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## Maternal Liability: Courts Strive to Keep Doors Open to Fetal Protection - But Can They Succeed, 20 J. Marshall L. Rev. 747 (1987)

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# MATERNAL LIABILITY: COURTS STRIVE TO KEEP DOORS OPEN TO FETAL PROTECTION— BUT CAN THEY SUCCEED?

## I. INTRODUCTION

In recent years, science has made rapid advances in the area of prenatal medicine.<sup>1</sup> The ability to detect fetal abnormalities during the early stages of pregnancy allows corrective measures to commence while the fetus is in the womb, thus enhancing the probability of successful treatment.<sup>2</sup> Additionally, fetal surgery is being performed with increasing success.<sup>3</sup> Scientists are also estab-

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1. Prenatal is defined as "existing or occurring before birth, with reference to the fetus." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1252 (25th ed. 1974) [hereinafter MEDICAL DICTIONARY]. A result of the increased knowledge with regard to fetal development, function, and environment, is that the medical community now regards the fetus as a patient entitled to the same care as a pregnant woman. N. GRANT, P. MACDONALD & J. PRITCHARD, WILLIAMS OBSTETRICS 139 (17th ed. 1985) [hereinafter WILLIAMS OBSTETRICS]. For purposes of this article, the unborn will be referred to as a fetus, regardless of the actual gestational age. The unborn actually passes through three stages of development: the ovum stage, from conception through the first two weeks; the embryonic stage, from two weeks through eight weeks; and the fetal stage, from eight weeks until birth. M. F. ASHLEY MONTAGU, PRENATAL INFLUENCES, 21-31 (1962).

2. An experimental test has been developed which identifies fetuses that may be susceptible to retinoblastoma, an eye cancer. Benowitz, *A Prenatal Test for Cancer*, 127 SCI NEWS 12 (1985). Retinoblastoma runs in families, therefore, a fetus is likely to develop the disease if a parent and another child in the family have the disease. *Id.* The advantage of this prenatal test is that tumors can be detected earlier, resulting in milder cancer treatments. *Id.*

3. In one case, a 21 week old fetus was partially removed from its mother's uterus, operated on, and returned to the uterus. Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 AM. J. LAW. & MED. 1, 16-17 (1983). The surgery, however, was performed too late to correct all of the abnormalities, and the infant only survived its birth for nine hours. *Id.* at 17 n.103. The increase in fetal surgery is largely the result of ultrasound, which provides the surgeon with a picture of the fetus in the womb. Clark & Witherspoon, *Surgery in the Womb*, NEWSWEEK, Oct. 31, 1983, at 78. Fetal surgery is currently performed for only a limited number of defects. These include hydrocephaly and blocked urinary tracks. Holcomb, *When the Patient is Still in the Womb*, SAVVY, Nov. 1984, at 90. Hydrocephaly is a condition where there is a fluid accumulation in the cranium, leading to an enlarged head and a prominent forehead. MEDICAL DICTIONARY, *supra* note 1, at 729. Hydrocephaly results in brain atrophy and mental deterioration. *Id.* A blocked urinary tract leads to abnormal lung development, kidney damage and death, shortly after birth. Witherspoon, *supra*, at 78. Current research is underway to perform fetal surgery to correct spina bifida and encephaloceles, both neurological defects. Kolata, *Fetal Surgery For Neural Defects?*, 221 SCI. 441 (1983). Fetal surgery is performed with moderate success. In the case of hydrocephaly, the survival rate is approximately 80%. Witherspoon, *supra*, at 78. The survival rate in the blocked urinary tract operations is approximately 50%. Holcomb, *supra*, at 90.

lishing causal relationships between the mother's intake of various substances and subsequent defects in the fetus.<sup>4</sup> Numerous other environmental factors are also linked with abnormal fetal growth and development.<sup>5</sup> As a result of medical studies, courts are faced with the issue of whether a mother owes a duty of care to her unborn child and, if so, what are the remedial consequences of a breach of this duty.

The essence of prenatal rights, in the context of a maternal duty of care, is the right to be born with a sound mind and body.<sup>6</sup> While every child clearly deserves to be born with a sound mind and body, the imposition of a maternal duty of care is not compatible with the present state of the law concerning a woman's rights, which stems from the *Roe v. Wade*<sup>7</sup> decision. This comment will examine the common law fetal rights as well as the recent expansion of these fetal rights in the area of tort law. The comment will then analyze the maternal duty in light of the tort law expansion of fetal rights. Next, the comment will examine the state interest in the unborn and state intervention in maternal care versus maternal interests. Finally, the comment will look at the recent cases holding that the maternal duty of care exists under the child abuse and neglect statutes, thus creating criminal liability for breach of duty. The comment concludes that a maternal duty of care should not be imposed through civil or criminal measures, or through state intervention, except in life-saving situations.

## II. HISTORY OF PRENATAL RIGHTS

The law has always been schizophrenic in the area of prenatal

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4. Infants born to cocaine users may suffer prenatal strokes, respiratory and kidney problems, "visual problems, lack of coordination and developmental retardation." Wallis, *Cocaine Babies*, TIME, Jan. 20, 1986, at 50. The infants of cocaine abusers may also be more susceptible to sudden infant death syndrome. *Id.* Heavy drinking can lead to "minor facial abnormalities and mental retardation." *The Littlest Victims*, LADIES HOME J., Sept. 1985, at 180 [hereinafter *The Littlest Victims*]. Maternal smoking may lead to lung disease in the subsequently born child. *Id.*

5. Studies are linking environmental pollution to fetal abnormalities. *The Littlest Victims*, *supra* note 4, at 179. Drinking water tainted with chemicals was linked to increased infant death, as well as increased ear and eye defects. *Id.* at 181. A community near a former uranium mine was found to have a rate of birth defects that was five times greater than the national average. *Id.* at 183. Some doctors even recommend that pregnant women avoid household products, including "oven cleaners, paints, insecticides, hair spray, hair coloring and relaxers, and furniture polishes." *Ways To Protect Your Unborn Child*, EBONY, July, 1986 at 72 [hereinafter *Ways To Protect Your Unborn Child*].

6. Courts have recognized this right. "[A] child has the legal right to begin life with a sound mind and body." *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960).

7. 410 U.S. 113 (1973). This is the landmark abortion decision, holding that a woman's right to privacy gives her the absolute right to terminate her pregnancy during the first trimester. *Id.* at 163.

rights. The common law always granted the fetus certain property rights.<sup>8</sup> A fetus could take by will;<sup>9</sup> it could inherit property;<sup>10</sup> it could have a guardian appointed to protect its property;<sup>11</sup> it could be the beneficiary of a trust;<sup>12</sup> and, it could prevent the application of the Rule Against Perpetuities.<sup>13</sup> All of these property rights, however, were conditioned upon the subsequent live birth of the fetus.<sup>14</sup> No property rights existed where a fetus was stillborn.<sup>15</sup> Therefore, these property rights did not establish that the fetus was a person *per se*. The common law, thus, was concerned with the realization of the testator's intent, rather than the protection of the fetus.<sup>16</sup>

In contrast to property law, criminal law has historically not extended any rights to the fetus.<sup>17</sup> At common law, feticide was not considered murder.<sup>18</sup> Killing a child in the womb after it had achieved viability constituted a misdemeanor.<sup>19</sup> If, however, one's

8. "An infant . . . in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born." 2 W. BLACKSTONE, COMMENTARIES 130 (1769).

9. See *Hall v. Hancock*, 32 Mass. (15 Pick.) 255 (1834) (bequest to "children living at my death" includes unborn fetus).

10. See *Biggs v. McCarty*, 86 Ind. 352 (1882) (unborn child could take devise of land as tenant in common with its mother).

11. See *Deal v. Sexton*, 144 N.C. 157, 56 S.E. 691 (1907) (consent of unborn child's guardian necessary prior to division or sale of devised property).

12. See *Industrial Trust Co. v. Wilson*, 61 R.I. 169, 200 A. 467 (1938) (posthumous child entitled to share in trust left to "surviving children").

13. See *Aubuchon v. Bender*, 44 Mo. 560 (1869) (unborn child may take either vested or contingent remainders).

14. See Doudera, *Fetal Rights? It Depends*, 18 TRIAL 38, 39 (1982). (unless born alive, fetus has no estate rights or property rights).

15. *Id.* at 39 (fetus has no property rights, regardless of fetal age, if stillborn).

