of the Nat'l Acads., Preterm Births Cost U.S. \$26 Billion a Year; Multidisciplinary Research Effort Needed to Prevent Early Births (July 13, 2006), *available at* <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=11622> [hereinafter IOM Preterm Birth Report Press Release]. The Institute of Medicine Report defines “preterm” as any birth that occurs at less than thirty-seven weeks of pregnancy (a full-term pregnancy is 38–42 weeks post-conception). *Id.*
27. BD. ON HEALTH SCIS. POLICY, INST. OF MED. OF THE NAT'L ACADS., PRETERM BIRTH: CAUSES, CONSEQUENCES, AND PREVENTION 16–17 (Richard E. Behrman & Adrienne Stith Butler, eds. 2007).
28. *Id.* at 17.
29. *See, e.g.*, Tarun Jain, Stacey A. Missmer & Mark D. Hornstein, *Trends in Embryo-Transfer Practice and in Outcomes of the Use of Assisted Reproductive Technology in the United States*, 350 *NEW ENG. J. MED.* 1639 (2004) (noting the adverse results of the high multiple birth rate in the United States, but observing that the U.S. has not regulated ART practices “in part because of the basic belief that such decisions should be left to couples and their physicians”). *But see* Rosato, *supra* note 25 (criticizing the regulatory hands-off position of states and the federal government).
30. *See* Laurie Tarkan, *Lowering Odds of Multiple Births*, *N.Y. TIMES*, Feb. 19, 2008, <http://www.nytimes.com/2008/02/19/health/19mult.html>. The high cost of fertility treatment often influences women’s decisions to risk multiple births, and “many people just see the adorable twins cooing in the double strollers,” ignoring the 15% of low birthweight infants who do not survive. *See id.*
31. *See cases noted infra* in Parts II.B–D & Appendix A.

public attention focused on an epidemic of crack cocaine use (which disproportionately affected racial minorities and the poor), many women were convicted of crimes such as delivering drugs to a minor or child abuse. In every state but South Carolina, these convictions were ultimately overturned by state appellate courts.<sup>32</sup> In invalidating these prosecutions, judges first cited the principle of legality to hold that a fetus was not a child or that drugs could not be “delivered” to a minor via the umbilical cord, emphasizing the separation of powers problem inherent in having judges and prosecutors create law going beyond that enacted by the legislature.<sup>33</sup> Many judges also expressed concern that criminalizing women’s conduct beyond that already encompassed by the crimes of drug use or possession would only drive addicted women underground, away from medical help.<sup>34</sup> Some legislatures took a similar approach. Missouri, for example, concluded that the problem of pregnant women’s drug use could be most effectively addressed by making more drug treatment resources available, and explicitly precluded the criminal prosecution of women for harm to their children allegedly caused by prenatal drug exposure.<sup>35</sup>

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32. In *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997), the South Carolina Supreme Court upheld a conviction under the child endangerment statute for drug use during pregnancy, declaring that a viable fetus was a “child” under the statute, *id.* at 778.

33. *See, e.g., Reyes v. Superior Court*, 141 Cal. Rptr. 912, 915 (Cal. Ct. App. 1977) (holding that mother’s actions were not prohibited by statute because fetus was not a “child” within the meaning of statute); *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992) (holding that cocaine passing through umbilical cord was not punishable under statute prohibiting adult delivery of controlled substances to minors); *State v. Luster*, 419 S.E.2d 32, 34–35 (Ga. Ct. App. 1992) (emphasizing the need to determine the legislature’s intent and neither limit nor extend application of the statute).

34. *See, e.g., Kilmon v. State*, 905 A.2d 306 (Md. Ct. App. 2006). Medical and public health groups also assert that such prosecutions will simply drive a wedge between pregnant women and their physicians, and render it less, not more, likely that the women will seek appropriate pre- and post-natal care, including substance abuse treatment. *Accord Ferguson v. City of Charleston*, 532 U.S. 67, 78, 82–85 (2001) (observing that “an intrusion on . . . [a patient’s expectation of privacy in regard to diagnostic medical tests] may have adverse consequences because it may deter patients from receiving needed medical care”). In a separate article, I will explore at greater length the anti-deterrent impact of criminal prosecutions on women seeking prenatal care and substance abuse treatment.

35. *State v. Wade*, 232 S.W.3d 663, 666 (Mo. Ct. App. 2007), (discussing, *inter alia*, MO. REV. STAT. §§ 1.205.1, 1.205.4 (2000), which provide simultaneously that “[t]he life of each human being begins at conception” and that “[n]othing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care”).

### C. *The Leap to Homicide Prosecutions*

In the late 1990s, after a period of inaction on the fetal protection front, prosecutors in six states undertook much more aggressive prosecutions against pregnant women, for the first time seeking to convict them of acts of criminal homicide, including murder, manslaughter, and attempted intentional homicide. In these and other states, prosecutors have also indicted women for crimes such as child abuse and drug delivery, even though these prosecutions had been declared to be legally unsound previously, either in those states or in other jurisdictions. In many recent cases, prosecutors have been assisted by nurses and doctors.

In 1996 Wisconsin prosecutors charged a young alcoholic woman, Deborah J.Z., with attempted first-degree intentional homicide<sup>36</sup> and first-degree reckless injury.<sup>37</sup> Ms. J.Z. went into labor at a bar. After being taken to the hospital, she told a nurse that she would drink herself and her fetus to death.<sup>38</sup> The Wisconsin Court of Appeals condemned the woman's behavior but barred the criminal prosecution. Relying on the principle of legality, the court ruled that under Wisconsin's "born alive" rule,<sup>39</sup> a fetus was not a human being,<sup>40</sup> and thus the attempted homicide statute did not apply. The court identified several other problems with the prosecu-

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36. At the time, WIS. STAT. § 940.01(1) (1995–96), describing first-degree intentional homicide, provided that "whoever causes the death of another human being *with intent to kill* that person or another is guilty of a Class A felony" (emphasis added).

37. At the time, WIS. STAT. § 940.23(1) (1995–96), describing first-degree reckless injury, provided that "[w]hoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class C felony."

38. Deborah J.Z. "allegedly told a nurse that 'if you don't keep me here, I'm just going to go home and keep drinking and drink myself to death and I'm going to kill this thing because I don't want it anyways.'" *State v. Deborah J.Z.*, 596 N.W.2d 490, 491 (Wis. Ct. App. 1999). Deborah J.Z. also expressed fear about the pain of giving birth and the baby's race. *Id.* The child was born with a blood alcohol level of .199 and physical features showing fetal alcohol effects. *Id.* at 491–92.

39. The "born alive" rule was a creature of English common law, developed by early English commentators and made famous by Lord Coke. It required as a prerequisite to a homicide prosecution that the child have been "born alive," defined to include breathing on its own. It was imported into American jurisprudence along with other aspects of the common law. See *Commonwealth v. Morris*, 142 S.W.3d 654, 655–61 (Ky. 2004) (describing the born alive rule and holding that it no longer made sense in an age when fetal health and viability, as well as the cause of its death, could be established by medical examination).

40. *Deborah J.Z.*, 596 N.W.2d at 496. Wisconsin law defined a "human being" as "one who has been born alive." WIS. STAT. § 939.22(16) (1995–96). The court explained its decision as required by the rule of strict construction of penal laws and by deference to the legislature in a complex public policy area. *Deborah J.Z.*, 596 N.W.2d at 494–95.

tion. The court first asked whether the problem of substance abuse was better addressed through treatment or punishment, noting the concern that threatening criminal prosecution could deter women from seeking prenatal care or treatment for substance abuse.<sup>41</sup> In addition, the court recognized the significant slippery slope problem created by the prosecution of pregnant women: since there is an extended continuum of maternal behavior which potentially risks harm to a fetus, where on that continuum should the line justifying criminal prosecution be drawn? The court observed that to permit the prosecution to go forward in this case would mean that

a woman could risk criminal charges for any perceived self-destructive behavior during her pregnancy that may result in injuries to her unborn child . . . [, including] smoking heavily or abusing legal medications . . . . “Taken to its extreme, prohibitions during pregnancy could also include . . . the failure to secure adequate prenatal medical care, and overzealous behavior, such as excessive exercising or dieting.”<sup>42</sup>

In South Carolina, prosecutors across the state embarked upon an even more strident campaign against pregnant women, with conviction and harsh sentences imposed in many cases. During the 1990s, nurses at Charleston’s main public hospital joined with prosecutors to create a clandestine program to test the infants born to women suspected of drug use. The United States Supreme Court struck down the program as violating the women’s Fourth Amendment rights in *Ferguson v. City of Charleston*.<sup>43</sup>

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41. *Deborah J.Z.*, 596 N.W.2d at 494–95. The court’s concern is supported by a study of low-income women who delivered their babies at an inner city hospital in Detroit. The women studied stated their belief that if Michigan adopted a law mandating that women whose babies tested positive for drugs would be sent to jail, substance-abusing women would be less likely to seek prenatal care, drug testing, or drug treatment. Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 *DRUG & ALCOHOL DEPENDENCE* 199, 201–02 (1993). When the study’s authors attempted to interview women in a state with a law that threatened incarceration, all known drug users refused to participate in the study out of fear of self-incrimination. *Id.* at 200.

42. *Deborah J.Z.*, 596 N.W.2d at 494–95 (quoting *Hillman v. Georgia*, 503 S.E.2d 610, 613 (Ga. Ct. App. 1998)).

43. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (rejecting the prosecution’s asserted “special needs” exception to the Fourth Amendment).

In 1999 Regina McKnight became the first American woman to be charged with murder after her child was stillborn.<sup>44</sup> McKnight was a homeless African-American woman with an IQ of 72 and an addiction to crack cocaine.<sup>45</sup> After she went into premature labor, her child was stillborn.<sup>46</sup> McKnight and her child were tested for drugs and cocaine metabolites were found in both their systems.<sup>47</sup> Although her first trial ended in a mistrial, largely because of the weakness of the prosecution's case on causation, in the second trial McKnight was convicted and sentenced to twenty years in prison.<sup>48</sup> The South Carolina Supreme Court upheld the conviction, rejecting the defendant's argument that a homicide prosecution violated the due process principle of legality.<sup>49</sup> The court relied on its previous decisions finding a fetus to be a child in the context of prosecutions for other crimes to hold that it was permissible to construe the "homicide by child abuse" statute to include cases in which a fetus is stillborn.<sup>50</sup> At the same time, the court, citing its previous decisions holding that a woman could be found guilty of child endangerment based on drug use while pregnant, concluded that it was "public knowledge that usage of cocaine is potentially fatal," and therefore there was sufficient evidence for a jury to find that Ms. McKnight, knowing she was pregnant when she used cocaine, had acted with "extreme indifference to the value of human life," the mens rea required under the statute.<sup>51</sup> The court also rejected McKnight's constitutional arguments based on her right to privacy and her Eighth Amendment right to sentencing not grossly disproportionate to the severity of her

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44. See *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003). The actual charge against McKnight was "homicide by child abuse," a statutory enactment of the felony-murder rule. S.C. CODE ANN. § 16-3-85 provides that this offense is committed if one "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life."

45. Robyn E. Blumner, *Moralists' New Target: Pregnant Women*, ST. PETERSBURG TIMES (Fla.), Aug. 10, 2003, at 7D, available at 2003 WLNR 3833624.

46. See *McKnight*, 576 S.E.2d at 171.

47. *McKnight*, 576 S.E.2d at 171, 173.

48. The trial court suspended the sentence upon service of twelve years in prison. *McKnight*, 576 S.E.2d at 171, 173.

49. *McKnight*, 576 S.E.2d at 175.

50. *McKnight*, 576 S.E.2d at 174-75.

51. *McKnight*, 576 S.E.2d at 172-73 (citing, *inter alia*, *Whitner v. State*, 492 S.E.2d 777, 782, 785 (S.C. 1997)). The court also rejected McKnight's arguments that the evidence was insufficient to establish causation, finding sufficient evidence to send the case to the jury. *Id.* at 172. The court did not consider evidence that in about one third of all stillbirths it is impossible to identify the cause of death. American Pregnancy Association, *Stillbirth: Trying to Understand*, <http://www.americanpregnancy.org/pregnancyloss/sbtryingtounderstand.html> (last visited Feb. 17, 2009).

crime.<sup>52</sup> It was not until 2008, after McKnight had been incarcerated for more than nine years, that the South Carolina Supreme Court granted her post-conviction relief on the grounds of ineffective assistance of counsel, due to, *inter alia*, counsel's failure to present key evidence raising doubt on the causation question and her failure to challenge the jury instructions on *mens rea*.<sup>53</sup>

Prosecutors have also brought homicide charges in four other states. In 2003 a Hawaii prosecutor charged Tayshea Aiwohi with manslaughter based on her methamphetamine use while pregnant, which allegedly caused the death of her infant two days after birth.<sup>54</sup> The indictment was not brought for over two years, and Ms. Aiwohi was sentenced after having successfully completed a drug treatment program.<sup>55</sup> The prosecutor and the circuit court judge asserted that criminal charges were necessary to hold her accountable and to send a message to prevent other mothers from using drugs while pregnant.<sup>56</sup> After conviction, Ms. Aiwohi received a twenty-year prison sentence, which was suspended on condition that she comply with the terms of probation for the next ten years.<sup>57</sup> On appeal, the Hawaii Supreme Court overturned the conviction. The court held, in a rather technically worded opinion, that the attendant circumstance that the victim be a person at the time of the

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52. *McKnight*, 576 S.E.2d at 176–77. In asserting her Eighth Amendment claim, McKnight had argued that a twenty-year prison term for the stillbirth of a child was disproportionate, *see id.* at 177 & n.8, given that the maximum sentence for a woman who illegally procures an abortion in South Carolina is two years and the crime is a misdemeanor, S.C. CODE ANN. § 44-41-80(b) (2002). The court compared McKnight's sentence to the sentence received by other convicted murderers in South Carolina and by murderers of children in other states. *McKnight*, 576 S.E.2d at 177. The court declined to consider the applicability of the abortion statute since McKnight had not preserved the issue for appellate review. *Id.* at 174, 177–78.

53. *McKnight v. State*, 661 S.E.2d 354, 357–62 (S.C. 2008).

54. *State v. Aiwohi*, 123 P.3d 1210, 1210–11 (Haw. 2005).

55. *See Aiwohi*, 123 P.3d at 1210–11; Ken Kobayashi, *Mother Gets Probation in Ice Death*, HONOLULU ADVERTISER, Aug. 26, 2004, at 1B, available at LEXIS.

56. Kobayashi, *supra* note 55. According to the prosecutor, the indictment was a necessary “wake-up call,” so that “we will never see a case like this again.” *Id.* (internal quotation marks omitted). The sentencing judge concurred, commenting that “the State, with good reason, has served clear notice that such conduct can and will result in serious felony charges brought where the child is born alive and later dies or suffers injury due to knowing, intentional or reckless drug use.” Comment on Sentencing at 2, *State v. Aiwohi*, FC. CR. No. 03-1-0036 (Haw. Cir. Ct. Aug. 25, 2004), [http://www.courts.state.hi.us/attachment/43C062D78B180B07EBE773EC5C/state\\_v\\_aiwohi2.pdf](http://www.courts.state.hi.us/attachment/43C062D78B180B07EBE773EC5C/state_v_aiwohi2.pdf). The judge rejected any suggestion that Aiwohi's addiction could be a mitigating factor, declaring, “[D]rug usage, including the use of crystal methamphetamine[,] is a matter of choice and not an illness. Certainly it is a conscious choice to obtain and use the drug initially and worse yet, while pregnant.” *Id.* at 1.

57. Kobayashi, *supra* note 55.



defendant's conduct was an essential element of manslaughter, and thus her conviction could not stand.<sup>58</sup>

Yet even after the convictions of McKnight and Aiwohi, many observers were stunned by the 2004 decision of Utah prosecutors to charge Melissa Rowland for capital murder based on her decision to decline a recommended Caesarian section (C-section) and the subsequent stillbirth of her son.<sup>59</sup> Like Ms. McKnight, Ms. Rowland was a vulnerable woman without an adequate support system.<sup>60</sup> Her own mother died soon after she was born, and Ms. Rowland had a long history of serious mental illness and substance abuse.<sup>61</sup> When she became pregnant with twins, she decided to give up the infants for adoption.<sup>62</sup> A Utah adoption agency moved her from Florida to Salt Lake City, a not uncommon practice compliant with Utah's less demanding adoption laws.<sup>63</sup> While awaiting delivery, Ms. Rowland lived on disability payments<sup>64</sup> and a one-hundred-dollar weekly stipend from the adoption agency<sup>65</sup> and used cocaine, alcohol, and tobacco.<sup>66</sup> When she could not feel fetal movements, Ms. Rowland sought help at three hospitals, but she rejected the hospitals' advice to have a C-section.<sup>67</sup> After Ms. Rowland delivered a stillborn son and a living daughter, she was charged with first-degree murder.<sup>68</sup> Prosecutors predicated their case on a theory of maternal "selfishness," asserting that Rowland's decision not to have a C-section demonstrated the "depraved indifference to human life" nec-

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58. *Aiwohi*, 123 P.3d at 1210, 1223–25.

59. See Linda Thomson, *Rowland Enters Plea in Death of Twin Baby*, DESERET MORNING NEWS (Salt Lake City, Utah), Apr. 8, 2004, at A1, available at 2004 WLNR 16982308.

60. See *id.*; Linda Thomson & Pat Reavy, *Rowland's Out of Jail, Heading to Indiana*, DESERET MORNING NEWS, Apr. 30, 2004, at A1, available at 2004 WLNR 17014187.

61. Thomson & Reavy, *supra* note 60.

62. Linda Thomson, *Mother Is Charged in Stillbirth of a Twin*, DESERET MORNING NEWS, Mar. 12, 2004, at A1, available at 2004 WLNR 16942122.

63. Katha Pollitt, *Pregnant and Dangerous*, NATION, Apr. 26, 2004, at 9, available at <http://www.thenation.com/doc/20040426/pollitt>.

64. Pamela Manson, *Mother is Charged in Stillborn Son's Death*, SALT LAKE TRIB., Mar. 12, 2004, at A1.

65. Pollitt, *supra* note 63.

66. Linda Thomson, *Rowland Case Is Called 'Political'*, DESERET MORNING NEWS, Mar. 13, 2004, at A1, available at 2004 WLNR 16944885.

67. Manson, *supra* note 64. Prosecutors charged that she refused to have a Caesarian section because of "cosmetic" concerns that the operation would disfigure her, but Rowland stated that she never would have said that because she had already delivered two children by C-section. Thomson, *supra* note 62.

68. Thomson, *supra* note 62.

essary for murder.<sup>69</sup> The prosecutors argued that Ms. Rowland had refused the surgery because of vanity,<sup>70</sup> and alleged, contrary to well-established principles of informed consent,<sup>71</sup> that Ms. Rowland did not have a right to decline medical treatment.<sup>72</sup> After three months in jail, Rowland entered into a plea agreement by which she pleaded guilty to two counts of felony child endangerment.<sup>73</sup>

Since the Rowland prosecution, at least five other women have been charged with homicide based on their drug use while pregnant when the child died or was stillborn. These include Jennifer Arrowood,<sup>74</sup> Jamie Lee Burroughs,<sup>75</sup> and Lorraine Patrick<sup>76</sup> in South

69. *See id.*; Thomson, *supra* note 66.

70. Thomson, *supra* note 62; Thomson, *supra* note 66.

71. UTAH CODE ANN. § 78-14-5 codifies the common law of informed consent, although it presumes that “when a person submits to health care rendered by a health care provider . . . that what the health care provider did was expressly or impliedly authorized” by the patient. § 78-14-5(1). However, patients may still have a cause of action for battery without meeting the requirements of § 78-14-5 if they allege that they did not consent at all to medical treatment. *Lounsbury v. Capel*, 836 P.2d 188 (Utah Ct. App. 1992).

72. *See* Thomson, *supra* note 62.

73. Jacob Santini, *Stillborn Twin Case Fades, Issues Stay*, THE SALT LAKE TRIB., Apr. 16, 2004, at B4, available at LEXIS; Thomson, *supra* note 59; Thomson & Reavy, *supra* note 60. Ms. Rowland was sentenced to two terms of up to five years in prison, with the sentence suspended while on “good behavior probation” for eighteen months, requiring her to complete mental health and substance abuse treatment as well as a “parenting skills” course. Doug Smeath & Linda Thomson, *Rowland in New Trouble*, DESERET MORNING NEWS, May 27, 2004, at B1, available at 2004 WLNR 16958337.

74. In 2005 Ms. Arrowood was charged with homicide by child abuse; in 2006 she pleaded guilty to unlawful neglect by a custodian and was sentenced to ten years in prison. *See* Pickens County Thirteenth Judicial Circuit Public Index Search, <http://www.greenvillocounty.org/scjd/publicindex/SCJDPublicIndex39/PIsearch.aspx?CourtType=G> (search last name “Arrowood,” first name “Jennifer”) (last visited Feb. 18, 2009); *see also* National Advocates for Pregnant Women, S.C.: Leading the Nation in the Prosecution of Pregnant Women, [http://www.advocatesforpregnantwomen.org/issues/punishment\\_of\\_pregnant\\_women/south\\_carolina\\_leading\\_the\\_nation\\_in\\_the\\_prosecution\\_punishment.php](http://www.advocatesforpregnantwomen.org/issues/punishment_of_pregnant_women/south_carolina_leading_the_nation_in_the_prosecution_punishment.php) (last visited Feb. 18, 2009) (reviewing South Carolina cases, including that of Ms. Arrowood).

75. In 2006 Ms. Burroughs was charged with homicide by child abuse; Burroughs later pled guilty. *See* Kelly Marshall Fuller, *Test for Drugs Sends Woman Back to Jail*, SUN NEWS (Myrtle Beach, S.C.), Apr. 24, 2007, at C1, available at 2007 WLNR 7685738 (identifying the defendant, contrary to court records, as “Jamie Lynn Burroughs”); Georgetown County Fifteenth Judicial Circuit Public Index, <http://secure.georgetowncountysc.org/publicindex/PIsearch.aspx?CourtType=G> (search for case number “H750929”) (last visited Jan. 13, 2009).

76. Ms. Patrick was charged in October 2007 with homicide by child abuse; as of this Article’s publication, her case was still pending. Lexington County Eleventh Judicial Circuit Public Index Search, <http://www.lex-co.com/applications/scjdweb/publicindex/PIsearch.aspx?CourtType=G> (search for case number “J820080”) (last visited Jan. 13, 2009); *see also*

Carolina, Theresa Hernandez in Oklahoma,<sup>77</sup> and Sheri Lohnstein in Missouri.<sup>78</sup>

*D. The Current Wave of Child Abuse & Child Endangerment Prosecutions*

While prosecutors in some states were pursuing homicide charges, prosecutors in other states, notably Alabama, Maryland, Missouri, New Hampshire, New Mexico, Texas, and Wyoming, were bringing child abuse and endangerment charges against women who used drugs while pregnant, invoking legal theories discredited more than a decade earlier. However, in most case, the charges were dismissed or the convictions were overturned. In 2003 a Missouri prosecutor charged Keila Lewis with first degree felony child endangerment, based on her newborn baby's positive test for marijuana and Lewis' admission that she smoked marijuana once while pregnant.<sup>79</sup> The case was dismissed because the relevant toxicology results were ruled inadmissible.<sup>80</sup> In 2005, also in Missouri, Janet Wade was prosecuted for felony child endangerment based on her use of marijuana and methamphetamine while pregnant.<sup>81</sup> The Missouri Court of Appeals affirmed the trial court's decision to dismiss the charges, holding that while the Missouri legislature recognized that "[u]nborn children have protectable interests in life, health, and well-being," it had determined to advance those interests in a non-criminal manner.<sup>82</sup> Under this legislative scheme, pregnant women were to be given first priority in drug treatment programs, and social services were authorized to investigate whether a newborn child was at risk from its mother's drug use; at the same time, criminal charges and civil causes of action were precluded by statute.<sup>83</sup>

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Sarah Blustain, *This is Murder?*, AM. PROSPECT, Dec. 14, 2007, available at [http://www.prospect.org/cs/articles?article=this\\_is\\_murder](http://www.prospect.org/cs/articles?article=this_is_murder).

