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The "Fetal Protection" Wars: Why America Has Made the Wrong Choice in Addressing Maternal Substance Abuse - A Comparative Legal Analysis

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The “Fetal Protection” Wars: Why America Has Made the Wrong Choice in Addressing Maternal Substance Abuse - A Comparative Legal Analysis

INTRODUCTION

I. Two Decades of Prosecuting Pregnant American Women.....

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

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

 C. The Current Wave of Prosecutions.....

 1. *Homicide Prosecutions*.....

 2. *New Child Abuse and Child Endangerment Prosecutions*.....

 3. *Summary Observations*.....

II. How American Law Promotes the Fetus as a Separate Legal Entity.....

The Need for Different Priorities to Protect Children.....

III. Other Nations’ Approach to Fetal Protection and Child Health.....

 A. Canada.....

 1. The Legal Framework Regarding Fetuses.....

 a. *The Criminal Law*

 b. *Tort Liability and Civil Commitment*.....

 c. *Abortion Law*.....

 d. *Assisted Reproductive Technology*.....

 2. Health Care Access.....

 3. Social and Economic Support for Children and their Families.....

 B. France.....

 1. The Legal Framework Regarding Fetuses.....

 a. *Introduction*.....

 b. *Criminal Law*.....

 (1) *Homicide Prosecutions*.....

 (2) *Prosecutions for Other Fetal Harm*.....

 c. *Civil Protection of the Embryo and Fetus*.....

 (1) *Assisted Reproductive Technology*.....

 (2) *Patients’ Right to Refuse Unwanted Medical Treatment*

 (3) *Civil Actions for Causing Harm in Utero*.....

(4). <i>Abortion Law</i>	
2. The Health Care System and Efforts to Improve Children’s Health.....	
(a) <i>Efforts to Reduce Harm to Children Because of Alcohol Exposure in Utero</i>	
(b) <i>The French Health Care System in General</i>	
3. Social and Economic Support for Children and Their Families.....	
IV. Speculation on the Reasons for Different Treatment of the Fetus in American, Canadian, and French Law.....	
<i>The Strength of the National Government</i>	
<i>The Source of Abortion Rights</i>	
<i>Universal Health Care – or Not</i>	
<i>Different Prosecutorial Systems</i>	
V. Recommendations for Change in American Law.....	
<i>End Criminal Prosecutions</i>	
<i>Reform the American Health Care System</i>	
<i>Provide Effective, Non-Stigmatizing Drug Treatment</i>	
<i>Provide Paid Maternity and Parenting Leaves and Other Social Supports</i>	
CONCLUSION.....	

**The “Fetal Protection” Wars: Why America Has Made the Wrong Choice
in Addressing Maternal Substance Abuse - A Comparative Legal Analysis**

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. There is no reliable evidence linking stillbirths to methamphetamine use,¹ 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.² This crusade began in the late 1980s, with the prosecution of

¹ Ms. Hernandez was initially charged with first degree murder and faced a life sentence. After having being 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, *Is Meth Murder Charge Useful?*, The Oklahoman (Oklahoma City, OK), Dec, 19, 2007.

² 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*, UPI May 27, 1989, BC cycle. Since then, at least 25 states have prosecuted women for murder, manslaughter, child abuse or endangerment, or drug delivery to a minor. Lynn Paltrow, *Punishing Pregnant Women for Their Behavior During Pregnancy*, at www.crlp.org/pub_bp_punwom_page3.html. The following cases are those for which either a published decision, other court document, or newspaper article is available. *State v. Reinesto*, 894 P.2d 733 (Ariz. Ct. App. 1995); *Reyes v. Superior Court*, 141 Cal. Rptr. 912, (1977), *Jaurigue v. People*, No. 18988, slip op. (Cal. Super. Ct. Aug. 21, 1992); *People v. Stewart*, No. M508197, Transcript of Hearing (Cal. Mun. Ct. Feb. 26, 1987); *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, slip op. (Fla. Cir. Ct. July 23, 1990), *aff'd*, 602 So. 2d 995, 996 (Fla. App. 1992); *Hillman v. State*, 503 S.E. 2d 610 (Ga. Ct. App. 1998), *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992); *State v. Aiwohi*, 123 P. 3d 1210 (Haw. 2005); *People v. Bedenkop*, 252 Ill. App. 3d 419, 192 Ill. Dec. 163, 652 N.E.2d (1st Dist. 1993); *State v. Barnett*, No. 02D04-9308-CF-611, Order (Ind. Super. Ct. Feb. 11, 1994); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993); *Kilmon v. State*, 905 A.2d 306 (Md. Ct. App. 2006); *Commonwealth v. Pellegrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990); *People v. Hardy*, 471 N.W.2d 619 (Mich. 1991), *People v. Bremer*, No. 137619 (Mich. Ct. App. July 14, 1992), *People v. Cox*, No. 90-53454 FH, slip op. (Mich. Cir. Ct. July 9, 1990), *aff'd*, No. 131999 (Mich. App. Feb. 28, 1992); *State v. Lewis*, Case 03CR113048, Chariton County, Missouri Circuit Ct.; *State v. Arandus*, No. 93072, slip op. (Neb. Dist. Ct. June 17, 1993); *New Jersey v. Barker*, No. 96-02-605, Tr. of hearing at 30-41 (N.J. Super. Ct. Jan. 3, 1997); *People v. Morabito*, slip op. (N.Y. Ont. Cty. Ct. Sept. 24, 1992), *aff'g*, 580 N.Y.S.2d 843 (Geneva City Ct. Jan. 28, 1992), *People v. Morabito*, 580 N.Y.S.2d 843 (Geneva City Ct. Jan. 28, 1992), *aff'd*, slip op. (N.Y. Ont. Cty. Ct. Sept. 24, 1992); *Sheriff, Washoe County, Nevada v. Encoe*, 110 Nev. 1317, 885 P.2d 596 (Nev. 1994); *State v. Inzar*, Nos. 90CRS6960, 90CRS6961, slip op. (N.C. Super. Ct. Apr. 9, 1991), No. 9116SC778 (N.C. App. Aug. 30, 1991); *State v.*

women who used cocaine while pregnant for crimes like child endangerment and delivery of drug to a minor, but 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 populations of poor women whose lives are highly dysfunctional or who are addicted to alcohol and other drugs, only in the United States are these women treated as criminals or civilly committed based on their conduct while pregnant. Only in the United States do prosecutors take the position that embryos and fetuses should be protected as full human beings while in utero. 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.

Gray, 584 N.E.2d 710 (Ohio 1992), *State v. Andrews*, No. JU 68459, slip op. (Ohio C.P. June 19, 1989); *State v. Alexander*, No. CF-92-2047, Transcript of Decision (Okla. Dist. Ct. Aug. 31, 1992); *Commonwealth v. Kemp*, No. 114-Pitt-1993, Judgment, slip op. (Pa. Super. Ct. Feb. 22, 1994), affg, 75 Westmoreland L.J. 5, slip op. (Pa. Ct. C.P. Dec. 16, 1992), *Commonwealth v. Kemp*, 75 Westmoreland L.J. 5, slip op. (Pa. Ct. C.P. Dec. 16, 1992), aff’d 643 A.2d 705 (Pa. Super. Ct. 1994); *State v. Eagle Hawk*, 411 N.W.2d 120 (S.D. 1987); *Ward v. State*, 2006 Tex. App. LEXIS 2371 (Tex. Ct. App. March 29, 2006), *Collins v. State*, 890 S.W.2d 893 (Tex. Ct. App. 1994); *Commonwealth v. Wilcox*, No. A-44116-01, slip op. (Va. Dist. Ct. Oct. 9, 1991). *Commonwealth v. Smith*, No. CR-91-05-4381, slip op. (Va. Cir. Ct. Sept. 16, 1991), *Commonwealth v. Turner*, No. 91-054382, slip op. (Va. Cir. Ct. Sept. 16, 1991); *State v. Dunn*, 916 P.2d 952 (Wash. App. 1996); *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. App. 1999); *Judge Drops ‘Meth Baby’ Charge*, Casper (Wyoming) Star-Tribune, Sept. 29, 2005, *State v. State v. Osmus*, 276 P.2d 469 (Wy. 1954). South Carolina is the only state in which convictions of pregnant drug users have been upheld. *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997) (upholding child abuse conviction under child endangerment statute for prenatal drug use); *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003).

What is noteworthy about the women targeted by “fetal protection” warriors are the many ways in which the women are already marginalized. In addition to their to alcohol or drug addiction, the overwhelming majority of these women have histories of mental illness and/or mental retardation, and there is significant evidence that much of their drug use is an attempt to self-medicate for depression or other illnesses.³ These women are disproportionately women of color and almost always living in poverty.⁴ In many cases, they are victims of childhood sexual abuse and current domestic violence.⁵

In this paper 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, demonstrating how the fetus has increasingly been given 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 not only the right to reproductive freedom but also the right to control other aspects of their economic and private lives. I will contrast the fetal protection movement’s focus on denying abortion access, creating crimes for fetal harm, and protecting embryonic and fetal life in other ways, with the failure of American government to provide

³ See Women’s Law Project, *Responding to the Needs of Pregnant and Parenting Women with Substance Use Disorders in Philadelphia* 4, 6 (Sept. 2002); 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) (hereinafter *Pregnancy, Domestic Violence, and the Law*).

⁴ Dorothy E. Roberts, *Killing the Black Body OR Unshackling Black Motherhood*, 95 Mich. L. Rev. 938, 939 (1997), Laura Gomez, *Misconceiving Motherhood: Legislators, Prosecutors and the Politics of Prenatal Drug Exposure* 118 (1997).

⁵ *Id.* See also Women’s Law Project, *supra*, and Lynn R. Paltrow, *Pregnant Drug Users, supra*. 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. 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, *Valley Voice: Pregnant Women Face Increased Violence*, Desert Sun (Palm Springs, CA), June 28, 2007, at 6B.

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. I will offer 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: America’s considerable reliance on constitutional litigation as a means of achieving law change, America’s federal system of government, which provides more opportunities for different legal rules to operate concurrently within the same nation, the United States’ unique system of locally elected prosecutors, and the lack of a system of government-funded universal health care. Finally, I will suggest ways in which American law could be reformed 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. The Risks of Maternal Drug Use

A focus on maternal behavior as the guarantor of successful childrearing is not new. Ever since Jean Jacques Roseau penned Emile, mothers have been seen as essential to creating healthy citizens and ensuring social harmony.⁶ In the 1950s, American women were supposed to be at home full time to nurture their children. 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

⁶ In *Emile*, Jean Jacques Rousseau urged French women to take up their duties to breastfeed their infants. He wrote: “Do you want to bring everyone back to his first 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 husbands and fathers again.” *Emile (or On Education)*, trans, A. Bloom (1979)), cited by 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).

other drugs) while pregnant. Approximately 5-6% of American women use illegal drugs during pregnancy, while 25% use alcohol.⁷ Drug use is common across all ethnic groups and classes; although black women are ten times more likely to have their drug use reported to prosecutors or child welfare authorities.⁸ 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.⁹

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.¹⁰ Even infants born to mothers who drink moderately while pregnant may experience deficits in IQ, learning, and attention,¹¹ but the debate continues about whether minimal alcohol consumption during pregnancy is dangerous.

It is less clear whether, and to what extent, other drugs affect fetal development. Some researchers have determined that maternal cocaine use may lead to subtle, long-lasting neurological deficits, including “the ability to habituate or self-regulate” and small deficits in IQ and language ability,¹² but 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.”¹³

⁷ *Addiction Medicine: Psychopathology of Pregnant Women with Alcohol and Drug Dependencies Examined*, Women’s Health Weekly, Aug. 23, 2001, at 8 (hereinafter *Addiction Medicine*).

⁸ Ira Chasnoff, *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, 1206 (1990) (observing that black women were ten times as likely as white women to be reported by their physicians for using drugs, despite equal rates of drug use).

⁹ See, e.g., National Conference of State Legislatures, *States Responses to Maternal Drug and Alcohol Use: An Update* (2000), available at www.ncsl.org/programs/health/forum/maternalabuse.htm, and Janet R. Hankin, *Fetal Alcohol Syndrome Prevention Research*, National Institute on Alcohol Abuse and Alcoholism’s Alcohol Research and Health (August 2002).

¹⁰ *Addiction Medicine*, supra n. [7].

¹¹ Steven J. Onderama, Sharon M. Simpson, Elizabeth V. Brestan, Martin Ward, *Prenatal Drug Exposure and Social Policy: The Search for an Appropriate Response*, 5 (No. 2) *Child Maltreatment* 93, 95-97 (2000) (hereinafter *Prenatal Drug Exposure*). *Prenatal Drug Exposure* supra, at 95-97.

¹² *Id.*

¹³ National Conference of State Legislatures, *States Responses to Maternal Drug and Alcohol Use: An Update* (2000), supra n. [9].

Methamphetamine is the illegal drug *de jour*, which is affecting communities across the United States. It is portrayed 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.¹⁴

Even legal drugs are now coming under heightened public scrutiny. Tobacco use during pregnancy poses risks similar in kind to those of cocaine, although the risks are of lower magnitude. Of course, many more women smoke while pregnant than use cocaine.¹⁵ Caffeine, a widely used drug, has recently received substantial media attention, although the evidence of its harmful effects is quite limited and sharply contested.¹⁶

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.¹⁷ Because it is difficult to untangle the complex

¹⁴ See, e.g., Dana Stone, *supra* n. 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,’ available at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news/bbc.co.uk/2/hi/americas/475719.s> (5/14/2006). Others have criticized this media coverage as sensational and poorly informed. See, e.g., Daniel Thigpen, *Case of Lodi Baby Raises Difficult Legal Dilemma*, The Record (Stockton, CA), Oct. 14, 2007 (discussing a lack of medical data showing that methamphetamine causes developmental problems in children), and *Meth and Myth: Top Doctors, Scientists and Specialist Warn Mass Media on “Meth Baby” Stories*, available at <http://stopthedrugwar.org/chronicle/397/methandmyth.shtml> (July 29, 2005); see also Ryan S. King, *The Next Big Thing? Methamphetamine in the United States 16-28* (The Sentencing Project June 2006) (asserting that the media have failed utterly to accurately report the science and epidemiological data surrounding methamphetamine addiction), and Canadian Broadcasting System (CBC) News, *Newborn Hair Signals Expectant Mothers’ Meth Use: Study*, CBC News, Oct. 31, 2006 (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).

