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Fetal Abuse: Culpable Behavior by Pregnant Women or Parental Immunity

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FETAL ABUSE: CULPABLE BEHAVIOR BY PREGNANT WOMEN OR PARENTAL IMMUNITY?

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I. INTRODUCTION

> In a quiet room at Howard University Hospital, there is a healthy, 7-month-old baby who has spent her entire life there. The mother smoked crack cocaine during her pregnancy and abandoned the child a few days after she was born, leaving hospital officials an address for the child's grandmother, who already had three of the woman's children. After months of being unable to locate the mother, the hospital staff realized last month that the woman had returned as a patient. When social workers confronted her, the mother gave no reason for abandoning the baby, made no apologies and signed papers making her daughter a ward of the city.[1]

This excerpt from a front page article in the September 11, 1989, issue of *The Washington Post* highlights the sense of wreckless abandon with which crack-cocaine mothers abandon their new-born infants with little or no concern.[2] As a result, local hospitals become *ad hoc* orphanages and "the only safety net for children who are sometimes abandoned before they are named."[3]

There is grave concern that the cocaine babies of today will have suffered such a marked degree of irreparable dysfunctional development during the first twelve weeks of their fetal development that within a few years they will emerge as a "bio-underclass."[4]

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[1] Green, *"Boarder Babies" Linger in Hospitals: Drug Users Abandon Their Babies*, Wash. Post, Sept. 11, 1989, at 1, col. 1.

[2] *Id.*

[3] *Id.*

[4] Milloy, *A Time Bomb in Cocaine Babies*, Wash. Post, Sept. 17, 1989, at B3, col. 4.

> Already, a few of them are turning up in first-and-second-grade classrooms around the country, wreaking havoc on themselves and others. Severe emotional damage and even physical deformities not so readily apparent today may mushroom in the near future.[5]

While these children "will know nothing of their addiction at an intellectual level, at a neurochemical level, their brains will never forget cocaine,"[6] and with age, in fact, they become prime candidates for drug abuse.[7]

The dimensions of fetal abuse are simply staggering.[8] There are indications that drug abuse during pregnancy is more prevalent than previously thought. These women have shown a complete absence of concern and responsibility for their newborn babies. The law must respond by imposing liability for such actions — preferably re-education and rehabilitation; but, in certain cases, civil damages, imprisonment and even sterilization.

In the past, the doctrine of parental immunity would have precluded such actions. The doctrine is founded upon the policy that a parent should be immunized from legal responsibility for his or her tortious conduct toward children within a family unit.[9] This doctrine must be abolished by the states; the American Law Institute has already rejected parental immunity as a viable doctrine.[10] Parental immunity should no longer be viewed as a shield from civil liability for the irresponsible and grossly negligent biological parent, specifically, the drug addicted natural or surrogate mother who causes injury to an infant.[11]

The purpose of this essay is to demonstrate the pressing need of the law to take decisive action in imposing tort liability for willful and malicious conduct by drug addicted women during their pregnancy.[12] Liability should be imposed notwithstanding the warnings from civil liber-

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Norris, *Wider Drug Abuse During Pregnancy Indicated*, Wash. Post, Sept. 18, 1989, at A6, col. 1.

During the first half of 1989, the infant mortality rate in the District of Columbia increased by nearly fifty percent — this being attributed to the surge of cocaine addicted women giving birth. This revelation means that District of Columbia babies are dying at a rate more than triple the national average of 9.9 deaths per 1,000 in 1988. Abramowitz, *Infant Mortality Here: Mothers' Crack Use Blamed in Increase of Nearly 5%*, Wash. Post, Sept. 30, 1989, at 1, col. 6.

[9] Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489 (1982). W. KEETON, D. DOBBS, R. KEETON & D OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 904 passim (5th ed. 1984) [hereinafter PROSSER & KEETON].

[10] RESTATEMENT (SECOND) OF TORTS § 895G (1977). The doctrine of parental immunity was abrogated by the American Law Institute in 1977.

[11] Allen, *Torts Are Taking Over for Morality*, Wall St. J., June 4, 1989, at 10, col. 4. *See also* Stearns, *Maternal Duties During Pregnancy: Toward a Conceptual Framework*, 21 NEW ENG. L. REV. 595 (1986).