77. See Stone, *supra* note 1.

78. Tim Bryant, *Mother Can't Be Prosecuted in Baby's Death, Lawyer Argues*, ST. LOUIS POST-DISPATCH, Oct. 16, 2007, at B1, available at 2007 WLNR 20282262; Kelly Wiese, *Missouri Lawmakers Offer Bills on Courts, Taxes, Alcohol for '08*, KAN. CITY DAILY REC. (Mo.), Dec. 4, 2007, available at 2007 WLNR 24037579.

79. Brief of Amici Curiae, State v. Lewis, No. 03CR113048 (Mo. Cir. Ct., Chariton County) (on file with author); see also NAT'L ADVOCATES FOR PREGNANT WOMEN, ANNUAL REPORT 5 (2004), available at <http://advocatesforpregnantwomen.org/file/NAPWAnnualReport2004.pdf>.

80. Personal communications from Jane H. Aiken, Professor of Law, Washington Univ. Sch. of Law (now at Georgetown Univ. Law Ctr.), to author (Mar. 7, 2005), and Jenean Thompson, Counsel for Keila Lewis, to the author (June 21, 2005).

81. State v. Wade, 232 S.W.3d 663, 663 (Mo. Ct. App. 2007).

82. Wade, 232 S.W.3d at 665-66 (citing MO. REV. STAT. § 1.205.2 (2000)).

83. Wade, 232 S.W.3d at 665-66.

In 2003, relying on a newly enacted Texas law, a Texas prosecutor brought a series of indictments, charging eighteen women with child abuse and two others with delivery of a controlled substance to a minor.<sup>84</sup> The prosecutor asked local physicians to report women they suspected of drug use,<sup>85</sup> and many complied. In 2006 the Texas Court of Appeals reversed the convictions of Tracy Ward and Rhonda Smith for drug delivery, holding that the prosecution had not established the fact of drug delivery beyond a reasonable doubt and that, under the principle of legality, it could not expand the meaning of “deliver” beyond legislative authorization.<sup>86</sup>

In 2004 a Wyoming prosecutor charged Michelle Foust with causing a child to ingest methamphetamine.<sup>87</sup> A judge dismissed the indictment, ruling that a fetus was not a child under the law.<sup>88</sup> In 2004 and 2005 a Maryland prosecutor charged two women, Regina Kilmon and Kelly Cruz, with reckless endangerment based on their use of cocaine while pregnant.<sup>89</sup> Their convictions were reversed in 2006 by the Maryland Court of Appeals, with the court concluding that the Maryland

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84. The new Texas law, Act of May 31, 2003, ch. 822, 2003 Tex. Gen. Laws 2607, redefined the term “individual” in certain statutes to mean “a human being who is alive, including an unborn child at very stage of gestation from fertilization until birth,” *id.* §§ 1.01, 2.01. The law also redefined death to include, “for an individual who is an unborn child, the failure to be born alive.” *Id.* The prosecutor charged at least eighteen women with crimes before the Texas Attorney General issued an opinion concluding that the new law neither authorized prosecution for maternal drug use under the Controlled Substances Act nor required physicians to report such drug use. Tex. Att’y Gen. Op. GA-0291 (Jan. 5, 2005), 2005 WL 35412 (Tex.A.G.); *see also* News from Lynn Paltrow, Exec. Dir. of Nat’l Advocates for Pregnant Women, The Real Cost of Prisons Weblog, [http://realcostofprisons.org/blog/archives/2005/01/news\\_from\\_lynn.html](http://realcostofprisons.org/blog/archives/2005/01/news_from_lynn.html) (Jan. 12, 2005, 17:52 EST).
85. Letter from Rebecca King, 47th Dist. Att’y, to all physicians practicing in Potter County (Sept. 22, 2003), *available at* <http://www.oag.state.tx.us/opinions/opinions/50abbott/rq/2004/pdf/RQ0250GA.pdf> (attachment).
86. *Ward v. State*, 188 S.W.3d 874, 876 (Tex. Ct. App. 2006); *Smith v. State*, No. 07-04-0490-CR, 2006 Tex. App. LEXIS 2370 (Tex. App. Mar. 29, 2006). In *Ward* the court declared,

We are a judicial body obligated to enforce the law as written by the legislature. If that body cares to define “deliver” as including the transfer of drugs by a mother to her unborn child through the exchange of bodily fluids, it may do so. Yet, ours is not to write where it has not.

*Ward*, 188 S.W.3d at 876.

87. *Alleged Meth Mother Bound Over to District Court Last Week*, WIND RIVER NEWS (Wyo.), June 2, 2005, at 9, *available at* 2005 WLNR 12005320.
88. Associated Press, *Judge Drops ‘Meth Baby’ Charge*, CASPER STAR-TRIB. (Wyo.), Sept. 27, 2005, <http://www.trib.com/articles/2005/09/27/news/wyoming/76df395b95d0af24872570880075b959.txt>.
89. *Kilmon v. State*, 905 A.2d 306, 307–08 (Md. Ct. App. 2006).

legislature had not made the conduct criminal.<sup>90</sup> A similar result was reached in New Mexico, where in 2003 Cynthia Martinez was convicted of felony child abuse based on her use of drugs and alcohol while pregnant.<sup>91</sup> In 2006 the New Mexico Court of Appeals reversed her conviction, holding that the New Mexico legislature had not intended a “fetus” to be a “child” within the meaning of the child abuse statute.<sup>92</sup> In 2006 Griseliz Fernandez was charged by a New Hampshire prosecutor with reckless conduct and endangering the welfare of a child after she delivered an infant with traces of cocaine in its blood.<sup>93</sup> These charges were dropped when Ms. Fernandez pleaded guilty to other charges and agreed to enter a drug treatment program.<sup>94</sup>

Since 2006, Alabama prosecutors in several rural counties have prosecuted pregnant women who used drugs under a new criminal statute, “chemical endangerment of a child.”<sup>95</sup> The statute was apparently designed to criminalize the conduct of parents and others who exposed children to methamphetamines in the course of their use or manufacture, but instead has been applied to women who use drugs while pregnant. This felony charge carries a sentence of ten years to life.<sup>96</sup> Initially only one county’s prosecutor, working in conjunction with physicians and hospital personnel, brought these cases; at least eight women entered guilty pleas. Most recently, two other district attorneys have initiated prosecutions, and the law’s use in these circumstances is now being challenged on appeal.<sup>97</sup>

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90. *Kilmon*, 905 A.2d at 310–15.

91. *See State v. Martinez*, 137 P.3d 1195, 1195–96 (N.M. App. 2006). The New Mexico Supreme Court granted certiorari, 141 P.3d 1280 (2006), and then quashed it, 161 P.3d 260 (2007), making the Court of Appeals decision final.

92. *Martinez*, 137 P.3d at 1196–98.

93. *Fetal Drug Case in Nashua Expected to Set Precedent*, UNION LEADER (Manchester, N.H.), Aug. 1, 2006, at A2, available at LEXIS.

94. Albert McKeon, *County Drops Endangerment Case*, TELEGRAPH (Nashua, N.H.), Dec. 20, 2006, <http://www.nashuatelegraph.com/apps/pbcs.dll/article?AID=/20061220/NEWS01/61220003>.

95. ALA. CODE § 26-15-3.2 prohibits the knowing, reckless, or intentional exposure of a child to a controlled substance, and was apparently designed to prosecute parents and others who exposed children to methamphetamines in the course of their use or manufacture. Dave Parks, *Law Puts New Mothers in Jail*, BIRMINGHAM NEWS (Ala.), Feb. 14, 2008, at 1, available at 2008 WLNR 3000083; Philip Rawls, *National Ire Over Alabama Prosecuting Pregnant Moms*, MOBILE PRESS-REG. (Ala.), Aug. 3, 2008, at B7, available at LEXIS.

96. Adam Nossiter, *In Alabama, a Crackdown on Pregnant Drug Users*, N.Y. TIMES, Mar. 15, 2008, at A10, available at <http://www.nytimes.com/2008/03/15/us/15mothers.html>.

97. Parks, *supra* note 95; Rawls, *supra* note 95.

*E. Summary Observations*

What can we conclude about the continuing, intensified prosecution of women for their drug and alcohol use while pregnant? Although, with exceptions in Alabama and South Carolina, the indictments or convictions have eventually been declared impermissible or overturned, prosecutors appear undaunted. What are the reasons for their behavior? It could be that these prosecutors are motivated simply by career ambitions. This Article will later consider whether the fact that American prosecutors are locally elected, rather than appointed and/or part of a centralized criminal justice system, explains some of the differences between American prosecutors and their Canadian and French counterparts. It also appears that some prosecutors are legitimately concerned about in utero drug exposure<sup>98</sup> and hope to solve the problem by publicly shaming the women involved. In addition, the American federal system provides multiple opportunities for new legal approaches to be tried out in the "laboratory" of the states,<sup>99</sup> so that innovations which are initially rejected may ultimately prevail.

However, one need not be a cynic to ask whether prosecutors could be more effective if they lobbied for comprehensive solutions to address the root causes of substance abuse, including domestic violence, mental illness, poverty, and lack of access to healthcare. Most physicians and public health authorities agree that threatening drug-abusing pregnant women with criminal prosecution, rather than providing them with social and economic support and effective drug rehabilitation, will drive women away from treatment, out of fear that they could lose their babies or be imprisoned.<sup>100</sup> New research on the nature of addiction

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98. For example, the Wyoming prosecutor in the Foust case stated, "We stuck our toe in the water on this thing. . . . People need to understand there's a big hole in the law that needs to be filled." Associated Press, *supra* note 88.

99. See the oft-quoted statement of Justice Brandeis in dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932): "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 311 (Brandeis, J., dissenting).

100. See, e.g., Matt Canham, *Proposed Law Targets Pregnant Drug Users*, SALT LAKE TRIB. (Utah), Apr. 10, 2004, at A1, available at LEXIS; Martha A. Jessup et al., *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 22 J. DRUG ISSUES 285, 291-92, 296-99 (2003); Patrik Jonsson, *South Carolina Tests the Bounds of a Fetus's Rights*, CHRISTIAN SCI. MONITOR (Boston), June 28, 2001, <http://www.csmonitor.com/2001/0628/p1s1.html>; Kirsten Scharnberg, *Prosecutors Targeting Pregnant Drug Users; Some Fear Women Will Shun Treatment*, CHI. TRIB., Nov. 23, 2003, at 1, available at 2003 WLNR 15345527; see also Thomson & Reavy, *supra* note 61.

suggests that, like many other illnesses, substance abuse is caused by a confluence of genetic, biological, and environmental factors. It can neither be treated nor eliminated simply by punishing as criminals those who suffer from substance abuse.<sup>101</sup>

Further, courts, medical authorities, and feminists have asserted that taking a criminal justice approach to deal with drug-addicted pregnant women launches prosecutors on a slippery slope. There is simply no principled way to limit prosecution to cases of illegal drug use. Pregnant women who smoke or who do not follow physicians' recommendations to have a C-section, eat properly, or exercise appropriately could also be prosecuted under the same theories of maternal harm used in current prosecutions.<sup>102</sup> Finally, prosecutions of pregnant drug and alcohol abusers raise the ugly spectre of racism seen in the eugenics movement of the early twentieth century. Not only are almost all the women targeted in the fetal protection crusade poor and/or racial minorities,<sup>103</sup> but the public reaction favoring such prosecutions is often characterized by undisguised antipathy toward these women. Public commentary includes eugenic responses remarkably similar to Justice Holmes' infamous "three generations of imbeciles is enough"<sup>104</sup> comment in *Buck v. Bell*.<sup>105</sup>

101. See, e.g., Jeneen Interlandi, *What Addicts Need*, NEWSWEEK, Mar. 3, 2008, at 36 (summarizing research).

102. Associated Press, *Arrest in C-Section Case Alarms Women's Groups*, USA TODAY, Mar. 17, 2004, available at [http://www.usatoday.com/news/nation/2004-03-17-mother-charged\\_x.htm](http://www.usatoday.com/news/nation/2004-03-17-mother-charged_x.htm).

103. See, e.g., Chasoff et al., *supra* note 13, at 1202, 1205–06; Roberts, *supra* note 7, at 939.

104. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

105. For examples, see the reader comments responding to a news story, Sandi Martin, *Birth Control Use Becomes Part of Pleas in Courtroom*, AUGUSTA CHRONICLE.COM (Ga.), Feb. 19, 2007, [http://chronicle.augusta.com/stories/021907/met\\_117138.shtml](http://chronicle.augusta.com/stories/021907/met_117138.shtml), about a South Carolina woman who pleaded guilty to the crime of unlawful conduct by a legal custodian, and received a sentence of probation on condition that she use birth control. One commenter wrote, "I think the system should look more into sterilization of these mothers, then [sic] making them take birth control. WE NEED TO PROTECT THESE INNOCENT CHILDREN!!!!!" Posting of zHolly220 to Martin, *supra* (Feb. 19, 2007, 8:29 EST). Another observed,

As a nurse who has had to help the children after being born addicted to drugs or suffering the consequences of poor prenatal care because the breeder (mother is not appropriate in this case) was too high to notice that she was even pregnant. The suffering at birth and beyond (due to medical procedures that need to be performed later in life due to many types of birth defects associated with drug use and poor prenatal care) is like continuous child abuse. I tend to think the law is not stiff enough. The taxpayers end up taking care of these children, who are more likely not able

## II. HOW AMERICAN LAW PROMOTES THE FETUS AS A SEPARATE LEGAL ENTITY

The criminal prosecutions discussed above are only a small part of the fetal protection war waged in recent years.<sup>106</sup> Civil suits, statutes, and regulatory initiatives have all sought to separate fetuses from the pregnant women whose bodies sustain them.

### *A. American Tort Protection of the Fetus*

American tort law also protects fetal interests. Early American law declined to recognize a fetus as a legal entity.<sup>107</sup> However, in 1946 a medical malpractice case, *Bonbrest v. Kotz*,<sup>108</sup> rejected the theory that a viable fetus is part of its mother,<sup>109</sup> and most American jurisdictions swiftly abandoned it.<sup>110</sup> Today, every state allows a suit for prenatal injuries if the infant is born alive,<sup>111</sup> and most states permit a wrongful death suit to be brought for a viable fetus who succumbs prior to birth due to prenatal injury.<sup>112</sup> A minority of states also permits suit on behalf of a

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to reach their full potential in life because of the effects of what these women have done to themselves and the child before it is born.

Posting of gunfrog to Martin, *supra* (Feb. 19, 2007, 13:11 EST).

106. For a fuller account of the broader legal context in which this fetal protection campaign has been waged, see my article, Linda C. Fentiman, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U. L. REV. 537 (2006).
107. For example, *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884), involved a pregnant woman who slipped and fell and then miscarried. Her four- or five-month old fetus lived for only a short time. *Id.* at 14. In ruling against the plaintiff, Judge Oliver Wendell Holmes, Jr., observed that "no case . . . 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. In Holmes' view, this made sense, since "*the unborn child was a part of the mother at the time of the injury.*" *Id.* at 17 (emphasis added). For a general survey of the evolving American tort law position, see Sheldon R. Shapiro, Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3D 411 (2004); Jill D. Washburn Helbling, Note, *To Recover or Not to Recover: A State by State Survey of Fetal Wrongful Death Law*, 99 W. VA. L. REV. 363, 364-65 (1996).
108. *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946) (holding that a child born alive, having directly sustained prenatal injuries while a viable fetus, may maintain an action against third parties allegedly responsible for those injuries).
109. *Bonbrest*, 65 F. Supp. at 139-40.
110. See Washburn Helbling, *supra* note 107, at 365-66.
111. See *Farley v. Sartin*, 466 S.E. 2d 522, 528 (W. Va. 1995).
112. See Michael P. Penick, *Wrongful Death of a Fetus*, 19 AM. JUR. 3D *Proof of Facts* §§ 1, 4-7 (1993); Shapiro, *supra* note 107, §§ 2(a), 3(a), 4(a); Washburn Helbling, *supra*



non-viable fetus.<sup>113</sup> Other states have recognized causes of action for loss of consortium on the part of parents whose fetus has been killed due to the tortious acts by others.<sup>114</sup>

Only six cases have considered whether infants should be permitted to sue their mothers for prenatal harm. The jurisdictions are evenly split on the subject, with three courts holding that suits against pregnant women should be permitted in order to provide compensation to an injured child,<sup>115</sup> and three holding that women should not be subject to suit for alleged prenatal negligence.<sup>116</sup> These cases raise the normative question of who *is* the reasonable pregnant woman, as well as the related

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note 107, at 430, 431–32 tbl.; *see also* Meyer v. Burger King Corp., 26 P.3d 925, 928–30 (Wash. 2001) (holding that the Washington worker's compensation statute did not bar a suit brought by a child allegedly deprived of oxygen in utero due to his mother's employer negligence). Indeed, employers' fear of tort liability for causing harm to the fetuses of their female employees is a major rationale of fetal protection policies in the workplace, which exclude some women from high-paying but hazardous positions. Elaine Draper, *Reproductive Hazards and Fetal Exclusion Policies after Johnson Controls*, 12 STAN. L. & POL'Y REV. 117, 118, 121 (2001). For a fuller discussion of the gendered nature of the construction of workplace risks, *see id.* *See also* discussion *infra* at text accompanying notes 192–195. Twelve states (Arkansas, California, Florida, Iowa, Maine, Nebraska, New Jersey, New York, Tennessee, Texas, Utah, and Virginia) require that a child be born alive before a suit for prenatal injuries can be brought. Washburn Helbling, *supra* note 107, at 430 & 431 tbl.

113. *See, e.g.*, Connor v. Monkem Co., 898 S.W.2d 89, 91–93 (Mo. 1995) (interpreting Missouri's wrongful death statute to permit a cause of action for a non-viable fetus in light of a Missouri statute of general applicability that declares that "[t]he life of each human being begins at conception"); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996) (holding that the South Dakota wrongful death statute should be interpreted to authorize a cause of action for wrongful death for non-viable fetuses, and surveying the law in other jurisdictions in the process).
114. Loss of consortium has been recognized as a cause of action at least since the time of Hammurabi, although his code explicitly calculated damages based on the social class of the pregnant woman. CODE OF HAMMURABI §§ 209, 213 (declaring that a free born woman was entitled to receive ten shekels for her loss while a maid-servant was entitled to receive two shekels). In more recent times, courts have continued to recognize that it is the parent's, not the fetus', loss that is the subject of compensation. *See, e.g.*, Dunn v. Rose Way, Inc., 333 N.W.2d 830, 832 (Iowa 1983) (holding that a parent could recover for loss of consortium even though Iowa does not recognize a cause of action for wrongful fetal death, because a loss of consortium action is based on parental, rather than fetal, loss); Broadnax v. Gonzalez, 809 N.E. 2d 645, 649 (N.Y. 2004) (permitting a woman to recover for emotional injury for a miscarriage or stillbirth due to medical malpractice, even if she herself does not suffer physical injury).
115. Nat'l Cas. Co. v. N. Trust Bank of Fla., N.A., 807 So. 2d 86 (Fla. Dist. Ct. App. 2001); Grodin v. Grodin, 310 N.W.2d 869 (Mich. Ct. App. 1981); Bonte v. Bonte, 616 A.2d 464 (N.H. 1992).
116. Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988); Remy v. MacDonald, 801 N.E. 2d 260 (Mass. 2004); Chenault v. Huie, 989 S.W.2d 474 (Tex. App. 1999).

question of *who* decides what conduct is reasonable, even though courts do not always acknowledge that they are confronting these issues.

*Grodin v. Grodin*<sup>117</sup> was the first case to permit a woman to be sued for her actions while pregnant. The Michigan Court of Appeals allowed the father of a child born with discolored teeth to sue the child's mother (and his wife) for these injuries, allegedly caused by the woman's taking Tetracycline® while pregnant. Without analyzing the consequences of its decision for pregnant women, the court framed the question as a simple factual inquiry: did the woman's Tetracycline® use constitute a "reasonable exercise of parental discretion"?<sup>118</sup>

Two other cases, *Bonte v. Bonte*,<sup>119</sup> and *National Casualty Co. v. Northern Trust Bank of Florida, N.A.*,<sup>120</sup> also permitted suit to be brought on behalf of children who were injured due to alleged negligence by their mothers while pregnant. In deciding the cases, the respective state appellate courts engaged in narrow doctrinal analysis in an apparent desire to provide an injured child with a remedy. In *Bonte*, the mother was struck by a car while crossing the street and her child was born with severe neurological injuries.<sup>121</sup> The New Hampshire Supreme Court held that a suit could proceed, relying on the abrogation of parent-child tort immunity (in part in recognition of the availability of insurance as a source of recovery) and the law that a child born alive can bring a cause of action for injuries suffered in utero against a third party.<sup>122</sup> The court rejected the argument that either the unique relationship between a pregnant woman and her fetus or the decision's potential impact on a woman's right to control her life during pregnancy should preclude liability, holding that a pregnant woman was "required to act with . . . *the same standard of care as that required of her once the child is born.*"<sup>123</sup>

A similar result was reached by a Florida appellate court in *National Casualty*, which ruled that a child could sue its mother for injuries allegedly caused by her negligent driving while pregnant, up to the amount of her automobile insurance coverage.<sup>124</sup> The court's brief opinion held

117. *Grodin*, 301 N.W.2d 869.

118. *Grodin*, 301 N.W.2d at 871. If it did, this conduct would fall within an exception to the general abrogation of parental-child tort immunity under Michigan law, and the woman could not be sued. *Id.* The court remanded the matter to the trial court to determine the "'reasonableness' of the [mother's] . . . conduct." *Id.*

119. *Bonte*, 616 A.2d 464.

120. *Nat'l Cas. Co. v. N. Trust Bank of Fla., N.A.*, 807 So. 2d 86 (Fla. Dist. Ct. App. 2001).

121. *Bonte*, 616 A.2d at 464.

122. *Bonte*, 616 A.2d at 466.

123. *Bonte*, 616 A.2d at 466 (emphasis added).

124. *Nat'l Cas. Co.*, 807 So.2d at 87.

that there was no reason to “den[y] . . . recovery merely because of the identity of the tortfeasor.”<sup>125</sup> The court rejected concerns about the impact of its decision on the mother’s privacy and personal health, and distinguished a case in which the Florida Supreme Court held that criminal charges could not be brought against a pregnant woman who shot herself and caused the death of her fetus.<sup>126</sup>

In contrast, the three cases that have rejected suits brought by children against their mothers for injuries suffered in utero have done so after considering the consequences of allowing a child to recover against the mother. In *Stallman v. Youngquist*,<sup>127</sup> the Illinois Supreme Court held that a child who suffered prenatal injuries in a car accident in which her mother was driving could not sue her mother for negligence.<sup>128</sup> The court criticized the *Grodin* decision, suggesting that the Michigan court had confused the question of whether parental tort immunity should be abrogated with the different issue of whether a pregnant woman owed a tort duty to her fetus.<sup>129</sup> The *Stallman* court confronted the latter issue directly. It emphasized that the relationship between a pregnant woman and the fetus she was carrying was unique, “unlike the relationship between any other plaintiff and defendant,” and thus could not be analogized to other negligence situations.<sup>130</sup> The Illinois Supreme Court held that, in view of the “fact of life” that a pregnant woman’s “every waking and sleeping moment . . . shapes the prenatal environment which forms the world for the developing fetus,”<sup>131</sup> it was impermissible to impose a duty of care on a pregnant woman.<sup>132</sup>

The court identified four threads in its reasoning. First, it would be impossible either to limit or to define a pregnant woman’s duty to her fetus, since many actions taken in a woman’s life, even prior to conception, could affect a fetus.<sup>133</sup> Second, it would be impossible to develop an objective standard applicable to women from diverse socio-economic backgrounds, who had different access to healthcare, and who might or might not know whether they were pregnant.<sup>134</sup> Third, the court acknowledged that the recognition of a common law cause of action had

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125. *Nat’l Cas. Co.*, 807 So.2d at 87.

126. *Nat’l Cas. Co.*, 807 So.3d at 87–88 (citing *State v. Ashley*, 701 So. 2d 338 (Fla. 1997)).

127. *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988).

128. *Stallman*, 531 N.E.2d at 355–56, 361.

129. *Stallman*, 531 N.E.2d at 358.

130. *Stallman*, 531 N.E.2d at 360.

131. *Stallman*, 531 N.E.2d at 360.

132. *Stallman*, 531 N.E.2d at 359–60.

