Pregnant Dads: The Crimes and Other Misconduct of Expectant Fathers

In the past decade there has been an unprecedented surge in state action seeking to protect potential human life. To date, this activity has chiefly occurred in two fields. One has been quite fertile, the other barren. A third field awaits significant discovery. This Article will first focus on the two fields recently tilled, which involve the acts of strangers and the acts of pregnant women. It will then suggest the need for the exploration of a third field, the acts of expectant fathers. To certain unborn, pregnant dads should owe special duties above those imposed on strangers. Moreover, unlike expectant mothers, expectant fathers can be more easily assigned special duties because constitutional limits, as well as public policy, reason, and common sense, present fewer obstacles. At its conclusion, this Article will propose legal reforms involving expectant fathers based upon the recent developments involving strangers and expectant mothers.

I
PROTECTING THE UNBORN IN THE EARLY 1990s FROM STRANGERS

Laws protecting the unborn can serve a variety of objectives. Such laws can promote the general public interest in healthy childbirth by aiding those involved in child begetting and childbearing to reduce the chances of birth disabilities and to increase the chances of live births. These laws can also promote

---


the particularized interests of certain individuals (including prospective parents) in securing live and healthy births. Although some courts still have difficulty reconciling the privacy right involving pregnancy termination, such laws frequently can be harmonized with the Supreme Court's decision in Roe v. Wade.

The most prevalent and the least controversial laws protecting the unborn regard the unborn as distinct victims of uninvited criminal assault or tortious conduct.

Criminal laws protecting the unborn can serve what the Roe Court called the government's "important and legitimate interest in protecting the potentiality of human life," without unduly burdening federal or state constitutional interests. Crimes against the unborn can cause either pregnancy termination or disabilities at birth. Both general and particularized interests can be promoted by laws criminalizing intentional and unintentional acts. Yet, many states have no such criminal laws. Where criminal laws do exist, the protection afforded the unborn is often incomplete in that unintentional acts and acts resulting in birth disabilities are not covered. The lack of laws protecting the unborn against criminal acts by strangers is especially surprising in states that otherwise support the interests of the unborn. The unborn are usually better protected under tort laws, where the viability requirement has been significantly eliminated and where preconception acts are occasionally covered.

State failure to enact "an integrated series of criminal statutes" protecting the unborn from assaults by strangers fre-

---

2 Id.
3 Id. at 112-13; see also id. at 113 n.67 (citing cases where state courts misunderstood Roe v. Wade, 410 U.S. 113 (1973) in resolving tort claims); cf. State v. Merrill, 450 N.W.2d 318, 322 (Minn.) (finding Roe did not foreclose state criminal law protection of embryos and nonviable fetuses), cert. denied, 496 U.S. 931 (1990).
5 Id. at 162.
6 Parness, supra note 1, at 146-50.
7 See, e.g., ILL. COMP. STAT. ANN. ch. 720, § 510/1 (Smith-Hurd 1993) (legislative pronouncement that the unborn is a human being from the time of conception, entitled to "the right to life"); LA. REV. STAT. ANN. § 40:1299.35.0 (West 1992) (longstanding policy to protect right to life of unborn from conception supports state abortion law); Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1259 (Ill. 1977) (Dooley, J., concurring) (recognizing a preconception tort claim by a child based upon negligent medical treatment afforded the mother).
9 Parness, supra note 1, at 166.
Pregnant Dads

quently immunizes pregnant dads from criminal prosecution for the intentional harm caused their unborn offspring. Consider Karl Andrew Smith\(^{10}\) and Robert Lee Hollis.\(^{11}\) Smith caused his wife to miscarry by choking, hitting, and kicking her while shouting “Bleed, baby, bleed.”\(^{12}\) Although the relevant statute criminalized “the unlawful killing of a . . . fetus with malice aforethought,”\(^{13}\) a California appeals court misunderstood the decision in _Roe_ and found, _inter alia_, that the relevant statute only applied to a viable fetus.\(^{14}\) Similarly, Hollis went to the home of his estranged wife’s parents, took his wife to the barn, told her he did not want the baby she was carrying, and caused the death of her viable fetus by forcing his hand up her vagina.\(^{15}\) The Kentucky Supreme Court read the murder statute to embody the common law rule that the murder victim must have been born alive before the murder,\(^{16}\) a reading that the legislature has not since overturned\(^{17}\) though it has urged the override of _Roe_\(^{18}\) and otherwise legislated to protect the unborn.\(^{19}\)

