

PROSECUTING PREGNANT ADDICTS FOR DEALING TO THE UNBORN

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On July 13, 1989, a Florida court convicted Jennifer Clarise Johnson of drug dealing under a statute which prohibits the delivery of a controlled substance to a minor. The recipient of the drug was her unborn child. The court held that the term "delivery," as used in the statute, includes the passage of cocaine through the umbilical cord, and that a child born, but whose umbilical cord has yet to be severed, is a person within the definition of Florida law.¹

INTRODUCTION

In recent history, tremendous medical and scientific advances have been made in the field of fetal health care, surgery, diagnosis, and treatment.² Due in part to the advancement of this technology, the legal status afforded a fetus has significantly changed from the time when a fetus was perceived to be an entity wholly dependent on its mother.³ The fetus is now granted independent protection under the law.⁴

Unfortunately, technology is not the only influence on the fetus. The growing drug problem in American society has reached into the womb. The National Institute on Drug Abuse estimates that of fifty-six million American women between the ages of fifteen and forty-four, eight million are currently drug abusers.⁵ The number of women who continue to abuse drugs once they become pregnant is unknown, but it is estimated that as many as 375,000 infants may be affected each year by their mothers' drug abuse during pregnancy.⁶ A woman who abuses drugs during her pregnancy risks spontaneous abortion or stillbirth. An infant who survives birth may suffer effects ranging from irritability to various birth defects.⁷

1. Miami Herald, July 14, 1989, at A1, col. 5. "I am convinced and find that a child who is born but whose umbilical cord has not been severed is a person within the intent and meaning [of the law]." *Id.* (quoting Circuit Judge O.H. Eaton Jr.).

2. For a general analysis addressing both scientific breakthroughs in fetal research and lawmakers' ability to respond, see Comment, *Fetal Research Statutes, Procreative Rights, and the "New Biology": Living in the Interstices of the Law*, 21 SUFFOLK U.L. REV. 723 (1987).

3. See *infra* note 9 and accompanying text.

4. See *infra* notes 13-20, 25-32, 45-50, 70 and accompanying text.

5. Silverman, *Scope, Specifics of Maternal Drug Use, Effects on Fetus are Beginning to Emerge From Studies*, 261 J. A.M.A. 1688 (1989).

6. *Id.* at 1689.

7. Silverman, *Interaction of Drug Abusing Mother, Fetus, Types of Drugs Examined in Numerous Studies*, 261 J. A.M.A. 1689 (1989). Although the long-term effect on cocaine-addicted infants is unclear at the present time, these babies may exhibit congenital malformation, as well as signs of emotional disturbance and sensory system impairment. Comment, *Maternal*

This Note outlines the history of fetal protection under the law and the changes that have taken place in recent years in the area of liability to the fetus. This Note will particularly address the legal responsibilities owed by the pregnant woman to her fetus. Finally, this Note will examine a case in which a woman was held criminally responsible for ingesting narcotics that resulted in harm to her fetus, and how that decision may affect the way in which courts choose to deal with similar situations in the future.

FETAL PROTECTION

Civil Liability

Historically, the law refused to recognize a fetus as an entity separate from its mother.⁸ In *Dietrich v. Inhabitants of Northhampton*,⁹ Justice Holmes, writing the opinion for the Massachusetts Supreme Court, denied a cause of action for prenatal injuries to a fetus whose mother slipped and fell on a defective highway. The fetus was born prematurely but subsequently died as a result of its premature birth. The *Dietrich* court concluded that a fetus could not maintain an action against a negligent tortfeasor because it had no separate legal status apart from the mother.¹⁰ Any damage incurred would have to be recovered in a suit brought by the mother.¹¹

Courts followed the *Dietrich* rule for more than sixty years.¹² It was not until 1946 that an American jurisdiction recognized the right of a fetus to maintain an independent cause of action for prenatal injuries. In *Bonbrest v. Kotz*,¹³ a fetus sustained injuries prior to birth but survived childbirth. An action was brought, on behalf of the fetus, claiming that the injuries sustained were the result of medical malpractice during the delivery. The *Bonbrest* court rejected Justice Holmes' contention¹⁴ that a viable fetus was a part of the mother, and held that a child *en ventre sa mere*¹⁵ could recover for injuries suffered prior to its birth, if the fetus was both viable at the time of injury and born alive.¹⁶ The court's decision was based on its acknowledgement that, although still in the womb, a fetus is viable if it has its own bodily form, possesses its own bodily systems, and manifests the anatomical characteristics of

Substance Abuse: The Need to Provide Legal Protection for the Fetus, 60 S. CAL. L. REV. 1209, 1217 (1987).

8. See *infra* note 9 and accompanying text.

9. 138 Mass. 14, 52 Am. Rep. 242 (1884).

10. *Id.* at 17, 52 Am. Rep. at 242. Since the fetus was viewed as a part of the mother, any prenatal injury to the fetus that was not too remote to allow recovery was recoverable by the mother.

11. *Id.*

12. Comment, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 DICK. L. REV. 691, 693 (1988) [hereinafter *Maternal Substance Abuse*].

13. 65 F. Supp. 138 (D.D.C. 1946).

14. See *supra* notes 8-11 and accompanying text.

15. *En ventre sa mere* is a term meaning "in its mother's womb." BLACK'S LAW DICTIONARY 479 (5th ed. 1979).

16. *Bonbrest*, 65 F. Supp. at 140. The *Bonbrest* court did not address the point of viability of a fetus. The fetus was injured as it was removed from its mother's womb. The court held that the fetus had reached the point of viability at the time of injury, since it was born alive only moments after the injury occurred.

an individual.¹⁷ The *Bonbrest* court also reasoned that denying a right of action to a child, who survived the injuries it sustained while a viable fetus, against the tortfeasor, would force the child to bear the burden of an injury caused by the fault of another.¹⁸ The court analogized its holding to property law, where a child *en ventre sa mere* is regarded as an individual, for purposes of inheritance, from the moment of conception.¹⁹ It found no reason to consider a fetus to be an individual in the one context, but not in the other.²⁰

The *Bonbrest* decision, which recognized the fetus as a distinct entity independent of the mother, paved the way for the expansion of fetal rights in tort law.²¹ Dean Prosser considered it one of the most influential cases in tort history.²² The *Bonbrest* decision helped support the position taken by many modern courts that the legal rights of fetuses may expand and develop with advances in medical science.²³ With both the legal and medical professions accepting the belief that a pregnant woman and her fetus are distinct from one another, the potential for liability of third-party tortfeasors and of the pregnant woman toward the unborn child is ever-increasing.