133. *Stallman*, 531 N.E.2d at 360.

134. *Stallman*, 531 N.E.2d at 360.

the potential for “unprecedented intrusion into the privacy and autonomy of the [female] citizens of this State.”<sup>135</sup> It held that if a duty was to be recognized, it must be by the legislature, “only after thorough investigation, study, and debate.”<sup>136</sup> Finally, the court urged that “[t]he way to effectuate the birth of healthy babies is not . . . through after-the-fact civil liability in tort for individual mothers, but rather through before-the-fact education of all women and families about prenatal development.”<sup>137</sup>

In 2004, in *Remy v. MacDonald*<sup>138</sup> the Massachusetts Supreme Judicial Court also held that a child could not sue its mother for prenatal harm allegedly caused when the pregnant woman drove negligently, causing an accident which led the plaintiff to be born prematurely with adverse health consequences.<sup>139</sup> The court emphasized the substantial disagreement about whether pregnant women should be held liable for causing fetal harm.<sup>140</sup> It observed that there were virtually unlimited circumstances in which a woman could be sued and declared that there was no principled way to limit the liability of pregnant women for causing fetal harm to the motor vehicle context.<sup>141</sup> The court explicitly rejected the reasoning of *Grodin*, *Bonte*, and *National Casualty*, and found that courts should recognize “that there are inherent and important differences between a fetus, in utero, and a child already born, that permits [sic] a bright line to be drawn around the zone of potential tort liability of one who is still biologically joined to an injured plaintiff.”<sup>142</sup>

The third case, *Chenault v. Huie*,<sup>143</sup> addressed the more difficult factual circumstances in which Huie, a pregnant woman (and her boyfriend), abused alcohol and other drugs while she was pregnant, subsequently giving birth to a child with developmental problems and cerebral palsy.<sup>144</sup> Huie’s sister sued on behalf of the child, seeking compensatory and punitive damages for Huie’s alleged negligence and gross negligence.<sup>145</sup> The Texas Court of Appeals declined to recognize a common law cause of action by a child against its mother for prenatal harm. The court declared that, while “the law wisely no longer treats a fetus as only a part of the mother, the law would ignore the equally important

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135. *Stallman*, 531 N.E.2d at 361.

136. *Stallman*, 531 N.E.2d at 361.

137. *Stallman*, 531 N.E.2d at 361.

138. *Remy v. MacDonald*, 801 N.E.2d 260 (Mass. 2004).

139. *Remy*, 801 N.E.2d at 262, 266–67.

140. *Remy*, 801 N.E.2d at 263–64.

141. *Remy*, 891 N.E.2d at 264–66.

142. *Remy*, 891 N.E.2d at 267.

143. *Chenault v. Huie*, 989 S.W.2d 474 (Tex. App. 1999).

144. *Chenault*, 989 S.W.2d at 475.

145. *Chenault*, 989 S.W.2d at 475.

physical realities of pregnancy if it treated the fetus as an individual entirely separate from his mother."<sup>146</sup> The court pointed to the difficulty of establishing an objective, uniform standard of care for pregnant and potentially pregnant women, noting the unavoidable subjectivity of jurors (leading inevitably to inconsistent and unpredictable jury verdicts) as well as the invasion of women's autonomy and the interference with women's rights to control their daily lives.<sup>147</sup> Like the *Stallman* court, the Texas court held that decisions about fetal protection were best left to the legislature, which alone could conduct the necessary "research and analysis of scientific and medical data . . . [and] evaluat[e] . . . broad matters of public policy."<sup>148</sup> Finally, the court was concerned that imposing civil liability might be counterproductive, because women who feared civil liability might not be candid with their physicians and thus would receive less than adequate prenatal care.<sup>149</sup>

Similarly, in the American workplace, efforts have been made to protect fetuses from harm, usually by excluding women who are pregnant or of child-bearing age from potentially hazardous environments.<sup>150</sup> Unfortunately, rather than ensuring safe conditions for all workers, for whom toxic exposures or other hazards could jeopardize the health of their future children, these efforts have focused almost exclusively on female employees. In *International Union, UAW v. Johnson Controls, Inc.*, the Supreme Court invalidated such workplace "fetal-protection" policies, declaring that they violated Title VII of the Civil Rights Act of 1964 because they discriminated on the basis of gender.<sup>151</sup> However, many employers continue to have such policies, effectively opting to be sued for gender discrimination rather than facing damage suits for causing prenatal injury.<sup>152</sup> Almost all fetal-protection policies ignore or discount the effects of exposure to toxic substances on men, despite the scientific evidence that such exposure can harm the male reproductive system and, thus, the children who are born to exposed men.<sup>153</sup>

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146. *Chenault*, 989 S.W.2d at 475-76.

147. *Chenault*, 989 S.W.2d at 476-78.

148. *Chenault*, 989 S.W.2d at 477-78.

149. *Chenault*, 989 S.W.2d at 478.

150. See the discussion of workplace hazards and the "fetal-protection policy" in *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 190-93 (1991).

151. *Johnson Controls*, 499 U.S. at 197-200.

152. Draper, *supra* note 112, at 121.

153. See, for example, the EPA's decision to cancel registration (and thus disallowing sale and distribution) of pesticides containing ethylene dibromide (EDB) for most uses, because of the chemical's oncogenic and mutagenic risks, as well as reproductive risks to male workers. Notice of Intent to Cancel Registrations of Pesticide Products Containing Ethylene Dibromide, 48 Fed. Reg. 46,234 (Oct. 11, 1983). See also Occupational Exposure to Ethylene Dibromide, 48 Fed. Reg. 45956 (proposed Oct.

*B. America's Evolving Abortion Law*

Recent proposals for changes in abortion law also emphasize fetal "personhood."<sup>154</sup> These include bills that would require women seeking abortion to be told about fetal pain,<sup>155</sup> or to be given the opportunity to view a sonogram or listen to the heartbeat of their fetus prior to deciding to have an abortion,<sup>156</sup> or would require that a fetal death certificate be prepared in all cases of induced abortion.<sup>157</sup> Supporters of these statutes justify them as providing "informed consent," but the statutes are unusual in mandating the substantive details of what patients contemplating a medical procedure must be told.<sup>158</sup> In contrast, most American informed consent law<sup>159</sup> focuses on the *process* of ensuring full communication

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- 7, 1983) (proposing revision to OSHA occupational health standard to protect against EDB's adverse effects on, *inter alia*, male reproductive capacity); *cf. Johnson Controls*, 499 U.S. 187.
154. This of course includes the Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006), which redefined a medical procedure to make it more akin to birth, for example, by using such terms as "delivers a living fetus," *id.* § 1531(b)(1). The law was upheld by the Supreme Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007).
155. See the Unborn Child Pain Awareness Act of 2005, S. 51, 109th Cong. § 1 (2005), introduced by Senator Sam Brownback of Kansas, a fierce abortion opponent, as well as Montana's Unborn Child Pain Prevention Act, H.B. 238, 2005 Leg., Reg. Sess. (Mont. 2005).
156. *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.35.6(B)(1)(h) (2008). Proposed federal funding of fetal imaging machinery through grants to nonprofit organizations could benefit so-called "pregnancy crisis centers," who have also been major beneficiaries of grants given to organizations that promote "abstinence only" sex education. *See* Informed Choice Act, S. 340, 108th Cong. (2003) (proposing additional funding for ultrasound equipment to be used to provide pregnant women with a visual image of the fetus); S. 755, 109th Cong. (2005) (same); H.R. 223, 110th Cong. (2007) (same); H.R. 195, 111th Cong. (2009) (same); Ziba Kashef, *The Fetal Position*, MOTHER JONES, Jan./Feb. 2003, at 18–19, *available at* [http://www.motherjones.com/news/outfront/2003/01/ma\\_218\\_01.html](http://www.motherjones.com/news/outfront/2003/01/ma_218_01.html). *See generally* NARAL PRO-CHOICE AM. FOUND., *THE TRUTH ABOUT CRISIS PREGNANCY CENTERS* (2009), <http://www.prochoiceamerica.org/assets/files/Abortion-Access-to-Abortion-CPC-truth.pdf>; Abortion Access Project, *Impeding the Right to Choose: Crisis Pregnancy Centers* (on file with the author) (citing to additional useful sources on crisis pregnancy centers).
157. H.B. 819, 106th Gen. Assem., Reg. Sess. (Tenn. 2009), *available at* <http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB0819> (requiring fetal death certificates in all cases of induced abortion).
158. *See* GUTTMACHER INST., *STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION* (Feb. 1, 2009), *available at* [http://guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](http://guttmacher.org/statecenter/spibs/spib_MWPA.pdf) (summarizing state laws).
159. Informed consent doctrine has roots in both the common law tort of battery and in negligence. A battery is an unconsented touching and includes medical treatment which the patient did not agree. *See, e.g.*, *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93–94 (N.Y. 1914). Informed consent also includes receiving medical treatment from a physician who has explained to the patient those risks and benefits

between patients and their healthcare providers rather than the *content* of the physician-patient dialogue,<sup>160</sup> relying on the healthcare professional to determine what information to convey to a particular patient based on her own individual needs. Revealingly, these so-called informed consent laws are unique in that their focus is on the interests of a third party, the fetus to be aborted, as opposed to the patient herself.

Fetal “guardians” are another recent legal innovation, ostensibly designed to protect the interests of the “unborn.” In June 2003 the wife of a Florida prosecutor sought to be appointed guardian of the fetus of a mentally disabled patient who lived in a group home in order to prevent the woman from having an abortion.<sup>161</sup> Although the Florida courts ultimately rejected the suit, the case became a *cause célèbre* in Florida. While Governor Jeb Bush pushed for the appointment of a fetal guardian, abortions rights advocates opposed the action, and judges suggested that if a guardianship was approved in this case it would be impossible to limit judicial involvement in many aspects of women’s behavior during pregnancy.<sup>162</sup> In Alabama some trial judges have appointed lawyers to represent the “silent voice” of the fetus in cases in which minors seek-

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of treatment that a reasonable patient would wish to know. *See, e.g.,* *Canterbury v. Spence*, 464 F.2d 772, 781–82, 787–88 (D.C. Cir. 1972); N.Y. PUB. HEALTH LAW § 2805-d (McKinney 2007).

160. Some abortion statutes require that the pregnant woman be told certain details about the fetus, such as its gestational age and its potential to survive outside the womb, and be informed of the availability of medical assistance for prenatal care, childbirth, and neonatal care, as well as options for child support and adoption. *See, e.g.,* LA. REV. STAT. § 40:1299.35.6 (2008); 18 PA. CONS. STAT. § 3205 (1990), *reviewed in* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881–87 (1992) (finding Pennsylvania’s informed consent requirement no undue burden and therefore constitutional); TEX. HEALTH & SAFETY CODE ANN. §§ 171.012–171.014, 171.016 (Vernon Supp. 2008). In addition, there are other areas of healthcare in which state laws mandate that patients (usually women) be told of alternative medical or surgical options. These include laws addressing hysterectomy, *see, e.g.,* CAL. HEALTH & SAFETY CODE § 1690 (West 2007); sterilization, *see, e.g.,* OR. REV. STAT. § 436.225 (2007); breast cancer, *see, e.g.,* S.G. Nayfield et al., *Statutory Requirements for Disclosure of Breast Cancer Treatment Alternatives*, 16 J. NAT’L CANCER INST. 1202 (1994); and childhood vaccination, *see, e.g.,* ARK. CODE ANN. § 6-18-702 (2001). Medical procedures that are less politically charged rarely have such “informed consent” requirements.
161. This attempt was rejected by the Florida District Court of Appeal in *In re Guardianship of J.D.S.*, 864 So. 2d 534 (Fla. App. 2004), which held that under the Florida guardianship statute, a guardian can be appointed only for a “person,” and that fetuses were not “persons” under Florida law, *id.* at 538.
162. *See* Mike Branom, *Judge Delays Debate on Guardian For Fetus*, S. FLA. SUN-SENTINEL (Ft. Lauderdale), May 15, 2003, at 6B, *available at* 2003 WLNR 15442738; *Florida Court Rules That Fetuses Can’t Have Guardians*, WOMEN’S HEALTH WKLY., Feb. 12, 2004; Phil Long, *Guardians for Fetuses Debated*, MIAMI HERALD, Aug. 22, 2003, at A1, *available at* 2003 WLNR 14850196.

ing an abortion have invoked the judicial bypass procedure to avoid the requirement of parental consent to abortion.<sup>163</sup>

### C. Other Statutory and Civil Recognitions of Fetal Personhood

In 2002 the Department of Health and Human Services (HHS) issued regulations purporting to “clarify and expand” the definition of “child” contained in the statute authorizing the State Children’s Health Insurance Program (SCHIP).<sup>164</sup> These regulations redefined “child,” from “an individual under 19 years of age”<sup>165</sup> to “an individual under the age of 19 *including the period from conception to birth*.”<sup>166</sup> This regulatory legerdemain was criticized as unnecessary, since Congress was already debating several bills that would permit immigrant women who were pregnant, the ostensible target of this regulation, to be covered under Medicaid or SCHIP.<sup>167</sup> It seems clear that the regulation’s real goal was to

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163. See, e.g., *Ex parte Anonymous*, 810 So. 2d. 786, 795 (Ala. 2001), *aff’d*, 889 So. 2d 525 (Ala. 2003) (Johnstone, J., dissenting).

164. SCHIP Eligibility for Prenatal Care and Other Services for Unborn Children, 67 Fed. Reg. 61,956, 61,956 (Oct. 2, 2002) (codified at 42 C.F.R. § 457.10 (2003)). SCHIP is a complement to Medicaid, established in 1997 under Title XXI of the Social Security Act, 42 U.S.C. §§ 1397aa–1397jj, and gives states the opportunity to provide additional health insurance coverage to children whose parents are too “wealthy” to qualify for Medicaid. Medicaid, which was enacted in 1965 and is authorized by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396–1396v, provides health insurance for the very poorest of American children. See also BARRY R. FURROW ET AL., *THE LAW OF HEALTH CARE ORGANIZATION AND FINANCE* 418–21 (4th ed. 2001). Both Medicaid and SCHIP are federal-state partnerships, with the federal and state governments sharing in both the financing and administration of the two programs. However, there are important differences. Medicaid is an entitlement program, in which all eligible persons must receive the same benefits. SCHIP gives states greater flexibility in choosing what services to provide. FURROW ET AL., *supra*, at 418–21, 438–39. Until 2007 the Bush Administration routinely approved state requests to expand SCHIP to cover more children at higher income levels, Joe Baker, Assistant to N.Y. Governor Eliot Spitzer, Remarks at New York City Bar Association Panel on New York Health Care (Feb. 7, 2008), but the Administration reversed course in the fall of 2007 and refused to approve New York State’s request to expand its SCHIP program to include children at 400% of the federal poverty level. Congress and the White House have been at loggerheads ever since. See Donna Smith, *U.S. House Sustains Bush Veto of Health Bill*, REUTERS, Jan. 23, 2008, <http://www.reuters.com/article/latestCrisis/idUSN23355599>.

165. 42 U.S.C. § 1397jj(c)(1) (2000 & Supp. 2006).

166. 42 C.F.R. § 457.10 (2007) (emphasis added).

167. Cynthia Dailard, *New SCHIP Prenatal Care Rule Advances Fetal Rights at Low-Income Women’s Expense*, GUTTMACHER REP. ON PUB. POL’Y, Dec. 2002, at 3, 5. Among the bills pending were the Mothers and Newborns Health Insurance Act of 2002, S. 724, 107th Cong. (as reported by S. Comm. on Finance, Aug. 1, 2002); the Start Healthy,



create a legal precedent for the principle that the law should treat fetuses as persons, with all the rights that accompany that status.<sup>168</sup>

In the summer of 2008 HHS launched a similar stealth effort to change the law so that life begins at conception. HHS drafted a proposal to redefine birth control as a form of abortion, in a proposed regulation that would protect healthcare employees' "freedom of conscience" by allowing them to opt out of participating in the prescribing or dispensing a prescription for birth control or "the morning-after pill."<sup>169</sup> The draft regulation could deny their employers' Medicare and Medicaid reimbursement if they were unable to certify that they were in compliance with "freedom of conscience" rules, and thus is a huge bludgeon requiring all healthcare entities to embrace the Bush Administration's views about when life is legally protected.<sup>170</sup> The final regulation, issued December 19, 2008 and effective January 20, 2009, retains the conscience rules and written certification requirement (with some additional exceptions).<sup>171</sup>

In March 2004 Congress enacted the Unborn Victims of Violence Act (UVVA),<sup>172</sup> which made it a crime to injure or cause the death of a

Stay Healthy Act of 2001, S. 1016, 107th Cong. (2001), H.R. 3729, 107th Cong. (2002); the Immigrant Children's Health Improvement Act of 2001, S. 582, 107th Cong. (2001); and the Legal Immigrant Children's Health Improvement Act of 2001, H.R. 1143, 107th Cong. (2001), all of which proposed to amend Medicaid and SCHIP to permit states to offer healthcare to more infants and pregnant women, including immigrant women who were excluded from eligibility under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, tit. IV, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.).

168. See Elisabeth H. Sperow, *Redefining Child Under the State Children's Health Insurance Program: Capable of Repetition, Yet Evading Results*, 12 AM. U. J. GENDER SOC. POL'Y & LAW 137, 143 (2003).

169. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 50,274 (proposed Aug. 26, 2008).

170. See Rob Stein, *Workers' Religious Freedom vs. Patients' Rights: Proposal Would Deny Federal Money if Employees Must Provide Care to Which They Object*, WASH. POST, July 31 2008, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/30/AR2008073003238.html>.

171. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,071, 78,092-93, 78,097-101 (Dec. 19, 2008) (to be codified at 48 C.F.R. pt. 88). Several states and individuals have sued to enjoin enforcement of this regulation. In February 2009, the Obama Administration announced that it was moving to rescind the regulation. Rob Stein, *Health Workers' 'Conscience' Rule Set to Be Voided*, WASH. POST, Feb. 28, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/27/AR2009022701104.html>.

172. Pub. L. No. 108-212, 118 Stat. 568 (2004).

fetus while committing another federal offense.<sup>173</sup> While both supporters and opponents of the UVVA acknowledged the significant problem of violence against pregnant women,<sup>174</sup> opponents objected to the Act's solution. Rather than focusing on the injury suffered by the pregnant woman herself and providing that a person who harms a pregnant woman who also injures or kills the fetus should receive an enhanced penalty for that harm,<sup>175</sup> the UVVA makes this attack or injury a separate crime. To do so, the UVVA defines "unborn child" broadly, as "a member of the species homo sapiens, at any stage of development."<sup>176</sup> Critics of the UVVA and similar state statutes contend that the law effectively erases the pregnant woman as an injured party.<sup>177</sup> In addition, as with the SCHIP regulation, this language suggests that the statute's real goal is to pave the way for sharply limiting access to abortion.<sup>178</sup>

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173. 18 U.S.C. § 1841 (2006). The law enumerated a lengthy list of federal offenses, including drive-by shootings in connection with drug offenses, 18 U.S.C. § 36, violence at international airports, 18 U.S.C. § 37, and assault on a federal officer or employee, 18 U.S.C. §§ 111, 1841(b)(1).
174. H.R. REP. NO. 108-420, pt. 1, at 4 n.2 (citing Victoria Frey, *Examining Homicide's Contribution to Pregnancy-Associated Deaths*, 285 JAMA 1510 (2001) (summarizing various studies); Isabelle L. Horon & Diana Cheng, *Enhanced Surveillance for Pregnancy-Associated Mortality—Maryland, 1993–1998*, 285 JAMA 1455 (2001); Linn H. Parsons & Margaret A. Harper, *Violent Maternal Deaths in North Carolina*, 94 OBSTET. & GYNECOL. 990 (1999); Andrew L. Dannenberg et al., *Homicide and Other Injuries as Causes of Maternal Death in New York City, 1987 through 1991*, 172 AM. J. OBSTET. & GYNECOL. 1557 (1995); John Fildes et al., *Trauma: The Leading Cause of Maternal Death*, 32 J. TRAUMA 643 (1992)).
175. Senator Dianne Feinstein proposed an amendment to the Senate bill to accomplish this, which was defeated by a vote of 50–49, largely along party lines. S. Amend. 2858, 150 CONG. REC. S2804 (daily ed. Mar. 12, 2004) (text of amendment); 150 CONG. REC. S3151 (daily ed. Mar. 25, 2004) (rollcall vote no. 61). A similar amendment offered by Representative Zoe Lofgren was also defeated in the House of Representatives, by a 229–186 vote. H.R. Amend. 465, 150 CONG. REC. H660–68 (daily ed. Feb. 26, 2004) (amendment text, statement of Rep. Lofgren, and roll vote no. 30). See Edward Epstein, *Bill to Make Harming Fetus a Crime is Passed by Senate; Assailant of a Pregnant Woman Could be Charged with 2 Separate Federal Offenses*, S.F. CHRON., Mar. 26, 2004, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/03/26/MNG475RPQE1.DTL&chw>; see also H.R. REP. NO. 108-420, pt. 1, at 86.
176. 18 U.S.C. § 1841(d), 10 U.S.C. § 919a, art. 119a(d) (emphasis added). Under the law, "the term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb." *Id.*
177. See Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L. J. 667, 694–97 (2006).
178. Senator Feinstein argued that the UVVA was a deliberate effort to undermine abortion rights, by "set[ting] the stage for a jurist to rule that a human being at any stage of development deserves . . . rights under the law." Epstein, *supra* note 175.

Finally, government lawyers and judges have on occasion sought to civilly commit pregnant women in order to impose “treatment” on the women and their fetuses,<sup>179</sup> and have also issued court orders mandating C-sections.<sup>180</sup> While the avowed goal of these actions is to ensure the birth of healthy children, most physicians believe that such interventions are unwarranted and counter-productive.<sup>181</sup> More than thirty states permit civil commitment based on the use of alcohol and other drugs,<sup>182</sup>

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179. See, e.g., *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997); Marilyn L. Miller, Note, *Fetal Neglect and State Intervention: Preventing Another Atleboro Cult Baby Death*, 8 CARDOZO WOMEN'S L.J. 71, 71–74 (2001) (describing the case of Rebecca Corneau, a woman who belonged to a religious sect that did not practice Western medicine and was confined in a “secure hospital facility for pregnant prison inmates” by a Massachusetts juvenile court judge until she agreed to medical examination and treatment).
180. See, e.g., *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999) (dismissing plaintiff's § 1983 civil rights action against a hospital that obtained a court order compelling Ms. Pemberton to submit to a C-section despite her refusal to consent to the procedure); see also David B. Caruso, Associated Press, *Childbirth Choices Debated*, L.A. TIMES, May 30, 2004, at 19, available at 2004 WLNR 19779537 (reporting the case of Amber Marlowe, who was the subject of an ex parte order to have a C-section because her fetus weighed over eleven pounds, despite her having delivered six very large children previously); David Weiss, *Court Delivers Controversy; Mom Rejects C-section, Gives Birth on Own Terms*, TIMES LEADER (Wilkes-Barre, Penn.), Jan. 16, 2004, at 1A, available at 2004 WLNR 19539526 (same).
181. See, e.g., AM. MED. ASS'N HOUSE OF DELEGATES, *H-420.969 Legal Interventions During Pregnancy*, in HEALTH AND ETHICS POLICIES OF THE AMA HOUSE OF DELEGATES 427 (2008), available at <http://www.ama-assn.org/ad-com/polfind/Hlth-Ethics.pdf> (declaring that “[j]udicial intervention is inappropriate when a woman has made an informed refusal of a medical treatment designed to benefit her fetus” and specifically recognizing the need for rehabilitative treatment for pregnant substance abusers); AM. COLL. OF OBSTET. & GYNECOL., *Patient Choice in the Maternal-Fetal Relationship*, in ETHICS IN OBSTETRICS AND GYNECOLOGY 34, 36 (2d ed. 2004), available at [http://www.acog.org/from\\_home/publications/ethics/ethics034.pdf](http://www.acog.org/from_home/publications/ethics/ethics034.pdf) (stating that “court-ordered intervention against the wishes of a pregnant woman is rarely if ever acceptable”); Am. Acad. of Pediatrics Comm. on Bioethics, *Fetal Therapy—Ethical Considerations*, 103 PEDIATRICS 1061, 1062 (1999) (examining the range of medical interventions to promote fetal health and the legal-ethical issues involved and concluding that “[u]nder no circumstances should a physician physically intervene [to insist on medical treatment] without the explicit consent of the pregnant woman without judicial review”). However, some physicians obviously do believe that their intervention to protect “fetal life and health” is justified, because they are the ones who are reporting pregnant women who confide in them and admit their struggles with drug use. See Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L.REV. 451, 482–87 (2000).
182. See ALA. CODE § 22-52-1.2 (LexisNexis 2006); ARK. CODE ANN. § 20-64-815 (2001); CAL. WELF. & INST. CODE § 3050 (Deering 2005); COLO. REV. STAT. § 25-1-1107 (2008); CONN. GEN. STAT. ANN. § 17a-685 (2006); DEL. CODE ANN. tit. 16,

and several state laws explicitly authorize such actions against pregnant women.<sup>183</sup> Most disturbingly, among the thirty-five American jurisdictions which authorize individuals to execute advance medical directives to govern their medical care if they become incompetent, two thirds of the jurisdictions suspend these directives if the patient is pregnant,<sup>184</sup> denying pregnant women the right to self-determination and advance planning available to all other adults.