[12] *See generally* Comment, *Parent-Child Immunity: The Case for Abolition*, 6 SAN DIEGO L. REV. 286 (1969).

tarians that the enforcement of such a policy would most assuredly give rise to "prenatal police patrols."[13]

Fetal abuse should be recognized both as a criminal and civil wrong. It is a crime because the state and society have a responsibility to guarantee that the civil liberties of all *recognizable* or viable citizens — regardless of age — be respected.[14] Just as general obligations are imposed upon all individuals to refrain from harming infants after their birth, so too must society impose similar obligations to assure that a mother's prenatal actions are consistent with this duty to protect children.[15]

The limits of a legal policy consistent with imposing postbirth sanctions would necessarily be shaped by a balancing test that weighs "the gains to children relative to the harms that might arise from such a policy."[16]

> Using the balancing test, the argument against use of postbirth civil or criminal sanctions would have to be that the possibility of error in assigning responsibility and determining causation is so great, and the chances that women would be unfairly treated so substantial, that egregiously culpable behavior by pregnant women should go unpunished . . . .[17]

II. PARENTAL IMMUNITY IN HISTORICAL CONTEXT

In 1891, the Mississippi Supreme Court first enunciated the principle of parental immunity for tortious conduct directed towards a child within the family.[18,19] In *Hewellette v. George*, the court reasoned:

> So long as the parent is under obligations to care for, guide, and control, and the child is under a reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.[20]

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[13] Allen, *supra* note 11.

[14] Roe v. Wade, 410 U.S. 113, 161 (1973).

The compelling point at which the state's legitimate interest in protecting potential life is at viability. *Id.* at 163. Viability is normally recognized at about seven months (twenty-eight weeks) — the third trimester — but may occur as early as twenty-four weeks. *Id.* at 160 (per Blackmun, J.).

[15] Robertson & Paltrow, *'Fetal Abuse': Should We Recognize It as a Crime?*, 75 A.B.A.J., Aug. 1989, at 38 (each author presenting opposite viewpoints on this issue).

[16] *Id.*

[17] *Id. See also* Note, *Developing Maternal Liability Standards for Prenatal Injury*, 61 ST. JOHN'S L. REV. 592 (1987); Curriden, *Roe v. Wade Does Not Prevent Criminal Prosecution of Prenatal Child Abuse*, 76 A.B.A.J. 51 (1990).

[18] Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891).

[19] Hollister, *supra* note 9, at 494. The reasoning behind this decision in turn formed the underlying policy for advancing the doctrine itself in all but eight states.

[20] 68 Miss. at 711, 9 So. at 887.

While the *Hewellette* court grounded its decision on the need for societal tranquility, other courts and writers have emphasized the concern for family unity,[21] parental respect[22] and family discipline.[23] Yet another concern is the effect of liability insurance. The presence of liability insurance could lead to fraudulent, collusive and/or friendly suits since a parent might encourage a minor child to maintain an action because of the existence of insurance coverage.[24]

The recent trend, however, is to reject the doctrine of parental immunity.[25] In 1977, the American Law Institute abrogated the general tort immunity between parent and child by declaring:

> (1) A parent or child is not immune from tort liability to the other solely by reason of that relationship.
> (2) Repudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious.[26]

Seizing upon the initiative of the American Law Institute, a substantial majority of states have followed in this direction by partially or totally abandoning the doctrine of parental immunity.[27]

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[21] *See, e.g.*, Black v. Solmitz, 409 A.2d 634, 639 (Me. 1979); Sorensen v. Sorensen, 369 Mass. 350, 352, 339 N.E.2d 907, 909 (1975).

[22] PROSSER & KEETON, *supra* note 9, at 905.

[23] Hollister, *supra* note 9, at 504.

Some courts have also mistakenly developed an analogy between interspousal immunity and parental immunity by drawing upon the common law that recognized husband and wife as one indivisible unit and thus preventing a wife from maintaining a legal action against her husband. PROSSER & KEETON, *supra* note 9, at 901-02. Children were not, however, held as parental extensions and have been allowed to sue their parents in tort to protect their property rights. *See* Petersen v. City & County of Honolulu, 51 Haw. 484, 487, 462 P.2d 1007, 1009 (1969).