Laws criminalizing offenses against the unborn by strangers have been recently expanded in a few states where an integrated series of criminal statutes has been adopted. In 1986, the Minnesota legislature enacted a scheme providing broad criminal law protection of the unborn.\(^{20}\) The scheme prohibits premeditated, intentional, grossly negligent, and negligent acts causing either the termination of potential human life or disabilities at birth. These laws were enacted after a Minnesota Supreme Court decision utilized the common law “born alive” rule to exclude a viable fetus as a victim under the vehicular homicide statute.\(^{21}\)

---


\(^{11}\) Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983).

\(^{12}\) _Smith_, 129 Cal. Rptr. at 500.

\(^{13}\) _Id._ at 499 n.1 (quoting _CAL. PENAL CODE_ § 187).

\(^{14}\) _Id._ at 502 (criticized in Parness, _supra_ note 1, at 112-13).

\(^{15}\) Hollis, 652 S.W.2d at 61.

\(^{16}\) _Id._ at 62. Some members of the court suggested Hollis could be prosecuted for criminal abortion. _Id._ at 65. Justice Wintersheimer did not agree such a prosecution was feasible. _See id._ at 67 (Wintersheimer, J., dissenting).

\(^{17}\) The born alive rule had been recognized in Kentucky as early as 1936. _See id._ at 62.


\(^{19}\) _See_, e.g., _KY. REV. STAT. ANN._ § 311.715 (Michie 1990) (forbidding use of public funds for abortions); _id._ § 311.800 (prohibiting abortions in public health care facilities).


\(^{21}\) State v. Soto, 378 N.W.2d 625 (Minn. 1985).
Later in 1986, the Illinois General Assembly adopted a similar statutory scheme, recognizing the unborn as potential victims of intentional homicide, voluntary manslaughter, involuntary manslaughter, reckless homicide, battery, and aggravated battery.\(^2\) In 1987, North Dakota created several new crimes against the unborn, including murder, manslaughter, negligent homicide, aggravated assault, and assault.\(^3\) Such new crimes typically apply to the acts of pregnant dads, so that men such as Karl Smith and Robert Hollis may be prosecuted. Yet none of the new laws distinguish expectant fathers from others who harm expectant mothers and their unborn, though in many other settings the duties of pregnant dads (such as to provide financial support) go well beyond the duties of other men. These new crimes also usually do not apply to assaults by pregnant women on their own unborn.\(^4\)

While not enacting a comprehensive set of new crimes, a few states have recently added at least some criminal laws protecting the unborn from the acts of strangers. For example, the Louisiana legislature in 1989 added three grades of criminal feticide,\(^5\) each involving the killing of an unborn and differentiated by the defendant’s state of mind, emotional state, physical state, or involvement in certain felonies.\(^6\) No new laws were added involving harm to the unborn resulting in birth disabilities.\(^7\) The


\(^4\) For example, the aforementioned Minnesota, Illinois, and North Dakota criminal laws all exclude pregnant women. MINN. STAT. ANN. § 609.266(b) (West 1987); ILL. COMP. STAT. ANN. ch. 720, §§ 5/9-1.2(b)(2), (c), -2.1(d), -3.2(c)(2), 5/12-3.1(b)(2) (Smith-Hurd 1993); N.D. CENT. CODE § 12.1-17.1-01 (Michie Supp. 1993).


\(^6\) See id. § 14:32.6(A)(1) (first degree feticide when offender has “specific intent to kill or to inflict great bodily harm”); id. § 14:32.7(A)(1) (second degree feticide defined as involving first degree conduct, but where the offense is “committed in sudden passion or heat of blood immediately caused by provocation of the mother”); id. § 14:32.8(A) (third degree feticide when there is criminal negligence, or a vehicle driver under the influence of alcohol or narcotic drugs); id. § 14:32.6(A)(2) (first degree feticide when offender engaged in aggravated forcible rape, certain robberies, or other designated crimes).