Liability of Third-Party Tortfeasors

Although the *Bonbrest* decision required the fetus to be both viable at the time of injury and subsequently born alive in order to recover damages, not all jurisdictions strictly adhere to these requirements. Many courts refuse to apply the viability requirement to a fetus' cause of action in tort.²⁴ For example, in *Smith v. Brennan*,²⁵ the plaintiff, while in the womb, was injured in an automobile accident caused by the defendant's negligence. As a result, the plaintiff was born three months later with deformed legs and feet.²⁶ The Supreme Court of New Jersey held that every child has the right to begin life

17. *Bonbrest*, 65 F. Supp. at 141.

18. The court noted that while the parents could bring suit for any losses that they had incurred, there is "a residuum of injury for which compensation cannot be had save at the suit of the child." *Id.*

19. *Id.* at 140. Although the law had been reluctant to afford legal status to fetuses, the rights of fetuses had been widely recognized in the area of inheritance. *See, e.g.*, *Cowles v. Cowles*, 56 Conn. 240, 13 A. 414 (1887). *See also* Uniform Probate Code § 2-108 (1969). If the fetus existed at the time of death of the testator and was later born alive, it was considered to be a person for the limited purpose of inheritance.

20. *Bonbrest*, 65 F. Supp. at 140.

21. Comment, *Criminal Liability of a Prospective Mother for Prenatal Neglect of a Viable Fetus*, 9 WHITTIER L. REV. 363, 370 (1987). The *Bonbrest* case has "served as a legal catalyst for subsequent causes of action, which have since established that a child, whether viable or not, does have a right to redress any harm sustained while inside the mother's womb."

22. W. PROSSER, *THE LAW OF TORTS* 336 (4th ed. 1971). "Beginning with [*Bonbrest v. Kotz*], a rapid series of cases . . . have brought about what was up till that time the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts."

23. *See, e.g.*, *Smith v. Brennan*, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960). The court stated, "Medical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body. . . . From the foregoing, it is clear that medical authorities recognize that before birth an infant is a distinct entity, and that the law recognizes that rights which he will enjoy when born can be violated before his birth."

24. *See infra* notes 25-32 and accompanying text.

25. 31 N.J. 353, 157 A.2d 497.

26. *Id.* at 355, 157 A.2d at 498.

with "a sound mind and body."²⁷ If the child is denied that right, he or she should be able to recover damages to compensate for the harm sustained, irrespective of when the harm occurred.²⁸ The court found the issue of viability at the time of injury to be irrelevant if the child was subsequently born alive.²⁹

Similarly, in *Womack v. Buchhorn*,³⁰ the Michigan Supreme Court ruled that an eight-year-old child could bring an action to recover for brain injuries he suffered as a four-month-old fetus as the result of an automobile accident. The court based its decision, in large part, on the tremendous advances made by science and medicine in the field of fetal research and on the trends in legal philosophy.³¹ At the time *Womack* was decided, twenty-seven American jurisdictions allowed a child to recover for prenatal injuries, condemning the old rule that denied recovery.³²

Some states, however, still refuse recovery for injuries suffered by pre-viable fetuses.³³ The rationales underlying these decisions include the difficulty in proving causation³⁴ and the fear that allowing recovery by pre-viable fetuses will undermine the Supreme Court's ruling in *Roe v. Wade*.³⁵ In *Commonwealth v. Cass*,³⁶ the Massachusetts Supreme Court addressed the causation issue in deciding whether the destruction of a fetus should be considered homicide. The court noted that the rationale for the common law rule that the killing of a fetus is not homicide was the difficulty in knowing whether the defendant's actions, in fact, caused the destruction of the fetus.³⁷ Ultimately, the *Cass* court held that the problem of proving causation is no longer a sound reason for denying criminal liability, because medical science can now provide competent proof as to whether the fetus was alive at the time of the defendant's actions and whether those actions were the cause of the fetus' death.³⁸ Despite advancements in medical technology, however, the causation issue is still troublesome. Proving causation is even more difficult when a fetus is not yet viable, because a defendant may claim that a pre-viable fetus might never have reached the point of viability, despite the actions of the defendant.

The possible conflict between the *Roe* decision and allowing pre-viable fetuses to recover for damages sustained by third-party tortfeasors has also

27. *Id.* at 364, 157 A.2d at 503. The court held that "a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right . . . damages for such harm should be recoverable by the child."

28. *Id.* at 365, 157 A.2d at 503.

29. *Id.* at 367, 157 A.2d at 504. The court stated, "[w]hether viable or not at the time of injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress."

30. 384 Mich. 718, 187 N.W.2d 218 (1971).

31. *Id.* at 720, 187 N.W.2d at 219-20.

32. *Id.* at 721, 187 N.W.2d at 220.

33. *See, e.g.,* *Albala v. City of New York*, 54 N.Y.2d 269, 445 N.Y.S.2d 108, 429 N.E.2d 786 (1981); *Evans v. Olson*, 550 P.2d 924, 927 (Okla. 1976); *Stetson v. Easterling*, 274 N.C. 152, 156, 161 S.E.2d 531, 534 (1968).

34. *Smith*, 31 N.J. at 365, 157 A.2d at 503.

35. 410 U.S. 113 (1973). The Court held that, prior to the point of the fetus' viability, a woman's right to have an abortion cannot be regulated by the state.

36. 392 Mass. 799, 467 N.E.2d 1324 (1984).

37. *Id.* at 806, 467 N.E.2d at 1328.

