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The Innocent Addicts

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THE INNOCENT ADDICTS

I. INTRODUCTION

The mother and the fetus are damaged every time cocaine is used by the pregnant woman. Any effect on the mother's body has a magnified effect on the fetus.

Fetuses exposed to cocaine in the womb have experienced growth retardation, hypertension, intrauterine strokes, and genito-urinary abnormalities. These are only a few of the effects on a fetus when its mother takes a hit of cocaine.

The pregnant woman also faces serious injury to her own body when she uses cocaine. Some of these effects are increased heart rate, increased blood pressure, decreased blood flow to the placenta, placenta abruption and bleeding, and premature labor.

The statistics regarding drug-related births in California are staggering. Approximately thirty drug exposed infants are born each month in San Francisco County and up to 180 such births per month are reported in Los Angeles County. An estimated ten percent of all births in the nation involve drugs and the number is estimated to be as high as twenty percent in California. This translates into an estimated 375,000 newborns per year nationwide who are exposed to drugs in utero; the drug of choice for the mothers of two-thirds of these 375,000 newborns is crack cocaine. The cost to the state for these drug addicted babies ranges from $6,000 to $250,000 per infant depending on the severity of the addiction.

1. A. Puentes, M.D., Chart on Maternal/Fetal/Neonatal Effects of Substances Commonly Abused by Pregnant Women (1990) (available at the Santa Clara County Health Department, Perinatal Substance Abuse Program).
2. Id.
4. Id.
6. Shaver, Prosecute the Mothers of Addiction, CAL. LAW., Nov. 1989, at 72. In addition to those statistics mentioned in the text, the article considers the additional costs of foster care ($1500 per infant) and the costs of special education.
Apart from such immediate costs, the physical effects of drugs on a newborn are overwhelming in their tragic unfairness. An example of the horrors facing a newborn addicted to drugs is:

[They] are usually born prematurely and are underweight and malnourished at birth. Their cry is shrill and piercing . . . . They are irritable, twisting, writhing, jerking, sweating, and sometimes convulsing. They sleep poorly. They suck their fists frantically, but have a poor swallowing reflex and suffer from vomiting, diarrhea, dehydration, and fever . . . . They often require intravenous fluids, antibiotics, respirators, and sedation.7

What should be done to remedy this situation? Should drug-taking mothers be penalized? Should the state be allowed to intrude into the privacy of the mother by monitoring her conduct during pregnancy? Do fetuses have rights which can be weighed equally or more heavily than the rights of the mother? Should the legislature be required to fund drug treatment centers which focus specifically on drug-taking mothers?

The issues raised by these queries will be discussed in this comment. This comment will also discuss the constitutionally guaranteed right to privacy that could potentially be curtailed for pregnant women who use, and abuse, illegal drugs. The rights of the state, the pregnant woman, and the fetus will be addressed, as well as their respective importance. It will be argued that guidelines or regulations must be instituted to penalize a pregnant woman who takes illegal drugs8 and otherwise fails to adequately and responsibly provide for her fetus.

Part II of this comment will provide a brief history of fetal rights as they have been recognized in certain areas of the law; and rehabilitation for these drug addicted infants. The cost of taking care of these infants is continuous and long-lasting. It is difficult to put an exact cost on the care and maintenance of these children but this article speaks of the potential long term costs as being in the “hundreds of millions of dollars.” Id.


8. The use and abuse of alcohol during pregnancy is another area of great concern. Fetal Alcohol Syndrome (FAS) has been cited as the cause of “growth retardation, facial anomalies, mental retardation, and assorted congenital defects affecting other organs.” Id. at 73.

Alcohol abuse by women during pregnancy is a major nationwide problem. However, this comment will focus on the use and abuse of illegal drugs only.
namely tort, criminal, property and inheritance law. A discussion of the development of the competing constitutional rights of the state, the woman and the fetus will follow. The attempts of states other than California to regulate prenatal conduct will also be considered, before focusing on California's approach towards fetal and other related rights. Part IV will analyze the history of these rights. Part V will propose that California adopt a statute that will regulate the conduct of pregnant women in order to create a more healthy environment for the fetus, while not unduly threatening the rights of the mother. In addition, this comment will propose that the state legislature commit sufficient funds to combat the problem of drug addicted newborns.

II. BACKGROUND

A. Historical Rights of the Unborn

Fetal rights have been recognized in certain legal contexts for several hundred years. At common law, it was proposed that "an infant en ventre sa mere\textsuperscript{9}... is supposed to be born for many purposes."\textsuperscript{10} In property and inheritance, tort and criminal law, the fetus was accorded some limited protection, usually focused upon the subsequent birth and continuing life of the child as a precondition to recovery of damages.\textsuperscript{11}

1. Property and Inheritance Law

The Uniform Probate Code attributes some rights to the fetus, stating that "relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."\textsuperscript{12} Due to this provision, a fe-

\textsuperscript{9} The phrase "en ventre sa mere" is French for "in the mother's womb." W. BLACKSTONE, Commentaries *130.
\textsuperscript{10} Id. (footnote supplied).
\textsuperscript{11} Note, Unborn Child: Can You Be Protected?, 22 U. RICH. L. REV. 285, 286 n.7 (1988) (authored by Heather White). Today, most jurisdictions allow a cause of action for prenatal injuries. There are four time limits for injuries inflicted against the fetus. In particular, a fetus which is viable at the time of injury will be allowed to recover. Some states will look back at any injuries caused since the time of conception if the child is born alive. Another possibility is to recognize a wrongful death action for the death of an otherwise viable fetus. Some states allow an action to be maintained on behalf of a pre-viable fetus if the fetus would have been able to maintain an action had it lived. Id. at 289 n.9.
\textsuperscript{12} UNIF. PROB. CODE §§ 2-108 (West 1983).
The common law also speaks of the possibility of a fetus "having a legacy, or surrender of a copyhold estate made to it . . . and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born."  

Property and inheritance law focuses on the potential recipient of property rather than the rights of the fetus. Nevertheless, the fetus is considered an individual in property and inheritance law, thereby enabling the fetus to benefit, provided it is born alive.  

2. Tort Law

A fetus' rights under tort law are significant and continue to expand. Originally, a cause of action by an unborn fetus for injury caused during pregnancy was regulated by Dietrich v. Inhabitants of Northampton. In Dietrich, a pregnant woman had a miscarriage after she suffered a fall due to a defect in the highway. A wrongful death action was brought against the town by the child's administrator. The court, in the opinion by Justice Holmes, decided that since an "unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered . . . was recoverable by" the mother only. In other words, the fetus had no independent legal identity while in the mother's womb.

The rule denying recovery for injury to an unborn child remained intact until 1946, when Bonbrest v. Kotz was decided. In Bonbrest, the court allowed the fetus to maintain a cause of action against the doctors for medical malpractice for "resultant consequences of a detrimental character." This case was notable because it established a new precedent allowing a cause of action against third parties for prenatal injuries.  

14. Implicit in property and inheritance law is that a fetus cannot inherit unless it is born alive to receive the benefit.
16. Id.
17. Id. at 17, 52 Am. Rep at 245.
19. Id. at 139.
20. Id. at 142. Today, the majority of American jurisdictions allow a fetus
tionally, the *Bonbrest* court recognized the inherent and sac-
rosanct right of an individual to the possession and enjoyment
of his life, limbs, and body.\textsuperscript{21}

Some jurisdictions have extended *Bonbrest*’s “born alive”
requirement and have allowed wrongful death claims for still-
born fetuses. For example, in Louisiana a stillborn fetus is al-
lowed a cause of action under the state’s wrongful death stat-
ute.\textsuperscript{22} This shows the expansive trend that tort law has taken
in recent years, but it is not representative of all states. Cali-
ifornia, in particular, has refused to allow a wrongful death action
based on medical malpractice for a stillborn fetus in *Justus v.
Atchison*.\textsuperscript{23} California conceded that, at the time, “25
states . . . recognize[d] a cause of action for the wrongful death
of a fetus.”\textsuperscript{24} Nevertheless, California chose to maintain the
position that a cause of action for prenatal injuries exists only
as long as the child survives the injuries and is born alive.\textsuperscript{25}

Tort law has been evolving as modern society evolves and
expands. The rights of the fetus have often been recognized in
tort law but under limited situations or with certain conditions
attached.\textsuperscript{26} This attitude has been changing and, presently,
damages may sometimes be awarded for injuries inflicted at
any point during gestation\textsuperscript{27} or even prior to conception.\textsuperscript{28}


\textsuperscript{23} 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

\textsuperscript{24} Id. at 569, 565 P.2d at 125, 139 Cal. Rptr. at 100.