¹⁵ N. Kistin, A. Handler, F. Davis, and C. Ferre, *Cocaine and Cigarettes: a Comparison of Risks*, 10 (3) Paediatric Perinatal Epidemiology 269 (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).

¹⁶ 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, p A10.

¹⁷ 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

causal relationships between maternal drug use and other contributors to poor birth outcomes, it is 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 (A.R.T.). 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.¹⁸ One out of eight American children is born premature and low-birthweight, with the rate of pre-term births rising 30% since 1981.¹⁹ A large percentage of these children are the product of A.R.T. Few commentators have suggested that the mothers who use A.R.T. should be criminalized or otherwise compelled to change their behavior to reduce the possibility of harm to their offspring.²⁰ Women (and their spouses and partners) who use A.R.T. are permitted complete choice in terms of the particular technology they use, as well as whether they will have multiple

high “[r]ates of homelessness, poverty, unemployment, and prostitution ... [and] histories of emotional, physical, and sexual abuse.” *Addiction Medicine*, *supra* n. [7]. See also Steven J. Onderama, Sharon M. Simpson, Elizabeth V. Brestan, Martin Ward, *Prenatal Drug Exposure*, *supra*, and Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure*, 285 *JAMA* 1613, 1619 (2001).

¹⁸ *Id.*, see also Jennifer L. Rosato, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them From Harm?*, 2004 *Utah L. Rev.* 57, 60, 62-66, 69-70, 77-80 (2004) (summarizing data showing that up to 10% of children born using ART suffer some adverse consequences).

¹⁹ Press release, Institute of Medicine, *Preterm Birth: Causes, Consequences, and Prevention*, July 13, 2006 (hereinafter *IOM Report on Preterm Birth*), available at <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=11622>. The Report defines “preterm” as any birth that occurs at less than 37 weeks of pregnancy (a full-term pregnancy is 38-42 weeks post-conception).

²⁰ See, e.g., Tarun Jain, Stacey A. Missmer, and Mark D. Hornstein, *Trends in Embryo-Transfer Practice and in Outcomes of the Use of Assisted Reproductive Technology in the United States*, (noting the adverse results of the high multiple birth rate in the United States, but observing that the United States 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* (criticizing the regulatory hands-off position of states and the federal government). [add Dorothy Roberts]

fertilized eggs implanted and/or engage in selective embryo reduction to reduce the chances of multiple births.²¹

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.²² In the late 1980s and early 1990s, as 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. 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, and emphasized the separation of powers problem inherent in having judges and prosecutors create law going beyond that enacted by the legislature.²³ 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.²⁴ Some legislatures, like Missouri’s, concluded that the problem of pregnant

²¹ Clinics Try to Lower the Odds of Multiple Births, N.Y. Times, Feb. 19, 2008 at F1 and F6. 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 ... double strollers...” ignoring the 15% of low birthweight infants who do not survive. *Id.*

²² See cases noted in n. [], *supra*.

²³ 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.

²⁴ 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 (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.” *Id.* at 78, n. 14, and 82-

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.²⁵

C. The Current Wave of Prosecutions

1. Homicide Prosecutions

However, in the late 1990s, prosecutors in six states began 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 woman, Deborah J.Z., with attempted first-degree intentional homicide²⁶ and first-degree reckless injury,²⁷ based on her comments, made following going into labor at a bar, that she would drink herself and her fetus to death.²⁸ The Wisconsin Supreme Court condemned the woman's behavior but

85). 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.

²⁵ State v. Wade, 232 S.W.3d. 663, at 666 (Mo. Ct. App. 2007), discussing, *inter alia*, Mo. Rev. Stat. § 1.205, which provides, simultaneously that “human life 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.” Mo. Rev. Stat. § 1.205 (1) and (4), respectively.

²⁶ At the time, Wisc Stat. 940.01, first-degree intentional homicide, provided that: “(a) ... 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).

²⁷ At the time, Wisc. Stat. § 940.23, “Reckless injury,” provided that: “(a) Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class D felony.”

²⁸ 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.’”

barred the criminal prosecution. Relying on the principle of legality, the court ruled that under Wisconsin's "born alive" rule, a fetus was not a human being,²⁹ and thus the attempted homicide statute did not apply. The court identified several problems with the prosecution. 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.³⁰ 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 the 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 or abusing legal medications.... [or] 'the failure to secure adequate prenatal medical care and overzealous behavior, such as excessive exercising or dieting.'"³¹

In South Carolina, by contrast, prosecutors have engaged in an ever more strident campaign against pregnant women, with conviction and harsh sentences imposed in many

Deborah J.Z. also expressed fear about the pain of giving birth and the baby's race. *State v. Deborah J.Z.*, 596 N.W.2d 490, 491 (Wis. 1999). The child was born with a blood alcohol level of .199 and physical features showing fetal alcohol effects. *Id.*

²⁹ *Id.* at 496. Wisconsin law defined a "human being" as "one who has been born alive." Wisc. Stat. s. 939.22 (16). 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. *Id.* at 494-95.

³⁰ 596 N.W.2d at 495. 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 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. 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. Marilyn L. Poland, Mitchell P. Drombrowski, Joel W. Ager, and Robert J. Sokol, *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 *Drug and Alcohol Dependence* 199, 201-02 (1993).

³¹ *Id.*, citing *Hillman v. Georgia*, 503 S.E.2d 610, 613 (Ga. Ct. App. 1998).

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*.³²

In 1999, Regina McKnight became the first American woman to be charged with murder³³ after her child was stillborn. McKnight was a homeless African-American woman with an IQ of 72 who was addicted to crack cocaine.³⁴ After she went into premature labor, her child was stillborn. McKnight and her child were tested for drugs and cocaine metabolites were found in both their systems.³⁵ 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.³⁶ The South Carolina Supreme Court upheld the conviction, rejecting defendant's argument that a homicide prosecution violated the due process principle of legality. The court failed to address the essence of her contention - that her actions could not constitute homicide without an express legislative declaration that a fetus could be considered a child for purposes of the penal law. Instead, the court cited its prior decisions upholding women's convictions for felony child abuse based on their drug use while pregnant, saying that these decisions provided ample notice to meet due process concerns.³⁷ The court also rejected McKnight's

³² 532 U.S. 67 (2001) (rejecting an asserted "special needs" exception to the Fourth Amendment).

³³ *State v. McKnight*, 576 S.E.2d 168 (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."

³⁴ Robyn E. Blummer, *Moralists' New Target: Pregnant Women*, *St. Petersburg (Florida) Times*, Aug. 10, 2003, p. 7D.

³⁵ *State v. McKnight*, 576 S.E. 2d 168 171, 173.

³⁶ The court suspended the sentence upon service of twelve years in prison. *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003).

³⁷ *Id.* at 175-76, citing *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997). The court also rejected Ms. McKnight's argument McKnight's arguments that the evidence was insufficient to establish either

constitutional arguments based on her right to privacy and her Eighth Amendment proportionality argument.³⁸

Prosecutors have also brought homicide charges in Hawaii, Missouri, Oklahoma, and Utah. 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.³⁹ The indictment was not brought for two years, after Ms. Aiwohi had successfully completed a drug treatment program. The prosecutor and the trial 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.⁴⁰ After conviction, Ms. Aiwohi received a twenty year prison sentence, which was suspended on condition that she comply

causation or the necessary mens rea of “extreme indifference to the value of human life. It found that the mens rea was met by its precedents upholding felony child abuse convictions for maternal drug use while pregnant, declaring that both she and other women in South Carolina were thus on notice that the use of cocaine while pregnant causes fetal harm. The court also found sufficient evidence to send the case to the jury on the causation question, despite evidence that in approximately 40% of stillbirths it is impossible to make a medical judgment about the cause of death. *Id.* at 172-73.

³⁸ McKnight asserted that a twenty year prison term for the stillbirth of a child was disproportionate, given that the maximum sentence for a woman who 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 murderers of children in other states. *Id.* at 177. The court declined to consider the applicability of the abortion statute was applicable, saying that she had not preserved the issue for appellate review. *Id.* at 174.

³⁹ Decision in *State v. Aiwohi*, by Circuit Judge Michael Town, Aug. 25, 2004, available at http://www.courts.state.hi.us/page_server/LegalReferences/73DFB8859867A628EAE7AB3DC5.html.

⁴⁰ *Id.*, denying the defendant’s motion to dismiss, According to the prosecutor, the indictment was a necessary “wake-up call,” so that “we will never see a case like this again.” Ken Kobayashi, *Mother Gets Probation in Ice Death*, Honolulu Advertiser, Aug. 26, 2004, p.1B. The trial judge concurred, ruling 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.” The judge rejected any suggestion that Aiwohi’s addiction could be a mitigating factor, declaring that, [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.” Opinion available at http://www.courts.state.hi.us/page_server/LegalReferences/73DFB8859867A628EAE7AB3DC.html.

with the terms of probation for the next ten years.⁴¹ On appeal, the Hawaii Supreme Court overturned the conviction on legality grounds.⁴²

Yet even after the convictions of *McKnight* and *Aiwobi*, 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 stillbirth of her son. Like Ms. McKnight, Ms. Rowland was a vulnerable woman without an adequate support system. Her own mother died soon after she was born, and Ms. Rowland had a long history of serious mental illness and substance abuse.⁴³ When she became pregnant with twins, she decided to give up the infants for adoption. She moved to Utah when the adoption agency told her that Utah's less demanding adoption laws made the process easier. While awaiting delivery, Ms. Rowland lived on disability payments and a \$100 weekly stipend from the adoption agency and used cocaine and tobacco.⁴⁴ 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.⁴⁵ After Ms. Rowland delivered a stillborn son and a living daughter, she was charged with murder. 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" necessary for murder.⁴⁶ The

⁴¹ *Id.*

⁴² The Court held, in a rather technical opinion, that the attendant circumstance that the victim be a person at the time of the defendant's conduct was an essential element of manslaughter, and thus her conviction could not stand *State v. Aiwohi*, 109 Haw. 115, 128, 123 P. 3d 1210, 1223 (Haw. 2005).

⁴³ Linda Thomson and Pat Reavy, *Rowland's Out of Jail, Heading to Indiana*, *Deseret Morning News* (Salt Lake City, Utah), Apr. 30, 2004.

⁴⁴ Katha Pollitt, *Pregnant and Dangerous....*, 278 (#16) *The Nation* 9 (Apr. 26, 2004).

⁴⁵ 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. Linda Thomson and Pat Reavy, *supra n. [42]*; see also Pamela Manson, *Mother is Charged in Stillborn Son's Death...*, *Salt Lake Tribune* Mar. 12, 2004.

⁴⁶ Linda Thomson, *Rowland Case Is Called 'Political,'* *Deseret Morning News* (Salt Lake City, Utah) March 13, 2004.

prosecutors argued that Ms. Rowland had refused the surgery because of vanity,⁴⁷ and alleged, contrary to well-established principles of informed consent,⁴⁸ that Ms. Rowland did not have a right to decline medical treatment.⁴⁹ After three months in jail, Rowland entered into a plea agreement by which she pleaded guilty to two counts of felony child endangerment.⁵⁰

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,⁵¹ Jamie Lee Burroughs,⁵² and Lorraine Patrick⁵³ in South Carolina, Theresa Hernandez in Oklahoma,⁵⁴ and Sheri Lohnstein in Missouri.⁵⁵

⁴⁷ Associated Press, *Caesarean Refusal Leads to Murder Charge*,

<http://www.CNN.com/2004/US/West/03/11/mother.charged.ap>. (Mar 12, 2004).

⁴⁸ 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).

⁴⁹ Linda Thomson, *Mother Is Charged in Stillbirth of a Twin*, *Deseret Morning News* (Salt Lake City, Utah) March 12, 2004.

⁵⁰ Ms. Rowland was sentenced to two concurrent five year prison terms, with 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. Jacob Santini, *supra*, Doug Smith and Linda Thomson, *Rowland in New Trouble*, *Deseret Morning News* (Salt Lake City, Utah) May 27, 2004.

⁵¹ 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. This information was obtained through a national judicial website, available at: <http://www.judicial.state.sc.us/caseSearch/caseSearch.cfm> Ms. Arrowood’s information was found at http://www.13th-judicial-circuit.org/Central_Index_Details_Crim.asp?tb_Casenum=I675718&tb_CourtAgency=39001&tb_LastName=Arrowood&tb_FirstName=Jennifer&tb_SeqNum=0&tb_County=39&tb_CourtType=G

⁵² In 2006 Ms. Burroughs was charged with homicide by child abuse. The case is still pending. Kelly Marshall Fuller, *Test for Drugs Sends Woman Back to Jail*, *The Sun News* (Myrtle Beach, S.C.) Apr. 24, 2007. See information available at: <http://secure.georgetowncountysc.org/publicindex/PICaseDetails.aspx?County=22+&Casenum=H750929&CourtType=G&CaseType=Criminal&CourtAgency=22001&LastName=Burroughs&FirstName=Jamie>

⁵³ Ms. Patrick was charged in October 2007 with homicide by child abuse. Her case is still pending. See information available at: <http://www.lex-co.com/applications/scjdweb/publicindex/PICaseDetails.aspx?County=32+&Casenum=J820080&CourtType=G&CaseType=Criminal&CourtAgency=32001&LastName=Patrick&FirstName=Lorraine>.

⁵⁴ See sources cited in note 1, *supra*.

⁵⁵ Tim Bryant, *Mother Can’t Be Prosecuted in Baby’s Death, Lawyer Argues*, *St. Louis Post-Dispatch*, Oct. 16, 2007, p. B1; Kelly Wiese, *Missouri Lawmakers Offer Bills on Courts, Taxes, Alcohol for ’08*, *Kansas City (MO) Daily Record*, Dec. 4, 2007.