38. *Id.*

been noted by courts denying recovery.³⁹ If a mother has the fundamental right to legally terminate her pregnancy at three months without regard for the rights of the fetus, some courts find it difficult to justify holding a third person liable for unintentionally but negligently injuring the fetus at that same stage.⁴⁰ The validity of the concern over the abortion issue, however, is questionable after the Supreme Court's ruling in *Webster v. Reproductive Health Services*.⁴¹ The *Webster* Court held that the state has an interest in protecting potential human life throughout the duration of a woman's pregnancy. While the ruling in *Webster* is certain to affect cases dealing with abortion, it may also have a substantial impact on tort suits involving the question of whether recovery should be allowed for injuries suffered by a pre-viable fetus.

Most jurisdictions have abandoned the live birth requirement established in *Bonbrest* and now allow recovery for fetal injuries even when the child is stillborn.⁴² Recovery, however, is dependent on the construction of a state's wrongful death statute.⁴³ If a court holds that the legislative intent was not to include the fetus as a "person" under the wrongful death statute, recovery will be barred.⁴⁴

In *Summerfield v. Superior Court, Maricopa County*,⁴⁵ the Arizona Supreme Court held that the term "person" in the Arizona wrongful death statute⁴⁶ includes fetuses, and that the wrongful death of a fetus is a compensable loss to the survivors. In *Summerfield*, the parents of a viable fetus that was stillborn as a result of medical malpractice brought a wrongful death action against the physicians. The court recognized the legislative goal of protecting the fetus, basing its determination on statutes concerning manslaughter,⁴⁷ criminal sentencing,⁴⁸ and abortion.⁴⁹ The court found that this legislative protection of the unborn indicated a legislative intent to make the wrongful death statute available to parents seeking a remedy when their viable child is negligently killed prior to birth.⁵⁰ With the increasing recognition of the fetus' cause of action against a third-party tortfeasor, the stage was set for

39. Toth v. Goree, 65 Mich. App. 296, 303-04, 237 N.W.2d. 297, 301 (1976).

40. *Id.*

41. 109 S. Ct. 3040 (1989).

42. See, e.g., *Simmons v. Howard Univ.*, 323 F. Supp. 529 (D.C.C. 1971); *Amadio v. Levin*, 509 Pa. 199, 501 A.2d 1085 (1985); *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984); *Salazar v. St. Vincents Hospital*, 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980).

43. W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS § 55 (5th ed. 1984).

44. *Id.*

45. 144 Ariz. 467, 698 P.2d 712 (1985).

46. ARIZ. REV. STATS. ANN. § 12-611 (1985).

When death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages.

47. *Id.* § 13-1103(A)(5) (felony to cause the death of unborn child knowingly or recklessly by any physical injury to the mother which would be murder if the mother died).

48. *Id.* § 13-702(D)(10) (death of unborn child is an aggravating circumstance for purposes of sentencing).

49. *Id.* § 36-2301.01(C) (physician performing abortion on viable fetus is constrained to take all reasonable steps to preserve life and health of fetus).

50. *Summerfield*, 144 Ariz. at 476, 698 P.2d at 721.

the conflict between the rights of the fetus and the rights of its mother in both civil and criminal law.

Civil Liability of the Pregnant Woman

The potential conflict between a pregnant woman and her unborn child has materialized in several cases. In *Grodin v. Grodin*,⁵¹ a Michigan court held that a child could sue his mother for negligently taking tetracycline during her pregnancy, which resulted in the discoloration of the child's teeth. The Michigan Court of Appeals remanded the case to the trial court for a determination of the reasonableness of Mrs. Grodin's actions, holding that the standard against which to measure her actions was that of the "reasonable" pregnant woman.⁵²

In *Curlender v. Bio-Science Laboratories*,⁵³ the California Court of Appeals considered whether a child born with Tay-Sachs disease, a severe genetic defect, could maintain an independent cause of action for wrongful life against the laboratory that tested her parents for the disease prior to the child's conception and reported that the test results were negative.⁵⁴ The parents, relying on the false results, allegedly did not consider the possibilities of amniocentesis or abortion.⁵⁵ The court upheld the child's right to an independent cause of action against the laboratory.⁵⁶ The court further suggested that had the parents received correct test results, but proceeded with the pregnancy despite the risk, the parents could have been the defendants in their child's action.⁵⁷

Some courts have been more reluctant to allow a child to sue his or her mother for injuries suffered while in the womb. For example, in *Stallman v. Youngquist*,⁵⁸ the fetus was injured in an automobile collision when the mother was driving. The father of the fetus brought a negligence action against both the mother and the other driver. The Supreme Court of Illinois refused to recognize a cause of action by or on behalf of a fetus, subsequently born alive, for the unintentional infliction of prenatal injuries by the mother.⁵⁹ The *Stallman* court differentiated between prenatal injuries inflicted by the mother and those inflicted by a third person. The court determined that holding a pregnant woman liable in tort for injuries to her fetus would violate her right to privacy and bodily autonomy, as well as injure the relationship between

51. 102 Mich. App. 396, 301 N.W.2d 869 (1980).

52. *Id.* at 400-02, 301 N.W.2d at 870-71.

53. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

54. *Id.*

55. *Id.* at 816, 165 Cal. Rptr. at 480.

56. *Id.* at 832, 165 Cal. Rptr. at 489.

57. *Id.* at 829, 165 Cal. Rptr. at 488. The *Curlender* court stated:

If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice would provide an intervening act of proximate cause to preclude liability insofar as defendants other than the parents were concerned. Under such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring.

58. 125 Ill. 2d 267, 531 N.E.2d 355 (1988).

59. *Id.* at 280, 531 N.E.2d at 360.

mother and child.⁶⁰ The *Stallman* court also noted the difficulty in establishing a standard of care for measuring a pregnant woman's acts or omissions. "Reasonable" prenatal care may be dependent upon several different variables, including: the socioeconomic status of the woman, the health of the woman prior to conception, and at what point the woman discovers she is pregnant.⁶¹ The difficulties apparent in the civil context escalate when the state attempts to hold the mother criminally responsible for acts or omissions that harm her fetus.