[24] Dennis v. Walker, 284 F. Supp. 413, 415 (D.D.C. 1968).

[25] Comment, *supra* note 12, at 295-96. *See* Dzenutis v. Dzenutis, 200 Conn. 290, 512 A.2d 130 (1986); Hale v. Hale, 312 Ky. 867, 230 S.W.2d 610 (1950); Villaret v. Villaret, 169 F.2d 677, 678 (D.C. Cir. 1948).

[26] RESTATEMENT (SECOND) OF TORTS § 859G (1979).

[27] Twelve states have either abrogated the doctrine or declined to adopt it: Gibson v. Gibson, 3 Cal.3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Rousey v. Rousey, 528 A.2d 416 (D.C. Cir. 1987) (en banc); Petersen v. City & Council of Honolulu, 51 Haw. 484, 462 P.2d 1007 (1969); Anderson v. Stream, 295 N.W.2d 595 (Mich. 1980); Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Kirchner v. Crystal, 15 Ohio St.3d 326, 474 N.E.2d 275 (1984); Winn v. Gilroy, 296 Or. 718, 681 P.2d 776 (1984); Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971); Elam v. Elam, 275 S.C. 132, 268 S.E.2d 109 (1980); Wood v. Wood, 135 Vt. 119, 370 A.2d 191 (1977).

Eleven additional states have abrogated the doctrine in specific instances of automobile negligence: Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Nocktonick v. Nocktonick, 227 Kan. 758, 611 P.2d 135 (1980); Transamerica Ins. Co. v. Royle, 202 Mont. 173, 656 P.2d 820 (1983); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Silva v. Silva, 446 A.2d 1013 (R.I. 1982); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971); Merrick v. Sutterlin, 93 Wash.2d 411, 610 P.2d 891 (1980); Lee v. Comer, 159 W. Va. 585, 224 S.E.2d 721 (1976); CONN. GEN. STAT. § 52-572c (Supp. 1986); N.C. GEN. STAT. § 1-539.21 (1983).

One court's rejection of this doctrine illustrates the competing concerns at stake.[28] In *Rousey v. Rousey*,[29] the court held that the doctrine of parental immunity was but an outdated idea set and developed on inaccurate premises.[30] "We see it as a vestige of an era in which children were without legal protection from the wrongs of their parents, and married women were without legal rights, subordinate to their husbands, all in the name of family harmony."[31] However, the *Rousey* court acknowledged that certain types of conduct maybe either "privileged or not-tortious consistent with [Section 895G of the Restatement] but that this decision must be done on *case-by-case* basis."[32] And, obviously, such a posture would be shaped by a simple balancing test measuring the costs versus the benefits of applying the rule itself.[33]

Interestingly, Judge Nebeker, who dissented in *Rousey*, emphasized his fear of the dissolution of the family unit as a result of the pressure on children to sue one or both parents. Judge Nebeker claimed that if such litigation were permitted, it would "strain the moral fiber which holds families together."[34] The *Rousey* decision would not fulfill the majority's hope of restoring family concord by insulating the family "from offspring suits . . . because insurance will eliminate true adversity."[35] Judge Nebeker asserted that the majority decision would in fact "foster collusion."[36] The *Rousey* court admitted the fact that the possibility of fraud exists to one extent or other in every case. However, the majority stressed that the possibility of parents and children conspiring together against the insurance carrier did not justify the total denial of recovery to all minor children.[37]

When an actionable offense is committed between a parent and an unemancipated child, the challenge to the family relationship has already occurred. To prohibit reparation for the offense can hardly be regarded as a fortifying or harmonious step in rebuilding familial unity and tran-

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In automobile negligence cases where the parent has liability insurance, five states have abrogated the parental immunity doctrine: Williams v. Williams, 369 A.2d 669 (Del. 1976); Ard v. Ard, 414 So.2d 1066 (Fla. 1982); Farmers Ins. Group v. Reed, 109 Idaho 849, 712 P.2d 550 (1985); Sorensen v. Sorensen, 369 Mass. 350, 339 N.E.2d 907 (1975); Unah v. Martin, 676 P.2d 1366 (Okla. 1984).