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§ 2212 (2005); FLA. STAT. ANN. § 397.675 (West 2004); GA. CODE ANN. § 37-7-41 (2004); HAW. REV. STAT. § 334-60.2 (2004); IND. CODE ANN. § 12-23-11-1 (West 2004); IOWA CODE ANN. § 125.75 (West 2008); KAN. STAT. ANN. § 59-29b54 (2008); LA. REV. STAT. ANN. § 28:54 (2008); MASS. GEN. LAWS ANN. ch. 123 § 35 (West 2008); MISS. CODE. ANN. § 41-30-27 (West 2008); NEB. REV. STAT. ANN. §§ 71-908, 71-919 (LexisNexis 2008); N.M. STAT. ANN. § 43-2-8 (West 2008); N.D. CENT. CODE § 12.1-04.1-22 (2003); R.I. GEN. LAWS § 21-28.2-3 (2009); S.C. CODE ANN. § 44-52-50 (2008); TENN. CODE ANN. §§ 33-1-101, 33-6-501 to -502 (2008); TEX. HEALTH & SAFETY CODE ANN. § 574.034 (Vernon 2004); VA. CODE ANN. §§ 37.2-800, -809 (West 2008); WASH. REV. CODE ANN. § 70.96A.140 (West 2008); W. VA. CODE ANN. § 27-5-2 (West 2008); WIS. STAT. ANN. § 51.15 (West 2008); WYO. STAT. ANN. § 25-10-110 (2004). Minnesota, Oklahoma, and South Dakota have involuntary commitment laws specifically for pregnant women who use drugs. See MINN. STAT. ANN. § 626.5561 (West 2008), OKLA. STAT. ANN. tit. 63 § 1-546.5 (West 2008); S.D. CODIFIED LAWS § 34-20A-70 (2008).

183. See, e.g., WIS. STAT. ANN. §§ 48.01, 48.02, 48.067, 48.203, 48.205 (West 2008) (permitting the civil commitment of pregnant girls and women); see also Tom Kertscher, 'Cocaine Mom' Law Involved in Attempt to Detain Woman, *Racine Case Thought to Be First Time Law is Used Without Other Crime*, MILWAUKEE J. SENTINEL, Nov. 5, 1999, at B1, available at 1999 WLNR 2841145.
184. For an overview of this subject, see Amy Lynn Jerdee, Note, *Breaking Through the Silence: Minnesota's Pregnancy Presumption and the Right to Refuse Medical Treatment*, 84 MINN. L. REV. 971, 978 (2000). Seventeen states provide statutory exceptions to their "living will" or healthcare proxy statutes which render advance directions automatically ineffective if the patient is pregnant. See *id.* at 978 & n.35. Another sixteen states render the living will or healthcare proxy inapplicable in a variety of circumstances, ranging from a possibility to a probability that the fetus will "develop to a live birth." See *id.* at 978-79 nn.36-44; accord 2004 Alaska Sess. Laws ch. 83, secs. 3 & 15 (repealing ALASKA STAT. § 18.12.040 (1998), the Alaska statute cited in support of this proposition by Jerdee, *supra*, at 978 n.37, but enacting ALASKA STAT. § 13.52.055 (2005), a substantially similar provision). Minnesota gives a slight bow to women's autonomy by establishing a rebuttable presumption that a pregnant woman would want healthcare to be provided if there is a "real possibility that the fetus could survive to the point of live birth," even if "the withholding or withdrawal of such health care would be authorized were she not pregnant." MINN. STAT. ANN. § 145C.10(g) (West 2008). The presumption can be rebutted by an explicit statement to the contrary in the advance directive itself, or by clear and convincing evidence presented at a hearing. See *id.* While this law endeavors to strike a balance between the woman's interest in autonomy and the provision of a living maternal body in which the fetus can continue to develop, it still enshrines a normative view of women—that any "reasonable" woman would choose to continue on life—support if it meant that her fetus would survive until birth.

## III. THE NEED FOR DIFFERENT PRIORITIES TO PROTECT CHILDREN

Many would agree that it should be the government's goal to ensure that all children are born healthy and have the opportunity to stay that way. However, if that were actually the case, the United States would adopt radically different policies, offering systemic harm reduction rather than a focusing on a handful of poor, marginalized, and drug-addicted women.

*A. The Need for Healthcare*

American healthcare data demonstrate significant racial disparities in birth outcomes and other measures of children's health, which reflect a crisis in access to healthcare. Millions of American children do not have a primary care physician.<sup>185</sup> More than ten million American children have no health insurance at all,<sup>186</sup> and the Bush Administration repeatedly resisted efforts to expand SCHIP to enroll more children.<sup>187</sup>

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185. KENNETH E. THORPE, JENNIFER FLOME & PETER JOSKI, *THE DISTRIBUTION OF HEALTH INSURANCE COVERAGE AMONG PREGNANT WOMEN, 1999 (2001)* (paper prepared for the March of Dimes), *available at* <http://www.marchofdimes.com/files/2001FinalThorpeReport.pdf> (identifying disparities in health insurance coverage along racial, employment status, and income lines); Ctrs. for Disease Control & Prevention, *Racial/Ethnic Disparities in Infant Mortality—United States, 1995–2002*, 54 *MORBIDITY & MORTALITY WKLY. REP.* 553, 553–55 (2005) (noting significant racial disparities in infant mortality rates within and across states); IOM *Preterm Birth* Press Release, *supra* note 26.
186. KAISER COMM'N ON MEDICAID & THE UNINSURED, *ENROLLING UNINSURED LOW-INCOME CHILDREN IN MEDICAID AND SCHIP 1 (2005)*, *available at* <http://www.kff.org/medicaid/upload/Enrolling-Uninsured-Low-Income-Children-in-Medicaid-and-SCHIP-Fact-Sheet-UPDATE.pdf>. In 2005, more than 12% of children under age 18 lacked health insurance for at least part of the previous year. ROBIN A. COHEN & MICHAEL E. MARTINEZ, CTRS. FOR DISEASE CONTROL & PREVENTION, *HEALTH INSURANCE COVERAGE: ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JANUARY—SEPTEMBER 2005* at 3 (2006). “[U]ninsured but Medicaid-eligible children are twice as likely as those enrolled in Medicaid to have an unmet medical need, to have not seen a doctor, and to have substantial family out-of-pocket spending on health care.” KAISER COMM'N, *supra*.
187. Robert Pear, *Veto Stands On Measure To Expand Health Plan*, N.Y. TIMES, Jan. 24, 2008, at A18, *available at* <http://www.nytimes.com/2008/01/24/washington/24override.html>. Late this past summer, the Bush Administration changed its position and declined to penalize states failing to change SCHIP policies to make it more difficult for middle-income children to enroll. Associated Press, *Children's Health Insurance Decision*, N.Y. TIMES, Aug. 14, 2008, [http://www.nytimes.com/2008/08/15/washington/15brfs-CHILDRENSHEA\\_BRF.html](http://www.nytimes.com/2008/08/15/washington/15brfs-CHILDRENSHEA_BRF.html). Soon after President Obama took office, Congress reversed course and passed an SCHIP expansion bill, which

One eighth of American infants are born prematurely, costing an estimated \$26 billion per year,<sup>188</sup> and the incidence of infants born with low birthweight is also increasing.<sup>189</sup> American infant mortality rates have not improved in recent years.<sup>190</sup>

Beyond improving access to quality healthcare, the government should concentrate on reducing environmental harms, including the risk to all children posed by such hazards as mercury in fish, endocrine disrupters, and lead from older buildings and manufacturing. Many species of fish pose risks to adults, children, and fetuses, primarily through exposure to mercury and polychlorinated biphenyls (PCBs).<sup>191</sup> Many widely-used pesticides are suspected to be endocrine disrupters, and based on studies of laboratory mammals, could affect both male and female human reproductive systems and increase the chance of reproductive harms.<sup>192</sup> Lead poses risks to male and female workers, as well as

President Obama signed. Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8.

188. IOM Preterm Birth Press Release, *supra* note 26 (noting also that the rate of preterm births has risen 30% since 1981).
189. Ctrs. for Disease Control & Prevention, *Assisted Reproductive Technology and Trends in Low Birthweight—Massachusetts, 1997–2004*, 58 MORBIDITY & MORTALITY WKLY. REP. 49, 49 (2009) (“Low birthweight (LBW) (<2,500 g) is an important cause of infant morbidity and mortality. The rate of LBW has been steadily increasing in the United States. In 2005, the most recent year for which data are available, LBW represented 8.2% of all births, the highest level reported in the past 4 decades.”) (citations omitted).
190. American infant mortality rates basically plateaued from 2000–2005 and declined only modestly in 2006, the most recent year for which data is available. The gap between the infant mortality rates in the U.S. and in other developed countries is widening. MARIAN F. MACDORMAN & T.J. MATHEWS, NAT'L CTR. FOR HEALTH STATISTIC, DATA BRIEF NO. 9, RECENT TRENDS IN INFANT MORTALITY IN THE UNITED STATES 1–2 (2008), available at <http://www.cdc.gov/nchs/data/databriefs/db09.pdf>.
191. Nick Fox, *Taking Worry off the Plate*, N.Y. TIMES, Jan. 30, 2008, at F5, available at <http://www.nytimes.com/2008/01/30/dining/30fish.html> (“[A] panel convened by the National Academy of Sciences reported in 2000 that 60,000 children were born each year exposed to levels of methylmercury—the main variety found in fish—that could cause neurological and learning problems.”); see also Jennifer Fisher Wilson, *Balancing the Risks and Benefits of Fish Consumption*, 141 ANNALS INTERNAL MED. 977, 978–79 (2004) (“Children born to women exposed to high levels of methylmercury during or before pregnancy may face numerous health problems, including brain damage, mental retardation, blindness, and seizures. Lower levels of methylmercury exposure in the womb have caused subtle but irreversible deficits in learning ability. . . . PCBs [are] a probable carcinogen. . . . In children, PCB exposure in utero and from breast milk consumption has been linked with neurodevelopmental delays, impaired cognition, immune problems, and alterations in male reproductive organs.”).
192. SHARON L. DROZDOWSKY WITH STEVE WHITTAKER, WASH. STATE DEP'T OF LABOR & INDUS., TECH. REP. NO. 21-3-1999, WORKPLACE HAZARDS TO REPRODUCTION AND DEVELOPMENT 48–50 (1999).

their children. In men, lead exposure leads to lowered sperm counts, abnormal sperm shapes, altered sperm transfer, and altered hormone levels.<sup>193</sup> The results can be sterility and infertility.<sup>194</sup> In women, lead can cause miscarriages, stillbirths, and infertility, as well as developmental disorders in children exposed in utero.<sup>195</sup>

*B. The Need for Social and Economic Support  
for Children and Their Families*

American law also fails to promote fetal and child health through mandated paid parenting leaves. Although the Family and Medical Leave Act (FMLA) requires employers of fifty or more workers to grant eligible employees twelve weeks a year of unpaid leave for the birth or adoption of a child, or for family illness,<sup>196</sup> the law does not adequately respond to children's need for parental attention soon after birth and when they are ill. Almost half of American workers are not covered by the FMLA<sup>197</sup> and even among those who are, only a fraction avail themselves of its leave provisions, because they cannot afford not to work, thus perpetuating existing race and class disparities.<sup>198</sup> No federal law mandates paid parental leave for the period connected with pregnancy, childbirth and the early stages of infancy,<sup>199</sup> and California, New Jersey,

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193. NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, DEP'T OF HEALTH & HUMAN SERVS., PUBL'N NO. 96-132, THE EFFECTS OF WORKPLACE HAZARDS ON MALE REPRODUCTIVE HEALTH tbl.1 (1997), available at <http://www.cdc.gov/niosh/malrepro.html>. Lead that workers bring home on their skin, hair, clothes, tool box, or car can cause severe lead poisoning for family members and can result in neurobehavioral and growth effects in a fetus. *Id.*

194. *Id.*

195. NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, DEP'T OF HEALTH & HUMAN SERVS., PUBL'N NO. 99-104, THE EFFECTS OF WORKPLACE HAZARDS ON FEMALE REPRODUCTIVE HEALTH 2-3, 4 tbl.1 (1999), available at <http://www.cdc.gov/niosh/pdfs/99-104.pdf>.

196. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611-2612 (2006), amended by National Defense Authorization Act for Fiscal Year 2008, sec. 585, Pub. L. No. 110-181, 122 Stat. 3. However, in contrast to almost all developed countries, the United States does not mandate paid leave. KURT H. DECKER, FAMILY AND MEDICAL LEAVE IN A NUTSHELL 9-14 (2000).

197. Erin Gielow, Note, *Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV. 1529, 1539 (2002).

198. Nancy E. Dowd, *The Family and Medical Leave Act of 1993: Ten Years of Experience: Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219, 222-31 (2004).

199. In April 2006, Representative Caroline Maloney introduced the Federal Employees Paid Parental Leave Act, H.R. 5148, 109th Cong. (2006). The Act would ensure

and Ohio are the only three states to mandate any form of paid parental leave.<sup>200</sup>

In contrast, many other developed nations either mandate or offer paid parental leave for at least some portion of this critical stage of fetal and child health and development.<sup>201</sup> In addition, many countries offer supplemental financial or childcare support to single parents, who are most likely to need to take a leave from work to care for a newborn or ill child and the least likely to be able to afford to do so.<sup>202</sup> In summary, when compared to other developed nations, the narrow, fetus-centric approach of the United States is seriously out of step.

#### IV. CANADIAN APPROACHES TO FETAL PROTECTION AND CHILD HEALTH

##### *A. The Legal Framework*

Canada has taken a very different approach from that of the United States in regard to protecting fetuses from harm in utero. To some extent, this difference may result from a greater reliance on British law, and the maintenance of the born-alive rule, stemming from the fact that Canada did not gain independence until 1867.<sup>203</sup> However, the path of Canadian law on fetal protection may also reflect a less punitive

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paid leave for six of the twelve weeks that federal employees are authorized to take parental leave. *Id.*

200. Press Release, N.J. Governor Jon S. Corzine, Governor Signs Historic Family Leave Insurance Legislation: New Jersey Becomes Only Third State in the Nation to Implement Program (May 2, 2008), <http://www.nj.gov/governor/news/news/2008/approved/20080502.html>; see also CAL. UNEMP. INS. CODE §§ 3300–3306 (West 2006); Act of May 2, 2008, ch. 17, 2008 N.J. Laws 17 (making six weeks of paid family leave available to all workers covered under New Jersey's temporary disability benefits law); OHIO REV. CODE ANN. § 124.136 (LexisNexis 2007) (providing that permanent government employees shall receive 70% of their salary for four of the six weeks in which they are authorized to take parental leave).
201. Dowd, *supra* note 198, at 233–36 (summarizing European Union law, and comparing, *inter alia*, the approach of France, which mandates maternity leave and provides much more generous paid leaves to mothers than to fathers, and Sweden, which is gender-neutral in its paid parenting leave policies); see also Naomi S. Stern, *The Challenges of Parental Leave Reforms for French and American Women: A Call for a Revived Feminist-Social Theory*, 28 VT. L. REV. 321, 324–25 (2004) (describing the French statutory scheme).
202. Gielow, *supra* note 197, at 1547.
203. See Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).



approach toward drug users generally,<sup>204</sup> the unifying effects of a strong national Parliament and the Supreme Court of Canada, as well as the different system for selecting prosecutors in Canada.

For the last twelve years, the Supreme Court of Canada has espoused a consistent view of the relationship between a pregnant woman and her fetus, declaring that the maternal-fetal relationship is legally unique, as there is but one legal person, rather than two persons with potentially adverse positions.<sup>205</sup> The Court has observed, "the law has always treated the mother and unborn child as one. To sue a pregnant woman on behalf of her unborn fetus therefore posits the anomaly of one part of a legal and physical entity suing itself."<sup>206</sup> This position was first articulated in the criminal law arena, and has been followed by decisions in the areas of civil commitment, compelled medical treatment of pregnant women, and tort law.

## 1. The Criminal Law

The Canadian Parliament has codified the common law born-alive rule for criminal matters.<sup>207</sup> In two important decisions, Canadian courts have applied this rule to hold that neither a pregnant woman nor a third party can be criminally liable for actions contributing to the injury or

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204. Warren Richey, *Bulging US Prisons Prompt Cross-Cultural Comparison*, CHRISTIAN SCI. MONITOR (Boston), June 26, 1997, at 3, available at 1997 WLNR 1368097 (noting that compared to Canada, Britain, and Germany, U.S. drug offenders were much less likely to receive an alternative sentence and drug treatment).

205. See, e.g., *Winnipeg Child & Family Servs. (Nw. Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925, 944-45 ¶¶ 27-29 (Can.); *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753, 753 ¶ 1 (Can.).

206. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 945 ¶ 27.

207. See the discussion of the English genesis of this rule, *supra* note 39, as well as section 223 of the Canadian Criminal Code:

- (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not
  - (a) it has breathed;
  - (b) it has an independent circulation; or
  - (c) the navel string is severed.
- (2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

death of a fetus.<sup>208</sup> In *Regina v. Sullivan*,<sup>209</sup> the Supreme Court of Canada held that two midwives who were negligent in their assistance at a home birth could not be convicted of “criminal negligence causing the death of a person.”<sup>210</sup> The Court upheld the British Columbia Court of Appeals’ conclusion that the foetus<sup>211</sup> was not a person for purposes of the statute since it had died in the birth canal and thus was not born alive.<sup>212</sup> In its decision the Court relied solely on the legislative history of the Criminal Code and did not reach the policy issues raised by holding that a foetus was not a person.<sup>213</sup>

*Regina v. Drummond*<sup>214</sup> is the only reported case in which a Canadian prosecutor indicted a pregnant woman for causing harm to her foetus. Even in a prosecution in which there was arguably evidence of intent to cause harm (rather than reckless indifference), the Ontario Court of Justice prohibited the prosecution of Brenda Drummond, a mentally ill pregnant woman. Ms. Drummond inserted a pellet rifle into her vagina and fired, causing a pellet to be lodged in the foetus’ brain.<sup>215</sup> The foetus was delivered alive, and subsequently had surgery to remove the pellet.<sup>216</sup> The prosecutor charged Ms. Drummond with attempted murder,<sup>217</sup> and defense counsel moved to quash for failing to “disclos[e]

208. This is very different than the position of a majority of states and the federal government in the United States, both of which accept and promote a distinction between actions done to the fetus by a third party and the woman who carries it. See, e.g., CAL. PENAL CODE § 187 (West 2008) (describing the crime of murder as including the unlawful killing of a fetus but excluding instances of lawful abortion and where the mother aided or consented); Unborn Victims of Violence Act of 2004, 18 U.S.C. § 1841 (2006).

209. *R. v. Sullivan*, [1991] 1 S.C.R. 489 (Can.).

210. At the time of the events at issue, section 203 of chapter C-34 of the Canadian Criminal Code provided, “Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.” Criminal Code, R.S.C., ch. C-34, § 203 (1970) (current version at R.S.C., ch. C-46, § 220 (1985), amended by 1995 S.C., ch. 39, § 141).

211. In discussing Canadian law, I will be using the Canadian spelling of “foetus,” rather than the American “fetus.”

212. *Sullivan*, [1991] 1 S.C.R. at 499, 502–03.

213. *Sullivan*, [1991] 1 S.C.R. at 502–03. The Supreme Court concluded that the British Columbia Court of Appeal had “reviewed and analyzed the law on this point in a very thorough manner,” *Sullivan*, [1991] 1 S.C.R. at 502, and the lower court’s opinion provides a useful overview of British and Canadian common law and statutory enactments with regard to causing injury or death to a fetus. *R. v. Sullivan*, [1988] 31 B.C.L.R.2d 145, ¶¶ 10–20, 22–41 (C.A.); see also *Sullivan*, [1991] 1 S.C.R. at 499–500.

214. *R. v. Drummond*, [1996] 143 D.L.R. (4th) 368 (Ont. Ct. Just.).

215. *Drummond*, 143 D.L.R. (4th) 368, ¶ 2.

216. *Drummond*, 143 D.L.R. (4th) 368, ¶ 2.

217. *Drummond*, 143 D.L.R. (4th) 368, ¶ 4.

an offence known in law.”<sup>218</sup> Relying on *Regina v. Sullivan*, the court held that the crime of attempted murder could not be established, because a foetus was not a human being under the Canadian Criminal Code, and therefore, at the time the mother fired the pellet rifle, she could not form the necessary intent to murder, i.e., to kill a human being.<sup>219</sup>

Advocates of “foetal rights” have endeavored to change the Canadian born-alive rule. In 2007 a Conservative Member of Parliament introduced a “private members” bill, the Unborn Victims of Crime Act, which would make it a crime punishable by life imprisonment to cause, “directly or indirectly, . . . the death of a child during birth or at any stage of development before birth while committing or attempting to commit an offense against the mother of the child, who the person knows or ought to know is pregnant,” if the person shows “reckless disregard for the life or safety of the child.”<sup>220</sup> Making clear its purpose to establish a foetus as a juridical person, the proposed law also provides that “[i]t is not a defence to a charge under this section that the child is not a human being,”<sup>221</sup> and “[a]n offence referred to in this section committed against a child is not included in any offence committed against the mother of the child.”<sup>222</sup>

## 2. Tort Liability and Civil Commitment

In the late 1990s, the Supreme Court of Canada first confronted the question of whether a foetus should be considered a legal person in the common law context and reached a result consistent with its abortion jurisprudence. In *Dobson v. Dobson*,<sup>223</sup> the Court held that the foetus should not be considered a person separate from its mother. The Court stated that “[t]he relationship between a pregnant woman and her

218. *Drummond*, 143 D.L.R. (4th) 368, ¶ 1.

219. *Drummond*, 143 D.L.R. (4th) 368, ¶¶ 28–32, 35–44. Ultimately, Ms. Drummond, whose lawyer asserted that she was so depressed that she did not know that she was pregnant, pleaded guilty to failing to provide the necessities of life to her son after he was born; she was not sentenced to jail. *Meant Suicide When Son Hit, Woman Says; Unaware She Was Pregnant, Lawyer Tells Court*, TORONTO STAR, Feb. 4, 1997, at A10, available at LEXIS.

220. Unborn Victims of Crime Act, C-484, 39th Parl., 2d Sess., sec. 3, § 238.1(1) (Can. 2007); see also Parliament of Canada, Member of Parliament Profile: Ken Epp, <http://webinfo.parl.gc.ca/MembersOfParliament/ProfileMP.aspx?Key=78339&Language=E> (last visited Jan. 27, 2009).

221. C-484, sec. 3, § 238.1(5).

222. *Id.* at sec. 3, § 238.1(6).

223. *Dobson (Litig. Guardian of) v. Dobson*, [1999] 2 S.C.R. 753 (Can.).

foetus is unique and innately recognized as one of great and special importance to society.<sup>224</sup> In *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*,<sup>225</sup> the Court declared, “Before birth the mother and unborn child are one in the sense that [t]he “life” of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman.”<sup>226</sup> In this case, the Court held that a pregnant woman addicted to sniffing glue could not be civilly committed in order to receive substance abuse treatment against her will.<sup>227</sup> In *Dobson*, the Court held that a pregnant woman could not be found liable in tort for alleged negligence while driving which caused harm to her foetus, even though a third party who drove negligently could be held liable.