Criminal Liability

Criminal Liability of Third Persons Toward the Fetus

The question of criminal liability for causing harm to a fetus emerged when courts were faced with determining whether a fetus was a "person" or a "human being" within the meaning of the criminal statute under which the defendant was charged.⁶² In *Keeler v. Superior Court*,⁶³ the California Supreme Court considered whether the fetus which the petitioner was accused of killing was a human being within the meaning of the state's homicide statute.⁶⁴ The petitioner in *Keeler* was the estranged husband of a woman in her eighth month of pregnancy. Angry that his wife was pregnant with another man's child, the petitioner shoved his knee into her abdomen, intentionally trying to kill the child. The child was stillborn with a fractured skull. The pathologist testified that the skull fracture could have been the result of the

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Holding a third person liable for prenatal injuries furthers the interests of both the mother and the subsequently born child and does not interfere with the defendant's right to control his or her own life. 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, and infringes on her right to privacy and bodily autonomy. . . . It would be a legal fiction to treat the fetus as a separate legal person with rights hostile to and assertable against its mother. The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant. No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world.

Id. at 278, 531 N.E.2d at 360. With regard to a pregnant woman's right to privacy, see also *infra* notes 105-07.

61.

The circumstances in which each individual woman brings forth life are as varied as the circumstances of each woman's life. Whether a standard of care to which a woman would be held while pregnant should vary according to whether a pregnancy was planned or unplanned, to whether a woman knew she was pregnant soon after conception or only knew after several months, to whether she had the financial resources with which to access the best possible medical care available or was unable to get any prenatal care are all questions which deserve much thought and reflection.

Youngquist, 125 Ill. 2d at 279, 531 N.E.2d at 360.

62. See Comment, *Criminal Liability of a Prospective Mother for Prenatal Neglect of a Viable Fetus*, 9 WHITTIER L. REV. 363, 374 (1987).

63. 2 Cal. 3d 619, 87 Cal. Rptr. 481 (1970).

64. CAL. PENAL CODE § 187 (West 1987). The statute provided in pertinent part: "Murder is the unlawful killing of a human being; with malice aforethought."

petitioner's blow to the mother's abdomen.⁶⁵ The court, after examining the legislative history of California's murder statute, which defined murder as the unlawful killing of a human being, determined that a fetus was not a human being.⁶⁶ The *Keeler* court found that the statute had been enacted as part of the California Penal Code of 1872,⁶⁷ and that the common law at the time of its enactment held that a fetus was not a human being. A fetus, therefore, could not be the victim of homicide unless it was born alive.⁶⁸ The court reasoned that because the legislature had never adopted a feticide statute or amended the existing homicide laws, despite the opportunity to do so, the legislature intended to exclude the killing of an unborn fetus from the state's homicide statute.⁶⁹ Although the California legislature later amended the state's homicide statute to include fetuses as a new category of murder victims,⁷⁰ the rule followed by the *Keeler* court remains the majority view in the United States.⁷¹ Unless a statute expressly alters the definition of "murder" to include the unlawful killing of a fetus, a defendant will generally escape prosecution for homicide.⁷²

Criminal Liability of the Mother for Actions Toward Her Fetus

While courts have been reluctant to convict anyone under existing criminal statutes for harm to a fetus, this reluctance is especially evident when the mother is the criminal defendant. The California Court of Appeals decision in *Reyes v. Superior Court*⁷³ provides further evidence that courts adhere to strict statutory interpretation in the area of criminal liability. In *Reyes*, a mother of twins who was addicted to the use of heroin during her pregnancy was charged with two counts of felony child endangering. She was warned by a public health nurse that unless she discontinued the use of the drug and sought prenatal care, the health and life of her unborn children would be endangered.⁷⁴ The petitioner disregarded this advice and continued to use heroin, delivering twins who were addicted to heroin at birth and subsequently suffered withdrawal.⁷⁵ The state argued that the mother was liable under the California

65. *Keeler*, 2 Cal. 3d at 623, 87 Cal. Rptr. at 482.

66. *Id.* at 623, 87 Cal. Rptr. at 483.

67. *Id.*

68. 3 E. COKE, INSTITUTES 58 (1648).

69. *Keeler*, 2 Cal. 3d at 631, 87 Cal. Rptr. at 488.

70. Stats. 1970, ch. 1311, § 1. Rather than redefine the term "human being" to include a fetus, the statute declares that murder is the "unlawful and malicious killing of a human being, or a fetus."

71. *People v. Greer*, 79 Ill. 2d 103, 111, 402 N.E.2d 203, 207 (1980). The court noted, "Some states have . . . expressly includ[ed] a fetus within the definition of victims of homicide or by passing a separate feticide statute. In the absence of such legislative enactment, however, no court of last resort in this country has held that the killing of a fetus is murder unless the fetus is born alive and then expires." (citations omitted).

72. See, e.g., *Greer*, 79 Ill. 2d 103, 402 N.E.2d 203 (Defendant allegedly beat his pregnant girlfriend using his fists, feet, and a broomstick causing the death of her eight-month-old fetus. Defendant escaped prosecution for injury to the fetus); *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983) (Criminal charges against estranged husband of pregnant woman were dropped because of the common law live-birth requirement despite the fact that he caused the death of her twenty-eight to thirty-week old fetus by forcing his hand up her vagina). *But see Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984) (A viable fetus is a "person" for purposes of Massachusetts' vehicular homicide statute).

73. 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977).

74. *Id.* at 216, 141 Cal. Rptr. at 912-13.