16. Damme & Shaw, *Legal Status of the Fetus*, in GENETICS AND THE LAW 4 (1976) (courts primarily concerned with testator's intent). For a discussion of property law in relation to the fetus, see Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW 349 (1971).

17. See *State v. Winthrop*, 43 Iowa 519 (1876) (child does not have independent life until it breathes on its own). See also *Roe v. Wade*, 410 U.S. 113, 160 (1973) ("There has always been strong support for the view that life does not begin until live birth.").

18. See, e.g., *Pennsylvania v. McKee*, 1 Add. 1 (1791) (in order to charge mother with homicide, state had to prove child had been born alive and then killed).

19. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as heinous misdemeanor. BLACKSTONE, *supra* note 8, at 129-30.

"Quick" was the common law term for viable, defined as "pregnant and able to feel the fetal movements." MEDICAL DICTIONARY, *supra* note 1, at 1299. "Quickening" is defined as "the first recognizable movements of the fetus, appearing usually from the sixteenth to the eighteenth week of pregnancy." *Id.*

A viable fetus is one "that has reached such a stage of development that it can live outside the uterus." *Id.* at 1714. Various factors affect viability, such as fetal age

actions caused a viable child to be born alive and it subsequently died, only then was the act considered murder.<sup>20</sup> Therefore, at common law, personhood did not attach until the fetus was born alive.<sup>21</sup> This common law tradition has generally continued into the modern area of criminal law.<sup>22</sup> States continually refuse to recognize the killing of a fetus, in the womb, as murder.<sup>23</sup>

Similar to the criminal law's treatment, the common law did not regard an injury to the fetus as an actionable tort either.<sup>24</sup> The landmark decision in this area was *Dietrich v. Inhabitants of Northampton*,<sup>25</sup> where the Supreme Judicial Court of Massachusetts denied recovery in a wrongful death action brought on behalf of an infant.<sup>26</sup> In *Dietrich*, an infant was born prematurely and died approximately fifteen minutes later due to the defendant's negligence.<sup>27</sup> Several reasons advanced for the denial of recovery included the lack of precedent,<sup>28</sup> exclusion of a fetus from the wrongful death statute,<sup>29</sup> the difficulty in establishing a causal relationship,<sup>30</sup> and the danger of fraudulent claims.<sup>31</sup> The court denied recovery, however, mainly because it found that the unborn child was not a sepa-

and weight. Benowitz, *supra* note 2, at 11. The exact time of viability, then, is difficult to identify. Generally, viability is thought to occur between 24 and 28 weeks. *Id.* See also *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 63-64 (1975) (viability includes ability to live outside womb with artificial aid and is a matter of medical judgment); *Roe v. Wade*, 410 U.S. 113, 160 (1973) (viability usually occurs between 24 and 28 weeks).

20. See R. PERKINS, *CRIMINAL LAW* 140 (2d ed. 1969) (common law predicated murder or manslaughter conviction on live birth).

21. For a discussion of ancient attitudes toward the unborn, see generally *Roe v. Wade*, 410 U.S. 113, 130-41; Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 411-28 (1968).

22. See, e.g., *People v. Greer*, 79 Ill.2d 103, 116, 402 N.E.2d 203, 209 (1980) (feticide not murder unless fetus, following live birth, dies as a result of the injuries received). But see *People v. Apodaca*, 76 Cal.App.3d 479, 486, 142 Cal. Rptr. 830, 835 (1978) (assaulting pregnant woman, absent consent, with the intent of murdering her fetus can constitute murder).

23. See Myers, *Abuse and Neglect of the Unborn: Can The State Intervene?*, 23 Duq. L. Rev. 1, 12-13 (1984). (Model Penal Code definition of homicide as "causing the death of a person who has been born and is alive" predominates).

24. "But no case, so far as as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb." *Dietrich v. Northampton*, 138 Mass. 14, 15 (1884).

25. *Id.* at 14.

26. The court declined to analogize this situation to the English common law situation, where injury to a woman pregnant with a viable fetus resulting in a premature birth and subsequent death of the infant, was considered murder. *Id.* at 15.

27. The infant's mother, while she was four or five months pregnant, slipped and fell on the highway. *Id.* at 14.

28. *Id.* at 15.

29. *Id.* at 17.

30. *Id.* at 16.

31. *Id.* at 17.

rate entity from its mother.<sup>32</sup>

The *Dietrich* rule, as it became known, was followed by all jurisdictions for the next sixty-two years.<sup>33</sup> In 1946, however, the District Court for the District of Columbia, in *Bonbrest v. Kotz*,<sup>34</sup> allowed recovery for negligently inflicted prenatal injuries to a viable fetus, which was later born alive.<sup>35</sup> The *Bonbrest* decision reflected the evolution of medical science since 1884, when *Dietrich* had been decided.<sup>36</sup> Particularly, the court recognized that because an unborn viable child is able to live without the aid of its mother,<sup>37</sup> it is a separate entity from its mother.<sup>38</sup> Today, all jurisdictions allow a cause of action for the negligent injury of a viable fetus, which is later born alive.<sup>39</sup>

Since the *Bonbrest* court's recognition of prenatal torts, courts have continued to expand upon the concept of a third party's liability to a fetus. Several jurisdictions have eliminated the viability requirement,<sup>40</sup> viewing it as an arbitrary requirement, because the

32. "[T]he unborn child was a part of the mother at the time of the injury. . . ." *Id.*

33. *But see* *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 372, 56 N.E. 638, 642 (1900) (Boggs, J., dissenting) (would allow cause of action on behalf of a viable fetus, for prenatal injuries, conditioned on its live birth). *See also* *Nugent v. Brooklyn Heights R. Co.*, 154 A.D. 667, 139 N.Y.S. 367 (1913) (court seemed willing to recognize prenatal rights, but held that a carrier's duty in this case extended only to mother).

34. 65 F. Supp. 138 (D.D.C. 1946).

35. The complaint charged professional malpractice in taking the child from its mother's womb. *Id.* at 139.

36. "[M]edical science certainly has made progress since 1884." *Id.* at 143.

37. "Here . . . we have a viable child . . . which has demonstrated its capacity to survive by *surviving*. . ." *Id.* at 140 (emphasis in original).

38. "[W]hile dependent for its [the viable fetus] continued development on sustenance derived from its peculiar relationship to its mother, it is not 'part' of the mother in the sense of a constituent element. . ." *Id.*

39. *See, e.g.*, *Tucker v. Howard L. Carmichael & Sons*, 208 Ga. 201, 65 S.E.2d 909 (1951) (viable fetus has cause of action for injuries); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973) (allowing wrongful death action for stillborn fetus, with viability as limitation on suits); *Amann v. Faigy*, 415 Ill. 422, 114 N.E.2d 412 (1953) (cause of action allowed for prenatal injuries resulting in death of subsequently born infant), *rev'd* *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638 (1900); *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951) (child may sue for injuries inflicted when he was viable fetus); *Keyes v. Construction Serv.*, 340 Mass. 663, 165 N.E.2d 912 (1960) (tort action may be brought on behalf of child injured as viable fetus); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949) (wrongful death action allowed for death of viable fetus prior to birth); *Rainey v. Horn*, 221 Miss. 269, 72 So.2d 434 (1954) (after point of viability, wrongful death action may be brought on behalf of unborn); *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 87 N.E.2d 334 (1949) (court allows recovery for injury inflicted on viable fetus); *Puhl v. Milwaukee Automobile Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959) (court points out present state of the law concerning prenatal injury). *See generally* W. KEETON & W. PROSSER, *THE LAW OF TORTS* 368 (5th ed. 1984) (in every jurisdiction, child born alive has cause of action for prenatal injuries and for wrongful death if child dies after birth due to injuries).