2. New Child Abuse and Child Endangerment Prosecutions

While prosecutors in some states were pursuing homicide charges, prosecutors in other states, notably Maryland, Missouri, New Hampshire, New Mexico, Texas, and Wyoming, were bringing child abuse and child endangerment charges against women who used drugs while pregnant, invoking legal theories discredited more than a decade earlier.

In all cases, 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.⁵⁶ The case was dismissed because the relevant toxicology results were ruled inadmissible.⁵⁷ In 2005, also in Missouri, Janet Wade was also prosecuted for felony child endangerment, based on her use of marijuana and methamphetamine while pregnant. The state 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.⁵⁸ 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.⁵⁹

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

⁵⁶ Missouri Brief of Amici Curiae in *State v. Lewis*, Case 03CR113048, Chariton County, Missouri Circuit Ct.

⁵⁷ Personal Communication from Professor Jane Aiken, Washington University School of Law, and Jenean Thompson, counsel for Keila Lewis.

⁵⁸ 232 S.W.3d 663, 665-66 (Mo. Ct. App. 2007), citing Mo. Rev. Stat. § 1.205 (2).

⁵⁹ 232 S.W.3d 663, 665-66.

controlled substance to a minor.⁶⁰ The prosecutor asked local physicians to report women they suspected of drug use, and many complied.⁶¹ 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.⁶²

In 2004, a Wyoming prosecutor charged Michelle Foust with causing a child to ingest methamphetamine. A judge dismissed the indictment, ruling that a fetus was not a child under the law.⁶³ 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. Their convictions were reversed in 2006 by the Maryland Court of Appeals, with the court concluding that the Maryland legislature had not made this conduct criminal.⁶⁴ 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. In 2006 the New Mexico Court of Appeals reversed her conviction, holding that the New Mexico legislature

⁶⁰ The new Texas law, Senate Bill 319, Act of May 31, 2003, 78th Leg., R.S., 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.” The law also redefined death to “include... for an individual who is an unborn child, the failure to be born alive.” Tex. Atty. Gen. Opinion No. GA-0291 (January 5, 2005). 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. News from Lynn Paltrow, Executive Director of National Advocates for Pregnant Women, http://realcostofprisons.org/blog/archives/2005/01/news_from_lynn.html.

⁶¹ September 22, 2003 Letter from Rebecca King, 47th District Attorney, available at http://www.oag.state.tx.us/opinions/requests_ga/RQ0250GA.pdf.

⁶² Ward v. State, 188 S.W.3d 874, 876 (Tex. Ct. App. Mar. 29, 2006) and Rhonda Tulane Smith v. State, 2006 Tex. App. LEXIS 2370 (Tex. Ct. App. Mar. 29, 2006), an unpublished opinion. 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.” *Id.*

⁶³ *Judge Drops ‘Meth Baby’ Charge*, Casper (Wyoming) Star-Tribune, Sept. 29, 2005; AP Alert, *Woman Charged with Using Meth While Pregnant Arrested Again*, AP May 2, 2005.

⁶⁴ Kilmon v. State, 905 A.2d 306 (Md. Ct. App. 2006).

had not intended a “fetus” to be a “child” within the meaning of the child abuse statute.⁶⁵ 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.⁶⁶ These charges were dropped when Ms. Fernandez pleaded guilty to other charges and agreed to enter a drug treatment program.⁶⁷

3. Summary Observations

What can we conclude about the continuing, intensified prosecution of women for their drug and alcohol use while pregnant? Although, with the exception of South Carolina, all of the indictments or convictions have eventually been declared impermissible or unjustified, prosecutors appear undaunted. What are the reasons for their behavior? It could be that these prosecutors are motivated simply by career ambitions, and this article will later consider some characteristics of the American prosecutorial system which may explain the difference between American prosecutors and their Canadian and French counterparts. It also appears that some prosecutors are legitimately concerned about in utero drug exposure,⁶⁸ and hope to solve the problem by publicly pillorying the women involved. In addition, the American federal system provides multiple opportunities for new legal

⁶⁵ *State v. Martinez*, 137 P.3d 1195 (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.

⁶⁶ *Fetal Drug Case in Nashua Expected to Set Precedent*, The Union Leader (Manchester, N.H.), Aug 1, 2006.

⁶⁷ Albert McKeon, *County Drops Endangerment Case*, The Telegraph (Nashua, N.H.), Dec 20, 2006.

⁶⁸ 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.” *Judge Drops ‘Meth Baby’ Charge*, Casper (Wyoming) Star-Tribune, Sept. 29, 2005.

approaches to be tried out in the “laboratory” of the states,⁶⁹ where the maxim, “If at first you don’t success, try, try again” may govern.

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 much substance abuse, including domestic violence, mental illness, poverty, and lack of access to health care. 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.⁷⁰ New research on the nature of addiction suggests that, like many other illnesses, substance abuse is caused by a confluence of genetic, biological, and environmental factors, and can neither be treated nor made to disappear simply by punishing those who suffer from substance abuse as criminals.⁷¹

Further, medical authorities, courts, 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 about having c-sections, eating properly, or exercising appropriately, could also be prosecuted

⁶⁹See the oft-quoted statement of Justice Brandeis in dissent in *New State Ice Co. v. Liebmann*, “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.” 285 U.S. 262, 311 (1932).

⁷⁰ See, e.g., Martha A. Jessup et al, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 22 J. Drug Issues 285, 291-292, 296-299 (2003); Kirsten Schamberg, *Prosecutors Targeting Pregnant Drug Users; Some Fear Women Will Shun Treatment*, Chicago Tribune, Nov. 23, 2003, at p. C1, Patrik Jonsson, *South Carolina Tests the Bounds of a Fetus’s Rights*, Christian Science Monitor, Jun. 28, 2001, at USA Section p. 1. See also Linda Thomson and Pat Reavy, *Rowland’s Out of Jail, Heading to Indiana*, supra n.[]; Matt Canham, *Proposed Law Targets Pregnant Drug Users...*, Salt Lake Tribune (Salt Lake City, Utah), Apr. 10, 2004.

⁷¹ See, e.g., Jeneen Interlandi, *What Addicts Need*, Newsweek, Mar. 3, 2008 (summarizing research).

under the same theories of maternal harm used in current prosecutions.⁷² 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 women targeted in the fetal protection crusade poor and/or racial minorities,⁷³ but the public reaction favoring such prosecutions is often characterized by undisguised antipathy to the women. Public commentary includes eugenic responses remarkably similar to Justice Holmes' infamous "three generations of imbeciles is enough"⁷⁴ comment in *Buck v. Bell*.⁷⁵

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 over recent years.⁷⁶ Civil suits, statutes, and regulatory initiatives have all sought to separate fetuses from the pregnant women whose bodies sustain them. 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

⁷² Associated Press, *Arrest in C-Section Case Alarms Women's Groups*, The Holland [Michigan] Sentinel, available at http://hollandsentinel.com/stories/031904/new_031904069.shtml.

⁷³ See, e.g., Dorothy E. Roberts, *Killing the Black Body OR Unshackling Black Motherhood*, *supra* n. 10, at 939, and Ira J. Chasnoff et. al., *supra* n. , at 1206.

⁷⁴ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

⁷⁵ See, e.g., the following blog entries responding to a news story 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 agree to use birth control. One blogger 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!!!!!" 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 preformed 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 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." Blog comments available at http://chronicle.augusta.com/stories/021907/met_117138.shtml#comments.

⁷⁶ For a fuller account of the broader legal context in which this fetal protection campaign has been waged, see my article, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 *Denver University Law Review* 537 (2006).

Children's Health Insurance Program (SCHIP).⁷⁷ These regulations redefined "child," from "an individual under 19 years of age"⁷⁸ to "an individual under the age of 19 *including the period from conception to birth.*"⁷⁹ This regulatory legerdemain was criticized as unnecessary, since Congress was already debating several bills that would permit illegal immigrant women who were pregnant, the ostensible target of this regulation, to be covered under Medicaid or SCHIP.⁸⁰ It seems clear that the regulation's real goal was to create a legal precedent for the principle that the law should treat fetuses as persons, with all rights that accompany that status.⁸¹

⁷⁷ SCHIP is a complement to Medicaid, SCHIP was 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 (v) et seq., provides health care insurance for the very poorest of American children; *see also* Barry R. Furrow, Thomas L. Greaney, Sandra H. Johnson, Timothy Stoltzfus Jost, and Robert L. Schwartz, *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. Barry F. 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 (Remarks of Joe Baker, Assistant to Gov. Eliot Spitzer, at New York City Bar Association Panel on New York Health Care, Feb. 7, 2008, New York, New York), 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. Donna Smith, *U.S. House Sustains Bush Veto of Health Bill*, NY Times Jan 23, 2008, available at http://www.nytimes.com/reuters/washington/politics-usa-congress-children.html?_r=2&sq...

⁷⁸ § 2110 of SCHIP, 42 U.S.C. 1397jj (c) (1).

⁷⁹ 42 C.F.R. § 457.10 (emphasis added).

⁸⁰ Cynthia Dailard, *New SCHIP Prenatal Care Rule Advances Fetal Rights At Low-Income Women's Expense*, *The Guttmacher Report on Public Policy*, Dec. 2002, at 3. Among the bills pending were the Mothers and Newborns Health Insurance Act of 2002, S724 (107th Cong., 1st Sess.), the Start Healthy/Stay Healthy Act of 2001, S. 1016 (107th Cong., 1st Sess.) and H.R. 3729 (107th Cong., 2nd Sess.), and the Immigrant Children's Health Improvement Act of 2001 (S.582) (107th Cong., 1st Sess.) and the Legal Immigrant Children's Health Improvement Act of 2001 (H.R. 1143) (107th Cong., 1st Sess.), all of which proposed to amend Medicaid and SCHIP to permit states to offer health care 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, 42 U.S.C. §§601 *et seq.*

⁸¹ *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).

Government lawyers have on occasion sought to civilly commit pregnant women, in order to impose “treatment” on the women and their fetuses,⁸² and have also pursued court orders mandating Caesarian sections.⁸³ 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.⁸⁴ More than thirty states permit civil commitment based on the use of alcohol and other drugs,⁸⁵ and several state laws explicitly authorize such

⁸² These include the case of Angela M.W., *State ex re. Angela M.W. v Kruzicki*, 561 N.W. 2d 729 (Wis. 1997), and Rebecca Corneau, a woman who belonged to a religious sect that did not practice Western medicine. Corneau 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). See Marilyn L. Miller, *Note: Fetal Neglect and State Intervention: Preventing Another Attleboro Cult Baby Death*, 8 *Cardozo Women’s L. J.* 71, 71 (2001).

⁸³ See, e.g., *Pemberton v. Tallahassee Mem’l Reg’l Med. Ctr, Inc.*, 66 F. supp. 2d 1247 (N.D. Fla. 1999) (dismissing women’s § 1983 civil rights action against a hospital which obtained a court order overriding Ms. Pemberton’s refusal to have a c-section) and *News...Husband to Challenge Court Order in Lawsuit over Wife’s Refusal of Caesarean Section*, *Penn. Law Weekly* Jan. 26, 2004, at 9; *New Questions about Childbirth Rights*, AP, May 19, 2004, available at http://keyetv.com/health_story_140110423.html. This article discussing the case of Amber Marlowe, who was the subject of an ex parte order to have a Caesarian section because her fetus weighed 11 pounds, despite her having delivered 6 very large children previously.

⁸⁴ See, e.g., American Medical Association, H-420.969, *Legal Interventions During Pregnancy*, declaring that “Judicial 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, available at http://www.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/H-420.969.HTM; American College of Obstetrics and Gynecology, *Patient Choice in the Maternal-Fetal Relationship*, in *Ethics in Obstetrics and Gynecology* (2d ed. 2004), available at 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”); American Academy of Pediatrics, Committee on Bioethics, *Fetal Therapy – Ethical Considerations* (after discussing the range of medical interventions to promote fetal health and the legal-ethical issues involved, concluding that “Under no circumstances should a physician physically intervene [to insist on medical treatment] without the explicit consent of the pregnant woman without judicial review....”), 103 *Pediatrics* 1061 (5 May 1999).

⁸⁵ Ala. Code. § 22-52-1.2 (2004), Alaska Stat. § 47.37.1990 (Michie 2004), Ark. Code Ann. § 20-64-815 (Michie 2004), Cal. Wel & Inst Code §3050 (Deering 2005), Colo. Rev. Stat. § 25-1-1107 (2004), Conn. Gen. Stat. §17a-685 (2004), Del. Code Ann. Tit. 16, §2212 (2005), D.C. Code Ann. §7-1303.04 (2004), Fla. Stat. Ch. 397.675 (2004), Ga. Code Ann §37-7-41 (2004), Haw. Rev. Stat. Ann. §334.60.2 (Michie 2004), Idaho Code §66-329 (Michie 2004), Ind. Code Ann. §12-23-11-1 (Michie 2004), Iowa Code §125.75 (2003), Kan. Stat. Ann. §59-29b54 (2003), La. Rev. Stat. Ann. §28.54 (2004), Mass. Ann. Laws ch. 123 §35 (Law. Co-op, 2005), Miss. Code. Ann. §41-30-27 (2004), Neb. Rev. Stat. Ann. §71-919 (Michie 2004), N.H. Rev. Stat. Ann. §135-C:127 (2004), N.M. Stat. Ann. §43-2-8 (2005), N.D. Cent. Code § 12.1-04.1-22 (2003), R.I. Gen. Laws § 21-28.2-3 (2004), S.C. Code Ann § 44-52-50 (Law. Co-op. 2004), South Dakota, Tenn. Code Ann. §33-5-403 (2004), Texas Health & Safety Code Ann. § 574.034 (Vernon 2004), Va. Code Ann §37.1-67.1 (Michie 2004), Wash. Rev. Code §70.96A.140 (2004), W. Va. Code Ann. § 27-5-2 (Michie 2004), Wis. Stat. § 51.15 (2004), Wyo. Stat. Ann. §25-10-110 (Michie 2004). Minnesota, Oklahoma, and South Dakota have involuntary commitment laws specifically for pregnant women who use drugs. Minn. Stat. §626.5561 (2004) Okla. Stat. tit. 43A §5-41- (2004) S.D. Codified Laws § 34-20A-70(Michie 2004).

actions against pregnant women.⁸⁶ 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,⁸⁷ denying pregnant women the right to self-determination and advance planning available to all other adults.