75. *Id.*, 141 Cal. Rptr. at 913.

child endangerment statute, which provided for the imprisonment of anyone who willfully caused or permitted a child to be placed in a situation where the child could be harmed or endangered.⁷⁶ The court held that the care and custody of unborn children was excluded from the statute.⁷⁷ The court reasoned that if the legislature had intended to include unborn children among the class of victims to be protected under the statute, it would have done so expressly by amending the Penal Code Section, as it did after the *Keeler* decision.⁷⁸

Most criminal cases against pregnant women for the purpose of protecting their unborn children have been actions for neglect or abuse.⁷⁹ In 1986, Pamela Rae Stewart⁸⁰ was charged under California Penal Code Section 270, which makes it a misdemeanor for a parent to fail to provide necessary medical attention for minor children.⁸¹ Children "conceived but not yet born" were expressly included within the coverage of the statute.⁸²

In 1985, Stewart became pregnant with her third child.⁸³ In her eighth month of pregnancy, she was admitted to the hospital because she was bleeding and suffering from pains resembling labor. Test results indicated that the bleeding and pains were caused by a condition known as *placenta previa*,⁸⁴ which could potentially endanger both mother and child. Stewart was later released from the hospital, but claimed that she was never told of the severity of her condition.⁸⁵ A week later she began bleeding again and returned to the hospital. She was released from the hospital the next day with instructions to abstain from sexual intercourse, take medication to control the bleeding, and return to the hospital immediately if she began bleeding heavily.⁸⁶ Two weeks after her last release from the hospital, Stewart delivered a son who was brain dead at birth. Hospital records indicated that on the day Stewart delivered, she

76. CAL. PENAL CODE § 273 a(1) (West 1987). The statute reads: "Any person, who, under circumstances or conditions likely to produce great bodily harm or death, . . . having the care or custody of any child, . . . willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment."

77. *Reyes*, 75 Cal. App. 3d at 218, 141 Cal. Rptr. at 915.

78. *Id.*, 141 Cal. Rptr. at 914-15.

79. *See, e.g., Reyes*, 75 Cal. App. 3d 214; *People v. Stewart*, No. M508197 (San Diego Mun. Ct. Feb. 26, 1987).

80. *Stewart*, No. M508197, slip op. at 4.

81. CAL. PENAL CODE § 270 (West Supp. 1988). The statute provides in pertinent part:

If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary . . . medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. . . . A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.

82. *Id.*

83. Comment, *The Pamela Rae Stewart Case and Fetal Harm: Prosecution or Prevention*, 11 HARV. WOMEN'S L.J. 227, 227 (1988) [hereinafter *Pamela Rae Stewart Case*] (citing Bonavoglia, *The Ordeal of Pamela Rae Stewart*, MS., July/Aug. 1987, at 92).

84. "Placenta previa is the implantation of the placenta in the lower portion rather than the upper section of the uterus. This condition can cause spontaneous abortion, postpartum hemorrhage, and infection." *Id.* at 228 n.9 (citing K. FINEBERG, J. PETERS, J. WILLSON & D. KROLL, *OBSTETRICS/GYNECOLOGY AND THE LAW* 427 (1984)).

85. *See Pamela Rae Stewart Case*, *supra* note 83, at 228.

86. *Id.*

engaged in sexual intercourse with her husband, smoked marijuana, stopped taking her prescribed medication, and refused to come to the hospital until almost twelve hours after she began bleeding heavily.⁸⁷ Stewart was arrested for contributing to the death of her child and charged under California Penal Code Section 270.⁸⁸ The prosecution based its charge against Stewart on three grounds: her use of illegal drugs during the pregnancy, her failure to adhere to her doctor's instructions to avoid sexual intercourse, and her refusal to immediately go to the hospital when the bleeding began.⁸⁹

Stewart filed a demurrer to the complaint, stating that the facts, as set forth, did not constitute an offense under Section 270. The trial court sustained the demurrer without leave to amend, finding that Section 270 did not impose a duty upon the pregnant woman because it was not drawn narrowly enough to meet the constitutional requirements of *Roe v. Wade*.⁹⁰ The court recognized that, consistent with the requirements of *Roe*,⁹¹ the state has a compelling interest in protecting an unborn child during the third trimester of pregnancy. The court held, however, that a statute protecting that interest must be narrowly drawn, so as not to capriciously restrict a woman's constitutional rights. Furthermore, the state's interest must be balanced against the rights of the pregnant woman.⁹² The trial court found that the statute, as applied to the facts of the *Stewart* case, was unconstitutional.⁹³ Interestingly, with the exception of her illegal drug use, Stewart was charged with activities that would not be considered illegal had she not been pregnant.⁹⁴ A non-pregnant woman would not have been arrested for having sexual intercourse with her spouse, nor for failing to adhere to her doctor's instructions.⁹⁵

Conflicts between the rights of the pregnant woman and those of the unborn child are inherent in the application of fetal protection statutes. The hands of the legislatures and the courts are tied when they must determine who should be afforded greater protection under the law. The Constitution affords women's rights the highest possible protection.⁹⁶ Her unborn child's health and safety remain almost exclusively within her control if state legislatures fail to pass laws that effectively protect the fetus. On one hand, if state legislatures and courts enforce fetal harm legislation against pregnant women to safeguard those who are unable to protect themselves, they face charges of constitutional violation. On the other hand, legislative and judicial bodies cannot afford to appear impotent when one member of society harms another.

87. *Id.* at 228-29.

88. CAL. PENAL CODE § 270 (West Supp. 1988).

89. *Stewart*, No. M508197, slip op. at 4.

90. *See Pamela Rae Stewart Case*, *supra* note 83, at 230.

91. 410 U.S. at 150, 159, 162-63.

92. *See Pamela Rae Stewart Case*, *supra* note 83, at 230.

93. *Id.*

94. *Id.* at 232.

95. *Id.*

96. *See infra* note 105.

CONFLICTS BETWEEN THE RIGHTS OF MOTHERS AND THEIR FETUSES

Several states have enacted criminal statutes to protect fetuses as entities separate and distinct from their mothers.⁹⁷ The statutory protection afforded fetuses, however, is limited. Most states fail to protect the fetus from harm that does not result in death,⁹⁸ and some states protect only viable fetuses.⁹⁹ Attempts to expand the protection afforded a fetus under existing statutes have been frustrated. In 1977, Louisiana amended its criminal code, defining "person" to include one who is in being from the moment of conception or fertilization.¹⁰⁰ The Louisiana Supreme Court, however, ruled that this broad definition of "person" was not intended by the legislature to make feticide punishable under the state's homicide statute.¹⁰¹ The court held that if the legislature intended to amend the homicide statute to include feticide, it should have done so with "greater clarity" than merely amending the definition of the term "person" in the criminal code to include a fertilized ovum.¹⁰² Furthermore, several states fail to protect the fetus from acts of its mother. Minnesota, for example, has extensive legislation protecting the unborn,¹⁰³ but excludes acts committed against the unborn by its mother.¹⁰⁴

A woman need not commit a criminal act to place herself in conflict with her unborn child. The rights of a pregnant woman and her fetus may collide

97. The states that have afforded protection to the fetus through their criminal laws include: Arizona, California, Florida, Illinois, Louisiana, Minnesota, and Rhode Island. See Comment, *supra* note 12, at 701-02 nn. 60-65.