40. *See, e.g.*, *Hornbuckle v. Plantation Pipe Line Co.* 212 Ga. 504, 93 S.E.2d 727

subsequently born child suffers the same injury regardless of whether he was viable at the time the injury was inflicted.<sup>41</sup> These jurisdictions, which recognize the fetus as a separate entity from its mother, have replaced the viability standard for recovery with a standard that is premised on the child's right to begin life with a sound mind and body.<sup>42</sup>

This standard has been implemented to hold third parties liable for negligent acts which are committed prior to conception and result in injury to the later born child.<sup>43</sup> In these preconception tort cases, the time between infliction of the injury and conception has ranged anywhere from several months<sup>44</sup> to eight years.<sup>45</sup> These gaps in time are justified under the basic tort concept of foreseeability.<sup>46</sup> For example, in *Renslow v. Mennonite Hospital*,<sup>47</sup> a child was injured as the result of a negligent blood transfusion given to her mother when her mother was thirteen-years old.<sup>48</sup> The Illinois Su-

(1956) (if causal relationship is established, child can recover for injury inflicted at any time in prenatal period); *Daley v. Meier*, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961) (infant born alive can recover for injuries sustained prior to viability); *Womack v. Buchhorn*, 384 Mich. 718, 187 N.W.2d 218 (1971) (court recognizes action for prenatal injuries, regardless of time when injury was inflicted); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958) (previable fetus may recover for tortious injury); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960) (allows recovery, whether fetus was viable or not at the time injury occurred); *Kelly v. Gregory*, 282 A.D. 542, 125 N.Y.S.2d 696 (1953) (can recover for injury inflicted at any point of fetal life); *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960) (cause of action allowed for injury inflicted on one month old fetus). *But see* *Green v. Smith*, 71 Ill. 2d 501, 377 N.E.2d 37 (1978) (no cause of action for injuries and death of pre-viable fetus).

41. *See* *Smith v. Brennan*, 31 N.J. 353, 367, 157 A.2d 497, 504 (1960) (opportunity to obtain remedy should be given regardless of fetal age at the time of injury, because resulting harm is same following birth).

42. *Id.* at 364, 157 A.2d at 503. (justice demands recognition of right to sound mind and body).

43. For a discussion of preconception torts, see Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706 (1977); Comment, *Preconception Torts: A Look At Our Newest Class of Litigants*, 10 TEX. TECH. L. REV. 97 (1978); Note, *Preconception Torts: Foreseeing the Unconceived*, 48 U. COLO. L. REV. 621 (1977); Comment, *Recognizing a Cause of Action for Preconception Torts in Light of Medical and Legal Advancements Regarding the Unborn*, 53 UMKC L. REV. 78 (1984).

44. *Jorgensen v. Meade Johnson Laboratories, Inc.*, 483 F.2d 237 (10th Cir. 1973) (birth control pills taken several months prior to conception altered mother's chromosome structure, resulting in mongoloid twins).

45. *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (negligent blood transfusion given to mother eight years prior to conception damaged fetus). *See also* *Bergstreser v. Mitchell*, 577 F.2d 22 (8th Cir. 1978) (negligent Caesarean section injured child born two years later).

46. "Foreseeability" is an element of proximate cause and is defined as "[t]he ability to see or know in advance; hence the reasonable anticipation that harm or injury is a likely result of acts or omissions." BLACK'S LAW DICTIONARY 584 (5th ed. 1979) [hereinafter BLACK'S].

47. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

48. The blood transfusion sensitized the mother's blood because she was given Rh-positive blood, which was incompatible with her own Rh-negative blood. *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 349, 367 N.E.2d 1250, 1251 (1977). The mother's

preme Court held that because it was foreseeable that a thirteen year old girl would one day marry and become pregnant,<sup>49</sup> the hospital responsible for the transfusion was liable for the injury to the child conceived after the negligent act.<sup>50</sup>

The *Renslow* decision demonstrates the vast changes in prenatal tort law since *Dietrich*. In light of these changing fetal rights, the next logical extension is to allow a child to recover from its mother for negligently inflicted prenatal injuries.<sup>51</sup> Historically, this recovery would have been barred because of the parental immunity doctrine.<sup>52</sup> The modern trend, however, has been to abrogate this doctrine.<sup>53</sup> As a result of the trend, courts, for the first time, are faced with the issue of whether a mother can be liable to her unborn child.

### III. MATERNAL LIABILITY IN A NEGLIGENCE ACTION

In order to assess maternal liability for negligence, it is necessary to examine the concept of parental tort immunity. Parental immunity is not a common law concept;<sup>54</sup> the doctrine was first established in 1891.<sup>55</sup> Justifications for the doctrine include: preservation of family harmony;<sup>56</sup> preservation of parental discipline and control;<sup>57</sup> preservation of the fabric of society;<sup>58</sup> fear of fraud;<sup>59</sup> fear that the suit would deplete the resources for the other children;<sup>60</sup> and the fear that, if the child died, the parent would inherit the judgment

sensitized blood resulted in the induced premature delivery of the child and in permanent brain and nervous system damage. *Id.*

49. *Id.* at 365, 367 N.E.2d at 1258 (Dooley, J., concurring).

50. *Id.* at 357, 367 N.E.2d at 1255.

51. *Cf. Allaire v. St. Luke's Hosp.*, 184 Ill. 359, 368, 56 N.E. 638, 640 (1900) (court denies action against third party for prenatal tort, foreseeing expansion of prenatal tort liability to mother for negligence).

52. "[P]arent is immune from liability for negligence in an action brought by his or her child. . . ." Black's, *supra* note 46, at 1004.

53. "[T]he trend has been to abolish or restrict such immunity." *Id.*

54. *See Prosser, supra* note 39, at 904 (no reason to think English law denied personal tort action between parent and child).

55. "The doctrine of parent-child immunity seems to have developed in 1891. . . ." Comment, *Recovery for Prenatal Injuries: The Right of a Child Against Its Mother*, 10 SUFFOLK U.L. REV. 582, 591 (1976).

56. *See, e.g., Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905) (society has interest in preserving domestic harmony which forms basis for parent-child tort immunity).

57. *See, e.g., Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891) (no parent-child cause of action when relationship is such that parent has duty to control child and child has duty to obey).

58. *Id.*

59. *E.g., Hastings v. Hastings*, 33 N.J. 247, 252, 163 A.2d 147, 150 (1960) (increased risk of collusion when suit brought by one family member against another family member and when family will receive financial gain).

60. *See, e.g., Roller*, 37 Wash. at 245, 79 P. at 789 ("it would not be the policy of the law to allow the estate, which is to be looked to for the support of all the minor children, be appropriated by any particular one.") (emphasis added).



that the child had recovered.<sup>61</sup> These justifications, however, have become less compelling in recent years, as today, exceptions to the doctrine are relied on more often than the doctrine itself.<sup>62</sup>

In many jurisdictions, the exceptions to the doctrine of parental immunity have led courts toward its abrogation.<sup>63</sup> Absent the availability of parental immunity, the four elements necessary in any negligence action would have to be established before maternal liability would arise.<sup>64</sup> The first element of negligence requires a legal duty or obligation on the part of an actor to conform to a reasonable standard of conduct, in order to protect others from unreasonable risk of harm.<sup>65</sup> Second, there must be a breach of that duty.<sup>66</sup> Third, the actor's conduct must be a proximate cause of the injury.<sup>67</sup> Finally, the injured party must sustain actual damage or loss.<sup>68</sup> The first two elements of a negligence action, duty and breach of duty, will be difficult to define in a maternal liability situation.<sup>69</sup>

Most would agree that there is a moral duty, on the part of a mother toward her unborn child, to refrain from engaging in activities which pose an unreasonable risk of harm to the fetus. Recognition of a legal duty, however, involves defining a maternal standard of conduct and defining unreasonable risk to the fetus. In determining a standard of conduct in negligence actions, courts generally balance the risk, in terms of the social value of the threatened interest and the probability and extent of the harm, against the actor's interest and the reasonability of the actor's conduct.<sup>70</sup> The actor's interest, or the maternal interest, in this situation, is the mother's right

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61. See *id.* ("if a child should recover a judgment from a parent, in the event of its death the parent would become heir to the very property which had been wrested by the law from him.").

62. See generally *Plumley v. Klein*, 388 Mich. 1, 5, 199 N.W.2d 169, 171 n.2 (1972) (list of states abandoning parent-child tort immunity); PROSSER, *supra* note 39, at 904-07 (discussing parent-child tort immunity).

63. See, e.g., *Goller v. White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963) (one of the first courts to expressly abrogate parental immunity).

64. Negligence "refers only to that legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit. . . . It is characterized chiefly by inadvertance, thoughtlessness, inattention, and the like. . . . [the] [d]octrine of negligence rests on duty of every person to exercise due care in his conduct toward others from which injury may result." BLACK'S, *supra* note 46, at 930-31.

65. PROSSER, *supra* note 39, at 164. Duty is defined as an "obligation to which law will give recognition and effect." BLACK'S, *supra* note 46, at 453. Reasonable is defined as "suitable under the circumstances." *Id.* at 1138.

66. PROSSER, *supra* note 39, at 164.

67. *Id.* at 165. Proximate cause exists when "the injury or damage was either a direct result or a reasonably probable consequence of the act or omission." BLACK'S *supra* note 46, at 1103.