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.⁸⁸ Although the Florida courts ultimately rejected the suit, the case became a cause celebre in Florida. In Alabama, some trial judges have appointed lawyers to represent the “silent voice” of the fetus in cases in

⁸⁶ See, e.g., Wis. Stat. §§ 48.01, 48.02, 48.067, 48.203, 48.205, permitting the civil commitment of pregnant girls and women, dubbed “The Cocaine Mom law.” 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 Journal Sentinel, Nov. 5, 1999, p. 1.

⁸⁷ 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) (hereinafter *Minnesota’s Pregnancy Presumption*). Seventeen states provide statutory exceptions to their “living will” or health care proxy statutes which render advance directions automatically ineffective if the patient is pregnant. *Id.* at 978, n. 35. Another sixteen states render the living will or health care proxy inapplicable in a variety of circumstances, ranging from a possibility to a probability that the fetus will “develop to a live birth.” *Id.* at n’s 36-44. The Alaska statute cited in n. 37, Alaska Stat. 18.12.040, was repealed in 2004. Minnesota gives a slight bow to women’s autonomy by establishing a rebuttable presumption that a pregnant woman would want health care to be provided if there is a “real possibility that the fetus could survive to the point of life birth,” even if “the withholding or withdrawal of such health care would be authorized were she not pregnant.” Minn. Stat. § 145C.10 (g). 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. *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.

⁸⁸ This attempt was rejected by the Florida District Court of Appeal in *In re: Guardianship of J.D.S.*, 864 So. 2d 534 (Fla. Dist. Ct. 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.

which minors seeking an abortion have invoked the judicial bypass procedure to avoid the requirement of parental consent to abortion.⁸⁹

In March 2004, Congress enacted the Unborn Victims of Violence Act (the UVVA or Act),⁹⁰ which made it a crime to injure or cause the death of a fetus while committing another federal offense.⁹¹ While both supporters and opponents of the Act acknowledged the significant problem of violence against pregnant women,⁹² 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,⁹³ 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..."⁹⁴ Critics of the UVVA and similar state statutes contend that the law effectively erases the pregnant woman as an injured party.⁹⁵ In

⁸⁹ See, e.g., *In re Anonymous*, 810 So. 2d 786, 795 (Ala. 2001) and *In re Anonymous*, 889 S0.2d 525, 527 (Ala. 2003) (Johnstone, J., dissenting).

⁹⁰ Pub. L. 108-212, 118 Stat. 568 (2004).

⁹¹ 18 U.S.C. § 1841. 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), 18 U.S.C. §1841 (b) (1).

⁹² H. Rep. No. 108-420, Part 1, at 4, n. 2, citing Victoria Frey, *Examining Homicide's Contribution to Pregnancy-Associated Deaths*, 285 JAMA 1510 (2001) (summarizing the various studies); Isabelle L. Horon and Diana Cheng, *Enhanced Surveillance for Pregnancy-Associated Mortality--Maryland, 1993-1998*, 285 JAMA 1455 (2001); Linn H. Parsons and Margaret A. Harper, *Violent Maternal Deaths in North Carolina*, 94 Obstet. Gynecol. 990-993 (1999); Dannenberg, et al., *Homicide and Other Injuries as Causes of Maternal Death in New York City, 1987 through 1991*, 172 Am. J. Obstet. Gynecol. 1557-1564 (1995); Fildes, et al., *Trauma: The Leading Cause of Maternal Mortality*, 32 J. Trauma 643-645 (1992).

⁹³ 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. A similar amendment offered by Representative Zoe Lofgren was also defeated in the House of Representatives, by a 229-186 vote. 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. March 26, 2004, at A1, see also H. Rep. No. 108-420, Part 1, at 86.

⁹⁴ 18 U.S.C. § 1841 (d), 10 U.S.C. § 919a (Article 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."

⁹⁵ See Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 Ind. L. J. 667, 694-97 (2006).

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.⁹⁶

Recent proposals for changes in abortion law also emphasize fetal "personhood."⁹⁷ These include laws requiring women seeking abortion to be told about fetal pain,⁹⁸ to be informed of the need to prepare a fetal death certificate, 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.⁹⁹ 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. In contrast, most American informed consent¹⁰⁰ law focuses on the *process* of ensuring full communication between patients and their health care providers rather than the *content* of the physician-patient dialogue,¹⁰¹ relying on the health

⁹⁶ 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'...." Edward Epstein, *Bill to Make Harming Fetus a Crime is Passed by Senate; Assaultant of a Pregnant Woman Could be Charged with 2 Separate Federal Offenses*, *supra* n. [86].

⁹⁷ This of course includes the Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, which redefined a medical procedure to make it more akin to birth, for example, by using such terms as "delivers a living fetus." The law was upheld by the Supreme Court in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

⁹⁸ See The Unborn Child Pain Awareness Act of 2005, S.51.S1, proposed by Senator Sam Brownback of Kansas, a fierce abortion opponent, and the Montana Unborn Child Pain Prevention Act, House Bill No. 238.

⁹⁹ Federal and state funding of fetal imaging machinery has paved the way for these laws through grants given to organizations that promote "abstinence only" sex education. The so-called "pregnancy crisis centers" have been a major beneficiary of such grants. Ziba Kashef, *The Fetal Position - News: Federal and State Dollars Are Subsidizing a Boom in Antiabortion 'Crisis Pregnancy Centers,'* (Jan./Feb.2003) (hereafter *The Fetal Position*, available at http://www.motherjones.com/news/outfront/2003/01/ma_218_01.html); see also The Abortion Access Project, *Impeding the Right to Choose: Crisis Pregnancy Centers*, and sources cited therein, available at www.abortionaccess.org, and the proposed Informed Choice Act, S.755.1S, which provides for additional funding for ultrasound equipment to be used to provide pregnant women with a visual image of the fetus.

¹⁰⁰ Informed consent doctrine has roots in both the common law tort of battery and in negligence. It protects both a patient's interest in choosing when to be touched (a battery is an unwanted touching and includes medical treatment which the patient did not agree to (see, e.g., *Schloendorff v. The Society of New York Hospital*, 105 N.E. 92, 93-94 (N.Y. 1914) and in receiving medical treatment from a physician who has explained to the patient those risks and benefits 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) and N.Y. Pub. Health L. § 2805-d).

¹⁰¹ 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

care 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 protection doctrine also has a place in American tort law, as every state permits an infant born alive to sue third parties for harm inflicted prenatally. Only a handful of 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 women should not be subject to suit for alleged prenatal negligence,¹⁰² and three holding that such actions are necessary to compensate the child who has been injured.¹⁰³ These cases are important because they frame the normative question of who *is* the reasonable pregnant woman, as well as the related question of *who* gets to decide what conduct is reasonable.

Similarly, in the American workplace, efforts have been made to protect fetuses from harm. 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* 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

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 and Tex. Health & Safety Code §§171.012 – 171.014, 171.016, and discussion of Pennsylvania’s informed consent requirement in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881-877 (1992). In addition, there are other areas of health care 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; sterilization, *see, e.g.*, Or. Rev. Stat. § 436.225; breast cancer, *see, e.g.*, S.G. Nayfield, G.C. Bongiovanni, M.H. Alciati, R.A. Fisher, L. Bergner, *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. Medical procedures that are less politically charged rarely have such “informed consent” requirements.

¹⁰²*Remy v. MacDonald*, 801 N.E. 2d 260 (Mass. 2004), *Chenault v. Huie*, 989 S.W.2d 474 (Tex. Ct. App. 1999), and *Stallman v. Younger*, 531 N.E. 2d 355 (Ill. 1988).

¹⁰³*National Casualty co. v. Northern Trust Bank of Florida, N.A.*, 807 So. 2d 86 (Fla. Dist. Ct. App. 2001), *Bonte v. Bonte*, 616 A.2d 464 (N.H. 1992), and *Grodin v. Grodin*, 310 N.W.2d 869 (Mich. Ct. App. 1981).

basis of gender.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

The Need for Different Priorities to Protect Children

If the government's goal were actually to ensure that more children are born healthy and have the opportunity to stay that way, 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. American health care data demonstrate significant racial disparities in birth outcomes and other measures of children's health, which reflect a crisis in access to health care access, including the lack of a primary care physician and the lack of health insurance.¹⁰⁷ More than ten million American children have no health insurance at all,¹⁰⁸ and the Bush Administration has recently announced a policy change that

¹⁰⁴ International Union, UAW v. Johnson Controls, 499 U.S. 187 (1991).

¹⁰⁵ Elaine Draper, *Reproductive Hazards and Fetal Exclusion Policies after Johnson Controls*, 12 Stan. L. Pol'y Rev. 117, 121 (2001).

¹⁰⁶ See, e.g., the EPA's decision to cancel the pesticide ethylene dibromide (EDB) because of its oncogenic and mutagenic risks, as well as reproductive risks to male workers, 48 Fed. Reg. 46234 (Oct. 11, 1983), see also 48 Fed. Reg. 45956 (Department of Labor document regarding EDB's effects on male reproductive capacity), cf. Johnson Controls, 499 U.S. 187 (1991).

¹⁰⁷ Press release, Institute of Medicine, Preterm Birth: Causes, Consequences, and Prevention, *supra*; Centers for Disease Control and Prevention, *Racial/Ethnic Disparities in Infant Mortality – United States, 1995-2002*, 54 (No. 22) Morbidity and Mortality Weekly Report 553 (June 10, 2005) (noting significant racial disparities in infant mortality rates within and across states); Kenneth E. Thorpe, Jennifer Flome, and Peter Joski, *The Distribution of Health Insurance Coverage Among Pregnant Women, 1999* (Emory University April 2001) (identifying disparities in health insurance coverage along racial, employment status, and income lines) (paper prepared for the March of Dimes, on file with the author).

¹⁰⁸ Kaiser Commission on Medicaid and the Uninsured, Medicaid Facts, *Enrolling Uninsured Low-Income Children in Medicaid and SCHIP* (March 2005) available at www.kff.org/kcmu. In 2005, more than 12% of children under age 18 lacked health insurance for at least part of the previous year. Robin A. Cohen and Michael E. Martinez, Centers for Disease Control, Health Insurance Coverage: Estimates from the national Health Interview Survey, January – September 2005, 3 (Released Mar. 20, 2006). “Uninsured but Medicaid-eligible children are twice as likely as those enrolled in Medicaid to have an unmet medical need,

will make it very difficult for states to expand access to health care for poor children under the SCHIP program.¹⁰⁹ One eighth of American infants are born prematurely or are low birthweight, costing an estimated \$26 billion per year,¹¹⁰ and American infant mortality rates have risen in recent years.¹¹¹

Beyond improving access to quality health care, 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 (PCB).¹¹² Many widely-used pesticides are suspected endocrine disrupters, which affect both male and female reproductive systems and increase the chances of infertility and other reproductive harms.¹¹³ Lead poses risks to male and female workers, as well as their children. In men, lead exposure leads to lowered sperm counts, abnormal sperm shapes, altered sperm transfer, and altered hormone levels. The

to have not seen a doctor, and to have substantial family out-of-pocket spending on health care.” Kaiser Commission on Medicaid and the Uninsured, Medicaid Facts, *Enrolling Uninsured Low-Income Children in Medicaid and SCHIP*, *supra*.

¹⁰⁹ N.Y. Times Jan. 23, 2008.

¹¹⁰ Press release, Institute of Medicine, Preterm Birth: Causes, Consequences, and Prevention, July 13, 2006 (hereinafter IOM Report on Preterm Birth), available at <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=11622>. The Report defines “preterm” as any birth that occurs at less than 37 weeks of pregnancy (a full-term pregnancy is 38-42 weeks post-conception) and notes that the rate of pre-term births has risen 30 % since 1981.

¹¹¹ Centers for Disease Control, *Racial/Ethnic Disparities in Infant Mortality- United States, 1995-2002*, 54 (22) Morbidity and Mortality Weekly Report (June 10, 2005).

¹¹² Nick Fox, *Taking Worry off the Plate*, N.Y. Times Jan. 30, 2008, Page F5. “[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.” *Id.* “Children born to women exposed to high levels of methylmercury [the organic form of mercury found naturally in the environment] 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.” Jennifer Fisher Wilson, *Balancing the Risks and Benefits of Fish Consumption*, 141 *Annals Int. Med.* 977, 978 (2004). PCBs are a probable carcinogen. In addition, “[i]n 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.” *Id.* at 979.

¹¹³ Washington State Department of Labor & Industries Safety & Health Assessment & Research for Prevention Program, Workplace Hazards to Reproduction and Development: A Resource for Workers, Employers, Health Care Providers, and Health & Safety Personnel 48-50, Technical Report Number 21-3-1999 (Aug. 1999).

results can be sterility and infertility. In women, lead can cause miscarriages, stillbirths, and infertility, as well as developmental disorders in children exposed in utero.¹¹⁴

American law also fails to promote fetal and child health through mandated paid parenting leaves. Although the Family and Medical Leave Act (FMLA)¹¹⁵ requires employers of more than fifty workers to grant them up to twelve weeks a year of unpaid leave for the birth or adoption of a child, or for family illness, 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 FMLA¹¹⁶ 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.¹¹⁷ No federal law mandates paid parental leave for the period connected with pregnancy, childbirth and the early stages of infancy,¹¹⁸ and California and Ohio are the only two states to mandate any form of paid parental leave.¹¹⁹ In contrast, many other developed nations either mandate or offer paid parenting leave for at least some portion of this critical stage of fetal and children's health

¹¹⁴ National Institute for Occupational Safety and Health, *The Effects of Workplace Hazards on Female Reproductive Health* 2-3, available at <http://www.cdc.gov/niosh/99-104.html>. Lead that workers bring home on their skin, hair, clothes, tool box or car can cause severe lead poisoning for everyone who comes into contact with it, and can result in neurobehavioral and growth effects in a fetus. National Institute for Occupational Safety and Health, *The Effects of Workplace Hazards on Male Reproductive Health*, available at <http://www.cdc.gov/niosh/malrepro.html>.