\(^7\) It is possible that existing criminal laws on assaults and the like might cover...
incomplete criminal law protection of the unborn in Louisiana is puzzling given the state legislature’s otherwise strong commitment to potential life protection and its continuing efforts to undercut Roe.28 In 1987, the Washington legislature redefined the crime of assault in the second degree to include acts harming an unborn quick child.29 Again, pregnant dads received no special attention and pregnant women were not covered in these laws.

In the past decade, the need for an integrated series of criminal laws protecting the unborn from strangers may have lessened due to the expansion of civil laws that seek to deter, prevent, remedy, or punish the acts of strangers who harm the unborn. Broad new tort laws cover various forms of conduct uninvited by expectant mothers, such as injuries to the unborn caused by negligent preconception conduct30 or the negligent exposure of a pregnant woman to hazardous substances in the workplace.31

such injuries because the “born alive” rule would be met. See State v. Gyles, 313 So. 2d 799 (La. 1975) (providing that assault on a pregnant woman could lead to a murder conviction in the death of the injured fetus only if the fetus was born alive and subsequently died). Yet, other difficulties with such prosecutions remain, including problems with mens rea requirements, defendants’ due process rights to be informed unambiguously about the types of conduct which may trigger criminal prosecution, and legislative intent. Regarding legislative intent, see for example, Johnson v. State, 602 So. 2d 1288 (Fla. 1992) (legislative history of statute did not show intent to use the term “delivery” in the prosecution of a mother for delivery of a controlled substance to a minor via the umbilical cord), State v. Brown, 378 So. 2d 916, 917 (La. 1980) (strict construction of penal statutes and preference for “separate enactments” dealing with harm to fetuses), and People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App.), appeal denied, 471 N.W.2d 619 (Mich. 1991) (pregnant woman’s cocaine use not prosecutable under delivery-of-cocaine statute).

28 See Sojourner T v. Edwards, 974 F.2d 27 (5th Cir. 1992) (invalidating the Louisiana Abortion Statute of 1991, which would have criminalized most abortions in the state), cert. denied, 113 S. Ct. 1414 (1993); Parness, supra note 1, at 132.


Also the protection offered potential human life under tort law principles is more complete than under criminal statutes. Actions in tort eliminate distinctions between viable and previable fetuses and, in a few jurisdictions, recognize claims for preconception acts. Yet, recognition of a particular child’s tort claims for birth disabilities does little to express the general societal outrage over the acts of a Karl Smith or a Robert Hollis. Thus, the need remains for an integrated series of criminal statutes protecting the unborn from the acts of strangers.32

II

PROTECTING THE UNBORN IN THE EARLY 1990s FROM PREGNANT WOMEN

Notwithstanding the fact that the new crimes against the unborn do not address the conduct of pregnant women, the past decade has witnessed an explosion of attempted criminal prosecutions of women for harm caused to their unborn during pregnancy, as well as a surge of laws covering the reporting and testing responsibilities of medical personnel and others who attend pregnant women. Simultaneously, there have been slowly emerging civil law reforms involving prebirth maternal responsibilities to the unborn. Unlike the attempted criminal prosecutions of Smith and Hollis and the new criminal laws involving strangers, efforts focusing on pregnant women frequently raise troubling questions about the individualized interests of expen-