68. PROSSER, *supra* note 39, at 165.

69. For a discussion of maternal duty to her unborn child, see generally Comment, *Parental Liability For Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47 (1978); Doudera, *supra* note 14.

70. PROSSER, *supra* note 39, at 173.

to personal privacy<sup>71</sup> and the right of control over her own body.<sup>72</sup> This is the interest that the United States Supreme Court recognized in *Roe v. Wade*.<sup>73</sup> This maternal right, however, is not absolute and is subject to certain limitations.<sup>74</sup> In a tort context, which is different from the *Roe v. Wade* situation, the maternal right is balanced, not against a state interest in potential life,<sup>75</sup> but against the fetal interest in the right to be born with a sound mind and body.<sup>76</sup> As discussed previously, this fetal right has already been established in third-party tort cases.<sup>77</sup>

Once the competing rights are established, the reasonability of the maternal conduct must be balanced against the probability and extent of harm to the fetus.<sup>78</sup> Defining the reasonability of the maternal conduct requires an analogy to third-party negligent conduct.<sup>79</sup> As in the third-party tort cases, courts will determine reasonability according to either a post-viability standard<sup>80</sup> or a foreseeability standard,<sup>81</sup> depending on that particular jurisdiction's precedent. Both standards, however, pose inherent problems when applied to maternal conduct.

First, in those jurisdictions allowing recovery only for injury to a viable fetus subsequently born alive, many injuries will go uncompensated. This is premised on the fact that the most critical stage in embryonic development,<sup>82</sup> the stage when the fetus is most suscepti-

71. "[A] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. 113, 152 (1973).

72. The fourteenth amendment protects liberty interests of individuals and protects individuals from unnecessary bodily restraint. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1981).

73. 410 U.S. 113 (1973).

74. "[T]he right of personal privacy . . . is not unqualified and must be considered against important state interests. . . ." *Id.* at 154.

75. *See id.* at 159 (state interest in potential life is involved in abortion decision at some point).

76. One author has called this right the "right to be well born," embracing rights to adequate physical, mental and emotional prenatal care. Ament, *The Right to Be Well Born*, 2 J. LEGAL MED. 25, 27 (1974).

77. *See supra* note 6.

78. This is a delicate balancing process, given the variety of factors and substances which may affect fetal growth and development. For an exhaustive discussion of fetal rights, see generally Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63 (1984).

79. The third-party tort differs from a maternal tort because in the third party situation, the defendant commits a tort upon the fetus *through* the body of the mother; while in the maternal tort case, the mother is more or less directly inflicting the injury. *See PROSSER, supra* note 39, at 367 (discussing prenatal injuries).

80. *See supra* note 39 and text accompanying notes 35-39 for a discussion of the foreseeability standard.

81. *See supra* notes 40-46 and accompanying text for a discussion of the post-viability standard.

82. The embryonic stage begins approximately three weeks after conception. WILLIAMS OBSTETRICS, *supra* note 1, at 139. During this stage, the basic organs of the embryo develop. PRENATAL INFLUENCES, *supra* note 1, at 29. This is called the period

ble to environmental factors,<sup>83</sup> is the first trimester.<sup>84</sup> In the first trimester, the major organs and basic tissues develop in the unborn child.<sup>85</sup> Because the first trimester is a pre-viability period,<sup>86</sup> however, a mother may be immune from liability for negligent acts she commits at a time when the likelihood of damage is the greatest.

Another problem with the viability standard is the difficulty in determining when viability occurs.<sup>87</sup> The time of viability differs with each fetus.<sup>88</sup> Furthermore, the exact moment when a certain environmental factor affected the development of the fetus is difficult to pinpoint.<sup>89</sup> A cause and effect relationship between maternal care and fetal injury has been scientifically established, but the precise time of the effect remains speculative.<sup>90</sup> As a result, the proximate cause in a negligence action against a mother would be difficult to prove.<sup>91</sup>

Just as the viability-requirement jurisdictions are not conducive

of organogenesis. *Id.* By the end of the embryonic period, the fetus is clearly distinguished as human. *Id.* at 30.

83. These environmental factors are called teratogens; agents or factors causing "the production of physical defects in the developing embryo." MEDICAL DICTIONARY, *supra* note 1, at 1549. "Susceptibility to teratogenic agents, in general, decreases as organ formation advances and using becomes negligible after organogenesis is substantially completed." WILLIAMS OBSTETRICS, *supra* note 1, at 799.

84. A trimester is three calendar months long; gestation is often referred to as consisting of three trimesters. WILLIAMS OBSTETRICS, *supra* note 1, at 139.

85. After the first trimester, fetal development consists of the growth and maturation of already formed structures. *Id.* at 140. "Few, if any, new major structures are formed" after approximately two months. *Id.*

86. Although viability is generally thought to occur between 24 and 28 weeks, viability continues to move to younger stages. Halcomb, *supra* note 3, at 93.

87. Several factors determine viability, including fetal age, fetal weight and organ development. Lenow, *supra* note 3, at 11 & n.71.

88. In addition, as advances are made in the care of premature infants, viability may occur at earlier stages. A premature baby weighs 2,500 gm. or less at birth. PRE-NATAL INFLUENCES, *supra* note 1, at 398. A fetus that weighs less than 400 gm. at birth has no chance of survival and one that weighs from 400 to 999 gm. has a low chance of survival. *Id.* at 398-99.

89. A teratogenic agent may have different effects depending on the stage of embryonic development. WILLIAMS OBSTETRICS, *supra* note 1, at 799. Furthermore, the fetus may have been exposed to more than one teratogenic agent. Different teratogens have different effects, even when introduced at the same time. *Id.* Therefore, a precise cause and effect relationship is virtually impossible to establish.

90. Another problem in establishing cause and effect is that a genetic disposition may produce a teratogenic response to a factor not normally teratogenic. *Id.* at 802.

91. Proximate cause requires a direct relationship or reasonably probable relationship between the actor's conduct or omission and the resulting injury. PROSSER, *supra* note 39, at 165. This element of a negligence action would be difficult to prove, for example, in cases where factors are thought to cause defects and abnormalities, but the results remain inconclusive. Caffeine at the level of approximately two cups of coffee per day is suspected of hindering skeletal development. *Ways To Protect Your Unborn Child*, *supra* note 5, at 72. Other studies, however, suggest that defects are caused only if the pregnant woman consumes the equivalent of 26 cups of coffee per day. Starr, *The Twelve Month Pregnancy*, 6 AM. HEALTH 56, 62 (1987).

to maternal liability, the jurisdictions with foreseeability requirements are also faced with difficulties. For example, if a third party may be liable for negligent acts causing injury to a fetus prior to conception,<sup>92</sup> should a mother also be held liable for engaging in similar pre-conception negligence? Applying a foreseeability analysis, it is foreseeable in the case of most women that one day they will become pregnant.<sup>93</sup> Arguably, then, women could be held to a standard of care throughout their child-bearing years.<sup>94</sup> Even though the absurdity of this kind of standard is apparent, it is consistent with a foreseeability analysis.

Pre-viability recovery presents problems similar to the pre-conception recovery problems. Most women are not aware that they are pregnant until weeks after conception occurs.<sup>95</sup> Consequently, the woman may continue to use potentially harmful substances<sup>96</sup> or to

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92. The number of jurisdictions permitting pre-conception negligence actions against third parties remains small. PROSSER, *supra* note 39, at 369. One fear with the expansion of the pre-conception tort claims is that cases will arise involving second and third generations genetically damaged due to radiation or toxic chemical exposure. Robertson, *Toward Rational Boundaries of Tort Liability For Injury To The Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1438.

93. *Cf.* Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 365, 367 N.E.2d 1250, 1258 (1977) (defendant hospital and doctor charged with knowledge that 13 year old patient would one day marry and become pregnant). Many doctors now recommend that women prepare for pregnancy, in order to prevent birth defects. *Ways To Protect Your Unborn Child*, *supra* note 5, at 68.

94. See Beal, "Can I Sue Mommy?" *An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325, 368 (1984) ("a woman [could be] . . . subject to a standard of conduct for her entire lifetime prior to the conception of her child which could result in legal liability."). *Cf.* WILLIAMS OBSTETRICS, *supra* note 1, at 245 ("systematic health care beginning long before pregnancy undoubtedly proves quite beneficial to the physical and emotional well-being of the mother-to-be and, in turn, her child-to-be.").