Seven jurisdictions have disavowed the doctrine except in those cases where the parent's alleged tortious act involves an exercise of parental authority over the child or ordinary parental discretion regarding educational matters or issues of food and care: Turner v. Turner, 304 N.W.2d 786 (Iowa 1981); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. App. 1970); Black v. Solmitz, 409 A.2d 634 (Me. 1979); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972); Foldi v. Jeffries, 93 N.J. 533, 461 A.2d 1145 (1983); Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971); Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193 (1963).

[28] *Rousey*, 528 A.2d at 416.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 420.

[32] *Id.* at 421. *See* RESTATEMENT (SECOND) OF TORTS § 859G comment k (1979).

[33] *See* Robertson & Paltrow, *supra* note 15.

[34] *Rousey*, 528 A.2d at 423.

[35] *Id.* at 422.

[36] *Id.* at 423.

[37] *Id.* at 420.

quility. Indeed, what is seen here is a simple action by two sets of parties — parent and child — to recover money damages from an insurance carrier. A fund for the child's medical care and support is then created without extinguishing other family assets. Thus, there is no real adversary action between parent an child when insurance is involved.[38]

Judge Nebeker's almost obsessive concern with the principle of family unity in *Rousey* is, indeed, commendable. The tragedy which the dissent fails to appreciate is that the nuclear family exists no more — expecially at the lower socioeconomic level of society.[39] Biologic parents must be held accountable for negligent or willful actions which injure their children. The flexibility of the Restatement's position serves as a reasonable framework for testing the limits to which liability will be imposed.

III. Stability, Confusion or Change

Illinois was one of the first jurisdictions to consider whether liability for negligence could be imposed on third parties who cause prenatal injury to a fetus.[40] In 1953, the Illinois Supreme Court overruled itself and held that a cause of action was warranted under the state's wrongful death statute for the death of an infant who, while viable, sustained prenatal injury owing to the negligence of a third person.[41] Three years later in *Renslow v. Mennonite Hospital*,[42] the court rejected viability as a necessary requirement of a successful action for prenatal injuries suffered by a fetus due to the negligence of third persons.[43]

In contrast, the Illinois Supreme Court, in *Stallman v. Youngquist*, rejected any legal cause of action either by or on behalf of a fetus — subsequently born alive — against its *mother* for an unintentional infliction of prenatal injuries.[44] This conclusion was reached without ruling on the status of the doctrine of parental immunity in Illinois. In *Stallman*, the plaintiff suffered prenatal injuries during an automobile accident that occurred while her mother was nine months pregnant. The action was maintained on behalf of the plaintiff, Lindsay Stallman, by her father and next of kin.[45]

In *Stallman*, the plaintiff claimed that her right to recover damages for prenatal injuries against a negligent third party was support for allowing her a cause of action against her mother under similar circumstances.[46] The plaintiff placed heavy reliance upon a Michigan Court of Appeals case, *Grodin v. Grodin*,[47] which had held that a mother incurred

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[38] *Id.* at 420, 421.

[39] Rick, *A Generation Alters Notion of U.S. Family: Census Reports Reflect Dramatic Changes*, Wash. Post, Sept. 5, 1989, at 12, col. 1.

[40] Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900) (The court refused to impose tort liability on a third party who negligently injured a fetus.).

[41] Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).

[42] 67 Ill.2d 348, 367 N.E.2d 1250 (1977).

[43] *Id.* at 357, 367 N.E.2d at 1255.

[44] Stallman v. Youngquist, 125 Ill.2d 267, 531 N.E.2d 355 (1988).

[45] *Id.*

[46] *Id.* at 274, 531 N.E.2d at 358.