*Winnipeg Child & Family Services* presented a tragic set of circumstances. Ms. D.F.G. was a young aboriginal woman<sup>228</sup> who was addicted to sniffing glue and had already given birth to three children, two of whom had been injured as a result of their exposure to solvents in utero.<sup>229</sup> When Ms. D.F.G. became pregnant again she intermittently both sought and rejected treatment for her addiction. Treatment was not initially available, but after arranging for her admission to a treatment program, the local child welfare agency came to Ms. D.F.G.’s home to

224. *Dobson*, [1999] 2 S.C.R. at 759 ¶ 1.

225. *Winnipeg Child & Family Servs. (Nw. Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925 (Can.).

226. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 944 ¶ 27 (citing *Paton v. United Kingdom*, App. No. 8416/78, 3 Eur. H.R. Rep. 408, 415 (1980)).

227. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 933 ¶ 1, 939–40 ¶¶ 15–17, 954–55 ¶¶ 47–51. In this decision, the Supreme Court reaffirmed the conclusion reached by most, but not all, lower courts, that the term “child” within the meaning of various provincial child protection statutes did not include a foetus and that courts’ *parens patriae* jurisdiction was not broad enough to authorize a Caesarian section without the mother’s consent, e.g., *Re Baby R.*, [1988] 30 B.C.L.R.2d 237 (Sup. Ct.), or other involuntary detention of a pregnant woman for the benefit of her foetus, e.g., *Re A.*, [1990] 75 O.R.2d 82 (Unif. Fam. Ct.). *But see* *Children’s Aid Soc’y of Belleville v. T. (L.)*, [1987] 59 O.R.2d 204 (Prov. Ct. Fam. Div.) (finding an “unborn child” in need of protection, under the authority of the Child and Family Services Act).

228. Canadian cases and commentators refer to native peoples either as “First Nations” or as “aboriginals.” See, e.g., Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 AKRON L. REV. 865, 865, 882, 889 (2008) (discussing the case of *R. v. Edmondson*, [2005] 257 Sask. R. 270 (C.A.), and describing the victim as both an “aboriginal girl” and as a “Yellow Quill First Nation girl”).

229. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 933–34 ¶¶ 1, 5; Françoise Baylis, Commentary, *Dissenting with the Dissent: Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, 36 ALTA. L. REV. 785, 785–86 (1998).

take her to a treatment facility.<sup>230</sup> Intoxicated at the time, D.F.G. refused to enter treatment.<sup>231</sup> The agency sought a court order to detain her for treatment at a health centre until the birth of her child.<sup>232</sup> The superior court judge granted the request, relying on provincial mental health law and the doctrine of *parens patriae* to justify its order for civil commitment.<sup>233</sup>

On appeal, both the Manitoba Court of Appeal<sup>234</sup> and the Supreme Court of Canada rejected the trial court's approach. The Supreme Court began with the premise that "the [common] law of Canada does not recognize the unborn child as a legal or juridical person."<sup>235</sup> After asking whether the rule should be changed to allow a remedy for circumstances in which "a mother is acting in a way which may harm her unborn child,"<sup>236</sup> the Court concluded that it should not.<sup>237</sup> The Court emphasized that "[a]scribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties—a matter which falls outside the concerns of scientific classification."<sup>238</sup>

The Court gave four reasons for declining to hold that a foetus should be considered a person with rights separate from those of its mother. First, the Court held, as a matter of separation of powers, that the legislature was in a better position than the courts to weigh the policy implications of law change.<sup>239</sup> Nonetheless, commenting on those policy concerns, the Court observed that a decision upholding the civil commitment of pregnant women might be counterproductive, either because women with substance abuse problems might not seek prenatal care out of fear of detection and consequent involuntary commitment, or because drug-addicted women might choose abortion rather than be

230. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 934 ¶ 5, 964 ¶ 77; Baylis, *supra* note 229, at 786.

231. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 934 ¶ 5, 964 ¶ 77; Laura Shaner, Commentary, *Pregnancy Intervention and Models of Maternal-Fetal Relationship: Philosophical Reflections on the Winnipeg C.F.S. Dissent*, 36 ALTA. L. REV. 751, 752 (1998).

232. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 926.

233. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 935 ¶ 6. After two days, the order was stayed and ultimately overturned on appeal. *Id.* at 933 ¶ 2. However, Ms. D.F.G. remained at the health centre for several days, stopped sniffing glue, and "gave birth to an apparently normal child." *Id.* at 933–34 ¶ 2.

234. *Child & Family Servs. of Winnipeg Nw. v. D.F.G.*, [1996] 113 Man. R.2d 3 (Man. Ct. App.).

235. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 937 ¶ 11.

236. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 935 ¶ 5, 940–44 ¶¶ 18–26.

237. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 954 ¶¶ 47–48.

238. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 938 ¶ 12 (quoting Tremblay v. Daigle, [1989] 2 S.C.R. 530, 553 (Can.)).

239. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 941 ¶ 20.

forced to give up drugs.<sup>240</sup> Second, viewing its decision on civil commitment as a matter of tort law,<sup>241</sup> the Court noted that neither England nor Australia, both common law countries, permit a child to sue for prenatal injuries until born alive.<sup>242</sup> Third, and most importantly, the Court noted that once a decision was made to treat the foetus as a person separate from its mother, it would be impossible to find a principled basis on which to limit tort liability.<sup>243</sup> Fourth, imposing such liability would conflict with women's rights to autonomy and equality.<sup>244</sup>

Combining these latter two concerns, the Court described the slippery slope onto which courts would be launched in trying to decide whether a pregnant woman should face the possibility of tort liability or involuntary civil commitment:

One faces . . . the "spectre of mothers being sued by their children for various activities or lifestyle choices, such as smoking, drinking and the taking or refusal of medication, during pregnancy that injure the child, with the result that mothers will be unable to control their own bodies and make autonomous choices[.]" . . .<sup>245</sup>

. . . .

. . . "[A woman] could . . . be held liable for any behavior during pregnancy having potentially adverse effects on her fetus, including failing to eat properly, using prescription, nonprescription and illegal drugs, smoking, drinking alcohol, exposing herself to infectious disease or to workplace hazards, engaging in immoderate exercise or sexual intercourse, residing at high altitudes for prolonged periods, or using a general anesthetic or drugs to induce rapid labor during delivery."<sup>246</sup>

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240. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 952 ¶ 44.

241. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 936 ¶ 9, 939–40 ¶¶ 15–17.

242. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 942–43 ¶ 22.

243. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 943 ¶ 24, 946–47 ¶ 33, 949–50 ¶¶ 38–40.

244. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 947–52 ¶¶ 34, 37–39, 42.

245. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 947 ¶ 34 (quoting *Dobson (Litig. Guardian of) v. Dobson*, [1997] 189 N.B.R.2d 208 (C.A.)) (citations omitted).

246. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 950 ¶ 39 (quoting Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 606–07 (1986)).

Importantly, the Court also challenged the myth of autonomous choice facing drug-addicted women, and urged that the policy decisions about how best to protect fetuses be made in the actual context of pregnant substance abusers' lives. The Court observed,

[L]ifestyle "choices" like alcohol consumption, drug abuse, and poor nutrition may be the products of circumstance and illness rather than free choice capable of effective deterrence by the legal sanction of tort. . . . ["T]reating pregnant substance abusers as fetal abusers ignores the range of conditions that contribute to problems like drug addiction and lack of nutrition, such as limited quality pre-natal care, lack of food for impoverished women, and lack of treatment for substance abusers.<sup>247</sup>

Finally, the Court also considered the question of whether a *parens patriae* theory justified the involuntary commitment of pregnant women. The Court concluded that it did not,<sup>248</sup> holding:

[T]he invasion of liberty involved in making court orders affecting the unborn child is of a different order than the invasion of liberty involved in court orders relating to born children. . . . The court cannot make decisions for the unborn child without inevitably making decisions for the mother herself. The intrusion is therefore far greater than simply limiting the mother's choices concerning her child . . . [and] would seriously intrude on the rights of women.<sup>249</sup>

The Supreme Court used a similar analytical approach in *Dobson v. Dobson*.<sup>250</sup> The case raised the question of whether a child who suffered permanent brain injuries due to his mother's allegedly negligent driving while pregnant could sue her for this prenatal harm.<sup>251</sup> The Supreme

247. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 950–51 ¶ 41 (quoting Julia E. Hanigsberg, *Power and Procreation: State Interference in Pregnancy*, 23 OTTAWA L. REV. 35, 53 (1991)).

248. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 954–60 ¶¶ 49–57.

249. *Winnipeg Child & Family Servs.*, [1997] 3 S.C.R. at 959–60 ¶ 56 (punctuation omitted).

250. *Dobson (Litig. Guardian of) v. Dobson*, [1999] 2 S.C.R. 753 (Can.).

251. *Dobson*, [1999] 2 S.C.R. at 760 ¶¶ 2–4. The two lower courts ruled that the child could sue his mother for injuries incurred while he was in utero. The New Brunswick trial court permitted the child to sue, analogizing to established precedent that permitted a child, once born, to sue third parties for injuries suffered prior to birth. *Dobson v. Dobson*, [1997] 186 N.B.R.2d 81 (Q.B.) (citing *Montreal Tramways Co.*

Court reversed the lower courts' decisions to let the suit go forward, holding that, due to the unique nature of the relationship between a pregnant woman and her foetus, the woman cannot be held liable for allegedly tortious conduct while the foetus was in utero.<sup>252</sup> Although the Court conceded that children had been permitted to sue third parties for negligently caused prenatal injuries, it found that these cases were readily distinguishable from suits for injuries allegedly caused by a pregnant woman's negligence.<sup>253</sup> The Court declared, "There is no other relationship in the realm of human existence which can serve as a basis for comparison."<sup>254</sup>

In considering whether tort duties should be imposed on pregnant women, the *Dobson* court first assumed *arguendo* that a pregnant woman and her foetus *could* be treated as separate entities.<sup>255</sup> It concluded that, under such circumstances, there would be no limit to a woman's potential liability, due to the extraordinarily close physical proximity between the woman and her foetus and the enormous range of actions which the woman could take which could have a detrimental effect on foetal development.<sup>256</sup> The Court noted, "Everything the pregnant woman eats or drinks, and every physical action she takes, may affect the foetus."<sup>257</sup> The Court identified two important public policy concerns "militat[ing] against the imposition of maternal tort liability for prenatal negligence[:]. . . (1) the privacy and autonomy rights of women and (2) the difficulties inherent in articulating a judicial standard of conduct for pregnant women."<sup>258</sup> Addressing women's interest in autonomy, the Court emphasized that simply because a woman is pregnant she does not lose "the right to make personal decisions, to control [her] bodily integrity, and to refuse unwanted medical treatment."<sup>259</sup>

The Court linked these concerns to the difficulty in developing a workable judicial standard of conduct for pregnant women, finding that it would be impossible to articulate an objective standard, since every

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v. Léveillé, [1933] S.C.R. 456 (Can.)). The New Brunswick Court of Appeal upheld this decision, asserting that, because the mother owed a general duty not to drive negligently, it was appropriate to allow her child, injured while a foetus, to bring an action against her for breach of that general duty. *Dobson v. Dobson*, [1997] 189 N.B.R.2d 208, 216 (C.A.).

252. *Dobson*, [1999] 2 S.C.R. at 796–97 ¶¶ 76–77.

253. *Dobson*, [1999] 2 S.C.R. at 770–72 ¶¶ 26–29.

254. *Dobson*, [1999] 2 S.C.R. at 769 ¶ 25.

255. *Dobson*, [1999] 2 S.C.R. at 767 ¶ 20.

256. *Dobson*, [1999] 2 S.C.R. at 770–71 ¶¶ 27–28, 798 ¶¶ 79–80.

257. *Dobson*, [1999] 2 S.C.R. at 770 ¶ 27.

258. *Dobson*, [1999] 2 S.C.R. at 768 ¶ 21.

259. *Dobson*, [1999] 2 S.C.R. at 774 ¶ 32 (quoting ROYAL COMM'N ON NEW REPROD. TECHS., 2 PROCEED WITH CARE 955–56 (1993)).



pregnant woman's life is different; there are women who are well-educated and not, those who are rich and poor, and those with and without access to good healthcare and prenatal care.<sup>260</sup> The Court also observed that any "reasonable pregnant woman" standard that would develop would inevitably be interpreted in light of the trier of fact's prejudices about proper conduct of pregnant women.<sup>261</sup> As in *Winnipeg Child & Family Services*, the Court invoked the slippery slope, concluding that there was no principled way to identify conduct on the part of a pregnant woman that was or was not negligent, and consequently refused to recognize a cause of action in tort.<sup>262</sup> The Court did hold out the possibility that Parliament could develop narrowly tailored legislation to address the needs of brain-injured children, as had the Parliament of the United Kingdom in enacting the Congenital Disabilities Act when it established an explicit "motor vehicle" exception to the general principle that women have tort immunity for damages to their fetuses in utero.<sup>263</sup> The Court concluded that such a legislative solution could meet both separation of powers concerns and permit a more careful consideration of the public policy issues.<sup>264</sup>

### 3. Abortion Law

In its landmark 1988 decision in *Regina v. Morgentaler*,<sup>265</sup> the Supreme Court of Canada invalidated Canada's criminal abortion law.<sup>266</sup>

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260. *Dobson*, [1999] 2 S.C.R. at 785 ¶ 54.

261. *Dobson*, [1999] 2 S.C.R. at 784–85 ¶ 53.

262. *Dobson*, [1999] 2 S.C.R. at 788–90 ¶¶ 60–62, 792 ¶ 66.

263. *Dobson*, [1999] 2 S.C.R. at 791–94 ¶¶ 64–70.

264. *Dobson*, [1999] 2 S.C.R. at 791–94 ¶¶ 64–70. As described by the Court, the Congenital Disabilities Act creates a very limited exception to the general rule of tort law that pregnant women are not liable for negligent conduct vis-à-vis their fetuses, except in the limited circumstances in which they are operating a motor vehicle, and then only to the limits of their insurance policy. *Id.* at 791 ¶¶ 64–65. The Court took pains to distinguish the approach taken in the United Kingdom from that proposed by the plaintiff in *Dobson*, both because the former was based on a legislative act, rather than a judicial decision, *id.* at 791 ¶ 64, and because it was devised on insurance, rather than tort, principles, consistent with the British system of mandatory motor vehicle insurance, *id.* at 792–93 ¶ 67. The sole goal of the Congenital Disabilities Act was to provide monetary compensation to fetuses who suffered injury in utero in an automobile accident. *Id.* at 793 ¶ 68.

265. *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.).

266. Criminal Code, R.S.C., ch. C-34, § 251 (1970) (current version at R.S.C. ch C-46, § 287 (1985), amended by 1993 S.C., ch. 28, § 78, 1996 S.C., ch. 8, § 32, 2002 S.C., ch. 7, § 141). While the *Morgentaler* court invalidated the law, the Parliament has not repealed it.

The abortion law placed the decision about whether a woman could have an abortion solely within the hands of a three-member physician committee.<sup>267</sup> The *Morgentaler* court found that this law violated women's right to "security of the person" under section 7 of the Canadian Charter of Rights and Freedoms<sup>268</sup> and did so in contravention of the principles of fundamental justice.<sup>269</sup> Nor could the law be "salvaged" under section 1 of the Charter as a law "of sufficient importance to warrant overriding a constitutionally protected right," with "the means chosen in overriding the right . . . reasonable and demonstrably justified in a free and democratic society."<sup>270</sup> Under the law, many women faced considerable delay in obtaining an abortion, as many needed to seek permission for abortion at multiple hospitals because of uncertainty about whether permission would be granted.<sup>271</sup> In addition to the psychological stress caused by uncertainty and delay, many women were also burdened by the fact that the medical procedure they sought was regulated by the criminal law.<sup>272</sup> The Court concluded that by removing women entirely from the decision-making process, this system deprived them of the "security of the person" protected by section 7 of the Charter.<sup>273</sup>

The Court's reasoning was stated succinctly by concurring Justice Beetz: "A pregnant woman's person cannot be said to be secure if, when her life or health is in danger, she is faced with a rule of criminal law which precludes her from obtaining effective and timely medical treatment."<sup>274</sup> Concurring Justice Wilson was the strongest in her critique of the abortion law,<sup>275</sup> although she nonetheless recognized the state interest in protecting the potential human life that a foetus represented.<sup>276</sup>

267. § 251(4), (6); *Morgentaler*, [1988] 1 S.C.R. at 64, 92–100 (discussing the committee requirements of § 251).

268. Canadian Charter of Rights and Freedoms § 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) [hereinafter Charter].

269. *Morgentaler*, [1988] 1 S.C.R. at 56–57, 70–73, 81–82.

270. *Morgentaler*, [1988] 1 S.C.R. at 73, 75–76, 82.

271. *Morgentaler*, [1988] 1 S.C.R. at 57–58.

272. *Morgentaler*, [1988] 1 S.C.R. 30 at 55–57, 89–90, 104–05.

273. *Morgentaler*, [1988] 1 S.C.R. 30 at 164–72.

274. *Morgentaler*, [1988] 1 S.C.R. 30 at 90.

275. Justice Wilson concluded that the criminal abortion provision contravened both the security and liberty interests protected by section 7. *Morgentaler*, [1988] 1 S.C.R. 30 at 162–63. Relying on John Stuart Mill and on American jurisprudence which had developed a constitutional right to privacy, Justice Wilson declared that section 7 of the Charter "guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives," *id.* at 171, and that this liberty interest includes "the decision of a woman to terminate her pregnancy," *id.* See also *id.* at 164–72.

276. *Morgentaler*, [1988] 1 S.C.R. at 181.

Justice Wilson reasoned that the governmental interest in protecting that life must vary with the stage of foetal development, suggesting in dicta that the governmental interest did not become compelling until somewhere in the second trimester.<sup>277</sup>

A year later, in *Tremblay v. Daigle*,<sup>278</sup> the Court directly addressed the question of the legal status of the foetus that it had avoided in *Morgentaler*. In *Daigle*, a pregnant woman's physically abusive male partner sought an injunction to prevent her from having an abortion.<sup>279</sup> After a lengthy litigation process, played out in the Canadian press,<sup>280</sup> the Supreme Court ruled that the man had no right to prevent the abortion because, under Canadian and Quebecois law, a foetus was not a "juridical person," with rights and legal protections while in utero.<sup>281</sup>

Despite the *Morgentaler* decision invalidating Canada's criminal abortion law, many women still find it difficult to access abortion services in Canada, due to strong opposition to abortion in some provinces and the poverty and geographic isolation of many women.<sup>282</sup> The Canada Health Act establishes federal standards for medically necessary services (including abortion), which must be met before provinces can be reimbursed by the federal government for the services they provide patients through provincial insurance plans.<sup>283</sup> Provinces vary widely in the extent to which they fund abortions, often distinguishing between hospitals, which are fully funded, and clinics, where funding may be partial.<sup>284</sup> Even in provinces which fully fund abortion services, there are few hospitals and clinics which perform abortions, leading to significant

277. *Morgentaler*, [1988] 1 S.C.R. 30 at 181–83.

278. *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 (Can.).

279. *Daigle*, [1989] 2 S.C.R. at 536–37.

280. See Alison Harvison Young, *New Reproductive Technologies in Canada and the United States: Same Problems, Different Discourses*, 12 TEMP. INT'L & COMP. L.J. 43, 72 n.155 (1998).

281. *Daigle*, [1989] 2 S.C.R. at 552–70. In reaching this conclusion, the Court reviewed prior Canadian decisions, as well as precedential French and British legislative and judicial authorities, and declared that there was no basis for finding that a foetus had legal personhood under Quebec law. *Id.*

282. Laura Eggertson, *Abortion Services in Canada: A Patchwork Quilt with Many Holes*, 164 CAN. MED. ASS'N J. 847, 847–48 (2001), available at <http://www.cmaj.ca/cgi/reprint/164/6/847>; see generally Sanda Rodgers, *Abortion Denied: Bearing the Limits of Law*, in JUST MEDICARE: WHAT'S IN, WHAT'S OUT, HOW WE DECIDE 107 (Colleen M. Flood ed., 2006).

283. See Canada Health Act, R.S.C., ch. C-6 (1985); Rodgers, *supra* note 282, at 115, 128–29 nn.71–75.

284. British Columbia and Ontario, for example, fund abortions fully under provincial health insurance plans, while other provincial health plans do not fully cover abortions performed at clinics, which may be more likely to be found in rural areas. Eggertson, *supra* note 282, at 847.

waiting times.<sup>285</sup> Prince Edward Island has no hospital or clinic where abortions are performed, so women must leave the province to seek care, leading to waiting times of up to a month.<sup>286</sup> Less than twenty percent of all Canadian hospitals perform abortions,<sup>287</sup> and even among hospitals which do provide these services, some have imposed additional requirements on women seeking an abortion, contrary to law.<sup>288</sup> For young and poor women, as well as those in rural areas, these procedural hurdles, increased costs, and the burdens of travel are often insuperable obstacles to obtaining an abortion.<sup>289</sup>

### B. Healthcare Access

Of course, the fact that Canadian courts do not recognize fetuses as juridical persons tells us nothing about whether pregnant women receive adequate healthcare under the Canadian healthcare system. Although Medicare, as the Canadian health system is known, provides universal coverage,<sup>290</sup> in reality, access to appropriate healthcare and to other prerequisites for health is not equal across class and racial lines. In addition to the problems with abortion access noted above, there are many people who do not receive appropriate healthcare under the Canadian system. Aboriginal peoples who live on reserves (and are the direct responsibility of the federal government) are particularly lacking in adequate healthcare, housing, and nutrition, and their health status reflects these deficits.<sup>291</sup>

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285. *See id.* at 849 (noting that only three out of ninety-nine hospitals perform abortions in Alberta, and that there are only two clinics in the entire province, leading to waiting times of two or more weeks even in a large city like Calgary).

286. *Id.*

287. Rodgers, *supra* note 282, at 113 (citing CANADIAN ABORTION RIGHTS ACTION LEAGUE, PROTECTING ABORTION RIGHTS IN CANADA (2003), available at <http://www.canadiansforchoice.ca/caralreport.pdf>).

288. *Id.* at 113–14 (citing, *inter alia*, CANADIAN ABORTION RIGHTS ACTION LEAGUE, *supra* note 287).

289. Eggertson, *supra* note 282, at 848; *see also* Rodgers, *supra* note 282, at 112.

290. Personal communication from Bernard Dickens, Professor Emeritus, Univ. of Toronto, to the author. Under the Canada Health Act, the federal government provides partial reimbursement to provinces for providing “reasonable access” to “medically necessary” healthcare services, providing that the provinces meet minimum federal standards. *Id.*; Canada Health Act, ch. C-6, §§ 2, 12. As noted, in the context of abortion, provinces are free to provide greater or fewer services if they do not seek federal reimbursement. Dickens, *supra*.

291. Sanda Rodgers, Commentary, Winnipeg Child and Family Services v. D.F.G.: *Juridical Interference with Pregnant Women in the Alleged Interest of the Fetus*, 36 ALTA L. REV. 711, 723 (1998).

At present, there are inadequate treatment resources for alcohol and other drug addictions across Canada.<sup>292</sup> Women who acknowledge their addiction and seek treatment face “devastating barriers to treatment.”<sup>293</sup> Women are inhibited in their reporting of substance abuse because of the stigma and negative stereotypes about their behavior and because they fear losing custody of their children.<sup>294</sup> As in the United States, poor women and women of color are significantly more likely to be screened for substance abuse than middle class women.<sup>295</sup> Further, treatment programs are not designed to reflect the special factors that predispose women to substance abuse compared to men, or to offer more supportive, less judgmental interventions to protect women and their fetuses.<sup>296</sup> Both epidemiological studies and a review of the cases in which judicial intervention to protect the foetus has been sought suggest a strong connection between domestic violence and the use of alcohol and other drugs by pregnant women.<sup>297</sup> Nonetheless, Canada is attempting to address its growing substance abuse problem. In 2007 it announced a national campaign to prevent and treat substance abuse among Canadians aged fifteen and twenty-four, who constitute 60% of

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292. NANCY POOLE, B.C. CTR. OF EXCELLENCE FOR WOMEN'S HEALTH, & COLEEN ANNE DELL, CANADIAN CTR. ON SUBSTANCE ABUSE, GIRLS, WOMEN AND SUBSTANCE USE 10 (2005).