\textsuperscript{25} “It is our view that a fetus is not a ‘person’ within the meaning of our
wrongful death statute until there has been a live birth.” *Id.* at 580, 565 P.2d at
132-33, 139 Cal. Rptr. at 107-08.

\textsuperscript{26} See *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946). Viability has often
been the cut-off point to recovering for any prenatal injuries, as evidenced by the
statement “it is but natural justice that a child, if born alive and viable should
be allowed to maintain a cause of action.” *Id.* at 142 (emphasis omitted).

\textsuperscript{27} See Smith v. Brennan, 157 A.2d 497, 504 (N.J. 1960) (stating “[w]e see no
reason for denying recovery for a prenatal injury because it occurred before the
infant was capable of separate existence”).

\textsuperscript{28} See Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250
(1979). In this case an infant was allowed to recover for an injury inflicted to the
mother by a blood transfusion given before the child was even conceived. The
defendant had administered incompatible blood to the plaintiff when she was 13
years old causing prenatal damages to her fetus conceived almost ten years later.
3. Criminal Law

In the area of criminal liability for injury to a fetus, the vast majority of jurisdictions follow the Model Penal Code definition of a human being, which defines a human being for homicide purposes as "a person who has been born and is alive." A growing number of jurisdictions, including California, have not followed the Model Penal Code's lead and instead define murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." The California legislature adopted this definition after the 1970 decision of Keeler v. Superior Court of Amador County, in which the defendant intentionally inflicted injury on a fetus. However, because the case was decided prior to the revision of the California murder statute, the conduct was deemed not to constitute murder. Criminal liability for harm to a fetus is recognized in some areas of criminal law in some states, but at this time, there is no consensus on the rights of the fetus to a criminal cause of action.

4. Summary

A discussion of the development of fetal rights is important for several reasons. A fetus is capable of being injured while in the womb. Furthermore, parents have an interest in protecting their expected child from tortious or criminal interference by third parties. Laws providing for third party liability

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31. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970). In this case, a recently divorced husband intercepted his wife, who was pregnant by another man, on a mountain road. Angry at her pregnancy, the husband shoved his knee into her abdomen and hit her, claiming he would "stomp it out of her." Id. at 623, 470 P.2d at 618, 87 Cal. Rptr. at 482. The fetus was stillborn with a fractured head, but the husband was not charged with homicide because he had no notice that killing an unborn viable fetus was prohibited under the existing murder statute.
32. "During the gestation period, the fetus can be injured by a physical force inflicted upon a woman or from exposure of the woman to an external teratogenic agent which enters her body and is transmitted to the fetus through the placenta." Beal, "Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive, 21 SAN DIEGO L. REV. 325, 359 (1984).
for prenatally-inflicted injury recognize the interests of the parent and the fetus.

Additionally, the concept of fetal rights is developing to the point of allowing the fetus to be born free of injury. In the medical field, the fetus has been recognized as a patient in certain situations. As will be discussed, the imposition of maternal liability for prenatal injury promotes the same interests served by protecting the fetus from third party tortious or criminal acts.

B. A Woman’s Right to Privacy

1. Background

The “right to privacy,” propounded and relied upon by the United States Supreme Court in numerous cases, is not specifically stated anywhere in the United States Constitution. Instead, certain constitutional amendments have been construed to imply a “penumbra” of individual privacy rights.

33. Ohlendorf-Moffat, Surgery Before Birth, DISCOVER, Feb. 1991, at 58. This article describes several procedures used in the medical profession to save babies who have life-threatening defects. The surgery is performed on the fetus while it is still in the mother’s womb.


36. The most commonly used constitutional amendments are:

U.S. CONST. amend. IV: “The right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . .”

U.S. CONST. amend. V: “No person shall be . . . deprived of life, liberty, or property . . . .”

U.S. CONST. amend. X: “The powers not delegated to the United States . . . are reserved to the States . . . .”

U.S. CONST. amend. XIV: “No state shall . . . deprive any person of life, liberty, or property . . . .”

37. Rights that have been commonly recognized under this “penumbra” are found in Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (sanctity of family relationship); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as decision whether to beget a child); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to use contraception in marriage relationship); Skinner v. Oklahoma, 316 U.S. 535 (1942) (marriage and procreation are fundamental to the very existence and survival of the race); Pierce v. Society of
Case law has been instrumental in establishing and expanding the importance and weight that is attached to these individual privacy rights.

In 1890, Justices Warren and Brandeis coined the phrase "right to privacy" in a Harvard University law review article.\(^3\) The definition advanced in their article was that the "right to life has come to mean the right to enjoy life,—the right to be let alone."\(^4\) The article spoke of how political, social and economic changes inevitably require the recognition of new rights.\(^5\) Expansion of individual rights was viewed as normal and expected.

In 1891, the first in a long line of privacy cases was decided. In Union Pacific Railway v. Botsford,\(^6\) the Supreme Court recognized the "rights of every individual to the possession and the control of his own person, free from all restraint or interference of others."\(^7\) The issue in this case was whether the plaintiff in a civil action for injury was required to submit to a surgical examination to determine the extent of the injury sued for.\(^8\) The Court held that this right to be left alone is not absolute, but rather can be qualified by "clear and unquestionable authority of law."\(^9\)

The right to privacy has been expanded and defined in subsequent United States Supreme Court cases. As far as women and procreation are concerned, the most important decision regarding the right to privacy was Roe v. Wade,\(^10\) decided in 1973.

2. **Roe v. Wade**

The decision in Roe v. Wade was significant in its proposition that a woman has a substantial amount of control over the

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Sisters, 268 U.S. 510 (1925) (liberty of parents to direct the education of their children); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to teach foreign languages in public schools).

39. *Id.*
40. *Id.* (stating "[p]olitical, social, and economic changes entail the recognition of new rights").
41. 141 U.S. 250 (1891).
42. *Id.* at 251.
43. *Id.*
44. *Id.*
45. 410 U.S. 113 (1973).
regulation of her own pregnancy. *Roe* involved a pregnant, unmarried woman who wished to obtain an abortion. She was unable to acquire a legal abortion in Texas due to a Texas law that required a finding that her life was threatened by the continuation of her pregnancy before a legal abortion could be obtained. Jane Roe alleged an invasion of her personal privacy as protected by the first, fourth, fifth, ninth, and fourteenth amendments of the United States Constitution.

The Court decided that the right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Importantly, the Court emphasized that this right is not absolute. The Court was reluctant to give credence to an "unlimited right to do with one's body as one pleases."

*Roe* separated the pregnancy cycle into trimesters to define the freedom and limits placed upon a woman in controlling her pregnancy. During the first trimester, the abortion decision is left exclusively to the woman. During the second trimester, the state is allowed to regulate an abortion if the health of the mother is in danger. The third trimester is the point where the state's interest in promoting the potentiality of human life allows intrusive regulation of the woman's right to have an abortion. The court felt that this bright line ruling would give the state and the woman adequate guidelines in regulating abortion. However, this trimester approach has been heavily criticized since *Roe* due to its unfounded medical focus on specific stages of the pregnancy.

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46. *Id.* at 120.
47. *Id.* at 117-18 (stating that it is a crime to "'procure an abortion,' . . . except with respect to an 'abortion procured or attempted by medical advice for the purpose of saving the life of the mother'" (quoting TEX. PENAL CODE Art. 1191, 1996)).
48. *Id.* at 120.
49. *Id.* at 153.
50. *Id.* at 154 (stating that "it is not clear . . . that the claim . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated").
51. *Id.* at 164-65.
52. See Justice O'Connor's dissent in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983). Here, Justice O'Connor argued that the *Roe* trimester approach "cannot be supported as a legitimate or useful framework for accommodating the woman's right and the State's interests." *Id.* at 454. In addition, she argued that the artificial lines drawn in the trimester approach of *Roe* were becoming "blurred" due to technological advances in the medical field. *Id.* at
Despite the criticism, *Roe* continues to stand for the importance of a woman's right to privacy and to retain her bodily integrity. The recent United States Supreme Court case of *Webster v. Reproductive Health Services*, however, criticized the trimester approach used in *Roe v. Wade* to establish abortion guidelines. *Webster* upheld a state's right to regulate abortion, thereby substantially reducing the impact of *Roe*. The Missouri statute in question openly stated that the legislature was "concerned with promoting the State's interest in potential human life rather than in maternal health." The focus in *Webster* shifted from *Roe's* trimester approach and the rigid line imposed at viability to one where the "State's interest, if compelling after viability, is equally compelling before viability." *Roe* was not overturned, but its emphasis on viability was seriously modified and limited by *Webster*.