95. There may be a reasonable likelihood of pregnancy "as early as a few days after a missed menstrual period." WILLIAMS OBSTETRICS, *supra* note 1, at 247. In most women, conception has occurred two or three weeks prior to the time when a reasonable likelihood exists. *Id.* The average duration of pregnancy is generally 282 days. *Id.* at 246. The majority of women, however, are unaware of their pregnancy until the eighth week or longer. *Ways To Protect Your Unborn Child*, *supra* note 5, at 68.

96. Many substances are known or thought to be harmful to a developing fetus. Smoking during pregnancy leads to lower birth weight infants and a higher number of unsuccessful pregnancies. WILLIAMS OBSTETRICS, *supra* note 1, at 258. See generally Comstock & Meyer, *Maternal Cigarette Smoking and Prenatal Mortality*, 96 AM. J. EPIDEMIOLOGY 1 (1972) (inverse relationship between number of cigarettes smoked by mother and infant's birth weight); Seligman, *Women Smokers: The Risk Factor*, 106 NEWSWEEK 76, 77 (1985) (effects of smoking on infant results in focusing antismoking campaign on pregnant women). *But cf.* Montgomery, *Prenatal Smoking*, OMNI, Sept. 1983, at 49. (infants born to smokers half as likely to develop Respiratory Distress Syndrome than infants born to non-smokers). Excessive alcohol intake will likely produce fetal abnormalities, and chronic alcoholism can lead to fetal alcohol syndrome, which is fetal maldevelopment. WILLIAMS OBSTETRICS, *supra* note 1, at 72. Children born to even moderate drinkers may suffer a withdrawal similar to the withdrawal experienced by heroin babies. *Drinking For Two: New Warning For Mothers-To-Be*, Jan. 1985, at 37 McCALLS [hereinafter *Drinking For Two*]. Alcohol intake may

participate in activities that are harmful to her unborn child,<sup>97</sup> unaware of her pregnancy. Under a foreseeability standard, however, because it is foreseeable that she could become pregnant, she would have violated her standard of care.<sup>98</sup>

One argument opposing the imposition of this standard of care is that the woman should not be held to a standard where she is unaware of her pregnancy. The counter-argument to limiting a mother's liability is that third parties are held liable for their negligence, even though they are unaware that a woman is pregnant.<sup>99</sup> Waiving liability until a woman is aware of her pregnancy would be contrary to the underlying policy of the jurisdictions which base recovery on the foreseeability of the injury.<sup>100</sup>

Another problem associated with a foreseeability analysis is the unplanned pregnancy situation.<sup>101</sup> Should a woman trying to conceive a child be held to a higher standard of care than one who is not? Because no method of birth control is fail-proof, it remains foreseeable that a pregnancy might occur even if a woman was attempting to prevent pregnancy. Therefore, even in the unplanned

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be most harmful during the first weeks of pregnancy. Starr, *supra* note 91, at 62. Drugs such as heroin, barbiturates and amphetamines not only harm the fetus, but also lead to withdrawal at birth. WILLIAMS OBSTETRICS, *supra* note 1, at 259. See generally Desmond, Verniaud & Wilson, *Early Development of Infants of Heroin-Addicted Mothers*, 126 AM. J. DIS. CHILD. 457 (1973) [hereinafter *Heroin Mothers*] (children born to heroin addicts exhibit low attention span, hyperactivity and maladaptive behavior); Desmond, Schwanecke, Wilson, Yasunaga & Burgdorgg, *Maternal Barbiturate Utilization and Neonatal Withdrawal Symptomatology*, 80 J. PEDIATRICS 190 (1972) (barbiturate withdrawal in infants similar to heroin withdrawal); Goodfriend, Klein & Shey, *The Effects of Maternal Narcotic Addiction on the Newborn*, 71 AM. J. OBST. & GYNEC. 29 (1956) [hereinafter *Maternal Narcotic Addiction*] (withdrawal symptoms at birth include restlessness, irritability, constant shrill crying, vomiting, diarrhea and convulsions); Perlmutter, *Drug Addiction in Pregnant Women*, 99 AM. J. OBST. & GYNEC. 569 (1967) (high rate of prematurity and congenital anomalies in infants born to drug addicts); Schenkel & Vorherr, *Non-Prescription Drugs During Pregnancy: Potential Teratogenic and Toxic Effects Upon Embryo and Fetus*, 12 J. REPRODUCTIVE MED. 27 (1974) "With rare exception, any drug that exerts a systemic effect in the mother will cross the placenta to reach the embryo and fetus." WILLIAMS OBSTETRICS, *supra* note 1, at 260.

97. If a pregnant woman is injured, the fetus may be indirectly injured due to inadequate oxygen intake. WILLIAMS OBSTETRICS, *supra* note 1, at 797.

98. An interesting sidelight of the foreseeability analysis is the possible duty of parents to refrain from reproduction if it is more than likely that the fetus will be defective. Shaw, *supra* note 78, at 81. This situation would be analogous to cases where a physician has been held liable for negligent genetic counseling, resulting in wrongful birth or wrongful life lawsuits. *Id.* at 82.

99. In fact, the mother would know she is pregnant even if the pregnancy was not showing. Pregnancy generally is not apparent to a third party until the fourth or fifth month. WILLIAMS OBSTETRICS, *supra* note 1, at 249.

100. The policy of these jurisdictions is to compensate the injured fetus for violation of its right to be born free from injuries. Robertson, *supra* note 92, at 1438.

101. See Beal, *supra* note 94, at 367 (argument could be made that woman not using contraception during intercourse "knew or should have known that she could conceive").

pregnancy situation, a woman might be held to a standard of care.

In addition to predicating maternal liability on a third party liability standard, liability may be based on the abrogation of parent-child immunity.<sup>102</sup> This approach was used in *Grodin v. Grodin*,<sup>103</sup> where a child sued his mother for taking Tetracycline through her eighth month of pregnancy.<sup>104</sup> The Tetracycline caused his teeth to be brown and discolored.<sup>105</sup> The Michigan Supreme Court in *Grodin* held that parental immunity did not bar the suit, unless the mother had acted with reasonable parental discretion in taking the drug.<sup>106</sup>

This reasonable parent standard is difficult to formulate.<sup>107</sup> Parenting is a very personal experience. Notions of reasonability may vary depending on one's nationality, race, or socio-economic class, among other things.<sup>108</sup> Furthermore, courts are reluctant to interfere in the parent-child relationship.<sup>109</sup> It is unlikely, then, that a reasonable parental discretion standard would provide much guidance for courts in determining liability.<sup>110</sup> It is unlikely that courts would even be able to define a reasonable parent.<sup>111</sup>

Although most courts have not faced the issue of maternal tort

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102. In a very recent case, the Illinois Appellate Court for the first time allowed a child to sue its mother for injuries sustained in a car accident, when the mother was pregnant. *Stallman v. Youngquist*, 504 N.E.2d 920, 925 (1987). The court noted that family harmony and fear of collusion are no longer sufficient justifications for denial of intrafamily suits. *Id.* In fact, the court stated that family harmony would be preserved, because financial hardship would be eased if the suit was successful. *Id.* at 926. The court limited the abrogation of parental tort immunity to tort cases arising out of automobile accidents. *Id.*

103. 102 Mich. App. 396, 301 N.W.2d 869 (1980).

104. *Id.* at 398, 301 N.W.2d at 869.

105. *Id.*

106. *Id.* at 401, 301 N.W.2d at 871. In overruling parental immunity, the Michigan Supreme Court retained two exceptions: (1) where the alleged negligence involves an "exercise of reasonable parental authority over the child"; and (2) where the alleged negligence "involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services and other care." *Plumley v. Klein*, 388 Mich. 1, 8, 199 N.W.2d 169, 172-73 (1972).

107. See Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 810 (1976) [hereinafter *The "Reasonable Parent" Standard*] (main objection to reasonable parent standard is that courts cannot realistically determine reasonableness).

108. See *Anderson v. Stream*, 295 N.W.2d 595, 602 (1980) (Rogosheske, J., dissenting) ("parent is the best, and perhaps only, witness capable of expressing the personal, cultural and socio-economic principles by which he raises his children.").

109. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943) (there is a "private realm of family life which the state cannot enter").

110. For a discussion of the abrogation of parental immunity and the evolution of the "reasonable parent" standard, see Beal, *supra* note 94; *The "Reasonable Parent" Standard*, *supra* note 107.