[47] Grodin v. Grodin, 102 Mich. App. 396, 400, 301 N.W.2d 869, 870 (1980).

the same liability for negligent misconduct which resulted in prenatal injury to her child as did a negligent third party.[48] The *Stallman* court declined to follow the Michigan Court of Appeals decision in *Grodin* and concluded that "if a legally cognizable duty on the part of pregnant women to their developing fetuses is to be recognized, the decision must come from the legislature . . . ."[49]

Several interesting policy reasons for the refusal to impose maternal liability were articulated by the *Stallman* court. Central to the court's decision was a concern with the unprecedented judicial intrusion and scrutiny into the privacy and autonomy of pregnant women.[50]

> 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.[51]

Further, if a fetus were granted assertable legal rights to a sound mind and body which were enforceable against its mother, the law "would make a pregnant woman the guarantor of the mind and body of her child at birth."[52] The *Stallman* court recognized that the law has never imposed a legal duty upon a woman to guarantee the mental and physical health of her infant. The court feared that if such a duty were imposed, any and all conduct "which negatively impacted fetal development would be a breach of the pregnant woman's duty to her developing fetus. Mother and child would be legal adversaries from the moment of concept until birth."[53]

As admirable as the *Stallman* court's position may be, this decision forecloses the possibility of imposing tort liability against the child's mother. The judicial system's task of redressing the harm inflicted upon a developing fetus by a pregnant woman's use of alcohol or controlled substances thus becomes even more difficult. A deterrent effect upon other mothers is also precluded. If a child may seek recovery for injuries inflicted upon it by a third person as a fetus because such injuries interfere with its "legal right to begin life with a sound mind and body,"[54] why should a fetus be prohibited from recovering against its mother for negligently inflicted prenatal injuries?[55]

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[48] *Id.* at 401, 301 N.W.2d at 870. (The court recognized two exceptions to this general rule. It stated that a child may not maintain an action against a parent when the alleged negligent act involves an exercise in reasonable parental authority or reasonable parental discretion with respect to the basic physical necessities of life. *Id.* at 396, 402, 301 N.W.2d at 870.

[49] 125 Ill. 2d at 280, 531 N.E.2d at 360.

[50] *Id.* at 279-80, 531 N.E.2d at 360.

[51] *Id.* at 278, 531 N.E.2d at 360.

[52] *Id.* at 276, 531 N.E.2d at 359.

[53] *Id.*

[54] Evans v. Olson, 550 P.2d 924, 927 (Okla. 1976); Womack v. Buchhorn, 384 Mich. 718, 725, 187 N.W.2d 218, 222 (1971); Smith v. Brennan, 31 N.J. 353, 364-65, 157 A.2d 497, 503 (1960).

[55] In Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1980), the court held that the liability of a mother for negligent conduct resulting in prenatal injury was the same as that of a negligent third party.

Public policy supports the imposition of tort liability in fetal abuse cases. Tort liability is not simply a consequence of the removal of parental immunity. Such liability draws support from the contractual duties imposed in the context of surrogate motherhood. The conduct of a pregnant woman who uses drugs is more than a failure to exercise reasonable care; it is reckless. In egregious cases of maternal abuse, the price that such behavior extracts from society justifies the imposition of criminal liability.

IV. THE SURROGATE MOTHER

A. Duties

Historically, a fetus was unable to maintain a cause of action for *in utero* injuries because, as a part of the mother, no legal duty was owed to one not yet in being.[56] In 1939, the first case was recorded which allowed for recovery for prenatal injuries.[57] A later case established viability as a necessary element to a cause of action.[58] Recovery was subsequently extended to nonviable fetuses in *Kelly v. Gregory*.[59] The *Kelly* court held that when a child is born alive, it is entitled to obtain relief for any prenatal injuries sustained by it any time after the point of conception owing, as such, to another's negligent conduct.[60]

A child's right to maintain a legal action against the surrogate mother whose negligent behavior resulted in prenatal injuries should not be hindered or barred by the parent-child immunity doctrine. The surrogate mother's contractual agreement to carry the infant for the ultimate benefit and consideration of the contracting parents imposes upon her a much higher standard of care than that imposed socially and legally upon a biological mother fulfilling the traditional child-bearing role. Indeed, the surrogate's behavior during her pregnancy is obviously of great concern to the contracting parents and focuses directly upon the best interest of the embryo/fetus.