98. The Florida Penal Code provides: "The willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter, a felony of the second degree." FLA. STAT. ANN. § 782.09 (West 1976).

99. The Rhode Island Penal Code provides in relevant part:

The willful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, or, the administration to any woman pregnant with a quick child of any medication, drug, or substance whatever, or, the use of any instrument or device or other means, with intent thereby to destroy such child, unless the same be necessary to preserve the life of such mother, shall in the event the death of such child be thereby produced, be deemed manslaughter.

In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

"Quick Child" — For purposes of this section "quick child" shall mean an unborn child whose heart is beating, who is experiencing electronically-measurable brain waves, who is discernibly moving, and who is so far developed as to be capable of surviving the trauma of birth with the aid of usual medical care and facilities available in this state.

R.I. GEN. LAWS § 11-23-5 (Michie 1981).

100. "Person" includes a human being from the moment of fertilization and implantation and also includes a body of persons, whether incorporated or not." LA. REV. STAT. ANN. § 14.2(7) (West 1986).

101. *State v. Brown*, 378 So. 2d 916, 918 (La. 1979).

102. *Id.*

103. MINN. STAT. § 609.21(4) (1987) (criminal vehicular operation resulting in injury to unborn child); §§ 609.2661-2663 (1987) (murder of unborn child in the first, second, and third degree); §§ 609.267, 609.2671, 609.2672 (1987) (assault of an unborn child in the first, second, and third degree).

104. *Id.* at § 609.266(b). "Whoever" does not include the pregnant woman."

although the woman is acting within the boundaries of the law, or if she has committed an unlawful act but has not been formally charged with a criminal violation.

Pregnant Women's Right to Privacy

In *Roe*, the Supreme Court held that a woman has a legal right to secure an abortion. The right was held to be "fundamental" and emanated from the broader constitutional right to privacy.¹⁰⁵ A woman's right to privacy and bodily autonomy, however, was not considered absolute.¹⁰⁶ The Court found that the state has a compelling interest in the well-being of a fetus during the third trimester of a woman's pregnancy.¹⁰⁷ *Webster*, however, abrogated the distinction between trimesters and held that the state's interest in protecting potential human life extends throughout a woman's pregnancy.¹⁰⁸ The *Webster* Court did not overrule the *Roe* holding that a woman has a fundamental right to privacy when making decisions concerning her pregnancy, including the right to terminate the pregnancy. It merely extended the period during which a court may balance the state's interests in the preservation of the fetus against the rights of the mother to determine the extent to which the state may intrude upon a woman's constitutional rights.¹⁰⁹

In addition to determining that a woman has a fundamental right to make decisions concerning her pregnancy, the *Roe* Court also held that a fetus is not a "person" within the meaning of the Constitution,¹¹⁰ and therefore, has no constitutional right to life. The *Webster* Court did nothing to change the status of a fetus under the Constitution, because it refused to rule on the issue of whether life begins at the moment of conception.¹¹¹ The refusal to recognize a fetus as a person under the Constitution should not be deemed to imply that a fetus is without legal rights. States are free to enact regulations to protect those rights, and many states have taken such action.¹¹² However, when these actions are taken on behalf of a fetus against the woman who is carrying it, the states create an adversarial relationship between mother and child.

Fetus' Right to Protection

The intrusions on a woman's right to privacy can be extreme when the welfare of her unborn child is at issue. In *Jefferson v. Griffin Spalding County Hospital Authority*,¹¹³ a mother refused to deliver her child by caesarean section, despite the fact that, due to the position of the afterbirth, there was a ninety-nine percent chance that the baby would not survive natural childbirth. The mother was told that if a caesarean was performed prior to the onset of labor, there was a nearly one hundred percent chance of the child surviving the

105. *Roe*, 410 U.S. at 152-53.

106. *Id.* at 154.

107. *Id.* at 163. The beginning of the third trimester was considered, at the time of the Court's ruling, to be the point at which the fetus became viable. *Id.* at 160.

108. See *Webster*, 109 S. Ct. at 3057.

109. *Id.*

110. *Roe*, 410 U.S. at 158.

111. *Webster*, 109 S. Ct. at 3050.

112. See, e.g., *supra* notes 97-100.

113. 247 Ga. 86, 274 S.E.2d 457 (1981).

delivery.¹¹⁴ The mother refused the surgery and the necessary blood transfusion on religious grounds.¹¹⁵ Concluding that the unborn child was without proper prenatal care, the court granted temporary custody of the fetus to the Department of Family and Children Services, giving it complete authority to authorize the surgical procedure to be performed on the mother.¹¹⁶ The Georgia court did not cite precedent for the ruling, but one argument advanced is that the court felt justified due to the high likelihood of success of the proposed procedure in comparison to the child's slim chance of survival if the caesarean was not performed.¹¹⁷ As evidenced by its failure to cite precedent for its ruling, the *Jefferson* court apparently felt unconstrained in intruding upon the mother's constitutional right to freedom of religion in order to protect the child, who, prior to birth, is afforded no constitutional rights.