111. Cf. *Haddrill v. Damon*, 149 Mich. App. 702, 386 N.W.2d 643 (1986) (failing to instruct child in use of dirtbike within scope of reasonable parental authority).

liability, the *Grodin*<sup>112</sup> case reflects that the potential for these lawsuits does exist. Theoretically, the notion of civil liability for maternal negligence is sound. The practical application of tort liability, however, could impose unreasonable restrictions on a woman's right to control her own body throughout her child-bearing years.<sup>113</sup>

Finally, maternal tort liability is not the best solution to the problem of negligent prenatal care. The basic precept of tort law is to compensate one for his injuries.<sup>114</sup> The ultimate goal, however, in recognizing that prenatal rights exist is to prevent injury to the developing fetus.<sup>115</sup> Compensating a prenatally injured child may provide some deterrence for maternal negligence, but would not sufficiently advance the fetus' right to be born with a sound mind and body.

#### IV. STATE INTERVENTION IN PRENATAL CARE

One way to prevent fetal injury or death is for the state to intervene on behalf of the unborn and enjoin the mother from continuing harmful practices or compel the mother to submit to treatment that will help the fetus.<sup>116</sup> This approach is more likely to prevent fetal injury or death than the tort liability approach.<sup>117</sup> In a state intervention approach, the mother's constitutional rights<sup>118</sup> would be balanced against the state's *parens patriae* interest in the welfare of the fetus<sup>119</sup> and the fetus's right to be born with a sound mind and

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112. One author sees the *Grodin* case as illustrative of the trend toward frivolous suits against parents, alleging minor defects or abnormalities. Shaw, *supra* note 78, at 98.

113. A more rational, middle of the road approach is that a woman plan for her pregnancy at least three months in advance. The newest trend is toward pre-pregnancy clinics, providing care and counseling to prospective mothers. Starr, *supra* note 91, at 56.

114. "A plaintiff's remedy in tort is compensatory in nature and damages are generally intended not to punish a negligent defendant but to restore an injured person as nearly as possible to the position he or she would have been in had the wrong not been done." Turpin v. Sortini, 31 Cal. 3d 220, 232, 643 P.2d 954, 961 (1982).

115. "The right recognized in all prenatal cases has been the right to be born free of mental and physical defects." Beal, *supra* note 94, at 363.

116. For suggestions concerning the limits of state intervention, see Ament, *supra* note 76; Comment, *The Right of the Fetus to Be Born Free of Drug Addiction*, 7 U.C. DAVIS L. REV. 45 (1974); Comment, *Constitutional Limitations of State Intervention in Prenatal Care*, 67 VA. L. REV. 1051 (1981) [hereinafter *Constitutional Limitations*].

117. See *Constitutional Limitations*, *supra* note 116, at 1052 n.5 ("intervention . . . would be more likely to prevent harm and would cause far less tension in the parent-child relationship.").

118. One commentator has suggested that a woman who chooses to continue a pregnancy has sacrificed her freedoms and liberty to act however she wants. Robertson, *Procreative Liberty And The Control Of Conception, Pregnancy, And Child-birth*, 69 VA. L. REV. 405, 437-38 (1983).

119. *Parens patriae* is the state's power to "act as guardian to persons with legal disabilities such as infants, idiots and lunatics." BLACK'S, *supra* note 46, at 1003.

body.<sup>120</sup>

In most of the cases that have raised the issue of state intervention in prenatal care, courts are willing to recognize the right of the child to be born with a sound mind and body as superior to maternal rights.<sup>121</sup> These cases, however, have been limited to situations where state intervention is necessary to save the fetus' life<sup>122</sup> and where the fetus is viable.<sup>123</sup> The state intervention, then, does not conflict with the *Roe v. Wade*.<sup>124</sup> *Roe* held that the state interest in potential life, after the fetus has achieved viability, is sufficiently compelling to supersede any maternal interests.<sup>125</sup>

Additionally, the viable fetus' right to live has been held so significant as to compel a woman to submit to a Caesarean section against her will.<sup>126</sup> In *Jefferson v. Griffin Spalding County Hospital Authority*,<sup>127</sup> a Caesarean section was deemed necessary to save a fetus' life,<sup>128</sup> but the unborn child's mother refused the surgery on religious grounds.<sup>129</sup> The Supreme Court of Georgia held that the state's duty to protect the fetus and to prevent its death outweighed the intrusion upon the mother's freedom of religion.<sup>130</sup>

In *Jefferson*, the state intervention was justified because it was a life-saving procedure and because the fetus clearly was viable.<sup>131</sup> Given the increase in successful *in utero*<sup>132</sup> fetal surgery, however, questions remain concerning how much state intervention will be al-

120. The fetus has the right to enjoin its mother from conduct which would harm it. Robertson, *supra* note 118, at 438. The mother must strive to produce as healthy a child as possible. *Id.*

121. *But cf.* Taft v. Taft, 338 Mass. 331, 446 N.E.2d 395 (1983) (state interest in seeing fetus carried to term not sufficiently compelling to justify restriction on mother's constitutional rights, when she refused surgery necessary to "hold" her pregnancy).

122. *See, e.g.,* Jefferson v. Griffin Spalding County Hosp., 247 Ga. 86, 274 S.E.2d 457 (1981) (with surgery, fetus had almost 100% chance of surviving).

123. *See, e.g.,* Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964) (fetus approximately eight months old).

124. 410 U.S. 113 (1973).

125. *Id.* at 163.

126. A caesarean section is an "incision through the abdominal and uterine walls for delivery of a fetus." MEDICAL DICTIONARY, *supra* note 1, at 1394.

127. 247 Ga. 86, 274 S.E.2d 457 (1981).

128. Another factor was that the mother's chances of survival without the Caesarean were only 50%. *Id.* at 87, 274 S.E.2d at 458.

129. Jefferson v. Griffin Spalding County Hosp., 247 Ga. 86, 87, 274 S.E.2d 457, 458 (1981).

130. "The Court finds that the intrusion involved into the life [of the mother] . . . is outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live." *Id.* at 89, 274 S.E.2d at 460.

131. The mother was 39 weeks pregnant. Jefferson v. Griffin Spalding County Hosp., 247 Ga. 86, 274 S.E.2d 457 (1981).

132. *In utero* means "within the uterus." MEDICAL DICTIONARY, *supra* note 1, at 794.



lowed. May the state intervene and compel a woman to submit to surgery when the fetus is not yet viable? According to *Roe v. Wade*,<sup>133</sup> the state interest in potential life would not be sufficiently compelling at this point to justify intervention.<sup>134</sup> In recognizing fetal rights, however, the *Roe* decision may not be controlling.<sup>135</sup> The fetal right to be born with a sound mind and body remains unchanged throughout gestation.<sup>136</sup> The combination of the fetal right and the state interest may be sufficient to outweigh the maternal interests during the pre-viability stage.

Another unanswered question is whether the state can intervene where fetal surgery will benefit the unborn, but is not necessarily life-saving.<sup>137</sup> The fetal interest in this situation remains unchanged from the last situation.<sup>138</sup> The state interest is in the quality of potential life, rather than the potential life itself.<sup>139</sup> It is unlikely that courts will construe the state interest in the welfare of the fetus as sufficiently compelling to outweigh maternal constitutional rights.<sup>140</sup> The result is that the state's *parens patriae* interest may justify intervention in life-saving situations, but may not be sufficient to protect the fetal interest in being well born.<sup>141</sup>

The issue of state intervention arises in the context of enjoining maternal behavior, as well as in compelling a woman to submit to treatment.<sup>142</sup> May the state, then, exercising its *parens patriae* pow-

133. 410 U.S. 113 (1973).

134. "[T]he 'compelling' point is at viability." *Id.* at 163.

135. The United States Supreme Court did not address the issue of fetal rights at all in *Roe*.

136. Gestation lasts approximately 40 weeks. WILLIAMS OBSTETRICS, *supra* note 1, at 246.

137. It has been suggested that the view requiring a mother to submit to all fetal surgery, unless the surgery threatened the maternal life, should be rejected because it indicates approval of a "fundamental right to be born healthy." Comment, *The Fetal Patient And The Unwilling Mother: A Standard For Judicial Intervention*, 14 PAC. L.J. 1065, 1086 (1983) [hereinafter *The Fetal Patient*].

138. The fetal surgery situation is analogous to cases where parents refuse medical care for their children. *The Fetal Patient*, *supra* note 137, at 1069-70. The fetus however, has not been recognized as a person, therefore its rights may not be compelling in a non-necessary surgery situation.