32 Identifying strangers to the unborn can be difficult. Consider some crimes which protect the unborn, at least in part, and involve those who provide pregnant women with health care and other assistance. Exemplary is a new Illinois law which requires certain health care professionals and others to report to the Department of Children and Family Services (DCFS) anyone reasonably thought to be a “neglected child,” defined to include a newborn infant exposed to a controlled substance, unless exposure occurs as “the result of medical treatment administered to the mother or the newborn infant.” Failure to report may constitute a Class A misdemeanor. Ill. Comp. Stat. Ann. ch. 325, §§ 5/3, 5/4 (Smith-Hurd 1993) (also requiring reports from social workers, law enforcement officers, and DCFS personnel; physicians are subject to disciplinary board referrals rather than to criminal prosecution). Under a related new Class B misdemeanor, a county clerk will face criminal penalties if she fails to provide a pamphlet describing the causes and effects of fetal alcohol syndrome with any marriage license she issues. Id. §§ 5/203(3), 5/215. As with crimes involving acts of pregnant women, these laws also address conduct which now seems best left primarily to civil law. Cf. Paul A. Logli, The Prosecutor's Role in Solving the Problems of Prenatal Drug Use and Substance Abused Children, 43 Hastings L.J. 559, 561-66 (1992).
tant parents,\textsuperscript{33} of parents of children born alive,\textsuperscript{34} of the unborn,\textsuperscript{35} and of born children\textsuperscript{36} themselves, as well as about the social consequences of laws governing prebirth maternal conduct.\textsuperscript{37}

Recent attempted criminal prosecutions of women who harmed their unborn during pregnancy have been pursued mainly under older criminal laws that fail specifically to include pregnant women as perpetrators of crime or to include the unborn as victims of crime. Three of the more publicized cases are illustrative. One involved the 1989 attempted prosecution of Melanie Green in Illinois for the involuntary manslaughter of her daughter Bianca, who died two days after birth due to "oxygen deprivation linked to cocaine exposure late in pregnancy."\textsuperscript{38} The prosecution failed when a grand jury refused to indict; some grand jury members were concerned both with Melanie's right to privacy and with the application of the general criminal manslaughter statute to Melanie's conduct.\textsuperscript{39} The new Illinois crime of involuntary manslaughter of an unborn child, enacted in 1986, was inapplicable because pregnant women were excluded as potential defendants.\textsuperscript{40} The second case involved the 1988 attempted prosecution of Tammy Gray in Ohio for the endangerment of her daughter Sierra,\textsuperscript{41} who suffered "serious physical harm" at birth due to Tammy's "ingestion of cocaine in

\begin{footnotes}
\item[33] See, e.g., Roe v. Wade, 410 U.S. 113, 153 (1973) (protecting a woman's right to privacy). On the interest of would-be, but not yet expectant, parents, see for example, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (protecting a man's right to procreate).
\item[34] See, e.g., Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("custody, care and nurture of the child reside first in the parents").
\item[35] See, e.g., ILL. COMP. STAT. ANN. ch. 720, § 510/1 (Smith-Hurd 1993) (within limits of Roe, state policy is "to protect the right to life of the unborn child from conception").
\item[36] See, e.g., Smith v. Organization of Foster Families, 431 U.S. 816, 842-44 (1977) (recognizing child's interests in being reared within a family unit, even where there are no biological relationships). At times, the child's interest may differ from the interests of other family members. \textit{Id.} at 857 n.1 (Stewart, J., concurring).
\item[38] \textit{Mother Charged After Her Baby Dies of Cocaine}, N.Y. TIMES, May 10, 1989, at A18.
\item[39] Isabel Wilkerson, \textit{Jury in Illinois Refuses to Charge Mother in Drug Death of Newborn}, N.Y. TIMES, May 27, 1989, at A10 (paraphrasing the state's attorney).
\item[40] ILL. COMP. STAT. ANN. ch. 720, § 5/9-3.2(c)(2) (Smith-Hurd 1993).
\item[41] State v. Gray, 584 N.E.2d 710 (Ohio 1992).
\end{footnotes}
the third trimester of her pregnancy." The relevant criminal statute prohibited creating a substantial risk to the health or safety of a "child under eighteen years of age." The Ohio Supreme Court found the statute inapplicable, expressing concern that the law did not specifically include harm to the unborn and that the state legislature was then considering a bill creating a new crime of prenatal child neglect. The third case demonstrates that even where there is a statute designed to cover prenatal maternal acts, criminal prosecution may still fail. In 1986, Pamela Rae Stewart was charged with misdemeanor child abuse for failing to furnish medical services to her child. The relevant statute defined child as including one "conceived but not yet born." Specifically, Pamela allegedly disregarded a physician's advice regarding her amphetamine use, sex life, and medical care during pregnancy, which caused her child to be born with brain damage and to die less than two months after birth. The charge was dismissed by the trial judge, who found the statute was not intended to penalize pregnant women for conduct during pregnancy, but rather was intended to penalize parents for failing to support their children financially. The generally applicable criminal child abuse statute was unavailable due to precedent indicating its protection did not extend to the unborn.