C. State Interests in the Fetus

1. Background

The interests of the state, however they may be defined, are always either directly or indirectly at issue in any individual privacy case. The state has a legitimate interest in the child and the potentiality of human life. The state's power to regulate conduct to advance its interests is best viewed under the substantive due process analysis or the *parens patriae* doctrine.

2. Substantive Due Process Analysis

One general and sweeping approach a state can take to justify imposing regulations is to assert a "compelling state
interest." There are three requirements that need to be met when using this type of analysis. First, the state must advance an important and legitimate interest. Second, any regulation must be substantially related to the purpose sought to be achieved. Finally, the regulation adopted must be the least intrusive means of achieving its specified end. In other words, a state must specifically outline what it is trying to regulate, how it will achieve that goal, and how these two goals are connected. These rather stringent requirements are necessary to insure that the state does not unfairly and unnecessarily infringe on the rights of the individual.

3. **Parens Patriae Doctrine**

Another possible approach that a state can take in asserting its control over fetuses or children is through its *parens patriae* power. The concept behind *parens patriae* is that the state possesses some "paternalistic power to protect or promote the welfare of certain individuals . . . who lack the capacity to act in their own best interests."  

The United States Supreme Court in *Prince v. Massachusetts,* recognized the ability of the state through its *parens patriae* power to limit "parental freedom and authority in things affecting the child's welfare." The California courts in *In re Phillip B.* extended the *parens patriae* doctrine to include the proposition that the "state has a right, indeed, a duty, to protect children.

These cases create an express obligation on behalf of a state to assume its role as protector of a child's best interests. A component of the *parens patriae* power is the duty of the

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58. See generally Roe v. Wade, 410 U.S. 113, 155 (1973) ("where certain 'fundamental rights' are involved the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest'"); NAACP v. Alabama, 377 U.S. 288, 307 (1964) ("governmental purpose . . . may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("strict scrutiny . . . is essential").


60. 321 U.S. 158 (1943).

61. Id. at 167.


63. Id. at 801, 156 Cal. Rptr. at 51.
state to actively protect a child in need of protection. The *parens patriae* doctrine can be used by the state to protect the physical and/or mental health of the child.

D. *A New Outlook on the Rights of the Fetus*

1. *Background*

There have been considerable changes in the laws defining fetal rights in the last thirty years. Some of these changes are evidenced by the state's right to override a parent's religious beliefs to allow prenatal medical care, to allow a cause of action for a pre-viable fetus against a third party who negligently injures the mother, and to allow a cause of action for a child relating to prenatal injuries negligently inflicted by a third party. Several states in recent years have gone even farther and have directly addressed the mother's prenatal conduct towards the fetus. Recently, an increasing number of states have been forced to confront the problem of drug addicted newborns. An overview of such case law and statutes from various states follows.

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64. See Myers, *supra* note 59, at 23 (stating that "in addition to the authority to act, the *parens patriae* power imposes a positive duty to do so").

65. See generally Jefferson v. Griffin Spalding County Hosp. Authority, 247 Ga. 86, 87, 274 S.E.2d 457, 458 (1981). In this case the mother refused to submit to a Caesarean section and a transfusion of blood on religious grounds. The court found it "appropriate to infringe upon the wishes of the mother to the extent it is necessary to give the child an opportunity to live;" see also Hoener v. Bertinato, 67 N.J. Super. 517, 520, 171 A.2d 140, 144 (1961). Here, the mother refused a blood transfusion for her fetus on religious grounds. The court focused on the "unborn child's right to life and health" in requiring the mother to consent to the blood transfusions.

66. See Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 354, 367 N.E.2d 1250, 1255 (1977). The Illinois court argued that "there is a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother."


68. Pregnant Drinker Faces Charge of Child Abuse, San Jose Mercury News, Jan. 22, 1990, at 5A. Two additional states, Florida and Wyoming, have recently addressed the issue of a woman's prenatal conduct and the possibility of imposing criminal penalties against the woman. In Wyoming, a pregnant woman who was under a judge's order to avoid alcohol due to the previous birth of a baby inflicted with Fetal Alcohol Syndrome (FAS), was charged with child abuse of her four month old fetus due to her excessive drinking. Id. In Florida, a woman was found guilty of delivering cocaine through her umbilical cord to her fetuses during two of her pregnancies. Id.
2. **Overview of Case Law**

*In re Male R.*,\(^{69}\) decided in 1979, was one of the first attempts by the New York courts to give the fetus more substantial rights. The baby in *In re Male R.* was born suffering from drug withdrawal symptoms. His mother had abused barbiturates, cocaine and alcohol during pregnancy, resulting in the baby's addiction upon birth.\(^{70}\) The court used the New York Family Court Act, Article X,\(^{71}\) which allows the state to provide for neglected children by assuming control of the newborn. The court focused on the language of the statute concerning whether the child was in "imminent danger of becoming impaired."\(^{72}\) The court, at this early stage in the development of fetal rights, was not comfortable basing its decision entirely on prenatal maternal conduct, and thus struck a compromise by using the neglected child provision.\(^{73}\) In other words, the court focused on the condition of the child at birth and the possibility that the child will be abused, rather than the prenatal conditions that led to the child's current addiction.

Six years later, in *In re Danielle Smith*,\(^{74}\) the New York court found that a mother had neglected her baby, based entirely on the mother's prenatal abuse of alcohol and failure to seek medical care.\(^{75}\) In this decision, the court went an additional step by proposing a legal presumption that would control future cases:

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70. Id. at 820, 102 Misc. 2d at 1.
71. N.Y. FAM. CT. ACT art. X § 1012(f) (McKinney 1983) (which states: "'Neglected child' means a child less than eighteen years of age . . . (i)whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care").
72. 422 N.Y.S.2d at 822, 102 Misc. 2d at 4 (stating that "[u]nder the terms of section 1012(f), a finding of neglect can be based on either the actual impairment of a child's physical condition or the imminent danger of such impairment").
73. Id. at 825, 102 Misc. 2d at 5 ("[i]t is a difficult question whether an adjudication of neglect can be based, at least in some cases, solely upon the prenatal maternal conduct which has caused the actual impairment at birth of a child's physical condition").
75. Id. at 332, 128 Misc. 2d at 977 (stating that the finding was "predicated solely upon the prenatal conduct of the mother").
Proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor... shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child.76

This court attempted to recognize an interest in potential life that would extend to the protection of the quality of life.77

However, in 1988, in In re Fletcher,78 the New York courts appeared to retreat from their earlier stance. In this case, the mother used cocaine during her pregnancy, resulting in a positive toxicology for cocaine in her newborn. The issue in this case was “whether a mother's prenatal drug use alone can form the basis for a finding of neglect under section 1012(f)(i)(B) of the Family Court Act.”79 The court held that a direct connection must be proven between the mother's use of illegal drugs and the child's safety.80 The court stated that in custody cases there will not be a presumption that a mother's admission of cocaine use during pregnancy constitutes neglect once the child is born.81 The court distinguished the circumstances of In re Male R. in reaching its decision.82

Two years later in In re Stefanel Tyesha C.,83 the court found the court's arguments in In re Fletcher to be flawed. In In re Stefanel Tyesha C., the baby was born with a positive toxicology for cocaine. The mother admitted using cocaine during the fifth month of her pregnancy and two days before the birth.84

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76. Id. at 334, 128 Misc. 2d at 978.
77. See id. at 335, 128 Misc. 2d 981.
79. Id.
80. Id. at 243, 141 Misc.2d at 335.
81. Id. at 244, 141 Misc.2d at 336.
82. See generally 533 N.Y.S.2d 241, 141 Misc.2d 333. The court emphasized that in In re Male R. there was proof of “regular and excessive drug use before and after birth.” Id. at 242, 141 Misc. 2d at 394. In addition, the drug use in In re Male R. was in combination with a statutory evidentiary rule as to repeated misuse of drugs which created a prima facie case of neglect. The circumstances in In re Male R. and Matter of Fletcher were viewed as significantly different by the court so as not to diminish the decision of In re Male R. and to account for any inconsistencies between the court's decisions. Id.
84. Id. at 281-82.
A child neglect proceeding was instituted and the court found an action for neglect would stand due to the mother's admitted use of drugs, a positive toxicology at birth and the mother's failure to enroll in a drug rehabilitation program. The court explained that it was not infringing on a mother's right to privacy in finding neglect with respect to the fetus. Instead, the court was concerned with the "protection of the child who is born when a woman has elected to carry that child to term and deliver it."