In fact, a surrogate mother's contractual duties directly benefit the unborn child. The intent of the parties is to remove external, controllable risks and produce a healthy child. Thus, the child is an intended third-party beneficiary of the contract between the biologic mother and pro-

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[56] Dietrich v. North Hampton, 138 Mass. 14 (1884) (Holmes, J.). The first case to hold a woman liable for homicide in the death of her own fetus may soon be decided in Massachusetts. A pregnant woman who drove her automobile while intoxicated has been charged with vehicular homicide stemming from an accident that resulted in the death of her fetus. For purposes of maintaining a charge of vehicular homicide under the state statute, a viable fetus needs to have been in existence — as here. Daly, *Woman Charged in Death of Own Fetus in Accident; Massachusetts Vehicular Homicide Case a First*, Wash. Post, Nov. 25, 1989, at A4, col. 1.

[57] Scott v. McPheeters, 33 Cal. App.2d 629, 92 P.2d 678, *reh'g denied*, 33 Cal. App.2d 629, 93 P.2d 562 (1939).

[58] Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

[59] 282 A.D. 542, 125 N.Y.S.2d 696 (1953).

[60] *Id.* at 544-45, 125 N.Y.S.2d at 698.

spective adoptive parents. The surrogate mother assumes an affirmative and unabridgeable duty to act reasonably and thus promote or insure the best interests of the fetus at the very moment of her impregnation. Consequently, any subsequent injury which is proximately caused by a breach of that duty should result in the imposition of liability against the surrogate for her negligent conduct.[61]

The duties set forth in the surrogate mother situation, i.e. to maintain proper nutrition, to obtain proper medical care, and to abstain from smoking, alcohol and drugs, should be imposed upon all pregnant women. The same concerns that generated the surrogate mother's contractual duties are shared by society as a whole, namely the birth of a healthy child. The harms to be prevented – a physically or mentally handicapped child and the societal costs of caring for this child – justify imposition of liability.

As noted previously, surrogate mother contracts normally prohibit the surrogate from smoking, drinking alcohol and using illegal drugs. The surrogate may also be obliged to undergo amniocentesis, electronic fetal monitoring or even a Cesarean delivery. In reality, the conditions of a surrogate mother contract are almost impossible to enforce.[62] The needed surveillance for both monitoring and enforcing such conditions would almost surely require round-the-clock supervision.

B. Causation

Although evidentiary proofs of causation are obviously going to be difficult in fetal abuse cases, they are not insurmountable. To establish a negligence claim, the legal cause of injury must be traceable to the wrongful actions of another; the legal cause need not be the sole or the predominant cause of injury.[63] Instead, the plaintiff need only show that the offending conduct is a substantial or material factor causing the injury.[64]

It would be of limited value to pursue a cause of action for breach of one or more of the provisions of the surrogate mother contract. Quite simply, a minor breach of behavioral restrictions are unlikely to lead to a clearly identifiable health problem in the subsequently born child. This type of uncertainty in the evidentiary chain would cloud the ability to assess legal damages.[65] Even if the surrogacy contract contained a liquidated damages clause, recovery under such a provision would not be

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[61] *See* Rothenberg, *Baby M, the Surrogacy Contract, and the Health Care Professional: Unanswered Questions*, 16 LAW, MED. & HEALTH CARE 113, 117-18 (1988). *See also In re* Baby M, 107 N.J. 140, 537 A.2d 1227 (1988); Smith, *The Baby M Decision: Love's Labor Lost*, 16 LAW, MED. & HEALTH CARE 121 (1988).

[62] Charo, *Legislative Approaches to Surrogate Motherhood*, 16 LAW, MED. & HEALTH CARE 96, 97 (1988).

[63] *See* Day v. Nationwide Mutual Ins. Co., 328 So.2d 560 (Fla. Dist. Ct. App. 1976).

[64] RESTATEMENT (SECOND) OF TORTS § 430 comment d (1965).

[65] *Id.*

permitted unless the liquidated damages can be shown to have some degree of reasonable relationship to the harm caused by the breach.[66]

A specific performance provision in a surrogate contract also raises a number of complex issues. The enforcement of such a provision could trigger assertions that individual privacy rights, personal autonomy and bodily integrity would be seriously compromised.[67] Yet, it has been suggested that regardless of any contractual provisions, a pregnant surrogate may well have inherent non-contractual duties to prevent harm to a fetus she is carrying. Thus, the surrogate's personal right of autonomy and "right" to breach the conditions of any surrogacy contract are limited.[68]