Neglect proceedings have also been brought against pregnant women for ingesting drugs during their pregnancies. In *In re Baby X*,¹¹⁸ a petition was filed against the mother of a child who exhibited symptoms of drug withdrawal within twenty-four hours of his birth. The petition alleged that, because of the mother's neglect, she should not be allowed custody of the child. The court ruled that, given the child's right to begin life with a sound mind and body, it would be in the child's best interest to examine all prenatal conduct of the mother bearing on that right. Prenatal neglect was considered probative of future child neglect.¹¹⁹ The court determined that the prenatal neglect was sufficient grounds for the probate court to take temporary custody of the child.¹²⁰ The court did not decide whether the mother's prenatal conduct was sufficient to deprive her of permanent custody, but did state that such conduct would be taken under consideration along with postnatal conduct when determining the question of permanent custody.¹²¹

One reason for the reluctance to either pass or enforce fetal protection statutes is the possibility that such legislation could make almost any action taken by a pregnant woman potentially criminal.¹²² Fetal harm legislation differs from ordinary criminal statutes because the former may criminalize behavior which is considered noncriminal when performed by someone other than a pregnant woman. There is a distinction, however, between a woman's constitutional right to choose whether to procreate and her rights during the course of a full term pregnancy.¹²³ A woman is free to choose not to conceive or to terminate her pregnancy before the point of viability. Once she chooses to conceive and to forego an abortion, however, a pregnant woman assumes obligations toward her fetus and, if the state protects fetuses, loses the freedom

114. *Id.* at 86, 274 S.E.2d at 458.

115. *Id.*

116. *Id.* at 86, 274 S.E.2d at 459.

117. See Comment, *Unborn Child: Can You Be Protected?*, 22 U. RICH. L. REV. 285, 295-96 (1988).

118. 97 Mich. App. 111, 293 N.W.2d 736 (1980).

119. *Id.* at 116, 293 N.W.2d at 739.

120. *Id.*

121. *Id.*

122. *Pamela Rae Stewart Case*, *supra* note 83, at 239.

123. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 437 (1983).

to act in ways that may adversely affect her unborn child.¹²⁴ Viewed in terms of fetal rights, a fetus has no right to be conceived or to be carried to the point of viability. Once a pregnant woman chooses to carry to that point, however, a viable fetus has the right to have its mother conduct herself in a manner that will not cause it harm.¹²⁵ Nonetheless, state legislatures appear reluctant to protect fetal rights at the expense of the rights of pregnant women.

As a result of both the apparent reluctance of courts to use fetal protection statutes to protect the fetus from the actions or omissions of its mother and the constitutional challenge pregnant women may assert when these statutes are applied, an alternative method of addressing the problem facing babies who are born with drug addictions must be found. As evidenced by the case of Jennifer Johnson,¹²⁶ prosecutors are beginning to charge pregnant addicts under statutes that have traditionally been used to convict drug traffickers.

THE JOHNSON CASE

Johnson ingested cocaine while she was pregnant with both of her children.¹²⁷ After the birth of her second child, an information was brought against Johnson, charging her with child abuse and delivery of a controlled substance to a minor.¹²⁸ Undoubtedly in an attempt to avoid the issue of whether a fetus is a "person" and, therefore, entitled to the statutes' protection, the state argued that Johnson in fact delivered drugs to "persons," and that the

124. *Id.* at 437-38.

125. *Id.* at 438.

126. *See supra* note 1.

127. Defendant's Motion to Dismiss at 19, *Florida v. Johnson* (Cir. Ct. 1989) (No. 89-890-CFA) [hereinafter *Motion to Dismiss*]. Defendant's attorney stipulated to ingestion of cocaine during pregnancies.

128. Section 827.04 states:

(1) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, inflicts or permits the infliction of physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child shall be guilty of a felony of the third degree.

(2) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, inflicts or permits the infliction of physical or mental injury to the child, shall be guilty of a misdemeanor of the first degree.

(3) Any person who commits any act which thereby causes or tends to cause or encourage any person under the age of 18 years to become a delinquent or dependent child, as defined under the laws of Florida, or which contributes thereto, or any person who shall, by act, threats, commands, or persuasion, induce or endeavor to induce any person under the age of 18 years to do or to perform any act, to follow any course of conduct, or so to live, as would cause or tend to cause such person under the age of 18 years to become or to remain a dependent or delinquent child, as defined under the laws of this state, is guilty of a misdemeanor of the first degree.

FLA. STAT. ANN. § 827.04 (West Supp. 1988). Section 893.13 provides in pertinent part: "(1)(c) Except as authorized by this chapter, it is unlawful for any person over the age of 18 years to deliver any controlled substance to a person under the age of 18 years." FLA. STAT. ANN. § 893.13 (West Supp. 1990).

delivery took place the moment the child emerged from the birth canal alive.¹²⁹ The method of transmittal was the umbilical cord which attached the child to the mother.¹³⁰ There was uncontroverted evidence that the cocaine derivative, benzylecgonine, was in Johnson's bloodstream at the time she delivered her babies, and that it passed through the placenta and the umbilical cord into the children's bodies.¹³¹ The state argued that although the transmittal was an ongoing process from the moment Johnson first ingested the cocaine, the crime took place from the moment the fetus became a person until the umbilical cord was severed.¹³²

Johnson contended that, despite the distinctions between a "fetus" and a "person" drawn by the prosecution, the state was actually attempting to punish Johnson for potentially causing harm to her fetus.¹³³ Arguing that the statutes under which she was charged specifically applied to "persons" rather than "fetuses," Johnson took the position so often adhered to in these cases that the legislature did not intend to protect an unborn fetus.¹³⁴

Johnson also argued that the application of the statutes in the manner urged by the prosecution violated due process¹³⁵ and her constitutional rights to liberty and privacy.¹³⁶ In effect, Johnson contended that the statutes, although valid on their faces, were unconstitutional when applied to her situation.

The state's argument that the crime occurred after the birth, however, sapped the substance from the defendant's arguments. The trial court convicted

129. Motion to Dismiss, *supra* note 127, at 40; quoting the prosecuting attorney, "We are proving that Jennifer Johnson delivered a controlled substance to her baby. I did not say fetus. I did not say zygote or embryo. I said person. We are proving that she delivered cocaine to her baby."

130. Transcript of Proceedings at 323, Florida v. Johnson (Cir. Ct. 1989) (No. 89-890-CFA) [hereinafter Transcript].

131. *Id.*

132. *Id.* at 6-7.