Michigan has also shown a trend toward recognizing and extending the rights of the fetus. Womack v. Buchhorn, decided in 1971, involved an eight year old child who suffered prenatal brain injuries from an automobile accident that occurred during the fourth month of pregnancy. The petitioner attempted to bring a common law negligence action on behalf of the surviving child. The Michigan court allowed the cause of action and also recognized the proposition that "justice requires that . . . a child has a legal right to begin life with a sound mind and body."

In contrast, the Illinois courts strongly criticized this "right" of a child to begin life with a sound mind and body. In Stallman v. Youngquist, an infant, by its guardian ad litem, brought an action against its mother and a motorist to recover for prenatal injuries sustained in an auto accident between the mother and the motorist. The court felt that holding a "mother liable for the unintentional infliction of prenatal injuries subjects to State scrutiny all the decisions a woman must make in attempting to carry a pregnancy to term." The court reasoned that the recognition of the right to begin life with a sound mind and body would make a "pregnant woman

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85. Id. at 282.
86. Id. at 285.
87. Id.
89. Id. at 719, 187 N.W.2d at 219.
90. Id.
91. Id. at 725, 187 N.W.2d at 222, (quoting Smith v. Brennan, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960)).
93. Id.
94. Id. at 272, 531 N.E.2d at 360.
the guarantor of the mind and body of her child at birth."95 The Stallman court refused to recognize a legal duty, as opposed to a moral duty, "to guarantee the mental and physical health of another."96

In 1980, In re Baby X97 was decided in Michigan. Baby X was born suffering from symptoms of drug withdrawal due to her mother's drug abuse.98 The Michigan court held that a "newborn suffering narcotics withdrawal symptoms . . . may properly be considered a neglected child."99 Michigan reiterated Womack's right to begin life with a sound mind and body and added that to enforce this right it is "within this best interest to examine all prenatal conduct bearing on that right."100

Grodin v. Grodin,101 also decided in 1980, involved a son's allegations of prenatal negligence against his mother. The mother had taken the prescription drug tetracycline during her pregnancy which resulted in discolored teeth for her son.102 The court assigned the same liability to the child's mother as would be accorded to a third person engaging in injurious, negligent conduct that results in prenatal injuries.103 The rule established in Grodin was that a "child may maintain a lawsuit against his parent for injury suffered as a result of the alleged ordinary negligence of the parent."104 The court allowed a cause of action by a son against his mother even though the woman's use of a legal prescription drug during pregnancy caused the injury.

Two exceptions were recognized to the general rule established in Grodin to curb any criticism that the rule might be seen as opening the family unit to unnecessary and potentially damaging lawsuits.105 The more noteworthy of these excep-

95. Id at 271, 531 N.E.2d at 359.
96. Id.
98. Id. at 113, 293 N.W.2d at 738.
99. Id. at 115, 293 N.W.2d at 739.
100. Id.
102. Id. at 397, 301 N.W.2d at 869.
103. Id., 301 N.W.2d at 870 (stating that "[t]he rationale . . . adopted by the Michigan Supreme Court in Womack, refers only to wrongful conduct of 'another' . . . As a result, the litigating child's mother would bear the same liability for injurious, negligent conduct as would a third person").
104. Id. (quoting Plumley v. Klein, 388 Mich. 1, 8, 199 N.W.2d 169, 172 (1972)).
105. 102 Mich. App. at 397, 301 N.W.2d at 870. The court stated that "par-
tions denies a cause of action if the alleged negligent act involves an "exercise of reasonable parental authority." The reasonableness standard that the court followed turned on "how the utility of the defendant's conduct is viewed in relation to the magnitude of the risk thereby created."

An Ohio case, in re Ruiz, involved a heroin-addicted mother whose baby was born suffering from drug withdrawal. The Ohio court found that an "unborn child is entitled to legal protection when his life has been interfered with by another." Ohio protects children in their child abuse statutes, but the issue remained whether an unborn child was included under these statutes. The Ohio court cited the New York case of In re Smith and the Michigan case of In re Baby X, discussed above, to highlight the developments in fetal rights and Ohio's acceptance and movement towards these changes.

3. Overview of Legislative Activity

Several states have instituted new "fetal abuse" statutes, expanded existing child abuse statutes or introduced legislation on the subject of drug addicted newborns. Bills have been introduced in Ohio, Georgia, Louisiana and Rhode Island that would make drug use during pregnancy a felony. The bill

ents must be accorded immunity from litigation which in fact would disrupt family harmony and unity." Id. (quoting the trial court).
106. Id. at 398, 301 N.W.2d at 870 (quoting Plumley v. Klein, 388 Mich. 1, 8, 199 N.W.2d 169, 173 (1972)). The second exception addresses the situation where there has been an exercise of reasonable parental discretion in providing food, clothing, housing, medical and dental services, and other care. Id.
107. Id. at 398, 301 N.W.2d at 871 (quoting Meyers v. Robb, 82 Mich. App. 549, 554, 267 N.W.2d 450 (1978)).
108. 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (1986).
109. Id. at 32, 500 N.E.2d at 936.
110. Id. at 33, 500 N.E.2d at 937.
111. Id. at 32, 500 N.E.2d at 936. "[Ohio's] Rev. Code Ann. 2919.22(A) prohibits any parent or guardian from creating a 'substantial risk to health or safety of the child, by violating a duty of care, protection, or support.'" Id. (quoting OHIO REV. CODE ANN. § 2919.22(A) (Anderson 1987)).

This statute is representative of the types of statutes that must be used to afford a fetus some protection. The statute focuses on the "substantial risk" that the parent creates through his or her conduct. In addition, the statute speaks of a "duty of care," which the Ohio court used in In re Ruiz to extend this child abuse statute to include fetal abuse. 27 Ohio Misc. 2d 31, 33-35, 500 N.E.2d 935, 937-39 (1986) (emphasis added). 112. Don't Punish the Troubled Mothers, Legal Times, May 21, 1990, at 20, 22.
pending in Ohio, for example, does several things. First, a woman who uses drugs during pregnancy would be prosecuted as a felon. If a woman fails to overcome her drug addiction the bill would mandate forced sterilization. The bill would set up several alternative sentences other than a prison term, ranging from tubal ligation to participating in a drug rehabilitation program.115

Oklahoma,114 Massachusetts,115 and Florida116 have statutes which require filing a child abuse report with the appropriate agency whenever a child is born physically dependent upon an addictive drug.

New Jersey's child abuse statute,117 which involves an application for care or custody of an endangered child, includes a provision allowing an application "on behalf of an unborn child."118 This statute appears to include not only the child's condition at birth but allows an unborn fetus the opportunity to have an application for custody or care filed relating to maternal prenatal conduct which may adversely affect the fetus.

4. Overview of Prosecutorial Action

In several states district attorneys have attempted to criminalize maternal conduct that harms the fetus. Some of these attempts have been more successful than others.

In San Diego, California, Pamela Rae Stewart Monson was prosecuted in connection with the death of her baby in September 1986.119 Monson smoked marijuana regularly, took amphetamines and had sexual intercourse despite her doctor’s

113. Id.
114. OKLA. STAT. ANN. tit. 21 § 846(A) (West 1991). The relevant portion of this statutes reads, "[e]very physician . . . attending the birth of a child who appears to be a child born in a condition of dependence on a controlled dangerous substance shall promptly report the matter." Id.
115. MASS. GEN. LAWS ANN. ch. 119 § 51A (West 1990). This general statute is entitled "Injured children, reports." In addition to regular cases of child abuse in children under the age of 18, the statute includes those "determined to be physically dependent upon an addictive drug at birth." Id.
116. FLA. STAT. ANN. § 415.503(9)(a)(2) (West 1990). This statute defines harm for purposes of the child abuse statutes. This section specifically speaks of "[p]hysical dependency of a newborn infant upon any drug." Id.
118. Id.
express warnings to avoid all three activities throughout the pregnancy. \^{120} Monson began hemorrhaging the day before she was to give birth to her son. She waited twelve hours before seeking medical attention, and engaged in sexual intercourse and used amphetamines during that time. \^{121} Her son died a month later from brain damage. \^{122}

Monson was charged with violating section 270 of the California Penal Code, which requires parents to furnish clothing, food, shelter and medical attention to their children. \^{123} The judge dismissed the case, ruling that the statute was meant to apply to fathers who were delinquent in paying child support and not to drug addicted mothers. \^{124} This was the first attempt in California to criminally sanction a woman for her conduct during pregnancy that resulted in harm to the fetus.