The surge in attempted criminal prosecutions of women for prenatal conduct under older criminal laws, as well as related calls for new laws which would specifically address crimes involving prenatal maternal conduct, have met significant opposition which is unlikely to abate. The push to expand the criminal lia-

42 Id. at 710.
43 Id. at 711.
44 Id. ("where the concerns of the unborn are at issue, the legislature and administrative bodies have referred to the unborn specifically").
45 Id. at 712-13.
47 CAL. PENAL CODE § 270 (West 1988).
48 Note, supra note 37, at 994.
50 Note, supra note 37, at 994 n.1.
51 Reyes v. Superior Court, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977) (stating that when the legislature seeks to protect the unborn via criminal law, it does so expressly).
52 See, e.g., Field, supra note 37; Note, supra note 37.
tility of pregnant women for harming their unborn should dissipate, if not disappear, in the next decade. Evidence of this dissipation is suggested by the continuing exemption of pregnant women from the criminal abortion laws enacted by some of the most vehement anti-abortion legislatures. Too many people now believe "public policy, reason and common sense" dictate that such criminal prosecutions be abandoned. They believe criminal prosecutions turn women away from seeking prenatal care, discourage them from providing accurate information to health care providers, unwittingly increase the incidence of abortion, and are ineffective in curing drug dependency or preventing substance abuse. Moreover, the recent wave of attempted criminal prosecutions of women has been tainted by racial and economic discrimination, so that abandonment of new prosecutions is urged even by those sympathetic to criminal proceedings, at least until such biases can be eliminated. Finally, recent attempts to prosecute pregnant women have usually involved the goals of rehabilitation and general deterrence, rather than punishment, which are aims that can also be achieved through new

53 This dissipation should occur even if federal and state constitutional interests could be accommodated. Among the relevant interests are unreasonable distinctions based on poverty, race, and/or drug addiction, as well as privacy interests in procreation, child begetting, childrearing, and the like. A good, early statement on guidelines for state regulation of pregnant women in their first trimester is found in John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 Va. L. Rev. 405, 447 n.129 (1983).

54 Thus, in Louisiana, where there is a longstanding policy to protect an unborn child from the moment of conception, see La. Rev. Stat. Ann. § 40:1299.35.0 (West 1992), and where three forms of feticide were added in 1989, see id. §§ 14:32.6-.8 (West Supp. 1993), the legislative attempt in the 1990s to eliminate abortion rights was grounded on a criminal abortion law that exempted women seeking or procuring abortions from criminal liability, see id. § 14:87 (West Supp. 1993) (invalidated in *Sojourner*, 974 F.2d at 29-30). See generally Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. Rev. 1774 (1991) (contemporary criminal abortion laws which exempt pregnant women are incoherent, lack sound policy justification, and are founded on a deeply rooted paternalism); Jean Rosenbluth, Note, *Abortion as Murder: Why Should Women Get Off? Using Scare Tactics to Preserve Choice*, 66 S. Cal. L. Rev. 1237 (1993) (suggesting that laws exempting pregnant women from criminal abortion laws violate the Equal Protection Clause of the Fourteenth Amendment).


56 Id. at 1295-96.


58 Parness, *supra* note 24, at 447.

59 In *Johnson*, 602 So. 2d at 1290, perhaps the most publicized case in which there
A variety of new civil laws do address harm caused by pregnant women outside of consensual abortions. While there has been little interest to date in expanding the tort law duties of pregnant women, there are new laws which promote research into the ways pregnant women may protect their unborn. New laws also educate the populace, or prospective parents in particular, about the adverse consequences on the unborn flowing from certain conduct during pregnancy, as well as afford increased prenatal care opportunities to pregnant women involved in drug or alcohol abuse. More controversial new civil laws help the government to identify pregnant women who have been, or are, involved in drug or alcohol abuse; permit the government to coerce certain pregnant women into treatment designed, in part, to protect potential human life; and permit

was a conviction at trial, the parties agreed that rehabilitation of the defendant and protection of her children were the intended goals, and the woman was sentenced to a year of community control in a drug rehabilitation program, followed by fourteen years probation. Kristen Barret, Comment, Prosecuting Pregnant Addicts for Dealing to the Unborn, 33 Ariz. L. Rev. 221, 237 n.143 (1991).