¹¹⁵ The Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (1993), requires employers of more than fifty employees to permit employees to take an unpaid leave for their own illness or a family member's birth, adoption, or illness. Pub. L. No. 103-3, 107 Stat. 6 (1993), codified at 2 U.S.C. §§ 1301, 1302, 1312, 1381-1385, 1401-1416, 5 U.S.C. §§ 6381-6387, 29 U.S.C. §§2601, 2611-2619, 2631-2636, 2651-2654. 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).

¹¹⁶ Erin Gielow, *Note: Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. Cal. L. Rev. 1529, 1539 (2002) (hereinafter cited as *Equality in the Workplace*).

¹¹⁷ 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) (hereinafter *Ten Years of Experience*).

¹¹⁸ In April, 2006 Representative Caroline Maloney introduced HR 5148, the Federal Employees Paid Parental Leave Act. The Act would ensure paid leave for 6 of the 12 weeks that federal employees are authorized to take parental leave.

¹¹⁹ Cal. Unemp. Ins. Code § 3300 (2006); Ohio Rev. Code Ann. § 124.136 (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).

and development,¹²⁰ and many countries offer additional financial or child-care support to single parents, those who are most likely to need leave from work to care for a newborn or ill child and are simultaneously the least likely to be able to afford to do so.¹²¹ In summary, when compared to other developed nations, the narrow, fetus-centric approach of the United States is seriously out of step.

III. Other Nations' Approach to Fetal Protection and Child Health

B. Canada

1. The Legal Framework Regarding Fetuses

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 1867.¹²² However, the path of Canadian law on fetal protection may also reflect 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 fifteen 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

¹²⁰ Nancy E. Dowd, *supra* n. [], 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. 32, 324-25 (2004) (describing the French statutory scheme), and Erin Gielow, *supra* n. 113, at 1539.

¹²¹ Erin Gielow, *supra*, at 1547.

¹²² The Constitution Act [formerly known as the British North America Act], 1867.

persons with potentially adverse positions.¹²³ The Court has observed, “[T]he 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.”¹²⁴ 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.

a. The Criminal Law

The Canadian Parliament has codified the common law born-alive rule for criminal matters.¹²⁵ 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 death of a fetus.¹²⁶ In *Regina v. Sullivan and Lemay*,¹²⁷ 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.”¹²⁸ The Court

¹²³ *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*, [1997] S.C.R. 925 ¶¶ 27-29; *Dobson v. Dobson*, [1999] 174 D.L.R. (4th) ¶1 (declaring that, “The relationship between a pregnant woman and her foetus is unique and innately recognized as one of great and special importance to society”).

¹²⁴ *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*, [1997] S.C.R. 925 ¶ 27.

¹²⁵ See discussion of the English genesis of this rule, *supra*. Under the Canadian Criminal Code § 223:

- (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.

R.S.C. 1985, c. C-46, s. 223.

¹²⁶ This is very different than the position of most states and the federal government in the United States, 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 (Deering 2008) and the federal Unborn Victims of Violence Act, Pub. L. 108-212, 118 Stat. 568 (2004).

¹²⁷ [1991] S.C.R. 489, 63 C.C.C. (3) 97.

¹²⁸ At the time, § 203 of the Canadian Criminal Code, R.S.C. 1970, c. C-34, provided that: “Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.”

concluded that the foetus¹²⁹ was not a person for purposes of the statute since it had died in the birth canal and thus was not born alive.¹³⁰ 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.¹³¹

In *Regina v. Drummond*,¹³² the Ontario Court of Justice relied on *Regina v. Sullivan and Lemay* in forbidding the prosecution of Brenda Drummond, a mentally ill woman who was pregnant. Ms. Drummond inserted a pellet rifle into her vagina and fired, causing a pellet to be lodged in the foetus' brain. The foetus was delivered alive, and subsequently had surgery to remove the pellet. The prosecutor charged Ms. Drummond with attempted murder, and defense counsel moved to quash for failing to “disclos[e]... an offense known to law.”¹³³ The court held that the crime of attempted murder could not be established, because a foetus was not a child under the Canadian Criminal Code, and therefore, at the time the mother fired the pellet rifle, she could not form the necessary intent to kill.¹³⁴

b. 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. In *Dobson v. Dobson*, the Court held that the foetus should not be considered a person separate from its

¹²⁹ In discussing Canadian law, I will be using the Canadian spelling - “foetus” - rather than the American “fetus.”

¹³⁰ [1991] 1 S.C.R. 489 ¶ 21.

¹³¹ *Id.* at ¶ 22. 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,” *id.* at ¶20, and the lower court’s opinion provides a useful overview of British and Canadian common law and statutory enactments in regard to causing injury or death to a fetus. *Regina v. Sullivan*, 43 C.C.C. (3d) 65 (B.C. Ct. App. 1988).

¹³² 143 D.L.R. (4th) (Ont. Ct. Just. 1996).

¹³³ *Id.*

¹³⁴ *Id.* at ¶¶ 28-32. 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. *Toronto Star*, Feb. 4, 1997, at A10.

mother. The Court stated that “The relationship between a pregnant woman and her foetus is unique and innately recognized as one of great and special importance to society.”¹³⁵ In *Winnipeg Child & Family Services (Northwest Area) v. G.(D.F.)*,¹³⁶ 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[.]”¹³⁷ In this case, the Court held that a pregnant woman addicted to solvents could not be civilly committed in order to receive substance abuse treatment against her will.¹³⁸ 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. G.D.F. was a young aboriginal woman¹³⁹ who was addicted to solvents (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.¹⁴⁰ When Ms. G.D.F. became pregnant again she intermittently both sought and rejected treatment for her addiction. Treatment was not initially available, but after a slot in a treatment program opened up the local child welfare agency came to Ms. G.D.F.’s home to take her to a treatment facility. As she was intoxicated at this time she

¹³⁵ *Dobson v. Dobson*, [1999] 2 S.C.R. 753 ¶ 1.

¹³⁶ 3 S.C.R. 925 (1997).

¹³⁷ *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*, 152 D.L.R. (4th) 193, 3 S.C.R. 925 ¶¶ 27 (1997), citing *Paton v. United Kingdom*, 3 E.H.R.R. 408, 415 (1980).

¹³⁸ 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 an foetus and that courts’ *parens patriae* jurisdiction was not broad enough to authorize a Caesarian section without the mother’s consent, *Re Baby R.*, 53 D.L.R. (4th) 69 (B.C. Sup. Ct. 1988), or other involuntary detention of a pregnant woman for the benefit of her foetus, *Re A.*, 72 D.L.R. (4th) 722 (Ont. Fam. Ct. 1990), *but see* *Children’s Aid Society of Belleville v. T. (L.)*, 4 A.C.W.S. (3d) 192, 59 O.R. (2d) 204 (Ont. Prov. Ct (Fam. Div.) 1987) (holding that an “unborn child” is a person within the purview of the Child and Family Services Act).

¹³⁹ Canadian cases refer to native peoples either as “First Nations” or, more recently, as “aboriginals.”

¹⁴⁰ Françoise Baylis, *Case Comment and Note: Dissenting with the Dissent: Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, 36 Alta L. Rev. 785, 785-86 (1998).

refused to enter treatment.¹⁴¹ The agency sought a court order to detain her for treatment at the Health Sciences Center. The trial court granted the request, relying on provincial mental health law and the doctrine of *parens patriae* to justify its order for civil commitment.¹⁴²

On appeal, both the Manitoba Court of Appeal¹⁴³ 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."¹⁴⁴ After asking whether the rule should be changed in circumstances in which "a mother is acting in a way which may harm her unborn child,"¹⁴⁵ the Court concluded that it should not. 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."¹⁴⁶

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, as a matter of separation of powers, the Court held that the legislature was in a superior position to the courts to weigh the policy implications of law change. 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 forced to give up

¹⁴¹ Laura Shanner, *Case Comment and Note: Pregnancy Intervention and Models of Maternal-Fetal Relationship: Philosophical Reflections on the Winnipeg C.F.S. Dissent*, 36 Alta. L. Rev. 751, 752, n. 11 (1998).

¹⁴² After two days, the order was stayed, and ultimately overturned on appeal. However, Ms. G.D.F. remained at the Health Sciences Centre for several days, and ultimately stopped sniffing glue and "gave birth to an apparently normal child." *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*, S.C.R. ¶2 (1997).

¹⁴³ 138 D.L.R. (4th) 254 (1996).

¹⁴⁴ *Id.* at ¶11.

¹⁴⁵ *Id.* at ¶5.

¹⁴⁶ *Id.* at ¶12.

drugs.¹⁴⁷ Second, viewing its decision on civil commitment as a matter of tort law, the Court noted that no common law country permitted a child to sue for prenatal injuries unless it was born alive. 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. Fourth, imposing such liability would conflict with women's right to autonomy and equality.

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 of 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.'¹⁴⁸

....

....

'[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.'¹⁴⁹

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. ... Treating pregnant

¹⁴⁷ *Id.* at ¶¶ 20,44.

¹⁴⁸ *Id.* at ¶ 34, citing Hoyt, C.J., in *Dobson v. Dobson*, 148 D.L.R. (4th) (N.B. Ct. App. 1997).

¹⁴⁹ *Id.* at ¶ 39, citing D.E. Johnsen, *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).

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.¹⁵⁰

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,¹⁵¹ 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.¹⁵²

The Supreme Court used a similar analytical approach in *Dobson v. Dobson*.¹⁵³ 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.¹⁵⁴ The Supreme 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. 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. The Court

¹⁵⁰ *Id.* at ¶41.

¹⁵¹ *Id.* at ¶¶ 49-57.

¹⁵² *Id.* at ¶56.

¹⁵³ *Dobson v. Dobson*, [1999] 2 S.C.R. 753 ¶ 1.

¹⁵⁴ 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*, 186 N.B.R. (2d) 81 (1997), citing *Montreal Tramways Co. v. Leveille* [1933] S.C.R. 456. The New Brunswick Court of Appeal upheld this decision, asserting that because the mother's alleged negligence was due to her driving, in a case in which she owed a duty of care to the world not to drive negligently, it was appropriate to hold that she had a duty to her foetus as well. *Dobson v. Dobson*, 189 N.B.R. (2d) 208 (1997).

declared, “There is no other relationship in the realm of human existence which can serve as a basis for comparison.”¹⁵⁵

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. It concluded that there would be no limit to the circumstances under which the woman could be held liable, 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.¹⁵⁶ The Court noted, “Everything the pregnant woman eats or drinks, and every physical action she takes, may affect the foetus.”¹⁵⁷ The Court identified two important public policy concerns “militat[ing] against the imposition of maternal tort liability for prenatal negligence[:] ...the privacy and autonomy rights of women and ... the difficulties inherent in articulating a judicial standard of conduct for pregnant women.”¹⁵⁸ Addressing women’s interest in autonomy, the Court emphasized that simply because a woman is pregnant she does not lose “the right to make person decisions, to control [her]... bodily integrity, and to refuse unwanted medical treatment.”¹⁵⁹

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 pregnant woman’s life is different, with women who are well-educated and ignorant, rich and poor, and with and without access to good health care and

¹⁵⁵ *Dobson v. Dobson* ¶ 25.

¹⁵⁶ *Dobson v. Dobson*, ¶ 20.

¹⁵⁷ *Id.* at ¶27.

¹⁵⁸ *Dobson* ¶ 21.

¹⁵⁹ *Dobson* ¶ 32, citing the Royal Commission on New Reproductive Technologies, 2 *Proceed with Care* 955-56 (1993).

good prenatal care.¹⁶⁰ 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.¹⁶¹ 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 therefore declined to recognize a cause of action in tort.¹⁶² The Court held out the possibility that Parliament could develop a tailored solution that would address the needs of brain-injured children, as had the British Parliament in enacting the Congenital Disabilities Act. The Court concluded that such a legislative solution would meet both separation of powers concerns and permit a more careful consideration of the public policy issues.¹⁶³

c. Abortion Law

Canada’s abortion jurisprudence is consistent with the approach taken by the Supreme Court in *Dobson* and *Winnipeg Child and Family Services*. In its landmark 1988 decision in *Regina v. Morgenthaler*,¹⁶⁴ the Court invalidated Canada’s criminal abortion law¹⁶⁵ without focusing on foetal personhood. The *Morgenthaler* court found that the abortion law’s provisions, which placed the decision about whether a woman could have an abortion solely within the hands of a three member physician committee, violated women’s right to “security of the person” under Section 7 of the Canadian Charter of Rights and Freedoms.¹⁶⁶

¹⁶⁰ *Dobson* ¶ 54.

¹⁶¹

¹⁶² *Dobson* ¶¶ 60-62, 66.

¹⁶³ *Dobson* ¶¶ 64-65, 67-68. As described by the Court, this law creates a very limited exception to the general rule that pregnant women are not liable for negligent conduct vis a vis their foetuses, except in the limited circumstances in which they are operating a motor vehicle, and then, only to the limits of their insurance policy.

¹⁶⁴ 1 S.C. R. 30 (1988).

¹⁶⁵ Criminal Code § 251.

¹⁶⁶ *R. Morgenthaler*, [1988] S.C. R. 30, 44 D.L.R. (4th) 385. [1988] S.C. R. at 40-47, 78-79.

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. 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 under the criminal law. 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 Seven of the Charter. Concurring Justice Deetz stated the Court’s reasoning succinctly: “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.”¹⁶⁷ Concurring Justice Wilson was the strongest in her critique of the abortion law,¹⁶⁸ although she nonetheless recognized the state interest in protecting the potential human life that a foetus represented. 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.¹⁶⁹

A year later, in *Daigle v. Tremblay*,¹⁷⁰ the Court directly addressed the question of the legal status of the foetus. In this case, a pregnant woman’s physically abusive male partner sought an injunction to prevent her from having an abortion. After a lengthy litigation process, played out in the Canadian press, the Supreme Court ruled that the man had no

¹⁶⁷ *Id.* at 105.