In Florida, in 1989, Jennifer Johnson was charged with a felony drug charge. \^{125} Johnson was subsequently convicted of delivering drugs to a minor through the umbilical cord. \^{126} This infant was Johnson's third cocaine-addicted baby. \^{127} Johnson received a sentence of fourteen years probation and one year in a rehabilitation program. \^{128} The court found that a child is a person after birth but not before the umbilical cord is severed for purposes of the relevant statute. \^{129} The court also found that Johnson chose to use cocaine, chose to become

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122. Id.

123. Id.


127. Id.

128. Sherman, Keeping Babies Free From Drugs, Nat’l L.J., Oct. 16, 1989, at 1, col. 2. In addition, Jennifer Johnson is required to report any pregnancy to law enforcement authorities. Id.

pregnant and chose to allow those pregnancies to come to term.\textsuperscript{130}

In Illinois, a prosecutor sought an indictment for manslaughter against a mother who abused cocaine late in her pregnancy, and therefore contributed to the death of her child two days after birth.\textsuperscript{131} Massachusetts prosecutors charged a woman with vehicular homicide in 1989.\textsuperscript{132} The woman was involved in a car accident due to the fact that she was driving under the influence of alcohol. The accident caused the miscarriage of her nine month old fetus.\textsuperscript{133}

E. **California’s Approach Towards the Rights of the Fetus**

1. **Background**

California has not allowed or created a cause of action for a fetus whose mother’s misconduct results in prenatal injuries to the fetus. Several attempts have been made in the past few years to criminalize a mother’s actions but nothing definitive has been done.\textsuperscript{134} Nevertheless, several court decisions and statutes have addressed the concept of “fetal rights” in certain situations. A discussion of the various results of these legislative decisions follows.

2. **Interests Accorded to a Fetus under California Law**

In 1939, the question of what interests an unborn child possessed was discussed in the California case, *Scott v. McPheeters*.\textsuperscript{135} This case, involving alleged medical malpractice

\begin{itemize}
\item \textsuperscript{130} Id.
\item \textsuperscript{132} Fein and Reynolds, *Addicts, Their Babies, and Their Liability*, Legal Times, May 21, 1990, at 20.
\item \textsuperscript{134} The two most notable attempts to create liability against a pregnant woman have been in San Diego County and Butte County. See supra notes 119-24 and accompanying text; Shaver, supra note 3. Another attempt was made by the District Attorney, Michael Ramsey, in Butte County to punish drug-using mothers. Ramsey has begun to use section 11550 of the California Health and Safety Code to prosecute “drug mothers.” Section 11550 prohibits drug use and allows a jail sentence if convicted of the misdemeanor. Ramsey has started to use this code section to initiate criminal sanctions against these women unless the mother agrees to join a drug treatment or counselling program. See also Shaver, supra note 3.
\item \textsuperscript{135} 33 Cal. App. 2d 629 (1939).
\end{itemize}
in the baby's delivery, focused on section 29 of the California Civil Code, which states, in relevant part, that "[a] child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."

The court's decision focused on the definition of "interests" as used in section 29. The California court felt that, "[c]learly the word is general in its application and includes both personal and property rights," including "anything that is profitable or beneficial to the child."

3. When a Fetus is Entitled to Protection in California

The courts' interpretation of California criminal and civil codes has resulted in the decision that a fetus is not within the definition of a person for the purposes of certain statutes. The courts in *Reyes v. Superior Court* and *In re Steven S.* decided that the legislature did not intend to include a fetus within their coverage of a "person" in every statute.

*Reyes v. Superior Court* involved a woman who was addicted to and continued to use heroin throughout her pregnancy. In addition, she failed to heed any of the advice she was given by her physician relating to the effect of her conduct on her fetus, resulting in the birth of twin boys who were both addicted to heroin and suffered withdrawal symptoms upon birth.

The prosecution relied on the child abuse statute, section 273a(1) of the California Penal Code, that addresses the

136. Id.
137. CAL. CIV. CODE § 29 (West 1982).
138. 93 Cal. App. 2d at 691.
139. Id.
143. 75 Cal. App. 3d at 216, 141 Cal. Rptr. at 912-913.
144. Id.
145. Id.
146. CAL. PENAL CODE § 273a(1) (West 1988) (stating in relevant part, "[a]ny person who, . . . willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be
situation of willfully causing unjustifiable pain or mental suffer-
ing upon any child. The court analyzed the use of "child" and
"fetus" in past statutory construction,\textsuperscript{147} as well as the cur-
rent language of the statute, to reach the conclusion that sec-
tion 273a(1) did not include a fetus in its definition of a
child.\textsuperscript{148}

The analogous case in the civil context is \textit{In re Steven
S.}\textsuperscript{149} The court in this instance was asked to decide whether
an unborn fetus was adjudged a "dependent child" under sec-
tion 300 of the California Welfare and Institutions Code.\textsuperscript{150}
After analyzing the statutory history in California relating to
children and fetuses,\textsuperscript{151} the court decided "that an
unborn fetus is not a person within the meaning of Welfare and Insti-
tutions Code section 300."\textsuperscript{152} The court concluded that
"when the legislature determines to confer legal personality on
unborn fetuses for certain limited purposes, it expresses that
intent in specific and appropriate terms."\textsuperscript{153}

4. \textit{California's Approach Towards Abused Children}

Once a child is born, California adopts a more protective
approach. The California courts appear more willing to allow

\textsuperscript{147} 75 Cal. App. 3d at 217, 141 Cal. Rptr. at 913. The analysis of the use of
the word "child" in section 273a(1) of the California Penal Code focused on other
California statutes that had decided the issue. The court discussed four instances
where an unborn child had not been considered a "human being:
1. An unborn child is not a human being within California Penal Code §
187 for murder and Penal Code § 192 for manslaughter;
2. An unborn child is not a "minor child" in the "failure to provide" stat-
ute (Cal. Penal Code § 270 (West 1988)).
3. An unborn person is not a person under the fourteenth amendment of
the United States Constitution;
4. An unborn child is not a "dependent child" under Aid to Families with
Dependent Children provisions of Title IV of the Social Security Act of 1935.

\textsuperscript{148} Id. at 217, 141 Cal. Rptr. at 913 (stating "[w]e are persuaded that the
word 'child' as used in Penal Code section 273a(1) was not intended to refer to
an unborn child").


\textsuperscript{150} Id.

\textsuperscript{151} Id. at 28-29, 178 Cal. Rptr. at 527-28. The court analyzed the history of
sections 29 and 377 of the California Civil Code and sections 187, 270 and 273(a)
of the California Penal Code.

\textsuperscript{152} Id. at 26, 178 Cal. Rptr. at 526.

\textsuperscript{153} Id. at 29, 178 Cal. Rptr. at 527-28 (emphasis omitted).
interference into the family unit when the welfare of a living child is jeopardized.\textsuperscript{154}

In the context of medical treatment and proper care, California law has granted the state some control over family decisions. \textit{In re Phillip B.}\textsuperscript{155} involved a twelve year old boy suffering from a congenital heart defect, whose parents had refused to consent to cardiac surgery.\textsuperscript{156} The appellate court, while recognizing the importance of parental autonomy,\textsuperscript{157} stressed the state's power to intervene to protect the welfare of the child.\textsuperscript{158} The court went even further to recognize that "[o]ne of the most basic values protected by the state is the sanctity of human life."\textsuperscript{159}

The court was reluctant, however, to freely allow state intervention into the family unit under any and all circumstances. Instead, the court outlined four specific factors that should be examined when determining whether the state could intervene to order medical treatment for the child: (1) "the seriousness of the harm that the child is suffering"; (2) "the evaluation for the treatment by the medical profession"; (3) the risks involved in medically treating the child; and, (4) "the expressed preferences of the child."\textsuperscript{160} The court also stressed the importance of the child's interests and whether his best interests would be served by ordering the medical treatment.\textsuperscript{161}

\textit{People v. Pointer,}\textsuperscript{162} which involved a mother who had imposed a macrobiotic diet on her two children despite the re-

\textsuperscript{154} See San Jose Mercury News, Dec. 10, 1989 at B7, col. 4. A young mother was charged with child endangerment when she left PCP joints within the reach of her baby and young child. The children were taken into protective custody while the mother and father awaited trial.

It is difficult to understand why the ingestion of drugs through the placenta is less onerous than ingestion of drugs through the mouth. The result in both situations is the same and could even be worse for the fetus because a fetus' stomach cannot be pumped.

\textsuperscript{155} 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979).

\textsuperscript{156} \textit{Id.} at 799-800, 156 Cal. Rptr. at 50.

\textsuperscript{157} \textit{Id.} at 801, 156 Cal. Rptr. at 50 (stating "[i]t is fundamental that parental autonomy is constitutionally protected").