293. *Id.* at 9.

294. *Id.* at 6, 9.

295. *Id.* at 7; *see also* Chasnoff et al., *supra* note 13, at 1202, 1204 (presenting data that in Pinellas County, Florida, black women are approximately ten times more likely than white women to be reported to health authorities for substance abuse during pregnancy, despite a roughly equivalent frequency of positive results on toxicologic testing for substance abuse).

296. POOLE & DELL, *supra* note 292, at 10.

297. *Id.* at 7; Rodgers, *supra* note 291, at 723 (citing Soc'y of OBSTETRICIANS & GYNECOLOGISTS OF CAN., HEALTHY BEGINNINGS: GUIDELINES FOR CARE DURING PREGNANCY AND CHILDBIRTH, No. 18 (1995) (“The literature regarding abuse during pregnancy reveals that one in twelve women are victims of violence. In Canada, forty percent of wife assaults begin during the time of the woman's first pregnancy.”)); *see also* Sheilah Martin & Murray Coleman, *Judicial Intervention in Pregnancy*, 40 MCGILL L.J. 947, 957–58 n.39 (1995) (discussing the cases *Superintendent of Family & Child Service v. M.(B.)*, [1982] 135 D.L.R. (3d) 330 (B.C. Sup. Ct.), and *Re Children's Aid Society for the District of Kenora & J.L.*, [1981] 134 D.L.R. (3d) 249 (Ont. Prov. Ct.), in which the courts considering whether newborns should be removed from their mothers due to the mothers' drug use while pregnant noted that the women in question were the victims of male violence); Erin Nelson, *Reconceiving Pregnancy: Expressive Choice and Legal Reasoning*, 49 MCGILL L.J. 593, 623–24 (2004).

illicit drug users, focusing on prevention rather than incarceration as its primary tool.<sup>298</sup>

### C. Social and Economic Support for Children and Their Families

Canada provides pregnant women and new parents with economic supports that permit them to be at home with a new child for a maximum of sixty-five weeks.<sup>299</sup> Qualifying individuals can receive up to fifteen weeks of sickness benefits, fifteen weeks of maternity benefits, and thirty-five weeks of parental benefits.<sup>300</sup> The benefits are available to all salaried and wage-earning workers, and the parental leave can be shared by parents, providing greater flexibility in childcare and job and career planning.<sup>301</sup> These benefits reimburse 55% of a worker's earnings up to a maximum of Can\$22,620 per year, thus providing a greater relative benefit to low- and middle-income workers.<sup>302</sup> Parents who return to work while still receiving maternity or sickness benefits will have their benefits reduced "dollar for dollar" by the amount they earn, but parents may retain a portion of parental benefits even if they return to work.<sup>303</sup>

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298. CANADIAN CTR. ON SUBSTANCE ABUSE, A DRUG PREVENTION STRATEGY FOR CANADA'S YOUTH (2007), available at <http://www.ccsa.ca/2007%20CCSA%20Documents/ccsa-011522-2007-e.pdf>.
299. Service Canada, Employment Insurance (EI) and Maternity, Parental and Sickness Benefits, <http://www1.servicecanada.gc.ca/en/ei/types/special.shtml> (last visited Jan. 27, 2009) (including sickness benefits); see also Associated Press, *U.S. Stands Apart from Other Nations on Maternity Leave*, USA TODAY, July 26, 2005, [http://www.usatoday.com/news/health/2005-07-26-maternity-leave\\_x.htm](http://www.usatoday.com/news/health/2005-07-26-maternity-leave_x.htm) (comparing the benefits received by American workers with their counterparts in Canada and other developed nations).
300. Service Canada, *supra* note 299. To qualify, the individual must have worked at least six hundred hours during the last fifty-two weeks. *Id.* In addition, to qualify for maternity benefits, the individual must have been pregnant. *Id.* Parental benefits are for a couple, to be shared among the two parents as they elect. *Id.*
301. *Id.*; see also Linda A. White, *Institutions, Constitutions, Actor Strategies, and Ideas: Explaining Variations in Paid Parental Leave Policies in Canada and the United States*, 4 INT'L J. CONST'L L. 319, 323-25 (2006).
302. Service Canada, *supra* note 299. An additional Family Supplement is given to low-income families (those earning below Can\$25,921) and is increased for families who have children under age seven. Service Canada, Employment Insurance (EI) and the Family Supplement, available at [http://www1.servicecanada.gc.ca/en/ei/service/family\\_supplement.shtml](http://www1.servicecanada.gc.ca/en/ei/service/family_supplement.shtml) (last visited Jan. 27, 2009).
303. Service Canada, *supra* note 299.

## V. FRENCH APPROACHES TO FETAL PROTECTION AND CHILD HEALTH

*A. The Legal Framework*

The French position on fetal protection might best be described as one of supporting the potential for new human life represented by pregnancy, but not treating either embryos or fetuses as fully human, drawing a bright line at birth. Thus, French law promotes the birth of children through state-regulated and state-funded assisted reproductive technology, as well as significant economic support to encourage French citizens to have larger families. France provides universal healthcare to children and adults, and French law mandates generous maternity leaves and other benefits to defray the costs of having more children. It also limits pregnant women's ability to work in hazardous conditions. At the same time, French law appears to respect women's rights to control their bodies and the healthcare they receive. This is evidenced by the declaration of the National Consultative Committee of Ethics<sup>304</sup> that intervention in a pregnant woman's right to refuse medical treatment should rarely be overridden, and through the availability of government-funded abortion during the first twelve weeks of pregnancy.

As in Canada, a unified judicial system and a strong national Parliament establish a uniform system of laws throughout the country. The highest French court, la Cour de Cassation,<sup>305</sup> has recognized a civil cause of action against third parties for harm caused prior to birth by medical malpractice, but Parliament has effectively overturned this decision by limiting the relief available in such cases and providing that the compensation is for the parents of the injured child for their losses,

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304. La Comité Consultatif National d'Ethique (CCNE) is an appointed body which is consulted by the president or a government minister for its recommendations on bio-ethical issues, which then form the basis for legislative action. *See* Law No. 94-654 of July 29, 1994, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 30, 1994, p. 11060, 11067; Decree No. 97-555 of May 29, 1997, *available at* <http://www.legifrance.gouv.fr/initRechTexte.do> (last visited Nov. 20, 2008).

305. The Cour de Cassation is the main court of last resort in France on civil, criminal, social and commercial matters; it deals with appeals (called "pourvoi en cassation") taken from the Courts of Appeals ("Cours d'Appel"). *See* Cour de Cassation: About the Court, [http://www.courdecassation.fr/about\\_the\\_court\\_9256.html](http://www.courdecassation.fr/about_the_court_9256.html) (last visited Jan. 27, 2009). Cases against the state or local authorities are decided by the "Tribunaux Administratifs" and appealed to the "Conseil d'État," the court of last resort for those cases. *See* Le Conseil d'État en bref, [http://www.conseil-etat.fr/ce/missio/index\\_mi\\_ce01.shtml](http://www.conseil-etat.fr/ce/missio/index_mi_ce01.shtml) (last visited Nov. 20, 2008).

rather than directed to the child itself.<sup>306</sup> Most significantly, in homicide cases French law has consistently recognized birth as a bright line. The Cour de Cassation has held repeatedly that, because a fetus is not a person, no homicide charges may be brought against a party who causes the death of a fetus, whether the defendant is a doctor or another third party, such as a drunk driver.<sup>307</sup> No French woman has ever been criminally prosecuted for conduct causing harm or death to her fetus, nor has any French woman been civilly committed as a means of preventing harm to her fetus, even though there is rising concern that alcohol consumption by pregnant French women is putting children at risk.<sup>308</sup>

## 1. The Criminal Law

In three cases decided in the last eight years, the Cour de Cassation has held that a fetus is not a “juridical person,” and thus one who causes the death of a fetus cannot be prosecuted for homicide.<sup>309</sup> Two cases arose out of medical malpractice, while the other involved fetal death as a result of a motor vehicle accident.

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306. See *infra* text accompanying notes 331–339.

307. See discussion *infra* Part V.A.1.

308. See Didier Mennecier, *Alcool et Grossesse*, LES MÉDECINS MAÎTRES-TOILE, Mar. 12, 2005, <http://www.mmt-fr.org/article183.html> (citing, *inter alia*, the French Government’s *Enquête nationale périnatale 1998* [National Prenatal Survey 1998], available at <http://www.sante.gouv.fr/html/dossiers/perinat/somm2.htm>). Estimates of the number of children born in France affected by fetal alcohol syndrome range between 1.3 and 3.5 per 1,000 infants. *Id.*

309. A striking transatlantic comparison of this difference between French and American law was brought home by the French prosecution of Thierry Gaitaud, a dual French-American citizen, charged with murdering his pregnant American wife in San Diego. See Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D’Assises*, 2001 U. ILL. L. REV. 791, 793 (2001). Under its extradition treaty with the United States, France is expressly permitted to refuse to extradite French citizens, who may choose to be tried in France for crimes committed extraterritorially. France has exhibited reluctance to extradite those facing the death penalty, as Thierry would have in California. *Id.* at 793–94. Gaitaud having fled the U.S. prior to his arrest in France, France elected to exercise its broad jurisdictional power and try Gaitaud in France. *Id.* During the trial the judge observed that the fetus was viable, describing “the little baby in Susan’s womb, who was only about fifteen days from being born—the baby who would have been your son. I’ve seen pictures of the fetus, and it was a real baby, with hands and fingers . . .” *Id.* at 793. Yet there was never a suggestion that Gaitaud could be charged with the fetus’ homicide under French law.



The *Vo* case,<sup>310</sup> which attracted the most attention, involved a physician's mistaken identification of a patient, which led him to commit malpractice. Two women of Vietnamese ancestry, both surnamed *Vo*, were patients at the same hospital.<sup>311</sup> One patient was six months pregnant, and the other patient was seeking removal of her IUD.<sup>312</sup> The defendant physician called out to the waiting room for Madame *Vo*, and the pregnant patient responded.<sup>313</sup> Without any preliminary physical examination, the physician attempted to remove the IUD he believed the woman was carrying.<sup>314</sup> Instead, he ruptured the amniotic sac surrounding the fetus, ultimately causing its demise at the age of twenty to twenty-one weeks.<sup>315</sup> Apparently because of the difficulties of bringing a medical malpractice case in France,<sup>316</sup> Madame *Vo* instead sought a criminal prosecution, and the physician was charged with unintentional homicide.<sup>317</sup> After a complicated procedural history, the case reached the

310. N.B. French criminal cases are generally not cited by the names of the defendants, but by their decision numbers and dates.

311. *Vo v. France* (No. 53924/00), ¶¶ 10–11, 2004-VIII Eur. Ct. H.R. (Grand Chamber), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

312. *Vo* (No. 53924/00) ¶¶ 10–11.

313. *Vo* (No. 53924/00) ¶ 11.

314. *Vo* (No. 53924/00) ¶ 11.

315. *Vo* (No. 53924/00) ¶¶ 11–12, 14.

316. For many years, it was necessary in practice for one seeking to win tort damages for medical malpractice to first successfully prosecute a criminal action. E-mail from Marc A. Rodwin, Professor of Law, Suffolk Univ. Law Sch., to author (Apr. 5, 2008). In addition, other difficulties in bringing malpractice actions include problems in suing physicians, many of whom are state employees, and the prolonged nature of malpractice litigation. The latter problem is exemplified by the case of Nicholas Perruche, whose case took fourteen years to progress through French courts. See *infra* text accompanying notes 332–334.

317. *Vo* (No. 53924/00) ¶¶ 17–18. This is the term used to describe the crime of “homicide involontaire,” CODE PÉNAL [C. PÉN] art. 319 (Fr.), translated in *Vo* (No. 53924/00) ¶ 23 (“Anyone who through his or her inadvertence, negligent act, inattention, negligent omission or breach of regulation unintentionally commits homicide or unintentionally causes death, shall be liable to imprisonment of between three months and two years and a fine of between 1,000 and 30,000 francs.”), under which the defendant was prosecuted. Through a reorganization of the Penal Code, this crime is now prosecuted under Article 221-6, see *Vo* (No. 53924/00) ¶ 24, which provides that “[c]ausing the death of another person by clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence imposed by statute or regulations . . . constitutes manslaughter punished by three years’ imprisonment and a fine of €45,000.” C. PÉN. art. 221-6, translated at [Legifrance.gouv.fr](http://legifrance.gouv.fr), <http://195.83.177.9/code/liste.html?lang=uk&c=33&r=3686> (last visited Jan. 27, 2009). For purposes of consistency, I will use the term unintentional homicide throughout this section.

Cour de Cassation.<sup>318</sup> That court noted the scientific uncertainty surrounding the precise moment at which a zygote becomes an embryo, an embryo becomes a fetus, and a fetus becomes viable, and declared that this uncertain and contingent status precluded it from upholding a homicide conviction in light of the principle that penal laws are to be strictly construed.<sup>319</sup>

The European Court of Human Rights upheld the decision of the Cour de Cassation against an appeal brought by Madame Vo. She alleged that the failure of French law to recognize a fetus as a person violated Article II of the European Convention on Human Rights, which provides that “Everyone’s right to life shall be protected by law.”<sup>320</sup> The European Court of Human Rights rejected the challenge, holding that because France provided adequate administrative remedies for the physician’s malpractice, it was unnecessary to impose a criminal sanction for the unintentional killing.<sup>321</sup> Significantly, the court found that in view of the diversity of viewpoints among European member states about the legitimacy of abortion, the question of when life begins, and whether a fetus was a “person,” “‘it would be inappropriate to impose one exclusive moral code.’”<sup>322</sup>

In two opinions rendered after its decision in the *Vo* case, the Cour de cassation reiterated its view that birth was essential to a homicide prosecution. The first, the *Potonet* case, also involved medical malpractice. A midwife and physician were charged with unintentional homicide based on allegations that they failed to act swiftly enough after a pregnant woman (Madame Potonet) alerted them to the irregular heartbeat of her fetus during a difficult labor; subsequently, the fetus

318. The Lyons Criminal Court acquitted the physician doctor on the ground that the fetus was not a person, and the case was appealed. *See Vo* (No. 53924/00) ¶ 19–20. The Lyons Court of Appeal reversed the lower court judgment, holding that the doctor was guilty of unintentional homicide and imposing a heavy fine and a suspended six month prison sentence. *See id.* ¶ 21. The physician then appealed. *See id.* ¶ 22.

319. *See Vo* (No. 53924/00) ¶ 21; *see also* Cour de cassation, Chambre criminelle [Cass. crim.] [highest court of ordinary jurisdiction, criminal chamber], Jun. 30, 1999, Bull. crim., No. 174, p. 511 (Fr.), available at <http://www.legifrance.gouv.fr/initRechJurijJudi.do> (search “Numéro d’affaire” for “97-82351”).

320. *Vo* (No. 53924/00) ¶ 46 (quoting Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, Europ. T.S. No. 5).

321. *Vo* (No. 53924/00) ¶¶ 91–95. Notably absent from the opinion of either the Cour de Cassation or the European Court of Human Rights was any meaningful discussion of the circumstances under which Madame Vo experienced negligent treatment from a physician, or the racism or language barrier that could have precipitated this incident. Why, for example, did the treating physician not ask Madame Vo why she was visiting him, rather than immediately reaching into her uterus?

322. *Vo* (No. 53924/00) ¶¶ 82, 87–95.

had been stillborn. The Cour de cassation declared explicitly that no conviction for involuntary manslaughter was possible because a fetus becomes a human person only after birth.<sup>323</sup>

The Cour de cassation also took this view in a case involving the death of a fetus as a result of harm to a pregnant woman as the result of a motor vehicle accident. In the *Grosmanjin* case, in which a driver injured a pregnant woman and caused the death of her six-month-old fetus, the Court upheld the driver's conviction for involuntary harm to the woman, but ruled that he could not be convicted of involuntary manslaughter of the fetus. The Court held that the principle of "legality of offenses and punishments which requires a strict interpretation of penal law precludes the extension of the law on unintentional homicide to the child to be born, whose legal status is enshrined in particular texts dealing with embryos and fetuses."<sup>324</sup> The *Grosmanjin* decision was followed in a subsequent lower court case involving an automobile accident in which both the pregnant woman and her fetus were killed.<sup>325</sup>

French law also makes it a crime punishable by five years imprisonment and a fine of €75,000 to terminate a pregnancy without the woman's consent.<sup>326</sup> Until recently it was a lesser crime to terminate pregnancy past the legal time limit for abortion,<sup>327</sup> or when the one terminating the pregnancy was not a physician, or when the procedure was not performed in an approved hospital, but these crimes were repealed in 2001.<sup>328</sup> However, since abortion became legal in 1975,<sup>329</sup> no French

323. Cass. crim., June 25, 2002, Bull. crim., No. 144, p. 531, available at <http://www.legifrance.gouv.fr/initRechJuriJudi.do> (search "Numéro d'affaire" for "00-81359") ("[I]l ne peut y avoir d'homicide involontaire du foetus, celui-ci ne devenant une personne humaine qu'après la naissance.").

324. *Grosmanjin* case, Cour de cassation, Assemblée plénière [Cass. ass. plén.], June 29, 2001, Bull. ass. plén., No. 8, p. 19, available at <http://www.legifrance.gouv.fr/initRechJuriJudi.do> (search "Numéro d'affaire" for "99-85973") (declaring "le principe de la légalité des délits et des peines, qui impose une interprétation stricte de la loi pénale, s'oppose à ce que l'incrimination prévue par l'article 221-6 du Code pénal, réprimant l'homicide involontaire d'autrui, soit étendue au cas de l'enfant à naître dont le régime juridique relève de textes particuliers sur l'embryon ou le foetus.")

325. Cour d'appel [CA] [regional court of appeal] Metz, Feb. 17, 2005, No. 05/222.

326. C. PÉN. art. 223-10. This article, and the others discussed in this paragraph, are in a section of the Penal Code separate from the one addressing "Offenses Against the Life of Persons," C. PÉN. arts. 221-1 to -10.

327. French abortion law is discussed *infra*, Part V.A.3.

328. C. PÉN. art. 223-11, repealed by Law No. 2001-588 of July 4, 2001, art. 14, J.O., July 7, 2001, p. 10823.

329. Abortion was made legal on January 17, 1975, by the Law Veil, Law No. 75-17, J.O., Jan. 18, 1975, p. 739, authorizing abortion at any time up to ten weeks when the pregnant woman was in a "situation of distress," *id.* at tit. II, § 1. Critics of the law objected to its seven day waiting period, and the requirement that women un-

woman has ever been criminally charged for causing harm to her fetus.<sup>330</sup>

## 2. Tort Liability and Medical Decisionmaking

French courts and Parliament have recognized limited rights to sue for damages caused by negligence that affected the fetus in utero. In the landmark *Nicolas Perruche* case,<sup>331</sup> the Cour de cassation affirmed the award of damages of €900,000 (about \$1.32 million in current U.S. dollars) to the parents of a child born with severe birth defects due to his mother's contracting rubella while pregnant, based on the clear causal connection between the physician's negligence in failing to accurately advise the mother about inconsistent laboratory tests about her rubella status and the harm suffered.<sup>332</sup> Madame Perruche had told her physician that she might have been exposed to rubella, and informed him that she would have an abortion if there was a risk that she would give birth to a disabled child.<sup>333</sup> However, due to the physician's negligence, the mother was not accurately informed about the test results, which showed that she had in fact contracted rubella.<sup>334</sup>

Both the Parliament and the National Consultative Ethics Committee for Health and Life Sciences (CCNE) responded strongly to the

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dergo a psychological interview prior to receiving an abortion. Although the 1975 law had a "sunset provision" of five years, it was renewed with minor changes in 1979. Law No. 79-1204 of Dec. 31, 1979, J.O., Jan. 1, 1980, p. 3, *available at* <http://cyber.law.harvard.edu/population/abortion/France.abo.htm> (last visited Nov. 20, 2008).

330. Before the Law Neurwith of 1967, which authorized the disclosure of information on contraceptive means, and the Law Veil of 1975, the repressive Law of 1920 forbade any disclosure of information on contraceptive means. Despite allowing an exception for therapeutic abortion where the mother's life was in danger, a 1939 abortion law extended punishment to women attempting to procure an abortion, and a Vichy-era law imposed the death penalty on those who performed abortions. *See* PETER DE CRUZ, *COMPARATIVE HEALTHCARE LAW* 436-38 (2001); MIRANDA POLLARD, *REIGN OF VIRTUE: MOBILIZING GENDER IN VICHY FRANCE* 179-80 (1998); Marcel Viaud, *La libre disposition de son corps*, 7 *RÉFRACTIONS* (1998-99), *as reprinted at* [http://www.plusloin.org/refractions/refractions7/corps\\_viaud.htm](http://www.plusloin.org/refractions/refractions7/corps_viaud.htm). The most famous person executed for this crime was Marie-Louise Giraud, a laundress from Cherbourg, who was convicted of having carried out twenty-seven abortions and was guillotined in the yard of La Roquette prison in Paris. POLLARD, *supra*, at 179-80; Viaud, *supra*.

331. Cass. ass. plén., Nov. 17, 2000, Bull. ass. plén., No. 9, p. 15.

332. R. Clement & O. Rodat, *Post-Perruche: What Responsibilities for Professionals?*, 25 *MED. & LAW* 31, 33 (2006) (summarizing the Perruche decision).

333. *Id.*

334. *Id.*

*Perruche* decision. The CCNE issued an opinion expressing its concerns about the decision's legal and ethical consequences.<sup>335</sup> On March 4, 2002, Parliament also responded, enacting a statute "governing patients' rights and the quality of the health system."<sup>336</sup> The law provides that children do not have a right not to be born, and that a child cannot be awarded damages for wrongful birth due to a failure to diagnose a condition for which the mother might have chosen abortion.<sup>337</sup> The law permits suits by the parents to go forward in cases of extreme physician fault, but the damages which can be awarded are limited to "moral damages."<sup>338</sup> The law was given retroactive effect. Its retroactive application, however, was found to violate Article 34 of the European Convention for the Protection of Human Rights.<sup>339</sup>

Pregnant women's ability to control their bodies and their health-care is generally protected by law and the medical community, although

335. The Minister for Employment and Solidarity particularly requested the National Consultative Ethics Committee's opinion on three points: the place in society of handicapped adults and children; the intrinsic value of a handicapped life as related to non-birth; and good medical practices entailing liability on the part of prenatal diagnosis practitioners. CCNE, AVIS NO. 68, HANDICAPS COGNITIFS ET PRÉJUDICE [CONGENITAL HANDICAPS AND PREJUDICE] (2001), <http://www.ccne-ethique.fr/docs/fr/avis068.pdf> [<http://www.ccne-ethique.fr/docs/en/avis068.pdf>].

336. Law No. 2002-303 of March 4, 2002, J.O., March 5, 2002, p. 4118 ("loi . . . relative aux droits des malades et à la qualité du système de santé") (translated as "the law relating to patients' rights and the quality of the health system").

337. *Id.* (codified at CODE DE L'ACTION SOCIALE ET DES FAMILLES L114-5 by Law No. 2005-102 of Feb. 11, 2005, J.O., Feb. 12, 2005, p. 2353) ("Nul ne peut se prévaloir d'un préjudice du seul fait de sa naissance. La personne née avec un handicap dû à une faute médicale peut obtenir la réparation de son préjudice lorsque l'acte fautif a provoqué directement le handicap ou l'a aggravé, ou n'a pas permis de prendre les mesures susceptibles de l'atténuer. Lorsque la responsabilité d'un professionnel ou d'un établissement de santé est engagée vis-à-vis des parents d'un enfant né avec un handicap non décelé pendant la grossesse à la suite d'une faute caractérisée, les parents peuvent demander une indemnité au titre de leur seul préjudice. Ce préjudice ne saurait inclure les charges particulières découlant, tout au long de la vie de l'enfant, de ce handicap. La compensation de ce dernier relève de la solidarité nationale.")

338. *See id.*; *Assistance Publique Hôpitaux de Paris c/Époux M*, Cour administrative d'appel [CAA] [regional court of administrative appeal] Paris (3e ch.), June 13, 2002, D. 2002, 2156, note de Montecler. *But see* Conseil d'Etat [CE] [highest administrative court], Feb. 19, 2003, J.C.P. 2003, II, 10107, note Mistretta (awarding, on appeal of the appellate court decision, additional damages arguably beyond the ordinary legal scope of moral damages).