¹⁶⁸ Justice Wilson concluded that the criminal abortion provision contravened both the security and liberty interests protected by Section 7. 37 C.C.C. (3d) 449, *Id.* at . 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,” and that this liberty interest includes “the decision of a woman to terminate her pregnancy.” *Id.* at 551-54.

¹⁶⁹ 37 C.C.C. (3d) at 563-64.

¹⁷⁰ [1989] S.C. R. 530.

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.¹⁷¹

Yet despite the decisions of the Supreme Court in *Morgentaler* that performing an abortion may not be made criminal, access to abortion can still be difficult in Canada, due to strong opposition to abortion in some provinces and the poverty and geographic isolation of many women.¹⁷² Although the Health Canada Act requires that all medically necessary services be covered under provincial insurance plans, in fact 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.¹⁷³ 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.¹⁷⁴ Even in provinces which fully fund abortion services, there are few hospitals and clinics which perform abortions, leading to waiting times.¹⁷⁵ Prince Edward Island has no hospital or clinic where abortions are performed, so that its women must leave the province to seek care, leading to waiting times of up to a month.¹⁷⁶ For young and poor women, as well as those in rural areas, this can be a significant obstacle to obtaining an abortion.¹⁷⁷

¹⁷¹ 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.* at ¶¶ 47-72.

¹⁷² *Abortion Services in Canada: A Patchwork Quilt with Many Holes*, 164 *Can. Med. Ass'n J.* 847, 847-848 (2001), available at <http://www.cmaj.ca/cgi/reprint/164/6/847>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 849, noting that only three out of 99 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.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 848.

d. Assisted Reproductive Technology

Canada has acted to address concerns about the birth of healthy children through its regulation of assisted reproductive technology (A.R.T.). In 2004, with the passage of the Assisted Human Reproduction Act, Canada created a uniform approach to the use of this technology, establishing a federal agency to oversee its use.¹⁷⁸ This agency, Assisted Human Reproduction Agency Canada, is charged with promoting the health and well-being of both children born through A.R.T. and the women who use its technologies, whom the Act states are “more than men directly and significantly affected by ...[A.R.T.]”¹⁷⁹ In order to accomplish this goal, the agency is mandated to inspect and license facilities performing A.R.T., as well as to gather and publish data regarding the success of various A.R.T. procedures. Both of these functions are designed to promote informed consent, which the Act deems a “fundamental condition of the use of human reproductive technologies.”¹⁸⁰ The Act also prohibits the commercialization of any aspect of A.R.T.¹⁸¹ Thus, in contrast to the state-by-state regulatory approach of the United States, the Act establishes a uniform national regulatory scheme for the use of A.R.T., eliminating differences among provinces in the laws governing its use. Unlike France, this law does not mandate any government support for couples seeking to use A.R.T.

2. Health Care Access

Of course, the fact that Canadian courts do not recognize fetuses as juridical persons tells us nothing about whether pregnant women receive adequate health care under the Canadian health care system. Although Medicare, as the Canadian health system is

¹⁷⁸ Assisted Human Reproduction Act, 2004, c.2, assented to Mar. 29, 2004.

¹⁷⁹ *Id.*, Principles § 2.(a) and (c).

¹⁸⁰ *Id.*, Principles § 2.(d).

¹⁸¹ ¹⁸¹ *Id.*, Prohibited Activities, §§ 5, 6, and 7.

known, provides universal coverage, in reality access to appropriate health care 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 health care under the Medicare system. Aboriginal peoples in particular lack adequate health care, housing, and nutrition, and their health status reflects these deficits.¹⁸²

At present, there are inadequate treatment resources for alcohol and other drug addictions across Canada.¹⁸³ Women who acknowledge their addiction and seek treatment face “devastating barriers to treatment.”¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ Nonetheless, Canada is attempting to

¹⁸² Sanda Rogers, *Case Comment and Note: 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) (hereinafter *Juridical Interference*.)

¹⁸³ Nancy Poole and Coleen Anne Dell for the Canadian Center on Substance Abuse, Girls, Women, and Substance Use 10 (2005).

¹⁸⁴ Poole and Dell, *supra*, at 9.

¹⁸⁵ *Id.* at 6, 9.

¹⁸⁶ *Id.* at 7. See also Chasnoff, *supra* n. [8] (presenting data that in the United States, black women are ten times more likely than white women to be referred for drug testing, despite equivalent drug use).

¹⁸⁷ *Id.* at 10.

¹⁸⁸ *Id.* at 7; Rogers, *supra*, *Juridical Interference* at 723, n. 66, citing the Ethics Committee of the Society of Obstetricians and Gynecologists of Canada (SOCG), *Healthy Beginnings, Guidelines for Care During Pregnancy and Childbirth*, No. 18, Dec. 1995, which found that, “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, *Article: Judicial*

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 illicit drug users, focusing on prevention rather than incarceration as its primary tool.¹⁸⁹

3. Social and Economic Support for Children and their Families

Canada provides pregnant women and new parents with several economic supports that permit them to be at home with a new child for a maximum of sixty-five weeks.¹⁹⁰ Qualifying individuals can receive up to fifteen weeks of sickness benefits, fifteen weeks of maternity benefits, and thirty-five weeks of parental benefits.¹⁹¹ These benefits reimburse 55% of a worker's earnings up to a maximum of \$22,620 per year, thus providing a greater relative benefit to low- and middle-income workers.¹⁹² 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.¹⁹³

Intervention in Pregnancy, 40 McGill L. J. 947, 957, n.39 (1995) (discussing the cases of *Superintendent of Family and Child Service v. M.(B.)*, 135 D.L.R. (3d) 330 (B.C.S.C. 1982), and *Re Children's Aid Society for the District of Kenora and J. L.*, 134 D.L. R. (3d) 249 (1981), 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. See also Erin Nelson, *Reconceiving Pregnancy: Expressive Choice and Legal Reasoning*, 49 McGill L. J. 593, 623-24 (2004).

¹⁸⁹ Canadian Centre on Substance Abuse, *A Drug prevention Strategy for Canada's Youth* (2007), available at <http://www.ccsa.ca>.

¹⁹⁰ Service Canada, *Employment Insurance (EI) and Maternity, Parental, and Sickness Benefits*, available at <http://www1.servicecanada.gc.ca/en/ei/types/special.shtml> (hereinafter cited as Service Canada).

¹⁹¹ *Id.* To qualify, the individual must have worked at least 600 hours during the last 52 weeks. In addition, to qualify for maternity benefits, the individual must have been pregnant. Parental benefits are for a couple, to be shared among the two parents as they elect.

¹⁹² *Id.* This benefit is in Canadian dollars. An additional Family Supplement is given to low income families (those earning below \$25,921(Canadian)) and is increased for families who have children under aged six. Service Canada, *Employment Insurance (EI) and the Family Supplement*, available at http://www1.servicecanada.gc.ca/en/ei/service/family_supplement.shtml.

¹⁹³ *Id.*

B. France

1. The Legal Framework Regarding Fetuses

a. Introduction

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 health care 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 health care they receive. This is evidenced by the declaration of the National Consultative Committee of Ethics¹⁹⁴ 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,¹⁹⁵ has recognized a civil cause of action against third parties for harm caused prior

¹⁹⁴ La Comite Consultatif National d'Ethique pour les sciences de la vie et de la santé (CCNE) is an appointed body which is consulted by the president or a government minister for its recommendations on bioethical issues, which then form the basis for legislative action. See Loi n° 94-654 du 29 juillet 1994 and Décret n° 97-555 du 29 mai 1997 relatif au Comité consultatif national d'éthique pour les sciences de la vie et de la santé available at <http://www.cne-ethique.fr/francais/start.htm>.

¹⁹⁵ 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 http://www.courdecassation.fr/_Accueil/francais/francais.htm. Cases against the state or local authorities are decided by the "Tribunaux Administratifs" and appealed to the "Conseil d'Etat," the

to birth by medical malpractice,¹⁹⁶ 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, rather than directed to the child itself. 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.¹⁹⁷ 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 the alcohol consumption of French women is putting children at risk.¹⁹⁸

b. Criminal Law

(1.) Homicide Prosecutions

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.¹⁹⁹ Two cases arose out of medical malpractice, while the other involved fetal death as a result of a motor vehicle accident.

court of last resort for those cases. See “le Conseil d’Etat en bref” at http://www.conseil-etat.fr/ce/missio/index_mi_ce01.shtml.

¹⁹⁶ See discussion *infra* in text accompanying n’s [-].

¹⁹⁷ See discussion *infra* in text accompanying n’s [-].

¹⁹⁸ 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. See Didier Menecier, *Alcool et Grossesse*, quoting the national survey conducted by the French Government, “*Enquête nationale périnatale 1998*”, and available at <http://www.sante.gouv.fr/htm/dossiers/perinat/somm2.htm>

¹⁹⁹ A striking transatlantic comparison of this difference between French and American law was brought home by the murder prosecution of Thierry Gaitaud, a French citizen who had long lived in the United States, who was charged with killing his American wife, who was pregnant at the time, in San Diego. Under French law, any citizen of France may choose to be tried in France for crimes committed extraterritorially, and because France does not have the death penalty while California does, Gaitaud

The “Vo” case,²⁰⁰ 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.²⁰¹ One patient was six months pregnant, and the other patient was there to have an IUD removed. The defendant physician called out to the waiting room for Madame Vo, and the pregnant patient responded. Without any preliminary physical examination, the physician attempted to remove the IUD he believed the woman was carrying. Instead, he ruptured the amniotic sac surrounding the fetus, ultimately causing its demise at the age of twenty to twenty-one weeks.²⁰² Apparently because of the difficulties of bringing a medical malpractice case in France,²⁰³ Madame Vo instead sought a criminal prosecution, and the physician was charged with unintentional homicide.²⁰⁴ After a complicated procedural history, the case reached the

elected to go to trial in France. 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 have been your son. I’ve seen pictures of the fetus, and it was a real baby, with hands and fingers...” Yet there was never a suggestion that Gaitaud could be charged with more than one homicide under French law. Renee 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) (hereinafter *The Intersection of Two Systems*).

²⁰⁰ French criminal cases are generally not cited by the names of the defendants, but by their decision numbers and dates.

²⁰¹ *Vo. France*, Application no. 53924/00 (European Court of Human Rights 2004), at ¶¶ 10-11, available at <http://www.echr.coe.int/Eng.GrandChamber/judgmentVovFrance080704>.

²⁰² *Id.* at ¶¶ 11-12, 14.

²⁰³ These difficulties 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, discussed *infra* at text accompanying n’s [-], whose case took fourteen years to progress through French courts.

²⁰⁴ *Id.* at ¶¶ 17-18. This is the term used to describe the crime of “homicide involontaire,” Criminal Code Article 319, under which the defendant was prosecuted, in the English version of the European Court of Human Rights decision in *Vo*. Article 319 provided that, “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.” Through a reorganization of the Penal Code, this crime is now prosecuted under Article 221-6, which provides that, “Causing the death of another person by clumsiness, negligence, carelessness, recklessness 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.” The French Penal Code is available at http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_text. For purposes of consistency, I will use the term unintentional homicide throughout this section.

Cour de Cassation.²⁰⁵ 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.²⁰⁶

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.”²⁰⁷ 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.²⁰⁸ 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 “it would be inappropriate to impose one exclusive moral code.”²⁰⁹

²⁰⁵ The Lyons Criminal Court acquitted the physician doctor on the ground that the fetus was not a person, and the case was appealed. *Vo. v. France* at ¶¶ 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. *Id.* at ¶ 21. The physician then appealed.

²⁰⁶ *Id.* at ¶ 22, *see also Vo case, Cour de Cassation*, June 30, 1999, available at <http://www.legifrance.gouv.fr/WAspad/Visu?cid=101247&indice=1&table=CASS&ligneDeb=1>.

²⁰⁷ *Id.* at ¶ 46.

²⁰⁸ *Id.* at ¶¶ 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 ?

²⁰⁹ *Id.* at ¶¶ 82, 87-95.

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 and the fetus was 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.²¹⁰

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."²¹¹ The *Grosmanjin* decision was followed in a subsequent lower

²¹⁰Cour de Cassation, Chambre Criminelle, 2002-06-25, 00-81359 (Publication: Bulletin criminel 2002 N° 144 p. 531). The court declared, « il ne peut y avoir d'homicide involontaire du foetus, celui-ci ne devenant une personne humaine qu'après la naissance. »

²¹¹ *Grosmanjin* case, Cour de Cassation, Assemblée plénière, 2001-06-29, 99-85973, (publication: Bulletin 2001 A. P. N° 8 p. 19 ; La Semaine juridique, 2001-07-18, n° 29 p. 1432). The Court declared: « 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 fœtus. »

court case involving an automobile accident in which both the pregnant woman and her fetus were killed.²¹²

(2.) Prosecutions for Other Fetal Harm

French law makes it a crime to terminate a pregnancy without the woman's consent.²¹³ It is a lesser crime to terminate pregnancy past the legal time limit for abortion,²¹⁴ or when the one who terminates the pregnancy is not a physician, or when the procedure is not performed in an approved hospital.²¹⁵ In addition, it is a crime to furnish a pregnant woman "with the physical means to practice a termination of pregnancy on herself."²¹⁶ Defendants who habitually perform these acts are subject to more severe sanctions.²¹⁷ However, since abortion became legal in 1975,²¹⁸ no French woman has ever been criminally charged for causing harm to her fetus.²¹⁹

²¹² Elias case, C.A. Metz, Chambre des Appels Correctionnels, 17 février 2005 (affaire n° A 04/00700 G. Kévin, CA n° 05/222).

²¹³ French Penal Code Article 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 Life."

²¹⁴ French abortion law is discussed *infra*, in section c. (4).

²¹⁵ French Penal Code Article 223-11.

²¹⁶ French Penal Code Article 223-12.

²¹⁷ French Penal Code Articles 223-11-12.