133. Memorandum in Support of Motion to Dismiss at 3-6, Florida v. Johnson (Cir. Ct. 1989) (No. 89-890-CFA) [hereinafter Memorandum].

134. *Id.* Johnson bolstered this contention by referring the court to Section 782.09 of the Florida Penal Code, which criminalizes the willful killing of an unborn viable child. She argued that by specifically protecting fetuses under only Section 782.09, the legislature evidenced its intent not to include fetuses within the scope of protection under other non-specific criminal statutes. *Id.* at 4.

135. *Id.* at 6-10.

136. *Id.* at 11-12. With regard to due process, Johnson urged that the broad interpretation given the statutes under which she was charged deprived her of notice and fair warning that her actions could subject her to criminal prosecution. Johnson compared the State's application of the statutes in this case to an *ex post facto* law, which the Constitution prohibits. U.S. Const. art. I, § 10. She argued that since she had no knowledge that the statutes would apply to her behavior in these particular instances, she lacked the necessary requirement of *mens rea*, or intent, to commit the crimes with which she was charged. Memorandum, *supra* note 133, at 6-10.

Johnson also argued that the application of the statutes to her circumstances deprived her, and those in her position, of their constitutional rights to liberty and privacy. She utilized the argument that a woman has the constitutional right of privacy, which encompasses the right to make choices regarding her pregnancy and the right to bodily autonomy. Furthermore, she argued that a fetal abuse statute, or a statute applied as such, would deter women, who perceive that their conduct could subject them to punishment, from seeking prenatal care. *Id.* at 11-12.

Lastly, Johnson challenged the application of the statutes in this way as a violation of equal protection, because it subjects pregnant women to greater state restrictions upon the manner in which they choose to live than those applied to men who become parents. *Id.* at 12-13.

Jennifer Johnson of delivering a controlled substance to minor children.¹³⁷ Finding that Johnson delivered a cocaine derivative to her children at birth, but before their umbilical cords were severed,¹³⁸ the court held that a child who is born but who remains attached to his mother by the umbilical cord is a person within the intent and meaning of Florida law.¹³⁹ The trial court determined that Johnson had chosen to become pregnant and to allow her pregnancies to come to term. Once those choices were made, she had the responsibility to deliver children who were free from drug addiction. The court held that to be the right of every child.¹⁴⁰ The court rejected the defendant's argument that the state was prosecuting Johnson under a statute that did not apply to her conduct. It noted that the previous failure to prosecute cases in which mothers gave birth to addicts simply indicated a lack of awareness that the facts of such cases constituted a crime under the law pertaining to delivery of controlled substances to a minor.¹⁴¹

The *Johnson* case demonstrates a potential for fetal protection through existing criminal statutes. Although, under the application of the statute in the *Johnson* case, the fetus must be born alive, the intent of the state was to deter pregnant women from ingesting drugs which can harm or kill their unborn children.¹⁴²

CONCLUSION

The case of Jennifer Johnson is significant because it indicates the extent to which courts may be willing go to protect unborn fetuses, who, due to the actions of their mothers, are born addicted to narcotics. Statutes such as the one used to convict Johnson, however, only apply when the fetus is born alive. A woman, who, due to the effects of the narcotics in her system, gives birth to a stillborn child, is not subject to prosecution under a statute like that used to convict Johnson, because her child is not considered a "person." The application of the statutes in *Johnson* was a legal maneuver designed to circumvent the traditional problems associated with imposing criminal liability for harm to a fetus. It is a maneuver which some courts may now be willing to accept, considering the national concern about drug abuse in American society. But it falls short of protecting all fetuses from maternal substance abuse. When a woman forgoes her constitutional right to obtain an abortion, she, in essence,

137. Transcript, *supra* note 130, at 365-66. Johnson was found not guilty of child abuse. *Id.* at 366.

138. *Id.*

139. *Id.*

140. *Id.* at 367.

141. *Id.*

142. *Id.* at 315-17; quoting the prosecuting attorney:

the State of Florida was aware that we had a problem in this county, and we had a problem in this state, and we had a problem in this nation, that the old way of ignoring the problem and hoping for the best for people like Jennifer Johnson simply has not worked.

Confronted with the problem, we were confronted with the fact that this legislature has not been mindful of protecting, although it has been given the authority to do so by the U.S. Supreme Court, it has not been mindful of protecting a fetus. . . . [W]hat we're trying to do is attach the same responsibility to Jennifer Johnson that we attach to everyone else that is outside the law.

voluntarily accepts a moral and legal obligation to act in the best interests of a child whom she has chosen to carry to term. Moral obligations cannot be mandated by law, but when a pregnant woman commits an illegal act to the detriment of her unborn child, she should be held accountable. Johnson's conviction is only the first step towards that end.

At common law, a fetus was afforded no rights under the law. Slowly, as advancements were made in medical science with regard to fetal health, the legal field struggled to remain in step. As is often the case, the law has not advanced as rapidly as medical technology. Perhaps in an effort to catch up, or perhaps in response to the recent resurgence of volatility surrounding the abortion issue, the legal profession has begun to seriously address the issues of fetal rights and fetal protection.

In a clash of rights such as this, it is difficult to determine who will emerge victorious, the pregnant woman or her fetus. In the recent past, there was little doubt that the woman's rights were accorded much greater deference, but that may be changing. Cases like *Johnson* suggest that the best interests of both the mother and the child can be served if prosecution and sentencing are tailored to meet the needs of the situation and the individuals involved.¹⁴³ If that is the case, the relationship between mother and child can be preserved and, hopefully, enhanced.

143. The trial court sentenced Johnson to fifteen years, one year to be served on community control in a drug rehabilitation program, followed by fourteen years probation. All parties agreed that in a case like that of Johnson, rehabilitation, rather than punishment of the pregnant addict, is the intended goal in addition to protecting the child. Motion for Rehearing and Sentencing at 10, 12-13, 21, *Florida v. Johnson* (Cir. Ct. 1989) (No. 89-890-CFA).