339. *Maurice v. France* (No. 11810/03), ¶¶ 10-11, 2005-IX Eur. Ct. H.R. (Grand Chamber), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>. After this judgment was rendered, the parties reached a negotiated settlement on the amount of damages. *See also* Sandrine Blanchard, *La justice suspend sa décision dans une demande de réparation pour un enfant né handicapé*, LE MONDE (Paris), May 20, 2005, available at LEXIS.

women's rights are occasionally overridden. In 2002 an administrative tribunal in Lille affirmed a patient's right to make decisions about her healthcare even though pregnant when it issued an injunction prohibiting a hospital from performing a blood transfusion on a pregnant Jehovah's Witness over the patient's objection.<sup>340</sup> On the other hand, in 2005 the CCNE issued an opinion stating that physicians could override a pregnant woman's refusal of treatment in exceptional situations, including C-sections and blood transfusions, which occur with some frequency in the case of women giving birth by C-section.<sup>341</sup> The opinion noted the difficulty of such cases, in light of the woman's religious beliefs, cultural community, and the risk that a woman who had a C-section in France might find it more difficult to have a subsequent C-section in her home country, but the CCNE concluded that it was permissible to override the woman's wishes in order to save the life of the child about to be born.<sup>342</sup> The opinion suggested, however, that many of these cases could be avoided if physicians anticipated such problems and discussed them with patients well before an emergency arose.<sup>343</sup> The opinion urged

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340. Tribunal Administratif [Trib. adm. Lille] [regional administrative court of first instance] Lille, Aug. 25, 2002, No. 02-3138. In so ruling, the court relied on Article L1111-4 of the Public Health Code, which provides, *inter alia*,

In the light of information and advice supplied by healthcarers [sic] and in consultation with them, patients are entitled to take decisions regarding their own health. Doctors must respect wishes expressed by patients after informing them of the consequences of their decisions. When refusing to undergo or continue treatment represents a threat to life, physicians must do their utmost to convince patients that they should accept essential treatment. No medical act nor [sic] any treatment may be applied without securing free and informed consent from the person concerned. Consent may withdrawn at any time.

CODE DE LA SANTÉ PUBLIQUE art. L1111-4, *translated in* CCNE, AVIS No. 87, REFUS DE TRAITEMENT ET AUTONOMIE DE LA PERSONNE [TREATMENT REFUSAL AND PERSONAL AUTONOMY] 16 (2005), <http://www.ccne-ethique.fr/docs/fr/avis087.pdf> [<http://www.ccne-ethique.fr/docs/en/avis087.pdf>]. The French text reads:

Toute personne prend, avec le professionnel de santé, compte tenu des informations et des préconisations qu'il lui fournit, les décisions concernant sa santé. Le médecin doit respecter la volonté de la personne après l'avoir informée des conséquences de son choix. Si la volonté de la personne de refuser ou d'interrompre un traitement met sa vie en danger, le médecin doit tout mettre en oeuvre pour la convaincre d'accepter les soins indispensables. Aucun acte médical ni aucun traitement ne peut être pratiqué sans le consentement libre et éclairé de la personne et ce consentement peut être retiré à tout moment.

*Id.*

341. CCNE AVIS No. 87, *supra* note 340, at 6–7.

342. *See id.*

343. *Id.* at 7.

physicians to endeavor to work through the issue with the patient in an atmosphere of trust, relying on second opinions and mediation to ensure a continuing dialogue with the patient.<sup>344</sup> In contrast to its approach to C-sections and blood transfusions, the opinion declared that pregnant women who were HIV positive could not be forced to receive treatment to decrease the risk that their children would also be born with HIV.<sup>345</sup> Importantly, the opinion declared that the legal and ethical dilemma posed by patients' refusal of treatment could not be solved by a reflexive application of the French legal obligation to "assist a person in danger."<sup>346</sup>

### 3. Abortion Law

Abortion has been legal in France since 1975, and access to abortion was expanded in 2001.<sup>347</sup> Currently, French women can obtain an abortion during the first twelve weeks of pregnancy if they are in "a state of distress" and wait at least seven days after their first request for an abortion.<sup>348</sup> Abortions may also be performed in the second trimester if two physicians and a psychologist or social worker certify that the continued pregnancy poses a risk to the life or health of the pregnant woman or there is a risk of fetal malformation or genetic defect.<sup>349</sup>

344. *Id.* at 27–28.

345. *Id.* at 11.

346. C. PÉN. art. 223-6 states,

[A]nybody who is able, without risk to himself or to a third party, to avoid either a crime or an offense against the bodily integrity of a person and who abstains from doing so will be punished to the same sentence as for the crime of a person who voluntarily abstains from securing someone.

In French, the Code reads:

Quiconque pouvant empêcher par son action immédiate, sans risque pour lui ou pour les tiers, soit un fait qualifié de crime, soit un délit contre l'intégrité corporelle de la personne s'abstient volontairement de le faire. . . . [s]era puni des mêmes peines quiconque s'abstient volontairement de porter à une personne en péril l'assistance que sans risque pour lui ni pour les tiers il pouvait lui prêter, soit par son action personnelle soit en provoquant un secours.

*Id.*

347. Law No. 2001-588 of July 4, 2001, J.O., July 7, 2001, p. 10823 ("loi relative à l'interruption volontaire de grossesse et à la contraception" [law governing the voluntary interruption of pregnancy and contraception]).

348. The 2001 amendments to the law eliminated the requirement of a psychological interview. *Id.*

349. *Id.* art. 11, at p. 10824. An abortion may be performed at "any time if two doctors of a multidisciplinary team testify that the continuance of the pregnancy will put the

Minors are authorized to receive an abortion without parental consent if they are accompanied by another adult;<sup>350</sup> indeed, on “Free Wednesday” when French schools are closed in the afternoon, clinics are open to teenagers to provide them with contraceptive advice and services.<sup>351</sup> The national health system includes abortion as a covered procedure, with women paying about 20% of the cost, although minors and poor women receive free abortions.<sup>352</sup> In practice, women must often wait three to four weeks to have an abortion. In the Paris region two-thirds of abortions are performed at public hospitals because of the dearth of private physicians who perform the procedure.<sup>353</sup>

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woman’s health in danger or that there is a strong probability that the child to be born is affected by a particularly serious disease known to be incurable.” The French text reads:

L’interruption volontaire d’une grossesse peut, à toute époque, être pratiquée si deux médecins membres d’une équipe pluridisciplinaire attestent, après que cette équipe a rendu son avis consultatif, soit que la poursuite de la grossesse met en péril grave la santé de la femme, soit qu’il existe une forte probabilité que l’enfant à naître soit atteint d’une affection d’une particulière gravité reconnue comme incurable au moment du diagnostic.

*Id.*

350. *Id.* art. 7, at p. 10823. However, under the law physicians are obliged to try to obtain the minor’s consent to consult her parents. *See id.*; F. Vendittelli & J.C. Pons, *Elective Abortion for Minors: Impact of the New Law in France*, 130 EUR. J. OBSTET. & GYNECOL. & REPROD. BIOL. 107, 111 (2007) (arguing that “[r]ecourse to non-parental adults was intended to be reserved for exceptional circumstances”). Some physicians may refuse to perform abortions for minors without their parents’ consent, under the law’s conscientious objection provision. Law No. 2001-588 of July 4, 2001, art. 8, at p. 10823.
351. LINDA BERNE & BARBARA HUBERMAN, *ADVOCATES FOR YOUTH, EUROPEAN APPROACHES TO ADOLESCENT SEXUAL BEHAVIOR AND RESPONSIBILITY* 11 (1999), [http://www.advocatesforyouth.org/PUBLICATIONS/european\\_es.pdf](http://www.advocatesforyouth.org/PUBLICATIONS/european_es.pdf).
352. Service-Public.Fr, *Vos Droits et Démarches: Santé: Interruption Volontaire de Grossesse (IVG)* (Apr. 23, 2008), <http://vosdroits.service-public.fr/particuliers/F1551.xhtml>. Currently a surgical abortion, if performed at a public or private non-profit institution, costs roughly between €228 and €330 (depending on use of general anesthesia and length of hospitalization), and a medical abortion costs about €257 or €192 (depending on the healthcare provider). *Id.*
353. *See* Jean-Michel Bader, *France: Call for Change in Regulations on Abortion Clinics*, 341 LANCET 485, 486 (1993).



### B. Healthcare Access

France has a universal healthcare system<sup>354</sup> in which all legal residents are entitled to receive treatment, although there are variations in the extent to which this care will be reimbursed by the government.<sup>355</sup> Further, coverage varies according to the longevity and status of one's employment, so that more highly paid workers who have had their jobs for several years are more likely to have most of their healthcare expenditures reimbursed.<sup>356</sup> For ambulatory care, people are expected to pay for the care when it is given and then are reimbursed for it, with different percentages of reimbursement depending on the type of care given (e.g., emergency room treatment, out-patient office visits, and prescription medications).<sup>357</sup> The system is generally considered to deliver high-quality care, although its high costs, for both the state and patients, have lead to calls for modification.<sup>358</sup> In 2004, the government tightened eligibility criteria for accessing the national healthcare system, excluding immigrants who have recently arrived in France.<sup>359</sup>

In the last several years, both government and private actors have attempted to reduce the incidence of fetal alcohol syndrome and other harmful effects of exposure to alcohol in utero.<sup>360</sup> The problem appears particularly pronounced in poor industrial areas, receiving attention in

354. Jason J. Kilborn, *Comparative Cause and Effect: Consumer Insolvency and the Eroding Social Safety Net*, 14 COL. J. EUR. L. 563, 571 (2008) ("Though not completely universal until 2000, 95% of the population of France has been covered by one of the three basic state health insurance schemes since the 1980s"); Elaine Sciolino, *France Battles a Problem That Grows and Grows: Fat*, N.Y. TIMES, Jan. 25, 2006, <http://www.nytimes.com/2006/01/25/international/europe/25obese.html>.

355. Kilborn, *supra* note 354, at 571–72, 594.

356. *See id.* at 571–72.

357. Lise Rochaix & David Wilsford, *State Autonomy, Policy Paralysis: Paradoxes of Institutions and Culture in the French Health Care System*, 30 J. HEALTH POL. POL'Y & L. 97, 99 (2005); Victor G. Rodwin & Claude Le Pen, *Healthcare Reform in France—The Birth of State-Led Managed Care*, 351 N.E. J. MED. 2259, 2260 (2004); *see also* Kilborn, *supra* note 354, at 572.

358. *See, e.g.*, Rochaix & Wilsford, *supra* note 357, at 98, 108, 115–17; Rodwin & Le Pen, *supra* note 357, at 2259, 2261.

359. *Medicins sans Frontieres [Doctors Without Borders], France: Helping Undocumented Residents* (May 12, 2005), *available at* [http://www.msf.org/msfinternational/invoke.cfm?objectid=F7F24938-E018-0C72-09773A35FE3334B3&component=toolkit.article&method=full\\_html](http://www.msf.org/msfinternational/invoke.cfm?objectid=F7F24938-E018-0C72-09773A35FE3334B3&component=toolkit.article&method=full_html).

360. Consumer groups and doctors have urged the government to provide warning labels on wine bottles, although the warning sign "is no bigger than the head of a pencil eraser." Molly Moore, *New Health Warning on Wine Labels Has Many French Seeing Red*, WASH. POST, Oct. 29, 2007, at A9. It has been estimated that about 3,000 French infants suffer from fetal alcohol syndrome each year. *Id.*

Roubaix, northeast of Lille in northern France.<sup>361</sup> In 2004, the public prosecutor in Lille launched a criminal investigation against wine producers and the French government into the damage caused by in utero alcohol exposure, with potential charges of putting another's life at risk, attempting to mislead consumers, and unintentionally causing injury.<sup>362</sup> Perhaps in response, in 2005 the Parliament enacted a law that requires all wine sold in France to carry a warning against drinking by pregnant women.<sup>363</sup> The law requires all wine bottles to carry a logo using the ubiquitous red circle with a line through it encircling a pregnant woman.<sup>364</sup>

### C. Social and Economic Support for Children and Their Families

France has adopted an extensive economic and social support system to encourage parents to have large families. Women are granted sixteen weeks of fully paid maternity leave for their first child, and twenty-six weeks for their subsequent children.<sup>365</sup> Men are granted eleven days of paid paternity leave.<sup>366</sup> Mothers are entitled to take additional unpaid leave until the child's third birthday,<sup>367</sup> and women whose children are very ill or are disabled are able to take additional leave.<sup>368</sup> Women and families with two or more children also receive a variety of economic subsidies, including the Parental Education and Upbringing

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361. Cf. Jane Burgermeister, News Extra, *French Wine Makers Face Legal Action over Birth Defects*, 329 BMJ 368 (2004).

362. *Id.*

363. Law No. 2005-102 of February 11, 2005, art. 5, J.O., Feb. 12, 2005, p. 2353.

364. See Stephanie Condron, *Drink Labels "Should Carry a Warning for Pregnant Women,"* DAILY TELEGRAPH (London), Feb. 10, 2007, at 13, available at 2007 WLNR 2646217 (describing the French label in the context of a British policy debate over requiring similar warning labels); *French Row Over "Wine Warnings,"* BBC NEWS, Nov. 25, 2005, available at <http://news.bbc.co.uk/2/hi/health/4469390.stm> (noting that the labeling requirement would become effective in 2006).

365. ORG. FOR ECON. CO-OPERATION & DEV. (OECD), *STARTING STRONG II: EARLY CHILDHOOD EDUCATION AND CARE* 325, 327 (2006), available at <http://www.oecd.org/dataoecd/14/32/37425999.pdf>. See generally *id.* at 325–32 (describing various French support systems relevant to early childhood education and care).

366. *Id.* at 325, 327.

367. *Id.*

368. CODE DE LA SÉCURITÉ SOCIALE [C. SÉC. SOC.] [SOCIAL SECURITY CODE] arts. R544-1 to -3 (Fr.); see also Service-Public.Fr, *Vos Droits et Démarches: Famille: Allocation Journalière de Présence Parentale (AJPP)* (Jan. 1, 2009), <http://vosdroits.service-public.fr/particuliers/F15132.xhtml?&n=Famille&l=N10&n=Allocations%20destin%C3%A9es%20aux%20familles&l=N156>.

Allowance for families with at least three children under age six<sup>369</sup> and subsidized day care for children under age six.<sup>370</sup> Single parents receive additional support,<sup>371</sup> and parents of school-age children also receive a once a year subsidy to help defray the costs of school books and clothing.<sup>372</sup> Other supplements are available for larger families, and some families are eligible for housing supports.<sup>373</sup> In 2004 this system was modified, to consolidate and eliminate certain benefits, to be replaced with a single, virtually universal allowance, called the PAJE.<sup>374</sup>

## VI. REFLECTIONS ON THE REASONS FOR DIFFERENT TREATMENT OF THE FETUS IN AMERICAN, CANADIAN, AND FRENCH LAW

My research suggests four major differences in the legal regimens of the United States, Canada, and France, which help explain their disparate approaches to “fetal protection.” First and foremost is the fact that Canada and France both have strong national governments, with relatively little power held at the provincial, and departmental, level, respectively. The second major difference is that in the United States, in contrast to Canada and France, the right to abortion was established through litigation rather than legislation. The third significant difference is that in Canada and France, abortion and other reproductive healthcare are covered services under the national healthcare system. The fourth fundamental difference is that American prosecutors at the state level are elected and locally accountable, in contrast to both Canada and

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369. C. séc. soc. arts. L532-1 to -5, *prior to abrogation by* Law No. 2003-1199 of Dec. 18, 2003, art. 60, J.O., Dec. 19, 2003, p. 21641; Service-Public.Fr, Vos Droits et Démarches: Famille: Allocation Parentale d'Éducation (APE) (Jan. 1, 2009), <http://vosdroits.service-public.fr/particuliers/F506.xhtml>; *see also* OECD, *supra* note 365, at 325, 327.

370. C. séc. soc. arts. L841-1 to -4, R841-1, *prior to abrogation by* Law No. 2003-1199 of Dec. 18, 2003, art. 60 *and* Decree No. 2003-1393 of Dec. 31, 2003, J.O., Jan. 1, 2004, p. 102; *see also* OECD, *supra* note 365, at 326–29.

371. C. séc. soc. arts. L524-1 to -4.

372. C. séc. soc. art. L543-1.

373. C. séc. soc. arts. L831-1 to -7.

374. Law No. 2003-1199 of Dec. 18, 2003, art. 60; *see also* Service-Public.Fr, *supra* note 369. For an overview of the comprehensive French system of child supports, see Edward Cody, *With Each French Birth, a Dividend from the State; Vast Welfare Support Network Is an Enduring Government Feature, Even During Financial Downturns*, WASH. POST, Nov.22, 2008, at A10. An excellent source of information about all French child supports is the The Clearinghouse on International Developments in Child, Youth and Family Policies at Columbia University, <http://www.childpolicyintl.org/countries/france.html> (last visited Mar. 6, 2009).

France, where prosecutors are appointed and function within a national criminal justice system.<sup>375</sup>

In addition, the legal system differences must be viewed in the context of important religious and cultural differences among the three countries. Despite the First Amendment's separation of church and state, Americans as a group are much more religious, more likely to attend church, and to consider religious issues in making political decisions than Canadians.<sup>376</sup> Although France's history as a Catholic nation strongly influenced the development of its law, for nearly a hundred years France has an official policy of "laïcité," religious secularism. Thus, although many French are at least nominally Catholic, they appear to be more tolerant of human frailty, as witnessed by the common appearance of mistresses, as well as wives, at political notables' funerals,<sup>377</sup> or the recent decision of the International Monetary Fund to reprimand, but not fire, its Director for having an affair with an employee.<sup>378</sup>

### *A. The Strength of the National Government*

The strength of the national government in Canada and France has led to a strikingly uniform body of law in the areas of criminal law, healthcare (including abortion, biotechnology, and other aspects of medical practice), and tort law, established through their respective national Parliaments and court systems. This stands in marked contrast to the United States, in which the federal and state governments are separate sovereign governments, with significant independent authority. Because the United States government is conceptually a government of limited powers, granted to the federal government by the states via the

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375. See discussion *infra* Part VI.D and sources cited therein.

376. Karen Dorn Steele, *Nations Are Old Friends Growing Apart; As U.S. Attitudes Veer Right, Canadians Head Left*, SPOKESMAN-REV. (Spokane, Wash.), Sept. 5, 2004, at 1A, available at 2004 WLNR 17372747 (citing multiple sources concluding that Canadians are "shedding their deference to authority, rejecting established churches and the patriarchal family," while "Americans are becoming more religious, xenophobic and fearful after the 9/11 attacks" and "more inclined to believe in an afterlife, God and the devil, . . . inject[ing] religion into political debates in ways that make Canadians squirm.").

377. E.g., Craig R. Whitney, *World Leaders Pay Last Tribute to Mitterrand*, HOUSTON CHRON., Jan. 12, 1996, at A22, available at 1996 WLNR 5923688.

378. Mark Landler, *Monetary Fund Won't Fire Director for Sexual Affair*, N.Y. TIMES, Oct. 26, 2008, at A10, available at <http://www.nytimes.com/2008/10/26/world/26imf.html>. While undoubtedly an overstatement, *My Fair Lady's* Henry Higgins may have been on to something when he observed, "The French don't care what they do actually as long as they pronounce it properly." Alan Jay Lerner & Frederick Loewe, *Why Can't the English?*, in *MY FAIR LADY* (1956).

Constitution, federal courts and Congress are reluctant to intrude on state legislative, judicial, and executive actions, for both practical and institutional reasons. Indeed, the pluralism of the American federal system is often cited as a plus, with states serving as a laboratory for experimentation.<sup>379</sup>

### *B. The Source of Abortion Rights*

Of course, as we know, the United States Constitution does impose some important constraints on state actions. However, as the battle over abortion that has raged for thirty-five years since *Roe v. Wade*<sup>380</sup> demonstrates, in a legal system in which access to a medical procedure is determined not only by fifty state legislatures and Congress, but also by a complex hierarchy of state and federal court judges, there are significant opportunities, not to say temptations, for those who oppose abortion to continue to seek to limit its availability.<sup>381</sup>

This in turn has shaped the strategy of feminists and other supporters of access to abortion. In responding to those who oppose abortion on “pro-life” grounds, advocates for abortion access have frequently framed the issue as one of a woman’s “choice” to have an abortion or not.<sup>382</sup> This rationale has given ammunition to fetal protection proponents, who assert that once a woman has chosen not to have an abortion, she has implicitly accepted full responsibility for all the consequences of her behavior during pregnancy.<sup>383</sup> Yet, as many commentators have pointed out, this twist on the “choice” rhetoric is flawed, both factually and as a matter of legal doctrine.<sup>384</sup>

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379. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

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

381. Many commentators have noted the significance of the departure of Justice Sandra Day O’Connor from the Supreme Court and her replacement with Justice Samuel Alito in leading to a different outcome in the two “partial-birth abortion” cases, *Stenberg v. Carhart*, 530 U.S. 914 (2000), and *Gonzales v. Carhart*, 550 U.S. 124 (2007). See, e.g., Talcott Camp, Remarks at the Brooklyn Journal of Law and Policy Symposium: The “Partial-Birth Abortion” Ban: Health Care in the Shadow of Criminal Liability (Mar. 7, 2008).

382. See, e.g., Planned Parenthood, Abortion Issues (Mar. 7, 2008), <http://www.plannedparenthood.org/issues-action/abortion-issues-5946.htm>.

383. I am grateful to Wendy Parmet for this insight.

384. See, e.g., Nelson, *supra* note 297, at 623–24; Oberman, *supra* note 181, at 471–76.

The fact that in the United States a woman's ability to obtain an abortion was established through constitutional litigation, decided by nine justices of the Supreme Court, has always made the abortion right more fragile here. In contrast, in many other developed nations, where access to abortion was hammered out in a national legislative setting, the process of political horse-trading has made compromise seem both possible and reasonable.<sup>385</sup>

That the constitutional right to abortion is thus seen as fragile and tentative, capable of being overturned by the appointment of a different person to a federal appeals court or the Supreme Court,<sup>386</sup> in turn means that abortion opponents will seek multiple avenues to undercut women's ability to control their reproductive lives. These include not only direct attempts to limit abortion access, but also more indirect efforts to challenge the analytical framework governing abortion. Thus, statutes and regulations which recast the fetus as a child,<sup>387</sup> interfere with women's abilities to plan in advance for their healthcare in the event that they become incompetent,<sup>388</sup> or insist that women be told about possible fetal pain and the stages of fetal development,<sup>389</sup> as well as the criminal prosecution of pregnant women addicted to alcohol and other drugs, must all be seen as a means to undermine abortion by making "unborn" life the full equivalent of, if not superior to, the mother's life.

385. See, e.g., MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 145–57 (1987). Of course, it must be noted that in Canada, the federal law making abortion a crime was invalidated by its Supreme Court in *Regina v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.). In that case, it was legislative inaction (which may also have been achieved by political maneuvering) that led to the current situation in which abortion is legally available throughout Canada, but nonetheless limited in practice. See discussion *supra* Part IV.A.3.

386. See, for example, the shift in position of the Supreme Court on so-called partial birth abortion between its decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), with the only notable difference being the departure from the court of Chief Justice Rehnquist and Justice O'Connor and their replacement by Chief Justice Roberts and Justice Alito.

387. This has been accomplished not only in the creation of the term "partial-birth abortion" by abortion opponents, see, e.g., Carole Joffe & Priscilla J. Smith, Remarks at the Brooklyn Journal of Law and Policy Symposium: The "Partial-Birth Abortion" Ban: Health Care in the Shadow of Criminal Liability (Mar. 7, 2008), but also in the regulations redefining a fetus as a child under SCHIP, see *supra* text accompanying notes 164–168, and the text of the Unborn Victims of Violence Act, see *supra* text accompanying notes 172–178.

388. These limitations placed on women's ability to execute Advance Medical Directives are discussed in text accompanying *supra* note 184.