It is true that not all women who become surrogate mothers possess the same level of intelligence or sophistication. However, liability is not to be premised upon the surrogate's lack of knowledge or understanding, but rather, liability is imposed because the surrogate failed to acquire the knowledge necessary to produce a healthy child.[69] Thus, it is no defense for a surrogate to assert that she was unaware of the consequences of smoking, drinking, or other harmful acts. Quite simply, knowledge is expected of an individual who serves as a surrogate mother, whether or not expressly provided for in the contract or imputed to her by reason of her status. "The surrogate exhibits negligent behavior by failing to acquire the knowledge which is an essential part of her task as a surrogate mother."[70]

Similarly, a woman who chooses to carry a child must acquire the knowledge necessary to produce a healthy child. Society requires that a woman adhere to basic safeguards — such as refraining from drugs, alcohol or tobacco and obtaining regular medical care. Behaviors that are almost certain to result in harm to the unborn child should provide a basis for tort liability.

V. CRIMINAL LIABILITY

A. Culpable Behavior

Jennifer Johnson recently became the first American mother to be convicted of delivering illegal drugs to her children through her umbilical cord.[71] She was found guilty by Seminole County Circuit Judge O.H. Eaton

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[66] *Id.*

[67] *Id.*

[68] *Ethical, Legal and Social Challenges to a Brave New World*, ch. 4 (G. Smith ed. 1982). *See also* Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987); Robertson & Schulman, *Pregnancy and Prenatal Harm to Offspring: The Case of Mothers with PKU*, 17 HASTINGS CENTER REP. 23 (1987).

[69] Seavey, *Negligence - Subjective or Objective?*, 41 HARV. L. REV. 1, 18 (1927).

[70] Comment, *Surrogate Mothers and Tort Liability: Will the New Reproductive Technologies Give Birth to a New Breed of Prenatal Tort?*, 4 CLEV. ST. L. REV. 311, 346 (1986); Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209 (1987).

[71] Sharp, *Drug-Baby Case Sentence Today: Ex-addict Mother is First Convicted*, USA Today, Aug. 25, 1989, at 3A, col. 2.

in Sanford, Florida, of delivering crack cocaine to a minor — her son Carl, born in 1987, and a daughter Jessica, born in 1989.[72] Ms. Johnson was subsequently sentenced to fifteen years of probation and ordered to complete a drug treatment program.[73]

While some civil libertarians bemoan this judicial decision as an unconstitutional invasion of privacy and stress that education and improved social services for pregnant women are the only ways to combat pre-birth abuse,[74] others suggest that fetal abuse be recognized in egregious cases as a crime.[75] "The desirability of post-birth sanctions should depend on the gains to children relative to the harms that might arise from such a policy."[76] Given the distressing fact that some 375,000 babies are born each year that have been exposed to drugs in the womb by their biological "mothers," surely this is reason enough to extend child abuse and neglect laws to include newborns. If a court can impose a duty in prenatal injury actions upon the father of an unborn infant for willfully failing to furnish necessary food, clothing, shelter, or medical attention for his child,[77] it is reasonable to place a mother within the same zone of responsibility. In turn, this can serve as a basis for subsequent criminal prosecution.[78] The balance is thus tipped in favor of benefiting new life at the cost of penalizing women who, for whatever reasons, have failed to accept the duties *and* obligations of their social contract with society as mothers.[79]

B. Sanctions

Fears of "pregnancy police" and over-zealous prosecutors infringing upon women's rights are an overreaction. "Prosecution is essential to properly motivate these people in order for them to see the benefits of treatment," observed Paul Longii the State Attorney of Winnebago County, Illinois.[80] Sadly, many of the young women — who, in actuality, are but girls in their early teens — defy educational opportunity and advancement.

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[72] *Id. See generally* Annotation, *Liability for Prenatal Injuries*, 40 A.L.R. 3d 1222 (1971).

[73] *Mother on Cocaine Sentenced for Passing Drugs to Infants*, N.Y. Times, Aug. 26, 1989, at 6, col. 1.

[74] Robertson & Paltrow, *supra* note 15, at 39. Paltrow's position is that "no maternal action, not even drug abuse, should justify pre- or post-birth sanctions for pregnant women's behavior."