²¹⁸ Abortion was made legal on January 17, 1975, by the Law Veil, Law n°75-17, authorizing abortion at any time up to ten weeks when the pregnant woman was in a "state of distress." Critics of the law objected to its seven day waiting period, and the requirement that women undergo 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>.

²¹⁹ Before the Law Neuwirth of 1967, which authorized the disclosure of information on contraceptive means, and the Law Weil of 1975, the repressive Law of 1920 governed. This law forbade any disclosure of information on contraceptive means and imposed the death penalty on those who performed abortions. The last person executed for this crime was Marie-Louise Giraud, a laundress from Cherbourg, who was convicted of having carried out 27 abortions and guillotined in the yard of Roquette Prison in Paris. See Marcel Viaud, *La libre disposition de son corps*, Réfractations numéro 7.

c. Civil Protection of the Embryo and Fetus

(1.) Assisted Reproductive Technology

In contrast to the United States, where assisted reproductive technology (A.R.T.)²²⁰ flourishes in a market-driven setting and is subject to an incomplete “patchwork” of state and federal regulation,²²¹ France was an early pioneer in the regulation of A.R.T. Since 1994 France has recognized the potential benefits of A.R.T. as well as its risks, and has developed a comprehensive set of safeguards to promote A.R.T.’s ethical and equitable use. France promotes the use of A.R.T. in infertile couples, by funding up to six cycles of artificial insemination and four cycles of in vitro fertilization and embryo transfer for any heterosexual couple in which the woman is under age forty-three.²²² Each year, about one in a hundred French children is born through in vitro fertilization.²²³ The French embrace of ART is consistent with France’s long-standing pronatalist policy,²²⁴ which is also apparent in the extensive economic supports provided families with young children and the generous maternity benefits mandated for working women.²²⁵

²²⁰ In France, the technology is known as Medically Assisted Procreation or MAP and is defined by article L. 2141-1 of the Public Health Code (“Code de la Santé Publique”). Act n° 94-654 of July 29, 1994 addressed “the donation and use of human body parts and derivatives, medically assisted procreation and antenatal diagnosis.”

²²¹ See generally Judith Daar, *Reproductive Technologies and the Law* 687-693 (2006), and Jennifer L. Rosato, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them From Harm?*, 57 Utah L. Rev. 57 (2004).

²²² Articles L152-1 to L152-19 of the Public Health Code (“Code de la Santé Publique”) inserted by the Law n° 94-654 of July 29, 1994 art. 8 Journal Officiel of July 30, 1994). To obtain government support, the couple must either be married or have lived together for at least two years. The government reimburses these ART services fully if they are performed in a public hospital and to a lesser amount if they are performed in a private hospital or clinic. Thus, there are still economic disparities in who may avail themselves of ART, but it is not as great as in the United States. It is illegal for same sex couples to practice ART and French women in same sex couples often go to Belgium, where it is authorized, to practice it.

²²³ See Bruce Crumley, *Maman? Papa? Oncle? A 62-year-old and her brother take home 'their' two children — her womb, his sperm, another mother*, 158 Time Europe (No. 1), July 2, 2001.

²²⁴ This policy is said to reflect a variety of concerns, from the need to respond to the extraordinary loss of young men in World War I, to the aging of the French population (21.8 percent of the population was over 60 in 2001, according to an estimate released by the INSEE (The National Institute for Statistical and Economic Research), and the low but recently increasing birth rate. See the INSEE website, at http://www.insee.fr/en/home/home_page.asp

²²⁵ See discussion *infra* in sections - .

At the same time that government support for A.R.T. was initiated, the Bioethics Laws of 1994 established rules prohibiting its commercialization.²²⁶ The provisions concerning A.R.T. declare that egg and sperm donation is to be anonymous,²²⁷ and prohibit both surrogate birth arrangements²²⁸ and postmortem embryo and sperm transfer.²²⁹ All donation, transfer, and storage of gametes and embryos must be performed by government or licensed private not-for-profit organizations, which are subject to extensive regulation.²³⁰

²²⁶ The Bioethics Laws of 1994 were actually three separate statutes. The first, providing for “Respect of the Human Body, amended the Civil Code. These provisions were added by the Act n° 94-653 of 29 July 1994 in two new chapters of the Civil Code: Chapter II - Of Respect Of The Human Body And Chapter III-Of The Genetic Study Of The Particulars Of A Person And Of The Identification Of A Person Owing To His Genetic Prints. The second statute, governing organ and tissue donations and ART, amended the Public Health Code and the Penal Code. Act n° 94-654 of 29 July 1994 added provisions regarding the “Donation and Use of Human Body Parts and Derivatives, Medically Assisted Reproduction and Antenatal Diagnosis.” The third statute added provisions to the Public Health Code regarding confidentiality of medical and research data. Act n° 94-548 of 1 July 1994 added provisions regarding “The Use of Nominative Data for Research Purposes in the Field of Health and Modifying Law 78-17 of 6 January 1978 on Information, Files and Liberties.” As the French Parliament was considering the proposed Bioethics Laws of 1994, the President of the National Assembly and sixty-four other deputies challenged the laws’ constitutionality, alleging specifically that the law, which permitted destruction of embryos as part of the ART process, was unconstitutional because it negated the embryos’ right to life. Under the French Constitution, which establishes the Conseil Constitutionnel (Constitutional Council), the President, Prime Minister, President of the National Assembly or Senate, or sixty deputies or senators may refer a proposed law to the Constitutional Council prior to its enactment for an opinion on its constitutionality. This is the only opportunity for constitutional review; once the law is enacted it may no longer be challenged on constitutional grounds. French Constitution, Title VII (“le Conseil Constitutionnel”), art. 61 and 62. The Constitutional Council ruled that the constitutional principle of human dignity applies to embryos, but not the right to life and the principle of equality, and therefore the selection of embryos for pre-implantation diagnostic procedures and the destruction of other embryos authorized under the proposed law did not raise constitutional concerns.²²⁶ *Décision n° 94-343/344 DC, Loi relative au respect du corps humain et loi relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal.* Journal officiel du 29 juillet 1994, p. 11024, available in French at <http://www.conseil-constitutionnel.fr/decision/1994/94343dc.htm>.

²²⁷ Act n° 94-654 of 29 July 1994, Article L.152-5. Article 16-8 of the Civil Code also mandates anonymity of the egg and sperm donor, as well as anonymity of the donor and recipient of human organs and tissues. Section 311-19 of the Civil Code also provides that in cases of ART in which a third party is involved as an egg or sperm donor, no parent-child relationship exists between the donor and child thus created. Section 10 of the Respect for the Human Body Act inserts in chapter I of title VII of book I of the Civil Code a part 4 entitled “Medically Assisted Reproduction”, comprising two new sections 311-19 and 311-20. Section 311-19 provides that, in the case of medically assisted reproduction by donor, no relationship may be established between the donor and the child, and no action for remedies may be brought against the donor. Section 311-20 sets out the circumstances in which the applicant spouses or partners must first give their consent before a judge or a notary, who will inform them of the commitments they enter into thereby in respect of relationship.

²²⁸ Act n° 94-653 of 29 July 1994, adding Article 16-7 to the Civil Code, which provides that, “All agreements relating to procreation or gestation on account of a third party are void.”

²²⁹ Act n° 94-653 of 29 July 1994, Article 18.

²³⁰ Act n° 94-654 of 29 July 1994, Article L. 673-5.

Committee for Health and Life Sciences (CCNE in French) 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. 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 because in order to save the life of the child about to be born.²³⁴ 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. The opinion urged 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.²³⁵ 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.²³⁶ Importantly, the Opinion declared that the legal and ethical dilemma posed by patients' refusal of treatment could *not*

convince patients to accept essential treatment. No medical act nor [sic] any treatment may be applied without securing free and informed consent from the person concerned. Consent can be withdrawn at any time.

Translated in the National Consultative Ethics Committee for Health and Life Sciences (CCNE), Opinion No, 87, Treatment Refusal and Personal Autonomy, at 16 (hereafter cited as CCNE Opinion 87), or Avis n°87[2005] CCNE Refus de traitement et autonomie de la personne, French and English translations available at http://www.ccne-ethique.fr/francais/avis/a_087.htm. The French text reads: « Toute personne prend, avec le professionnel de santé et 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 ses 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. »

²³⁴ CCNE Opinion 87 at 6-7.

²³⁵ CCNE Opinion 87 at 27-28.

²³⁶ *Id.* at 11.

be solved by a reflexive application of the French legal obligation to “assist a person in danger.”²³⁷

(3) Civil Actions for Causing Harm in Utero

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,²³⁸ the Cour de Cassation affirmed the award of damages of €900,000 (about \$1.32 million in current American 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 and the harm suffered. 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. However, due to the physician’s negligence, the mother was not informed of test results which showed that she had in fact contracted rubella.

Both the Parliament and the National Consultative Ethics Committee for Health and Life Sciences (the CCNE) responded strongly to the *Perruche* decision. The CCNE issued an opinion expressing its concerns about the decision’s legal and ethical consequences.²³⁹ On March 4, 2002, Parliament also responded, enacting a statute “governing the rights of ill

²³⁷ Penal Code Article 63 states that “anybody 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 it 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. Sera 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.»

²³⁸ 99-13.701, Arrêt du 17 novembre 2000, Cour de cassation - Assemblée plénière.

²³⁹ The Minister 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. See Avis n°68 [2001] CCNE available at http://www.ccne-ethique.fr/english/avis/a_068.htm

people and the public health system.” 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 diagnosis a condition for which the mother might have chosen abortion.²⁴⁰ 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,” of no more than € 7,500-15,000.²⁴¹ The law was given retroactive effect. However, its retroactive application was found to violate Article 34 of the European Convention for the Protection of Human Rights.²⁴²

(4). Abortion Law

Abortion has been legal in France since 1975, and access to abortion was expanded in 2001. 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.²⁴³ 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

²⁴⁰ Article 1 of the Law n° 2002-303 of 4 mars 2002 « relative aux droits des malades et à la qualité du système de santé ». In French the Law reads: « 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 ».

²⁴¹ Article 1 of the Law n° 2002-303 of 4 mars 2002 and the decision of the Cour administrative d'appel (CAA) de Paris, troisième Chambre, 13 juin 2002, Assistance Publique Hôpitaux de Paris contre Époux M., JCP E Semaine Juridique (édition entreprise), n° 15, 10/04/2003, pp. 33-34

²⁴² Maurice v. France, Judgment of European Court of Human Rights, June 21, 2006, available at <http://cmiskp.echt.coe.int/tkp197/viewhbkm.asp?sessionId=1551928&skin=hudoc-en&acti...> After this judgment was rendered, the parties reached a negotiated settlement on the amount of damages. See also “La justice suspend sa décision dans une demande de réparation pour un enfant né handicapé, » (Paris) Le Monde, May 21, 2005, at http://www.chirurgiens-de-france.org/DOSSIER_DOCCHIR/DOC_05_05_21_MONDE_APPEL.htm .

²⁴³ The 2001 amendments to the law eliminated the requirement of a psychological interview. « loi relative à l'interruption volontaire de grossesse et à la contraception, » Article 11 of Law No 588, July 4, 2001.

genetic defect.²⁴⁴ Minors are authorized to receive an abortion without parental consent if they are accompanied by another adult,²⁴⁵ and indeed, on “free Wednesdays,” when French schools are closed in the afternoon, clinics are open to teenagers to provide them with reproductive advice and services. 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.²⁴⁶ In practice, women must often wait three to four weeks to have an abortion, and two-thirds of abortions are performed at public hospitals because of the dearth of private physicians who perform the procedure.

3. The Health Care System and Efforts to Improve Children’s Health

(a) Efforts to Reduce Harm to Children Because of Alcohol Exposure in Utero

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.²⁴⁷ The problem appears particularly pronounced in poor industrial areas, including Robaix and Lille in northern France. In 2004, the public prosecutor in Lille launched a criminal investigation against wine producers and the French government into the

²⁴⁴ *Id.* 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 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 ».

²⁴⁵ Article 11 of Law No 588, July 4, 2001. However, some physicians refuse to perform abortions for minors without their parents’ consent. Danielle Hassoun, Medical Abortion in France, in *Medical Abortion : Meeting Women’s Needs* (Hobden, J., ed. 2001).

²⁴⁶ Currently a surgical abortion costs between €137 and €213, and a medical abortion costs about €200. The conditions of reimbursement were set by a decree on February 20, 1990 (arrêté du 20 février 1990) with the same conditions as surgical abortions. See IUSSP International Population Conference Tours, France, 18-23 July 2005, available in French at <http://iussp2005.princeton.edu/download.aspx?submissionId=52321>.

²⁴⁷ It has been estimated that .3 % of all French newborns, or 2,100 children annually, show symptoms of fetal alcohol syndrome. CAMSP, a French medical watchdog group. get better cite.

damage caused by in utero alcohol exposure, with potential charges of putting another's life in danger, aggravated deception regarding merchandise (*i.e.*, wine), and causing involuntary injuries.²⁴⁸ 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.²⁴⁹ The law requires all wine bottles to carry a logo using the ubiquitous red circle with a line through it encircling a pregnant woman.²⁵⁰

(b) *The French Health Care System in General*

France has a universal health care system, in which all legal residents are entitled to receive treatment. 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).²⁵¹ The system is generally considered to deliver high quality care, although its high costs have led to calls for modification.²⁵² In 2004, the government tightened eligibility criteria for accessing the national health care system, excluding immigrants who have recently arrived in France.²⁵³

²⁴⁸ Get cite

²⁴⁹ Law No. 2005-102 of February 11, 2005, Art. 5 Journal Officiel Feb. 12, 2005.

²⁵⁰ Stephanie Condron, *Drink Labels "Should Carry a Warning for Pregnant Women,"* (London) Daily Telegraph Feb. 10, 2007; BBC News, *French Row Over "Wine Warnings,"* Nov 25, 2005, available at <http://newsvote.bbc.co.uk/mpappspagetools/print/news.bbc.co.uk/2/hi/health/4469390.stm> , noting that the labeling requirement would become effective in 2006.