389. See *supra* text accompanying notes 155–160.

*C. Universal Healthcare—or Not*

The failure of the United States to establish universal, government-funded healthcare<sup>390</sup> has significant consequences for the debate over abortion and “fetal rights.” This lack of a national healthcare system, which would cover abortion and birth control as part of routine healthcare, contributes to a situation in which abortion is not regarded by its opponents as a medical procedure, which can be chosen or rejected by a patient as part of a personal decisionmaking process, but as murder. The situation in the United States contrasts markedly with that of France, where abortion is a fully covered procedure, available to all women during the first twelve weeks of pregnancy, and under certain circumstances during later stages of pregnancy.<sup>391</sup> The United States’ lack of universal healthcare also contrasts with the Canadian approach, in which providing healthcare to all citizens is accepted as a responsibility of government on both the federal and provincial levels.<sup>392</sup> Abortion is covered as a medical procedure, and the federal government will reimburse provinces for providing abortion services. However, as critics have noted, some provinces “limit their funding to specified procedures which often render access illusory, result in . . . delay or require[] women to leave their home provinces.”<sup>393</sup> Thus, while the law demands access to abortion as a medically necessary procedure, in practice provincial government decisions make it much harder for poor, rural, and northern Canadian women to obtain a safe and timely legal abortion.<sup>394</sup>

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390. A complete description of the U.S. healthcare system is beyond the scope of this Article. However, as most readers know, healthcare in the United States is closely linked to employment. Medicaid, the state-federal partnership making some healthcare available to very low-income persons, does not require participating states to fund abortion, and only a handful do. *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding the constitutionality of the Hyde Amendment, which precludes federal Medicaid funding for many types of medically necessary abortion, and ruling that states are not obligated to fund abortions for which the Hyde Amendment denies federal funding).

391. *See supra* notes 347–353 and accompanying text. Though abortion is available, the extent to which the government pays for it depends on the patient’s income level, as is the case with other medical procedures. *See supra* note 352.

392. *See* DEBORAH J. CHOLLET, U.S. DEP’T OF LABOR, HEALTH CARE FINANCING IN SELECTED INDUSTRIALIZED NATIONS: COMPARATIVE ANALYSIS AND COMMENT (1993), *as excerpted in* HEALTH CARE LAW AND ETHICS 1136 (Mark A. Hall, Mary Ann Bobinski & David Orentlicher eds., 7th ed. 2007).

393. Rodgers, *supra* note 282, at 115.

394. *See id.*; *supra* text accompanying notes 282–289.

### D. Different Prosecutorial Systems

Finally, the local and politicized system through which American prosecutors are chosen differs sharply different from the more national and professional prosecutorial systems of Canada and France, and contributes to the emotional pitch of the “fetal protection” wars. The distinct prosecutorial systems of each nation are a product of both different histories and different philosophies of government.

The local, politically accountable American prosecutor was an early innovation in the original thirteen colonies. In Great Britain, a system of private prosecution developed in the Middle Ages and continued through the late nineteenth century, although Crown prosecutors were appointed by the central government (the King) in important cases.<sup>395</sup> In contrast, in the American colonies prosecutors were appointed by local colonial authorities.<sup>396</sup> This made sense, as the colonies were isolated and struggling small settlements, which were often located at great distances not only from Great Britain but from other outposts of British rule, and the colonists were living on the edge of survival.<sup>397</sup> The colonies’ cultural norms varied tremendously based on their founders, with religious orthodoxy featuring prominently in several of the colonies.<sup>398</sup> Over time, the phenomenon of locally appointed prosecutors evolved into positive law, with Connecticut leading the way in 1704 by establishing a system of county prosecutors throughout the colony.<sup>399</sup> After the American Revolution, the states continued the system of local prosecutors, who acted largely independently within their finite geographic realms.<sup>400</sup> Although laws were enacted at the state (and federal) level, as the nation moved westward and new communities were established along the frontier, these communities’ geographic (and sometimes cultural) isolation meant that local prosecutors were seen as best suited to enforce the criminal law.<sup>401</sup> In the wake of the Jacksonian democracy movement which swept across the United States beginning in the 1820s, prosecutors

395. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 21 (1993); JOAN A. JACOBY, *THE AMERICAN PROSECUTOR* xv, 8–9 (1980).

396. See JACOBY, *supra* note 395, at 5, 15.

397. See FRIEDMAN, *supra* note 395, at 23; JACOBY, *supra* note 395, at 11.

398. See FRIEDMAN, *supra* note 395, at 23–24 (discussing how the different religious cultures of New England, New Jersey, and Pennsylvania influenced the colonial systems).

399. See JACOBY, *supra* note 395, at 10.

400. See *id.* at 20–21.

401. See *id.* at 16–17, 20–21.



became elected, rather than appointed, officials.<sup>402</sup> This practice continues to the present, with forty-five of the fifty states electing prosecutors on the local level.<sup>403</sup>

In contrast, the Canadian system of prosecution continued to follow the British model even after Canada gained independence from Great Britain in 1867. Consistently with the development of a national uniform Criminal Code,<sup>404</sup> prosecutors at both the provincial and federal level initiate criminal proceedings for violations of that Code, although there is a division of authority depending on the crime's subject matter. Generally speaking, provincial Attorneys General and their deputies initiate criminal proceedings at the provincial level for violations of federal offenses which are not in the Criminal Code (such as environmental and other regulatory crimes), as well as for violations of most provisions of the Criminal Code. However, prosecutions of some provisions of the Criminal Code are reserved for the federal government, including tax offenses, elections offenses, drug crimes, money laundering, organized crime, war crimes, and crimes against humanity.<sup>405</sup> Federal prosecutors are located in regional and national offices, and their work is sometimes supplemented by private counsel who are selected to prosecute cases on behalf of the Crown,<sup>406</sup> perhaps a throwback to the British system of private prosecution.

In France, prosecutors are actually judicial officials. The *procureur* and the *juge d'instruction*<sup>407</sup> supervise investigations and prosecute

402. See *id.* at 22–24 (noting that election of prosecutors was an outgrowth of the movement to elect judges, since prosecutors were initially seen as judicial, not executive, officers).

403. *Id.* at xvii.

404. Canada enacted its first criminal code in 1892. Under Canadian law, the federal Parliament enacts a uniform national criminal code, which is administered by both federal and provincial law enforcement officers. Anthony N. Doob, *New Role for Parliament in Canadian Sentencing*, 9 FED. SENT. R. 239, 239–40 (1997).

405. Federal prosecutors also bring criminal prosecutors for violations of the Criminal Code in the three territories, through a group of lawyers known as the “Northern Flying Squad.” See DEP’T OF JUSTICE OF CAN., THE FEDERAL PROSECUTION SERVICE DESKBOOK §§ 2.1–2.4 (2005), <http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch02.html>; *Id.* §§ 5.1–5.6, <http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch05.html>; Public Prosecution Service of Canada, About the Public Prosecution Service of Canada, <http://www.ppsc-sppc.gc.ca/eng/bas/abr-suj.html> (last visited Jan. 30, 2009) [hereinafter About the PPSC].

406. See About the PPSC, *supra* note 405; Public Prosecution Service of Canada, Agent Affairs, <http://www.ppsc-sppc.gc.ca/eng/aaf-man/index.html> (last visited Jan. 30, 2009) [hereinafter Agent Affairs].

407. See JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 128 (1998) (describing *L'instruction*, the judicial process used to determine whether there is sufficient evidence to justify bringing a suspect to trial).

crimes, although ninety-five percent of French cases are handled by the *procureur* or *magistrate*.<sup>408</sup> With a relatively small number of judicial officials available to act in this role, the police play a more significant role in the investigatory stages of the prosecution than in common law countries.<sup>409</sup> As is typical of civil law countries, prosecutions may also be initiated by a private party, who can also participate in the criminal process before and during trial.<sup>410</sup>

## VII. RECOMMENDATIONS FOR CHANGE IN AMERICAN LAW

Comparative law analysis can inform our understanding of American law, but a solution to an American social and legal problem must also reflect the unique reality of American institutions and sensibilities. In the context of the “fetal protection” wars, this reality includes an expensive, dysfunctional, and often inequitable healthcare system, a highly decentralized system of criminal prosecution with more than three thousand separate federal and state prosecutors’ offices, and a society whose racial and ethnic composition and cultural mores are changing rapidly.

To put an end to the “fetal protection” wars, and to achieve the goal of getting more women necessary healthcare access, including drug treatment, so that their children can have the best chances for a life of health and success, the following four steps are both crucial and feasible: 1) declaring a national moratorium on prosecutions of women for fetal abuse; 2) expanding access to healthcare for women, especially pregnant women; 3) improving and expanding substance abuse treatment programs; and 4) expanding the economic supports necessary for pregnant women and new parents.

### *A. End Criminal Prosecutions*

The most important step is to end the criminal prosecutions of pregnant women based on their behavior and decisions while pregnant. Using the resources and connections of the National Association of Attorneys General, and the National District Attorneys Association, as well as advocacy groups, like the ACLU Reproductive Rights Project and

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408. Conversation with Jacqueline Ross, Professor, Univ. of Ill. Coll. of Law, at Comparative Law Workshop at the University of Michigan Law School, May 15, 2008.

409. See BELL ET AL., *supra* note 407, at 125–26. These are the judicial police, authorized by article 14 of the Code of Criminal Procedure. C. PR. PÉN. art. 14.

410. BELL ET AL., *supra* note 407, at 130, 134–35; Lettow Lerner, *supra* note 309, at 819–22.

National Advocates for Pregnant Women, and medical and public health authorities, all federal, state, and local prosecutors should be urged to agree to stop criminally prosecuting pregnant women. With the exception of South Carolina, the highest court in every state presented with a “fetal protection” prosecution has declared it unlawful. The only conceivable point in initiating such a criminal proceeding is for a prosecutor to pursue political ambitions and/or to push the state legislature to action.<sup>411</sup> Yet the data are clear that such prosecutions do not deter pregnant women from abusing substances, either illegal or legal, because the nature of addiction is such that a drug user cannot readily stop her drug use.<sup>412</sup> There is no data showing that the use of criminal sanctions in addition to the ones already available for the underlying crime of drug use or possession have any salutary effect on the addict’s behavior or a general deterrence effect. Instead, available data suggest that such sanctions simply make women more fearful of revealing the problem of their addiction, and therefore less likely to receive the help they need.<sup>413</sup>

### *B. Reform the American Healthcare System*

The healthcare system must be reformed to guarantee healthcare across their lives to all Americans, with pregnant women and women of child-bearing age given priority in this reform effort. Medicaid already pays for one third of all American births; how much better it would be to spend government money preventatively. Young girls, teenagers, and women of reproductive age are much less likely to become pregnant in situations where this is not advisable or desired if they (and their male counterparts) have routine access to age-appropriate healthcare. This must include reproductive healthcare to prevent infertility, the transmission of sexually transmitted diseases, and other reproductive health problems, as well as the prevention of unwanted pregnancy, through the provision of birth control and abortion where necessary. Women who are in good general health and who are able to control their reproductive lives are much less likely to become pregnant unintentionally or to con-

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411. See, for example, the comments made by the Wyoming prosecutor in the *Michelle Foust* case, *supra* note 98.

412. See generally NAT’L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS 1 (2006), available at [http://www.nida.nih.gov/PDF/PODAT\\_CJ/PODAT\\_CJ.pdf](http://www.nida.nih.gov/PDF/PODAT_CJ/PODAT_CJ.pdf).

413. This is the position taken by the Supreme Court in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), as well as by a broad coalition of medical and public health groups. See, e.g., sources cited *supra* notes 100–102.

tinue a pregnancy when other aspects of their lives, ranging from being in school to being addicted to drugs, make having a baby unwise.

### *C. Provide Effective, Non-Stigmatizing Drug Treatment*

A major part of this healthcare reform must include the creation of radically improved drug treatment programs. Current resources for the treatment of women who abuse alcohol and other drugs are completely inadequate, for three reasons. Most substance abuse programs fail to recognize the significant relationship between domestic violence and women's mental illness and substance abuse,<sup>414</sup> fail to acknowledge the differing treatment needs of men and women, and do not provide a supplementary support system which is necessary for pregnant women to beat their addiction. Only fourteen percent of the drug treatment facilities in the United States have program specifically designed to treat pregnant and postpartum women.<sup>415</sup>

Many women who abuse drugs were sexually abused or beaten as children and have significant mental health and self-esteem issues, which make it much more likely that they will misuse drugs.<sup>416</sup> Women will not receive the support necessary to recover from addiction and mental illness unless drug treatment programs and those who work with the victims of domestic violence acknowledge the causal connections between domestic violence, substance abuse, and mental illness, and actively intervene to prevent a continuation of current domestic violence.<sup>417</sup> Those who encounter domestic violence victims, including police, hospital staff, and social workers, need to be trained about the broader context of domestic violence, in order for their interventions to be appropriate and effective.<sup>418</sup>

Many drug treatment programs are not designed with the needs of women in mind, nor have they kept abreast of the latest in addiction research. For example, traditional confrontational approaches, effective with male drug addicts, do not work well with women, and women also

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414. Only thirty-five percent of drug treatment facilities in the United States have programs specifically designed for women or for persons needing treatment for both substance abuse and mental illness. OFFICE OF APPLIED STUDIES, DEP'T OF HEALTH & HUMAN SERVS. ADMIN., NATIONAL SURVEY OF SUBSTANCE ABUSE TREATMENT SERVICES (N-SSATS): 2003: DATA ON SUBSTANCE ABUSE TREATMENT FACILITIES 4 (2004), available at [http://www.dasis.samhsa.gov/03nssats/nssats\\_rpt\\_03.pdf](http://www.dasis.samhsa.gov/03nssats/nssats_rpt_03.pdf).

415. *Id.*

416. Paltrow, *supra* note 6, at 477; WOMEN'S LAW PROJECT, *supra* note 6, at 23.

417. Paltrow, *supra* note 6, at 477.

418. WOMEN'S LAW PROJECT, *supra* note 6, at 21.

have better treatment outcomes in programs that are for women only.<sup>419</sup> For women who are long-term abusers, residential programs are most effective, but these programs must take into account the needs of women with children.<sup>420</sup> Childcare, housing, healthcare, job training, and other supports are all vital if women are to stay clean and become self-sufficient.<sup>421</sup> In addition, new research suggests that new medications which focus on the biochemical basis of addiction may assist people in treatment who cannot afford, in the short term, to be in a residential program.<sup>422</sup> Finally, more programs must emphasize prevention, treating addicted women before they become pregnant.

#### *D. Provide Paid Maternity and Parenting Leaves and Other Social Supports*

If the United States truly wants to ensure that children are born healthy and are able to get a good start in life, state and federal governments should end their hands-off approach to maternity and parenting leaves.<sup>423</sup> The government, not private employers, should shoulder the burden of providing economic support to pregnant women and their partners that will permit them to take a leave from work to prepare for the birth of a child and make it possible for them to choose to stay at home with a child for some time after the child is born. The generous benefits available in France, and the moderate benefits offered in Canada, provide some examples to consider. In addition, social support programs should be expanded to provide additional support for children who are at high risk for poor healthcare outcomes or domestic abuse or neglect, including abuse connected with their mothers' drug addiction. These include programs like the Nurse-Family Partnership, which has been shown in trials around the country to be successful in enhancing children's health status, improving family planning, increasing rates of maternal employment, decreasing families' reliance on welfare programs, and generally having the biggest "bang for the buck."<sup>424</sup> New York City

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419. SANDRA L. BLOOM, *THE PVS DISASTER: POVERTY, VIOLENCE, AND SUBSTANCE ABUSE IN THE LIVES OF WOMEN AND CHILDREN* 123–24 (2002), available at <http://www.sanctuaryweb.com/Documents/PVS%20Final.pdf>; WOMEN'S LAW PROJECT, *supra* note 6, at 29.

420. BLOOM, *supra*, note 419, at 126–27.

421. *See id.* at 124 (citing NAT'L INST. OF DRUG ADDICTION, NAT'L INSTS. OF HEALTH, PUBL'N NO. 13652, *TREATMENT METHODS FOR WOMEN* (1999)).

422. *See* Interlandi, *supra* note 101, at 37–42.

423. *See* the discussion of the Family and Medical Leave Act, *supra* Part III.B.

424. JULIA B. ISAACS, BROOKINGS INST., *COST-EFFECTIVE INVESTMENTS IN CHILDREN* 13–16 (2007); David L. Olds et al., *Effects of Nurse Home-Visiting on Maternal Life Course and Child Development: Age 6 Follow-Up Results of a Randomized Trial*, 114

has launched one such partnership program, connecting visiting nurses with newly pregnant women who live in poor neighborhoods.<sup>425</sup> The nurses will visit the women throughout pregnancy and for two years after their infants' births, to assist with breastfeeding, evaluate the infants' health and the safety of the home environment, provide advice about child development, and make referrals for other necessary social and health services.<sup>426</sup> While realistically, in a difficult economic climate and an unabashedly capitalist society, these reforms may need to be implemented incrementally, it is time that we acknowledged the need for societal support of all our nation's children.

### CONCLUSION

It is time to move beyond the rhetoric of "fetal protection," and to work in practical, non-spectacular ways to help woman escape from addiction, domestic violence, and despair. Only then can the United States truly take its place among developed nations in promoting the birth of healthy children. ♣

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PEDIATRICS 1550, 1553–58 (2004); see also LYNN A. KAROLY ET AL., RAND CORP., EARLY CHILDHOOD INTERVENTIONS xxvii–xxviii (2005).

425. New York City Department of Health and Mental Hygiene, Nurse-Family Partnership, <http://home2.nyc.gov/html/doh/html/ms/ms-nfp.shtml> (last visited Jan. 31, 2009); see also Dorian Block, *Mothering Young Moms; City Expands Bronx Program That Gives One-on-one Support to First-time Parents*, N.Y. DAILY NEWS, Sept. 30, 2007, at 37, available at 2007 WLNR 19155972; Jean Hopfensperger, *Nurse-Family Partnership: Help Moms Now To Avoid Problems Later; The Visiting Nurse Program for First-time Mothers Unfolding in Minnesota, has Caught Barack Obama's Notice*, STAR TRIB. (Minneapolis), Jan. 14, 2009, available at <http://www.startribune.com/lifestyle/health/37543234.html> (describing the national Nurse-Family Partnership program).
426. Block, *supra* note 425; Hopfensperger, *supra* note 425.

## APPENDIX A

The following cases, in which a woman was prosecuted for her substance abuse while pregnant, are those for which either a published decision, other court document, or newspaper article is available.

## Arizona

*State v. Reinesto*, 894 P.2d 733 (Ariz. Ct. App. 1995).

## California

*Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Ct. App. 1977).

*Jaurigue v. People*, No. 18988 (Cal. Super. Ct. Aug. 21, 1992).

*People v. Stewart*, No. M508197, transcript of hearing (Cal. Mun. Ct. Feb. 26, 1987).

## Florida

*State v. Ashley*, 701 So. 2d 338 (Fla. 1997).

*Johnson v. State*, 602 So. 2d 1288 (Fla. 1992).

*State v. Gethers*, 585 So. 2d 1140 (Fla. App. 1991).

*State v. Carter*, No. 89-6274 (Fla. Cir. Ct. July 23, 1990),  
*aff'd*, 602 So. 2d 995, 996 (Fla. App. 1992).

## Georgia

*Hillman v. State*, 503 S.E. 2d 610 (Ga. Ct. App. 1998).

*State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992).

## Hawaii

*State v. Aiwohi*, 123 P. 3d 1210 (Haw. 2005).

## Illinois

*People v. Bedenkop*, 625 N.E.2d 123 (Ill. App. Ct. 1993).

## Indiana

*Herron v. State*, 729 N.E.2d 1008 (Ind. Ct. App. 2000).

*State v. Barnett*, No. 02D04-9308-CF-611, order (Ind. Super. Ct. Feb. 11, 1994).

## Kentucky

*Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993).

*Commonwealth v. Cochran*, No. 2006-CA-001561-MR, 2008 Ky. App. LEXIS 8 (Ct. App. Jan. 11, 2008), *review granted*, No. 2008-SC-0095-D, 2008 Ky. LEXIS 165 (Aug. 13, 2008).

## Maryland

*Kilmon v. State*, 905 A.2d 306 (Md. Ct. App. 2006).

## Massachusetts

*Commonwealth v. Pellegrini*, No. 87970 (Mass. Super. Ct. Oct. 15, 1990), *rev'd*, 608 N.E.2d 717 (Mass. 1993).

## Michigan

*People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App.), *leave to appeal denied*, 471 N.W.2d 619 (Mich. 1991).

*People v. Bremer*, No. 90-32227-FH (Mich. Cir. Ct. Jan. 31, 1991), *appeal dismissed*, No. 137619 (Mich. Ct. App. July 14, 1992).

*People v. Cox*, No. 90-53454-FH (Mich. Cir. Ct. July 9, 1990), *aff'd*, No. 131999 (Mich. Ct. App. Feb. 28, 1992).

## Missouri

Brief of Amici Curiae, *State v. Lewis*, No. 03CR113048 (Mo. Cir. Ct., Chariton County) (on file with author); *see also* NAT'L ADVOCATES FOR PREGNANT WOMEN, ANNUAL REPORT 5 (2004), *available at* <http://advocatesforpregnantwomen.org/file/NAPWAnnualReport2004.pdf>.

## Nebraska

*State v. Arandus*, No. 93072 (Neb. Dist. Ct. June 17, 1993).

## Nevada

*Sheriff, Washoe County, Nev. v. Encoe*, 885 P.2d 596 (Nev. 1994).



## New Jersey

*New Jersey v. Barker*, No. 96-02-605 (N.J. Super. Ct. Feb. 14, 1997).

## New York

*People v. Morabito*, 580 N.Y.S.2d 843 (Geneva City Ct. 1992),  
*aff'd*, slip op. (Ont. County Ct. Sept. 24, 1992).

## North Carolina

*State v. Inzar*, Nos. 90CRS6960, 90CRS6961 (N.C. Super. Ct. Apr. 9, 1991), *appeal dismissed*, No. 9116SC778 (N.C. App. Aug. 30, 1991).

## Ohio

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

*State v. Andrews*, No. JU 68459 (Ohio C.P. June 19, 1989).

## Oklahoma

*State v. Alexander*, No. CF-92-2047, transcript of decision (Okla. Dist. Ct. Aug. 31, 1992).

## Pennsylvania

*Commonwealth v. Kemp*, 75 WESTMORELAND L.J. 5 (Pa. Ct. Com. Pl. Dec. 16, 1992), *aff'd*, No. 114-Pitt-1993 (Pa. Super. Ct. Feb. 22, 1994).

## South Dakota

*State v. Eagle Hawk*, 411 N.W.2d 120, 125–26 (S.D. 1987)  
(reviewing a conviction for felony child abuse and finding harmless error in trial court's admission of evidence concerning mother's drug overdose while pregnant).

## Texas

*Ward v. State*, 188 S.W.3d 874 (Tex App. 2006).

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

## Virginia

*Commonwealth v. Smith*, No. CR-91-05-4381 (Va. Cir. Ct. Sept. 16, 1991).

*Commonwealth v. Turner*, No. 91-054382 (Va. Cir. Ct. Sept. 16, 1991).

*Commonwealth v. Wilcox*, No. A-44116-01 (Va. Dist. Ct. Oct. 9, 1991).

## Washington

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

## Wisconsin

*State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. Ct. App. 1999).

## Wyoming

Foust case, *see* Associated Press, *Judge Drops 'Meth Baby' Charge*, CASPER STAR-TRIB. (Wyo.), Sept. 27, 2005, available at <http://www.trib.com/articles/2005/09/27/news/wyoming/76df395b95d0af24872570880075b959.txt>.

## South Carolina

South Carolina is the only state in which convictions of pregnant drug users have been upheld.

*State v. McKnight*, 576 S.E.2d 168 (S.C. 2003).

*Whitner v. State*, 492 S.E.2d 777 (S.C. 1997) (upholding conviction under child endangerment statute for prenatal drug use, declaring viable fetus a "child" under the law).

For exhaustive lists and descriptions of many of these cases and others, see CTR. FOR REPROD. RIGHTS, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY 11 app. B (2000), available at [http://reproductiverights.org/sites/default/files/documents/pub\\_bp\\_punishingwomen.pdf](http://reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf); Developments and Trends in the Law, *Synopsis of State Case and Statutory Law*, 1 YALE J. HEALTH POL'Y L. & ETHICS 237 (2001) (providing synopses to answer the question, How are states regulating the use of drugs and alcohol during pregnancy?).