[75] *Id.* at 38. Robertson states: "I see a plausible case for use of post-birth sanctions in egregious cases."

[76] *Id.*

[77] People v. Yates, 114 Cal. App. Supp. 782, 298 P. 961 (1931) (*per curiam*). *Accord* People v. Sianes, 134 Cal. App. 355, 25 P.2d 487 (1933).

[78] Stone, *It's Tip of Iceberg in Protecting Infants*, USA Today, Aug. 25, 1989, at 1, col 2.

[79] Comment, *Sterilization Technology and Decisionmaking: Rethinking The Incompetent's Rights*, 2 J. CONTEMP. HEALTH L. & POL'Y 275, 281-82 (1986).

[80] Robertson & Paltrow, *supra* note 15.

More serious consideration should be given to sterilizing those women who prove themselves to be repeated child abusers through drug addiction and other willful acts.[81] Just as a conviction for statutory rape has brought, in lieu of sentencing, an agreed sterilization,[82] courts should act (with or without personal agreement or acquiescence) to prevent continued tragedies of birth where egregious cases of maternal negligence or culpable behavior have clearly shown that a woman is not deserving of the dignity and moral recognition of a true mother.[83]

VI. CONCLUSION

The fear of intrafamilial disruption and/or dissolution as a consequence of adopting maternal liability for fetal abuse are greatly exaggerated. In the case where legal recovery would be allowed, the "family" unit is simply not in existence. The *biological* mother carries only that status — and not that of a loving, devoted, moral mother. Tragically, in cases of substance abuse, the mother and embryo-fetus have indeed become adversaries at the moment of conception — for an educated, loving and caring woman would not allow herself to continue such a course of action.

To disregard the coordinate *responsibility* attendant to the procreative right of autonomy under the guise of the prenatal immunity doctrine would demean the whole status of motherhood, the family, and thus, society. A framework for addressing the problem of fetal abuse may be constructed through the use of Section 895(G) and Comment k of the Second Restatement of Torts[84] together with the utilization of a simple balancing test. The gains to the child would be weighed against the harm to the child's mother as a consequence of adopting such a policy.[85]

The level of personal dignity accorded each member of society is contingent upon a level of full membership in a moral community — for the social contract each has within that community creates duties and obligations and a level of responsibility upon breach of that agreement.[86] A pregnancy may well have been unwanted, an accident. A mother may well be unwilling — because of drug addiction and circumstances of life — to make the unequivocal and necessary commitment to care for and respect her fetus. Nonetheless, such circumstances do not relieve a mother

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[81] See Comment, *Sterilization: A "Remedy for the Malady" of Child Abuse?*, 5 J. CONTEMP. HEALTH L. & POL'Y 245 n.1 (1989) discussing Debra Ann Williams, a mother who agreed to sterilization after pleading guilty to involuntary manslaughter in the starvation death of her twelve week old son.

[82] People v. Blankenship, 161 Cal. App.2d 606, 61 P.2d 352 (1936).

[83] *See generally* Smith, *Limitations on Reproductive Autonomy for the Mentally Handicapped*, 4 J. CONTEMP. HEALTH L. & POL'Y 71 (1988).

[84] *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 32.

[85] *See* Robertson & Paltrow, *supra* note 15.

[86] Comment, *supra* note 79. *See also* Smith, *Limitations on Reproductive Autonomy for the Mentally Handicapped*, 4 J. CONTEMP. HEALTH L. & POL'Y 71 (1988).

of her responsibility. A woman has little valid right to assert an invasion of her privacy rights and/or violation of autonomy when she *knowingly* jeopardizes or even permanently injures her fetus.

In cases where education of such women is beyond the pale and there is a reasonable expectation, based on their socioeconomic and intellectual background and past record to expect repeat performances, sterilization should be considered a viable option. Harsh though such proposed actions may be, the undeniable fact is that women who wish the honor *and* responsibility of motherhood — actual or surrogate — must act reasonably and responsibly in the nurturing of the embryo-fetus. Courts must be free to meet the challenge and the responsibility of dealing with one of the most threatening socio-legal problems of the century by imposing civil and criminal sanctions upon pregnant women who clearly fail to adhere to minimum standards to insure the health of their children.