\textsuperscript{158} \textit{Id.} at 801, 156 Cal. Rptr. at 51 (stating "[u]nder the doctrine of \textit{pier\ae patriae}, the state has a right, indeed, a duty to protect children").

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{Id.} at 802, 156 Cal. Rptr. at 51.

\textsuperscript{161} \textit{Id.} (stating "[o]f course, the underlying consideration is the child's welfare and whether his best interests will be served . . .").

peated warnings of her physician regarding the health of the children,\textsuperscript{163} is important in two respects. First, the mother was found guilty of child endangerment under section 273a(1) of the California Penal Code.\textsuperscript{164} Second, the trial court attempted to impose a condition of probation on the mother that she not conceive during her probationary period.\textsuperscript{165} This provision was struck down as unconstitutional,\textsuperscript{166} but it remains a novel attempt by a judge to remedy a problem before irreparable damage resulted to a new child.\textsuperscript{167}

California abolished the doctrine of parental tort immunity in \textit{Gibson v. Gibson}\textsuperscript{168} by allowing a minor child to maintain an action for negligence against one of his parents. The minor son brought an action against his father alleging negligence for injuries he suffered as a result of his father's conduct.\textsuperscript{169} In deciding the issue, the court in \textit{Gibson} proposed two important principles: (1) the "interest of the child in freedom from personal injury"\textsuperscript{170} and (2) that parental discretion does "not include the right willfully to inflict personal injuries beyond the limits of reasonable parental discipline."\textsuperscript{171} The recognition of these two principles resulted in the court's

\begin{itemize}
\item \textsuperscript{163} \textit{Id.} at 1131-32, 199 Cal. Rptr. at 359.
\item \textsuperscript{164} \textit{Id.} at 1133, 199 Cal. Rptr. at 360.
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.} at 1141, 199 Cal. Rptr. at 366 (deciding that "the condition of probation prohibiting conception is overbroad, as less restrictive alternatives are available that would feasibly provide the protections the trial court properly believed necessary").
\item \textsuperscript{167} See Churchville, \textit{D.C. Judge Jails Woman as Protection for Fetus; Convicted Thief Allegedly Uses Cocaine}, Wash. Post, July 23, 1988, at A1, col. 5 (reporting on a judge in the District of Columbia who sentenced a woman to jail until the date her baby was due because of test results showing a high level of cocaine in her system. The woman was before the judge on a charge of forging $700 worth of checks. This offense would have ordinarily been punished by probation. Instead, the judge put the woman in jail for twelve weeks, until shortly before the birth of her baby.)
\item \textsuperscript{168} 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).
\item \textsuperscript{169} In \textit{Gibson}, the father instructed his son to go out on the roadway and correct the position of the tires on the jeep he was towing. The son was injured by another vehicle while undertaking this act. \textit{Id.} at 916, 479 P.2d at 649, 92 Cal. Rptr. at 289.
\item \textsuperscript{170} \textit{Id.} at 920, 479 P.2d at 652, 92 Cal. Rptr. at 292.
\item \textsuperscript{171} \textit{Id.} at 921, 479 P.2d at 652, 92 Cal. Rptr. at 293.
\end{itemize}
adoption of the "reasonable parent standard" of conduct and the abolition of parental tort immunity.

From the above examples, it is apparent that the California courts and legislature are more apt to recognize a living child's rights. The decision in Gibson demonstrates how the court "refused to accept the notion that in certain or all areas of child rearing, a parent could act in any manner and then hide behind the defense of parental immunity." However, California remains reluctant to extend those rights to the fetus.

5. California's Uncertainty With Fetal Rights

Several recent California cases have involved babies born addicted to illegal drugs and subsequent attempts to state a cause of action for neglect against the mother. In In re Troy D., the child was born with a detrimental condition caused by the mother's ingesting dangerous drugs while pregnant. The court found that the prenatal use of dangerous drugs by a mother was probative of future child neglect.

In 1990, the court of appeal decided In re Stephen W., a case in which the child was born addicted to heroin. The mother, a heroin addict with a long history of drug abuse, took heroin the day before delivery. Again, the court determined that prenatal drug use was probative of future child neglect. California courts therefore appear ready to accept the proposition that prenatal substance abuse that results in injury to the child determines, to some extent, the future harm that a child might receive. However, California is still not comfortable with extending a finding of child neglect to the gestation period.

172. Id. (stating "we think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent parent have done in similar circumstances?").
173. See id. at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.
176. Id. at 897, 263 Cal. Rptr. at 872.
177. Id. at 899, 263 Cal. Rptr. at 874.
179. Id. at 634, 271 Cal. Rptr. at 321.
180. Id.
181. Id. at 639, 271 Cal. Rptr. at 324.
6. Attempts at Fetal Protection in California

District attorneys and senators have tried to institute programs to curb the incidence of drug addicted babies. In 1988, Butte County District Attorney, Michael Ramsey, announced a plan to use "evidence of illegal substances in newborns as evidence to charge their mothers with violating state criminal law forbidding the use of controlled substances." The goal of the program is to "protect children by sending a strong message to pregnant women that they should stop using illegal drugs." The punishment under the plan would be to enter a drug rehabilitation program or face a minimum ninety-day mandatory sentence upon conviction.

Additionally, then-Senator Pete Wilson (R.- Calif.) introduced the Child Abuse During Pregnancy Prevention Act into the United States Senate in 1989. The bill would create five $10 million grants, disbursed to states meeting certain criteria, to establish programs for the prevention of illegal drug use and alcohol abuse during pregnancy. The criteria determining eligibility for these grants include:

1. Offering a comprehensive approach for the prevention of illegal drug use by pregnant mothers, including preventive outreach programs, education and treatment;

2. Providing mandatory rehabilitation to substance-abusing mothers who give birth to a baby who is addicted or otherwise injured or impaired by the mother's substance abuse during pregnancy;

3. Conditioning probation on abstinence from substance abuse and from association with known drug users, and offer to mothers who successfully complete probation the opportunity to have their records expunged;

4. Providing mothers undergoing mandatory rehabilitation the opportunity to keep her baby with her if the mother is competent to function in a maternal capacity.

183. Id.
184. Id.
186. Id.
187. Id.
F. Criticisms of Legal Intervention

1. Overview

There are a number of possible criminal punishments for mothers who abuse illegal drugs during pregnancy. However, there are four main criticisms to the use of criminal punishment: (1) the threat of criminal prosecution drives mothers away from prenatal care; (2) the inadequacy of treatment programs; (3) the potential for discrimination in prosecution; and (4) the invasion of privacy into a woman’s right to bodily integrity.

2. Driving Mothers Away From Prenatal Care

For a variety of reasons, many pregnant women in the United States are unable to seek medical attention. For drug addicted pregnant women, there is a "lack of available or accessible medical services," resulting in inadequate prenatal care and education of poor and/or drug addicted pregnant women.

In addition, 37 million people in the United States are without health insurance. Of these, 26% are women and children. This creates a dilemma because some pregnant women are unable to afford much-needed medical treatment. The inability to control the pregnancy for financial reasons may also extend to women, including drug addicted women, being unable to procure abortions. They are, therefore, required to carry the baby to term without adequate resources to ensure prenatal medical care.

If doctors are required to report drug use by pregnant women, the women who have a chance to obtain medical help will most likely avoid prenatal care. The doctors would be seen not as ones to confide in, but instead as another form of police. Requiring doctors to report drug-using pregnant women would undermine the doctor-patient relationship:

189. Id.
191. Id.
tients would be less likely to confess their problem and request help if that confession resulted in criminal liability.

In addition, substance-abusing mothers who already have children might avoid prenatal care if they think that discovery of their addiction would result in their own children being taken away from them. If the women know that their addiction is harming their fetus, but are unable to overcome the addiction themselves, they will avoid the prenatal care and possible criminal punishment. Medical care becomes an option that is viewed by these women as resulting in worse immediate consequences for themselves and their families.

3. Inadequate Drug Treatment Programs Presently in Place

A study revealed that of the drug treatment programs in New York City, 54% excluded pregnant women and 67% would not take women whose medical bills were paid by Medicaid. In Michigan, twelve drug treatment programs accepted women but only one provided child care. Most programs did not accept pregnant women.

Requiring drug addicted pregnant women to attend treatment programs has been ineffective due to the unavailability of the programs and their inability to meet the needs of pregnant women. Even if a woman secures a place in a program, the program may be unable to adequately provide for pregnant women (e.g., no child care, insufficient knowledge of the different medical needs of pregnant women, the possible drug withdrawal of the fetus, etc.).