139. *Cf. Taft v. Taft*, 388 Mass. 331, 335, 446 N.E.2d 395, 397 (1983) (in weighing state interest versus maternal rights, court is influenced by fact that record does not show "whether the operation is merely desirable or is believed to be necessary as a life-saving procedure").

140. *Cf. Rennie v. Klein*, 653 F.2d 836, 843 (3rd Cir. 1981) (individual's liberty interests allow him to refuse medication).

141. This is complicated by the fact that, although promising, fetal surgery cannot guarantee that a child will be born with a sound mind and body. In the case of surgery to correct hydrocephalus, over half of the fetuses operated on still encountered developmental problems. Holcomb, *supra* note 3, at 91. The survivors of urinary tract fetal surgery also may encounter further disabilities. *Id.* at 90.

142. One example of the trend toward enjoining harmful maternal behavior is a New York City ordinance which requires any place that sells alcohol to post a warning to pregnant women that alcohol may cause birth defects. Silas, *An Issue Is Born*,

ers, force a woman to discontinue harmful practices?<sup>143</sup> The policy behind the doctrine of *parens patriae* is that parents do not always act consistently with the child's welfare.<sup>144</sup> Extending this *parens patriae* interest to the fetus means that the state may limit maternal discretion during pregnancy if the state finds that the mother is not acting consistently with the fetus' welfare interests.<sup>145</sup>

An example of maternal behavior that a state would want to limit would be maternal drug abuse.<sup>146</sup> One area in particular involves the situation of pregnant heroin addicts.<sup>147</sup> The suggestion is to statutorily provide for compulsory detoxification of heroin addicts who are in their third trimester when the state interest in potential life is sufficiently compelling.<sup>148</sup> Analogous situations would involve alcoholic mothers, as well as those addicted to cocaine.<sup>149</sup>

The problem with allowing the state to enjoin maternal behav-

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71 A.B.A.J. 21 (1985).

143. *Cf. Matter of Baby X*, 97 Mich. App. 111, 293 N.W.2d 736 (1980) (state *parens patriae* interest in newborn suffering drug withdrawal sufficient to remove child from mother's custody).

144. *See, e.g., People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952) (parental refusal to allow child to receive blood transfusion constitutes neglect); *Custody of a Minor*, 373 Mass. 733, 379 N.E.2d 1053 (1978) (court may limit parental autonomy if it appears that the child's health or welfare may be jeopardized by the parental decision).

145. Some experts would justify intervention on the grounds that the mother is committing prenatal abuse. "Prenatal abuse is unjustified mistreatment of the embryo/fetus; it is a form of child abuse which begins before birth," Overall, "*Pluck A Fetus From Its Womb: A Critique Of Current Attitudes Toward The Embryo/Fetus*", 24 U.W. ONTARIO L. REV. 1,2 (1986).

146. One area of maternal drug use which is on the rise is the use of cocaine. Cocaine addicted babies "now constitute 60% of drug-affected babies born to addicts . . . at Northwestern Memorial Hospital in Chicago. In Los Angeles they account for more than half of the drug-associated births." Wallis, *supra* note 4, at 50.

147. A mother "who takes heroin is actively causing harm to herself and to [her] infant." Perlmutter, *supra* note 96, at 47. The [s]tate must protect the rights of the fetus "who has no choice but to take the drug and suffer the agonies of withdrawal at birth, possibly coming into the world prematurely with a less-than-average chance of survival." *Id.* One court facing the issue held that a viable fetus was included in the term "child" in the child abuse statutes and that a mother's use of heroin in the last two weeks before delivery, resulting in the newborn's heroin addiction, constituted child abuse. *In re Ruiz*, 27 Ohio Misc.2d 31, 500 N.E.2d 935 (1986). *Contra Reyes v. Superior Court*, 75 Cal. App. 3d 214, 141 Cal.Rptr. 912 (1977) ("child" as used in child abuse statute does not include unborn).

148. State would declare fetus neglected or abused and appoint a guardian who would consent to medical care, which would include compulsory detoxification of pregnant addicts in their third trimester. Perlmutter, *supra* note 96, at 55.

149. The consumption of alcohol during pregnancy can lead to smaller babies at birth. *Drinking For Two*, *supra* note 96, at 37. If a woman discontinues the use of alcohol, however, even in the beginning of the third trimester, the ill effects may be prevented or minimized. *Id.* In the case of cocaine mothers, the state might want to intervene not only to prohibit the mother from continuing her drug abuse, but in order to take custody of the child after birth. *See Barol, Cocaine Babies: Hooked At Birth*, NEWSWEEK, July 28, 1986, at 57. (cocaine mothers likely to abuse or neglect baby).

ior is that state intervention probably would not be allowed until the third trimester, when the fetus is viable.<sup>150</sup> By the third trimester, however, drug and alcohol abuse has already resulted in deformity and abnormality to the developing fetus.<sup>151</sup> Compulsory detoxification in the third trimester would clearly benefit the fetus, but it would not prevent fetal injury.<sup>152</sup>

Attempts at intervention prior to the third trimester, when fetal injury is most likely preventable,<sup>153</sup> would probably not be successful. Courts would be unwilling to undermine a woman's absolute right to the control over her own body during the first trimester of pregnancy.<sup>154</sup> Furthermore, if women fear state intrusion into their personal lives, they might not seek prenatal care or might not be honest with their doctors regarding activities in which they are engaged.<sup>155</sup> In this way, state intervention might indirectly harm the fetus, in the state's attempt to help the fetus.

A related problem with state intervention concerns the determination of what maternal behavior might be enjoined. Inadequate maternal nutrition,<sup>156</sup> cigarette smoking,<sup>157</sup> excessive exercise<sup>158</sup> and

150. The compelling interest of the state in potential life does not arise until viability, when protection of fetal life "has both logical and biological justifications." *Roe v. Wade*, 410 U.S. 113, 163 (1973).

151. In the first few weeks following conception, the mass of the fetus grows by 2.5 million times, as all of the body's systems are formed. Starr, *supra* note 91, at 58. It is at this development and differential stage that interference leads to malformity and defects. *Id.*

152. Compulsory detoxification would benefit the fetus because studies have shown that "[i]f treatment is instituted for several weeks prior to delivery, it is likely that the infant will show no abstinence symptoms." *Maternal Narcotic Addiction*, *supra* note 96, at 35.

153. See Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 589 (1965) ("medicine emphasized that the crucial period of intrauterine development during which the fetus would be most susceptible to environmental influences was during the first trimester, long before viability.").

154. *But see* *Roe v. Wade*, 410 U.S. 113, 154 (1973) (privacy right is not absolute and does not create an unlimited right "to do with one's body as one pleases").

155. *Cf. Heroin Mothers*, *supra* note 96, at 460 (addicts generally do not volunteer information concerning history of addiction and often lack prenatal care).

156. Good nutritional status of the mother is "the most important factor in contributing to the healthy development of the human conceptus." *PRENATAL INFLUENCES*, *supra* note 1, at 57.

157. Cigarette smoking during pregnancy generally produces babies that weigh a half pound less than the babies of nonsmokers. Seligman, *supra* note 96, at 77. This lower birth weight may result in "immature lungs, bleeding within the brain, bowel problems, infections and intellectual impairment." *Id.*

158. Increased maternal body temperature may harm fetal development in the early stages. Starr, *supra* note 91, at 59. Intense exercise for a protracted time period may generate enough heat to cause fetal damage. *Id.* See also *PRENATAL INFLUENCES*, *supra* note 1, at 426 ("the mother's motor activities, walking, running . . . and the like . . . may well play a role in the individual differentiation of the fetus"). *But see* *WILLIAMS OBSTETRICS*, *supra* note 2, at 256 ("not necessary for the pregnant woman to limit exercise, provided she does not become *excessively* fatigued or risk injury to herself or her fetus.") (emphasis added).

exposure to disease<sup>159</sup> each detrimentally affect the developing fetus. In exercising its *parens patriae* duties, can a state force a woman to quit smoking, quit exercising, eat properly, or prevent her from going places where there is a high risk of exposure to disease? Although these questions may seem ridiculous, courts would be faced with responding to them in defining what constitutes fetal welfare and well-being.<sup>160</sup>

Thus, state intervention in prenatal care would prevent some fetal injury and death. Intervention should be limited, however, to life-saving procedures and to third trimester fetuses.<sup>161</sup> Ideally, women should take the best care of their bodies during pregnancy,<sup>162</sup> but the state should not be allowed to force a woman to observe overreaching standards of care. State intervention prior to the third trimester, even combined with the fetal rights at stake, would ignore the woman's right to privacy which the United States Supreme Court guaranteed in *Roe v. Wade*.<sup>163</sup>