²⁵¹ Rochaix and Wilsford, *Health Politics* (2005).

²⁵² N. E. J. Med. (Nov. 2004).

²⁵³ Medecins sans Frontieres (Doctors Without Borders), *France, Helping Undocumented Residents*, Dec. 5, 2005, available at http://www.msf.org/msfinternational/invoke.cfm?objectId=F7F24938-E018-0C72-09773A35FE3334B3&component=toolkit.article&method=full_html

3. 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 maternity leave for their first child, and twenty-six weeks for their second and subsequent children.²⁵⁴ Men are granted eleven days of paid paternity leave.²⁵⁵ Mothers are entitled to take additional unpaid leave, and women whose children are very ill or disabled children are able to take additional leave.²⁵⁶ Women and families with two or more children also receive a variety of economic subsidies, including the Parental Education and Upbringing Allowance for families with any child under age three,²⁵⁷ and subsidized day care for children under age six.²⁵⁸ Single parents received additional support,²⁵⁹ and parents of school-age children also receive a once a year subsidy to help defray the costs of school books and clothing.²⁶⁰ Other supplements are available for larger families, and some families are eligible for housing supports.²⁶¹ In 2004 this system was modified, to consolidate and eliminate certain benefits, to be replaced with a single, virtually universal allowance, called the PAJE.²⁶²

IV. Speculation 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 might explain their disparate approaches to “fetal

²⁵⁴ Organization for Economic Co-Operation and Development (OECD), *Starting Strong II: Early Childhood Education and Care* 325 (2006).

²⁵⁵ *Id.*

²⁵⁶ *Id.*, see also allocation de presence parentale (added 2001).

²⁵⁷ Social Security Code Articles L. 532-1 – 532-5.

²⁵⁸ Social Security Code Articles L.841-1 – L. 841.4, R. 841-1, and D. 841-1 – D. 841-5, L.842.1-R. 841.2-842.7.

²⁵⁹ Social Security Code Articles L. 524.1- 524.4.

²⁶⁰ Social Security Code Article L. 543-1.

²⁶¹ Social Security Code Articles L. 831-1 – 831-7.

²⁶² Prestation d'accueil du jeune enfant.

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 health care are covered services under the national health care system. The fourth fundamental difference is that American prosecutors at the state level are elected and locally accountable, in contrast to both Canada and France, where prosecutors are appointed and function within a national criminal justice system.

The Strength of the National Government

The strength of the national government in Canada and France has led to the development of uniform laws regarding criminal law, health care (including abortion, biotechnology, and other aspects of medical practice), and tort law, to name several areas of the law, established through national legislative and judicial branches. 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 Constitution, federal courts and the Congress are reluctant to intrude on state legislative, judicial, and executive actions, for reasons that are both practical and “temperamental.” Indeed, the pluralism of the American federal system is often cited as a plus, with states serving as a laboratory for experimentation.²⁶³

²⁶³See, e.g., *New State Ice Co. v. Liebmann*, “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.” 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The Source of Abortion Rights

Of course, as we know, the United States Constitution does impose some important constraints on state actions. But as is demonstrated by the battle over abortion that has raged for thirty-five years since *Roe v. Wade*,²⁶⁴ 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.²⁶⁵ 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 right more fragile here than in other developed nations, where access to abortion was hammered out in a national legislative setting, through the process of political horse-trading which makes compromise seem both possible and reasonable.²⁶⁶

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,²⁶⁷ 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

²⁶⁴ 410 U.S. 113 (1973).

²⁶⁵ 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*, 127 S. Ct. 1610 (2007). See, e.g., remarks of Talcott Camp at conference, The "Partial-Birth Abortion" Ban: Health Care in the Shadow of Criminal Liability, Brooklyn Law School, Brooklyn, New York, March 7, 2008.

²⁶⁶ See, e.g., Mary Ann Glendon, *Abortion and Divorce in Western Law* 145-157 (1987).

²⁶⁷ See, e.g., the shift in position of the Supreme Court on so-called partial birth abortion between its decision in *Stenberg v. Carhart* and *Stenberg v. Gonzales*, 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.

framework governing abortion. Thus, statutes and regulations which recast the fetus as a child,²⁶⁸ interfere with women's abilities to plan in advance for their health care in the event that they become incompetent²⁶⁹ or insist that women be told about possible fetal pain and the stages of fetal development,²⁷⁰ 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.

Universal Health Care – or Not

The failure of the United States to establish universal, government-funded health care²⁷¹ has significant consequences for the debate over abortion and "fetal rights." This lack of a national health care system, which would cover abortion and birth control as part of routine health care, 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

²⁶⁸This has been accomplished not only in the creation of the term "partial-birth abortion" by abortion opponents (see, e.g., remarks of Carole Joffe and Priscilla J. Smith, at conference, The "Partial-Birth Abortion" Ban: Health Care in the Shadow of Criminal Liability, Brooklyn Law School, Brooklyn, New York, March 7, 2008) but also in the regulations redefining a fetus as a child under the State Child Health Insurance Program, discussed in text accompanying n's [77-81], *supra*, and the text of the Unborn Victims of Violence Act, discussed in text accompanying n's [90 - 96], *supra*.

²⁶⁹ These limitations placed on women's ability to execute Advance Medical Directives are discussed in text accompanying n [87], *supra*.

²⁷⁰ See text accompanying n's [97 – 100], *supra*.

²⁷¹ A complete description of the United States health care system is beyond the scope of this paper. However, as most readers know, health care in the United States is closely linked to employment. Medicaid, the state-federal partnership making some health care available to very low-income persons, does not require participating states to fund abortion, and only a handful do. ADD cite to the Hyde Amendment.

circumstances during later stages of pregnancy.²⁷² The United States lack of universal health care also contrasts with the Canadian approach, in which no criminal legislation prohibits abortion and abortion is a covered medical service under Medicare, the national health care plan. However, as noted, in practice access to physicians who provide abortion services may be difficult in Canada, depending on a woman's income and where she lives.

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.²⁷³ In contrast, in the American colonies prosecutors were appointed by local colonial authorities.²⁷⁴ 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 living on the edge of survival.²⁷⁵ The colonies' cultural norms varied tremendously based on their founders, with religious orthodoxy

²⁷² Though abortion is available, see discussion in text accompanying n's [-], *supra*, the extent to which the government pays for it depends on the patient's income level, as is the case with other medical procedures.

²⁷³ Lawrence M. Friedman, *Crime and Punishment in American Criminal History* 21 (1993); Joan A. Jacoby, *The American Prosecutor: A Search for Identity* xv, 8-9 (1980).

²⁷⁴ Jacoby, *supra*, at 5, 15.

²⁷⁵ Friedman, *supra*, at 23, Jacoby, *supra*, at 11.

featuring prominently in several of the colonies.²⁷⁶ 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.²⁷⁷ After the American Revolution, the states continued the system of local prosecutors, who acted largely independently within their finite geographic realms.²⁷⁸ 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.²⁷⁹ In the wake of the Jacksonian democracy movement which swept across the United States beginning in the 1820s, prosecutors became elected, rather than appointed officials.²⁸⁰ This practice continues to the present, with forty-five of the fifty states electing prosecutors on the local level.²⁸¹

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,²⁸² 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 most provisions of the Criminal Code. However,

²⁷⁶ Friedman at 23-24, discussing New England, New Jersey, and Pennsylvania.

²⁷⁷ Jacoby, *supra*, at 10.

²⁷⁸ Jacoby, *supra*, at 20-21.

²⁷⁹ *See id.* at 22.

²⁸⁰ Their election was an outgrowth of the movement to elect judges, since prosecutors were initially seen as judicial, not executive, officers. *Id.* at 23-24.

²⁸¹ *Id.* at xvii.

²⁸² See discussion *supra*, in text accompanying n's .

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.²⁸³ 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,²⁸⁴ perhaps a throwback to the British system of private prosecution.

In France, prosecutors are actually judicial officials. The *procurer* and the *judge d'instruction*²⁸⁵ both prosecute crimes and supervise their investigation, with the latter becoming involved in more serious cases. 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.²⁸⁶ 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.²⁸⁷

²⁸³ 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.” Canada, Dept of Justice, The Federal Prosecution Service Deskbook, Chapter 2, §§ 2.1-2.4, available at <http://www.justice.gc.ca/en/dept/pub/fps/fpd/ch02.html>, Chapter 5, §§ 5.1 – 5.6, available at <http://www.justice.gc.ca/en/dept/pub/fps/fpd/ch05.html>, and The Public Prosecution Service of Canada, About the Public Prosecution Service of Canada, available at <http://www.ppsc-sppc.gc.ca/eng/bas/abt-suj.html>.

²⁸⁴ The Public Prosecution Service of Canada, About the Public Prosecution Service of Canada, *supra*, and the Public Prosecution Service of Canada, Agent Affairs, available at <http://www.ppsc-sppc.gc.ca/eng/aaf-man/index.html>.

²⁸⁵ John Bell, Sophie Boyron, and Simon Whittaker, Principles of French Law 128 (1998). *L'instruction* is the judicial process used to determine whether there is sufficient evidence to justify bringing a suspect to trial.

²⁸⁶ *Id.* at 125. These are the judicial police, authorized by Art. 14 of the Code of Criminal Procedure.

²⁸⁷ *Id.* at 130, 134-35; Renee Lerner Littow, *The Intersection of Two Systems*, *supra* n. 199] , at .

V. **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 health care system, a highly decentralized criminal justice system of criminal prosecution, with more than three thousand separate federal and state prosecutors’ offices, and a society whose cultural mores vary significantly along the blue to red state continuum, compounded by rapid changes in the population’s racial and ethnic make-up.

To put an end to the “fetal protection” wars, and to achieve the goal of getting more women necessary health care 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 health care for women, especially pregnant women, and 3) improving and expanding substance abuse treatment programs, and 4) expanding the economic supports necessary for pregnant women and new parents.

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 the 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 bringing such a criminal proceeding is for a prosecutor to pursue political ambitions and/or to push the state legislature to action.²⁸⁸ 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. 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, all 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.

Reform the American Health Care System

The health care system must be reformed to guarantee health care 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 health care. This must include reproductive health care to prevent infertility, the transmission of sexually transmitted diseases, and other reproductive health problems, as well as 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

²⁸⁸ See Wyoming prosecutor in Michelle Foust case, *supra* n. .

are much less likely to become pregnant unintentionally or to continue a pregnancy when other aspects of their lives, ranging from being in school to being addicted to drugs, make having a baby unwise.

Provide Effective, Non-Stigmatizing Drug Treatment

A major part of this health care 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,²⁸⁹ 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 14% of the drug treatment facilities in the United States have program specifically designed to treat pregnant and postpartum women.²⁹⁰

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.²⁹¹ 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 and substance abuse and mental illness, and actively intervene to prevent a continuation of

²⁸⁹Only 35% of drug treatment facilities in the United States have programs for persons needing treatment for both substance abuse and mental illness Office of Applied Studies, Substance Abuse and Mental Health Services Administration, Department of Health and Human Services, National Survey of Substance Abuse Treatment Services (N-SSATS): 2003, Data on Substance Abuse Treatment Facilities 4 (Sept. 2004).

²⁹⁰ *Id.*

²⁹¹ Lynn M. Paltrow, *Pregnancy, Domestic Violence, and the Law*, *supra* n. [] at 477; Women's Law Project, *supra* n..

current domestic violence.²⁹² 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.²⁹³

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 have better treatment outcomes in programs that are for women only.²⁹⁴ For women who are long-term abusers, residential programs are most effective,²⁹⁵ but these programs must take into account the needs of women with children.²⁹⁶ Child care, housing, health care, job training, and other supports are all vital if women are to stay clean and become self-sufficient.²⁹⁷ 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.²⁹⁸ Finally, more programs must emphasize prevention, to treat addicted women before they become pregnant.²⁹⁹

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

²⁹² *Id.*

²⁹³ Women's Law Project, *supra* n. 4.

²⁹⁴ Sandra L. Bloom, The PVS Disaster: Poverty, Violence, and Substance Abuse in the Lives of Women and Children 164 (2002); Women's Law Project, *supra* n. [], at 8.

²⁹⁵ Sandra L. Bloom, *supra* , at 108, citing M. Daley et al., *The Impact of Substance Abuse Treatment Modality on Birth Weight and Health Care Expenditures*, 33 (1) J. Psychoactive Drugs 57-66 (2001).

²⁹⁶ Sandra L. Bloom, *supra*, at 1.

²⁹⁷ Sandra L. Bloom, *supra*, at 164, citing National Institute of Drug Addiction, Treatment Methods for Women 13652 (1999).

²⁹⁸ See Jeneen Interlandi, What Addicts Need, *Newsweek*, Mar. 3, 2008, pp. 37-42.

²⁹⁹ Women's Law Project, *supra* n. 4.

to maternity and parenting leaves.³⁰⁰ 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 to make it possible for them to choose to stay at home with a child for some time after the child is born, to support that child's growth and development. 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 health care outcomes or domestic abuse or neglect, including abuse connected with their mothers' drug addiction. The 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, and decreasing families' reliance on welfare programs, and generally have the biggest "bang for the buck."³⁰¹ New York City has recently initiated a program to connect visiting nurses with newly pregnant women who live in neighborhoods with high infant mortality rates. The nurses will visit the women throughout pregnancy and for two years after their infants' birth, 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.³⁰² While realistically, in a difficult economic climate and an unabashedly capitalist society, these

³⁰⁰ See discussion of the Family-Medical Leave Act in text accompanying n's [-], *supra*.

³⁰¹ Julia B. Isaacs, Brookings Institute Cost-Effective Investments in Children 13-16 (Jan. 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 *Pediatrics* 1550 (2004); see also Lynn A. Karoly et al, Rand Corp., *Early Childhood Interventions: Proven Results, Future Promise*, at xxviii (2005)..

³⁰² Community Initiatives Unit Bureau of Maternal, Infant, and Reproductive Health, New York City Department of Health and Mental Hygiene, information available at <http://home2.nyc.gov/html/doh/html/ms/ms-nfp.shtml>

reforms may need to be phased in an incremental fashion, 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.