4. The Potential for Discrimination

Reports indicate that “most women prosecuted for using illegal drugs while pregnant have been poor members of racial minorities, . . . even though drug use in pregnancy is equally prevalent in white middle-class women.” A reason offered to explain this lopsided prosecution is that poor women are more likely to go to public hospitals for their care, and public

192. Id.
194. Id.
195. Id.
hospitals are more likely to run drug tests than private hospitals. In addition, public hospitals have been allowed to test a newborn if drug related symptoms are suspected, without the consent of the parents.

Even though research shows fairly equal rates of drug use among white and minority women who are pregnant, there is a perception that minority women are more likely to be drug users. The practical result of this misperception is that minority women are immediately suspect and tested for drugs more often than their white counterparts. The American Civil Liberties Union (ACLU) has found that 80% of the women prosecuted for drug use while pregnant are black, Hispanic or a member of some other minority. Other research has found that 15% of white and black women use drugs but that black women are ten times more likely to be reported than white women and poor women are more often reported than middle class women.

Part of this discrimination may be attributed to the fact that there is a difference in preferred drug use among the races and the classes. Studies show that poor minority women are more likely to use cocaine, whereas white middle class women are more likely to use marijuana. Nevertheless, poor minority women appear to bear the brunt of the prosecution.

5. Invasion of Privacy

As discussed previously, the right to be free from bodily invasion is protected by several constitutional amendments. In addition, a long line of United States Supreme Court cases have reiterated the importance and sanctity of the right to privacy. Under this right, privately conducted activities will more likely be protected than other activities.
However, in recognizing privacy rights, the Supreme Court has not allowed the home to “be made a sanctuary of crime.” The “limits of the right of privacy are found by examining societal values and determining which private activities are traditionally sanctioned and which are proscribed.”

Feminists and pro-choice advocates argue that it is “unconstitutional to deprive women of their freedom simply because they are pregnant.” Some attorneys fear that states will violate a woman’s right to privacy by improperly making health care decisions for women during pregnancy.

The Supreme Court has stated that there are certain decisions that are entitled to protection from governmental control. These decisions are those “dealing with matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.” Nevertheless, governmental intrusion into a woman’s privacy regarding her body and her pregnancy can be sanctioned only in compelling cases.

III. IDENTIFICATION OF THE PROBLEM

As the preceding material illustrates, the issue of prenatal drug use and misconduct by mothers is producing a generation of innocent drug addicts who require extensive state intervention in order to lead normal, productive and functional lives. At present, California laws and educational efforts are ineffective at preventing permanent damage to fetuses. The options that have been discussed are criminal prosecution of the mothers versus programs educating women about the dangers of taking drugs during pregnancy. However, neither method will combat or permanently change the real problem: addiction to drugs. Preventive measures must be taken now to stop the abuse of a fetus before the damage is permanently and irreversibly inflicted.

208. Id.
210. See supra note 58 and accompanying text.
IV. ANALYSIS

California has the option of proceeding along several different avenues to remedy the problem of maternal, prenatal, illegal drug use and misconduct.

A. An Extension of Already Existing Fetal Rights

The fetus has been entitled to specific legal rights since the days of the common law. In the context of fetal abuse, tort law and criminal law are the most natural areas of the law to encompass the injury inflicted upon the innocent fetus.

In various states, a fetus is able to bring an action in a wrongful death suit and a negligence suit. Typically these actions have been allowed against third parties and in some limited situations against the mother. The fetus originally had to be viable before it was allowed a cause of action, but some states have allowed a cause of action during the gestational period.

More importantly, several states, concerned enough about the problem of drug addicted and injured fetuses, have tried to create the necessary means to allow relief. If a mother was found to be feeding drugs to her newborn infant or toddler, most courts could easily make a finding of child abuse or child endangerment. Several states have attempted to extend this reasoning to fetuses. In essence, these states recognize that ingestion of drugs during pregnancy is comparable to direct ingestion by the child outside the womb.

California has been, and continues to be, confronted with the problem of a fetus that is addicted to drugs because of its mother's conduct. However, the California courts have refused to extend current statutes that protect children against injury or other detrimental conduct. The child abuse statutes continue to protect abused children and will only allow a cause

211. See supra notes 9-10 and accompanying text for a discussion of the common law rights accorded a fetus.
212. See supra note 22, notes 67 and 88-91 and accompanying text.
213. See supra notes 18-20 and accompanying text.
215. See supra notes 74-77 and 83-104 and accompanying text for an in-depth discussion of the advances several states have made in the area of fetal rights.
216. See supra note 119.
of action for these damaged children. California does recognize its authority through the doctrine of parens patriae and its affirmative obligation to protect endangered children. However, as far as abuse or neglect by a parent is concerned, that protection is conditional upon a child taking its first breath outside the mother's womb. Any conduct prior to that time is off-limits to state scrutiny. Currently, California recognizes a right to life but it does not extend its protection to a right to begin life with a sound mind and body as some states have done.

Overall, the cases decided in California have skirted the direct issue of fetal rights. The groundwork has been laid in California for an extension of the law to the fetus through the interests accorded to a fetus by section 29 of the California Civil Code and California's willingness to protect the welfare of living children. All that is required is for California to take the extra step to protect an abused fetus. Other state courts have recognized that a fetus can be protected from abusive behavior. From this position, courts in other states have been willing to extend their criminal or civil child abuse statutes to include harm inflicted upon a fetus.

The fetus has increasingly been recognized as an entity that should be afforded some protection. The extent to which states are willing and able to experiment with expanded rights is closely connected to the competing interests of the mother and the state.

217. See the discussion of In re Phillip B. and People v. Pointer, supra notes 155-67 and accompanying text.
218. See supra note 64 and accompanying text.
220. See supra notes 135 and 137-39 and accompanying text.
221. See supra notes 154 and 159 and accompanying text.
B. The Issue of the Rights and Duties of the Pregnant Woman, the State and the Fetus

1. The Pregnant Woman

*Roe v. Wade*[^223] is the landmark case for the proposition that a pregnant woman retains complete autonomy during the first trimester of her pregnancy to terminate that pregnancy. Until the last trimester of the pregnancy the woman has a qualified right to do with her body as she pleases.[^224] This qualified right essentially consists of a woman’s wishes being given substantial deference by the state unless the state’s interest in the mother’s health is important enough to justify overriding the mother’s rights.

With the recent Supreme Court decision in *Webster*,[^225] a woman’s right to autonomy in her personal decision-making will more likely be balanced against the equally important interests in fetal health and protecting potential life. The Missouri statute upheld in *Webster* insisted that “unborn children have protectable interests in life, health, and well-being.”[^226] This case marks a trend towards recognizing the importance of fetal rights and the state’s interest in protecting potential life.

The choice of whether to have an abortion involves an extremely personal decision regarding a woman’s right to procreate and to control her body. However, the decision to terminate a pregnancy can be separated from the decision to continue a pregnancy.[^227] Once a woman has decided to continue her pregnancy, the focus moves to the woman’s management of the pregnancy. This line of reasoning does not disregard the seriousness of an abortion or advocate abortions to minimize “management” problems during a pregnancy. An assumption that the fetus’ right to life is of paramount importance has to be made.[^228] Terminating a pregnancy should

[^224]: *Id.*
[^227]: One commentator has discussed the difference between managing a pregnancy and the right to procreate, arguing that the “maternal fetal conflicts that arise in managing a pregnancy do not involve the women’s right to procreate, but rather her right to bodily integrity in the course of procreating.” Robertson, *Procreative Liberty and the Control of Conception*, 69 VA. L. REV. 405 (1983).
[^228]: *Id.* A mother has “a duty to avoid acts or omissions that will damage the
not be viewed as an escape or as a less serious alternative to
abusing a fetus.

An extension of the rights of a fetus does not mean the end
to a woman's right to privacy. A woman will always be free
to procreate. However, the choices and decisions a woman
makes once she chooses to procreate may be more readily
scrutinized. Neither men nor women are allowed to freely
engage in illegal conduct without legal repercussions. Society
cannot forget or ignore that a fetus becomes a child after the
ten month gestational period. When does the limited free-
dom of a woman/mother begin—once the child is outside of
the womb or does it include the nine-month period when the
child is also completely dependent on the mother’s body for
its growth?

A woman's right to privacy cannot be so substantial and
overwhelming that she is able to forego all duties to society
and other individuals. Destructive, negligent behavior is not
tolerated between adults or between adults and children. Why
is it then so intrusive to ask a mother to refrain from destruc-
tive, negligent, and illegal behavior towards her fetus?