## V. MATERNAL LIABILITY UNDER CRIMINAL STATUTES

In addition to potential civil liability for negligent prenatal care, women who engage in activities which threaten injury to the fetus could also face criminal liability.<sup>164</sup> Criminal liability would be based

159. Maternal gonorrhea can produce blindness in newborns. *Ways To Protect Your Unborn Child*, *supra* note 5, at 68. Maternal syphilis may "cause brain damage, skin lesions, malformations of the teeth and even death in babies." *Id.* Children of diabetics who do not control their diabetes adequately are born with a higher number of congenital abnormalities. *Id.* Catching rubella during pregnancy often leads to birth defects. Starr, *supra* note 91, at 58. See also Blattner, Desmond, Franklin & Hill, *The Relation of Maternal Disease to Fetal and Neonatal Morbidity and Mortality*, 8 *PED. CLINICS N. AM.* 421 (1961) (lists maternal infectious diseases and likelihood of effect on fetus); Kalter & Warkany, *Congenital Malformations*, 265 *NEW. ENG. J. MED.* 1046 (1961) (maternal syphilis can lead to deafness and retardation). See also *PRENATAL INFLUENCES*, *supra* note 1, at 269-321 (infectious diseases of mother affect the fetus).

160. One argument in favor of prohibiting maternal use of alcohol, cigarettes and drugs is that the prohibition would pass the United States Supreme Court's "rational basis" test. Robertson, *supra* note 118, at 442-43. It would not be necessary for a state to show a compelling interest in prohibiting these substances "because there is no fundamental right to use psychoactive substances." *Id.* at 442.

161. One author rationalizes more intrusive state action on the grounds that a woman's obligations to her fetus would only arise when she chose not to exercise her right to abort, regardless of when the decision to continue the pregnancy was made. Robertson, *supra* note 118, at 442. This then, would permit intrusion prior to the third trimester.

162. "Good prenatal care is vital for the . . . delivery of a healthy baby from a healthy mother." WILLIAMS *OBSTETRICS*, *supra* note 1, at 245.

163. 410 U.S. 113 (1973).

164. Civil liability is "[a] sum of money assessed either as general, special or liquidated damages" in a civil action brought to redress private injury. BLACK'S, *supra* note 46, at 223. In contrast, criminal liability charges a violation of criminal law and involves penal damages. *Id.* at 336-37.

on a novel interpretation of child abuse and neglect statutes.<sup>165</sup> In order to create this liability, however, a child as defined in these statutes would have to be extended to include fetuses.<sup>166</sup> Some courts have already demonstrated a willingness to include the unborn in the definition of a child.<sup>167</sup>

The state of California recently implemented this interpretation in a case where a woman was accused of contributing to the death of her newborn, which constituted a criminal misdemeanor.<sup>168</sup> She was charged with failing to "furnish necessary medical attendance" to the fetus, under a statute normally used to collect child support.<sup>169</sup> The charges provided that the woman failed to follow her doctor's instructions.<sup>170</sup> These instructions were to abstain from illegal drugs, to avoid sexual intercourse and to immediately call the hospital if she began to hemorrhage.<sup>171</sup> Although the case was dismissed, it shows a willingness to try to expand fetal rights into the area of criminal law.

Child abuse and neglect statutes have already been successfully enforced in order to grant custody of a fetus to the state. In *Hoener v. Bertinato*,<sup>172</sup> when an unborn child's parents refused a blood transfusion necessary to save the fetus' life, custody of the fetus was granted to the state under a child abuse and neglect statute.<sup>173</sup> In *Hoener*, the New Jersey Juvenile Court granted custody prior to birth.<sup>174</sup> Nevertheless, the transfusion did not occur until birth.<sup>175</sup>

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165. Although definitions of child abuse vary, most definitions involve sexual abuse or "nonaccidental physical or mental injury." Myers, *supra* note 23, at 24-25. Neglect involves unintentional, as well as intentional acts or omissions. *Id.* at 25-26. See also *Wallace v. Labrenz*, 411 Ill. 618, 624, 104 N.E.2d 769, 773 (1952) ("neglect . . . is the failure to exercise the care that the circumstances justly demand. It embraces willful as well as unintentional disregard of duty.").

166. "The only limitation expressed in the [child abuse and neglect] statutes is at the upper end of the age range. . . . It must be admitted, however, that legislators probably were not thinking of unborn children when they passed such statutes." Myers, *supra* note 23, at 26.

167. See, e.g., *People v. Yates*, 114 Cal. App. 782, 298 P. 961 (1931) (father's duty to provide child with necessities included unborn child).

168. See *Is Ignoring M.D. Criminal?* 73 A.B.A.J. 23 (1987) [hereinafter A.B.A.J.].

169. *Id.* See also CAL. PENAL CODE § 270 (West 1970) (Supp. 1987).

170. The woman had a condition known as placenta previa, which can result in fetal death if appropriate precautions are not taken. A.B.A.J., *supra* note 168, at 23.

171. The charges state that the woman used marijuana and amphetamines during the pregnancy. *Id.* She also waited 12 hours to call the hospital, after she began to hemorrhage. *Id.* Furthermore, after she began to hemorrhage, she engaged in sexual intercourse. *Id.*

172. 67 N.J. Super. 517, 171 A.2d 140 (1961).

173. *Id.* The parents refused the transfusion on religious grounds, because they were Jehovah's Witnesses. *Id.* at 519, 171 A.2d at 142.

174. "[S]tatute is applicable . . . even though the child is not yet born." *Id.* at 525, 171 A.2d at 145.

175. The transfusion was to be given immediately upon birth. *Id.* at 519, 171 A.2d at 141. The hearing was held prior to birth, in order to avoid an emergency court hearing immediately after birth. *Id.* at 525, 171 A.2d at 144.

The question, then, remains whether compulsory medical treatment *in utero* can be enforced through the implementation of child abuse and neglect statutes.<sup>176</sup>

Although the state has a legitimate interest in ensuring that a fetus is not neglected while in the womb, the use of criminal liability for prenatal care is an impermissible extension of the *parens patriae* interest. Criminal sanctions would undermine the doctor-patient relationship, making it less likely that women would confide in their doctors.<sup>177</sup> This is because doctors would probably be the ones responsible for reporting fetal abuse or neglect.<sup>178</sup> If women did not confide in their doctors, fearing criminal liability, the doctor, in turn, would not be able to provide the best prenatal care.<sup>179</sup> As in the state intervention situation, the attempt to help the fetus would result in more harm than good.

## VI. CONCLUSION

All children should have the right to begin life free from preventable defects and deformities. With the increased general knowledge concerning the causes of certain defects, as well as the greater availability of *in utero* surgery, women now, more than ever, can take steps to insure that their fetus will be healthy. Women today have access to a wide variety of information concerning substances that are or may be harmful to the developing fetus. Consequently, all mothers should avoid these substances. A developing fetus should enjoy the best prenatal care possible.

The answer to inadequate prenatal care, however, cannot be found through state intervention or the imposition of liability, whether civil or criminal. The imposition of civil liability will not further a child's right to be born with a sound mind and body. Civil liability compensates the child who is injured when he is a fetus, but cannot adequately prevent the injury. Likewise, the enforcement of prenatal care through criminal liability provides an inadequate solution. The use of criminal sanctions would discourage mothers from being honest with their doctors and would make the doctor an ad-

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176. For a discussion of compulsory *in utero* medical treatment, see Lenow, *supra* note 3.

177. See A.B.A.J., *supra* note 168, at 23 ("you would be a damn fool to walk into a physician's office and tell him that you have done drugs or have not followed his medical advice.") (quoting defense attorney Richard Boesen).

178. See Doudera, *supra* note 14, at 44. Doudera asks: "[S]hould physicians and other health care providers who recognize or should have recognized that a fetus is being, or that a newborn has been, injured as a result of the mother's conduct have an obligation to report the abuse?"

179. If a woman conceals critical information from her doctor, she may receive inadequate prenatal care. "Bad prenatal care may be worse than none." WILLIAMS OBSTETRICS, *supra* note 1, at 245 (emphasis in original).

versary, thus undermining the doctor-patient relationship. Similarly, permitting state intervention prior to fetal viability, when intervention would be most beneficial, would impermissibly encroach on a mother's constitutional rights. The solution to inadequate prenatal care must be found in the mother herself, through education and through access to medical services.

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