2. The State's Interest

States have argued repeatedly that they have an interest in
human life and potential human life. The interest in human
life is always present but the disagreement centers around
when the state’s interest in potential human life becomes suffi-
cient to overcome a woman’s interest.

The state has the authority to regulate the conduct of
individuals and family life in order to achieve a compelling state interest.\textsuperscript{229} The state is scrutinized when it attempts to
regulate individuals; however, the state is allowed to regulate
individual conduct to some extent. It is undoubtedly an impor-
tant state objective to have healthy, productive individuals who
will benefit, rather than burden, society. The state will be ex-
tremely burdened by drug-addicted babies who will require

\textsuperscript{229} See \textit{supra} notes 58-64 and accompanying text.
medical care, foster placement, adoption, and more likely than not, ongoing care for the mental, educational, and physical problems resulting from drug addiction. Economically, the problem is of overwhelming and compelling interest to the state, which will inevitably be required to pay the costs of caring for these children now and in the future.

The state, under the parens patriae doctrine, is expressly allowed to regulate the conduct of parents towards their children so as to insure the child's welfare. This protection should be extended to the fetus. A fetus will turn into a child who is afforded legal protection within the nine-month gestational period. The courts have recognized the interest in protecting the child's welfare and the nine-month gestational period is a necessary precursor to the life of the child. The state could assert its interest in the fetus thereby achieving the same overall purpose of protecting children by limiting the freedom and authority of the parent to engage in abusive behavior towards his or her child.

3. The Fetus' Interest

In several states, the fetus has a right to begin life with a sound mind and body, a right that has been advanced regularly in various state courts. Something must be done to make that right a reality in California. This right should apply equally to each fetus, including the unfortunate fetus whose mother acts unreasonably or negligently during the nine-month gestation period. If the right is not upheld as it should be, the fatal cycle of drug-abusing mothers expecting to retain complete freedom during their pregnancy while ignoring the potential human life within them will continue.

An individual has a right to life and the fetus has been said to have a right to begin life with a sound mind and body,

230. See supra notes 3-6.
231. See supra note 6.
233. Roe v. Wade, 410 U.S. 113, 163 (1973). "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." Id. The "compelling" point has been determined as the third (and last) trimester of a woman's pregnancy. This is the point when the fetus is usually capable of living outside of the womb, i.e., it is viable.
234. See supra note 91 and accompanying text.
but what good are these rights when the life begins with an extensive drug rehabilitation program?

C. **Evolution of the Law Regarding Fetal Rights**

As previously discussed, several states have been active in extending some protection to a child who is damaged due to a mother's prenatal drug abuse. The legislature and the courts willingly protect children who are injured after birth and sometimes when injured in the womb. This protection is much needed, but the bottom line is that the damage has already been inflicted. A child is currently afforded a remedy in most courts for its injuries, but this occurs after the fact.

Some of the states responding to the needs and rights of the fetus are interpreting their child abuse statutes to extend coverage to the fetus. A New York court has also advanced legal presumptions that will make it easier for these innocent addicts to collect damages once they are born. Nonetheless, the harm is inflicted and monetary compensation is the only remedy.

The law in California regarding fetuses and a pregnant woman's negligent and unreasonable conduct must evolve. California's drug-related births are now at 20%. This flood of innocent addicts must be stopped and more active measures taken to decrease the percentage of drug abusing women who harm their fetuses. A fetus should be given some power to stop the irreparable damage that is inflicted on it every time its mother uses illegal drugs.

V. **PROPOSAL**

California has been presented with the problem of fetal abuse but, as of yet, has failed to respond. The incidence and frequency in which drug addicted babies are born is frightening and must be remedied. This problem is not confined to

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235. See supra notes 74-77, notes 83-91, notes 97-104 and note 119 and accompanying text.
237. See supra note 76 and accompanying text.
238. See supra note 4 and accompanying text.
poor, uneducated women, but reaches into every social and economic bracket.

Due to the prevalence and unfortunate consequences resulting from drug abuse during pregnancy, legislation must be passed that effectively prevents the problem rather than simply remedies its effects. Courts have focused on taking the child from the mother once it is born and treating it like an abused child.\footnote{See, e.g., In re Baby X, 97 Mich. App. 111, 293 N.W.2d 736 (1980) (court deciding whether sufficient evidence to take temporary custody of the baby); In re Danielle Smith, 492 N.Y.S.2d 331, 128 Misc. 2d 976 (1985) (court attempting to afford a baby protection under a state statute).} Rather than wait for the injury to be inflicted, the legislature must construct a statute that will address the problem at its roots.

A separate statute devoted to fetal abuse is required in California to combat the problem. Such a statute could read:

Any woman who willfully, intentionally, and knowingly uses illegal drugs during her pregnancy will be subject to scrutiny under a reasonableness standard of conduct. The state will be allowed to examine the utility of the conduct in relation to the magnitude of the risk thereby created. If the risk greatly outweighs the utility of a pregnant woman's conduct the state will be allowed to monitor her conduct for the remainder of the pregnancy.

The type of monitoring that is envisioned by this statute would vary depending on the situation. In some circumstances, it would be appropriate to require the woman to enter a drug rehabilitation/education program. In more serious cases, the state should consider funding a home specifically designed to treat pregnant, drug addicted women for up to the nine-month term of pregnancy. Such a home would be expensive to run, but the amount of money that will be spent on caring for drug addicted babies is also great. It is necessary to spend the time and money to alleviate problems before they are irreversible rather than spend the money for the lifetime care required for a damaged, drug addicted baby.

The California legislature has discussed the problem of drug addicted babies.\footnote{See supra notes 185-87 and accompanying text.} However, addiction will not disappear on its own or even with the threat of criminal sanctions. Drug addiction has been recognized by the courts as a medical,
not a criminal problem. Funding for the treatment of these women and their drug addiction is required if long-term solutions are desired by the state.

There is a fear that recognizing fetal abuse will criminalize abortion. Two different issues are at stake: one is abortion and the other is managing the pregnancy. Fetal abuse would focus on the woman who has decided to carry her fetus to term. As previously stated, this does not intend to advocate abortion or turn abortion into an escape route to avoid criminal liability for abuse.

Education programs should be initiated alongside a statute that, to some degree, regulates a pregnant woman's conduct. In addition, mandatory education programs could be required as part of a rehabilitation program. Billboards, television or radio advertisements or any other media could be used to alert women to the dangers of taking drugs while pregnant. In addition, mandatory education could be required as part of an extensive rehabilitation program.

Legislation must be enacted that will help these innocent addicts before they are permanently and irreparably damaged. The legislature has to allocate funds to provide treatment programs that will specifically address the needs of drug addicted, pregnant women. Only then will the flood of drug addicted babies be curtailed. Eighteen years and nine months of reasonable standards of parental conduct can make the difference between a healthy active baby and one who enters the world frail and sickly and immediately handicapped by drugs.

VI. CONCLUSION

As the incidence of drug related births rises in the United States, and in California particularly, society will increasingly be confronted with the need to act. The illegal use of drugs by itself is enough to put a person in jail. Thus, the illegal use of drugs during a pregnancy which results in known detrimental consequences to mother and fetus should be enough to allow the state to regulate a woman's conduct. Mandatory rehabilitation programs and scrutiny of a mother's illegal conduct are required.

A valid concern exists that a woman's right to privacy will be infringed and intruded upon, but there is a point at which one person cannot willfully damage another without incurring
legal responsibility. A policy instituted at this stage to combat addiction and deal effectively with drug-using mothers can hopefully curb the number of innocent addicts born every day and begin to prevent this ongoing tragedy of fetal abuse.

This comment has discussed the evolving status of fetal rights in various areas of criminal, tort, property and inheritance law. These rights, as well as the rights of the mother and the fetus have a strong basis in the Constitution and case law, thus affording them considerable weight in the legal system. The role of other states was discussed in their attempts to enlarge the protection given a fetus. California can use these models to help change its laws. Finally, this comment discussed the status of the law of California with respect to a fetus and to a child.

An analysis of this material led to the proposal of a statute for California which would provide some regulation and guidelines for women who abuse drugs during their pregnancy or otherwise intentionally harm their fetus. The statute proposed utilizing a reasonableness standard of conduct in assessing the conduct in question and the magnitude of the risk involved in the conduct.

Until an active role is taken by the California legislature, including a significant outlay of funds, the problem of drug addicted babies will remain. If nothing is done, the legislature will be faced with deciding how they can expect to stop the rise of drug addicted babies absent more particularized laws and funding. Money will have to be allocated to help resolve this problem. The issue now is when that money will be allocated.

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