See, e.g., Logli, supra note 32, at 561-66. Logli, the would-be prosecutor of Melanie Green, see supra notes 38-40 and accompanying text, emphasizes nonpunitive, state-initiated civil proceedings in most settings, with criminal prosecution appropriate only where drug treatment for pregnant women is readily available. Logli, supra note 32, at 561-66.


See, e.g., id. ch. 235, § 5/6-24a (based on the need for “public information,” sellers of alcohol required to post signs warning of the risks of birth defects caused by alcohol consumption during pregnancy); id. ch. 20, § 2310/55.52 (creating a public education program to reduce the prenatal transmission of HIV infection).

See, e.g., id. ch. 750, § 5/203 (requiring a pamphlet on fetal alcohol syndrome be distributed with each marriage license).

See, e.g., id. ch. 305, § 5/5-5 (pregnant public aid recipients suspected of drug abuse or addiction referred to treatment where cost is covered and no sanctions imposed); id. ch. 20, § 305/9-101 (Department of Children and Family Services to give priority to pregnant women in residential drug and alcohol treatment centers).

See, e.g., id. ch. 325, §§ 5/3, 5/4 (reports to child welfare agency of newborns exposed to controlled substance required of various health care workers and others); Minn. Stat. Ann. §§ 626.556(2)(c), (3), 626.5561 (West Supp. 1993) (reports of pregnant women using controlled substances to be made to the state).

conduct during a pregnancy to serve as a basis for suspension or
termination of parental rights.68

The controversies over such civil laws have just begun and in-
volve many of the same questions raised over the criminal prose-
cution of pregnant women. Will mandatory reporting laws
covering drug use during pregnancy deter many women from
seeking prenatal care, thereby causing more harm than good?69
Will laws coercing drug treatment for pregnant women unwit-
tingly increase the incidence of abortion, thereby undermining
one of the very goals (potential life protection) sought to be pro-
ounded?70 Will efforts to terminate maternal rights based upon
conduct during pregnancy necessarily be tainted with the race
and class biases that have accompanied the attempted criminal
prosecutions of pregnant women?71 No crystal ball is needed to
predict that during the next decade, there will be more wide-
spread debate over these questions.

“emergency admission” of pregnant woman who “refuses recommended voluntary
services or fails recommended treatment”).

68 See, e.g., ILL. COMP. STAT. ANN. ch. 705, § 405/2-3 (Smith-Hurd 1993) (newborn
exposed to controlled substances is a neglected child); id. § 405/2-5 (law enforce-
ment officer may, without warrant, take into temporary custody a minor reasonably
believed to be a neglected child); id. § 405/2-10 (temporary custody hearing can re-
sult in “the removal of the minor from his or her home”).

69 See Dawn Johnsen, From Driving to Drugs: Governmental Regulation of Preg-
prosecution will . . . deter substance-dependent women from seeking . . . prenatal
care.”); Michelle Oberman, Sex, Drugs, Pregnancy, and the Law: Rethinking the
(arguing that reporting laws will “create a profound disincentive for pregnant drug
users to seek health care”).

70 Oberman, supra note 69, at 522.

71 See, e.g., Logli, supra note 32, at 565 (noting “legitimate concerns” regarding
“racial and economic imbalance in the women being referred . . . as substance abus-
ing mothers,” and advocating a “universal testing of newborns or a testing method
using consistently applied objective protocols”); Roberts, supra note 57, at 1432-36
(bias against poor blacks found in testing of pregnant women and newborns for ex-
posure to illegal drugs and alcohol).

In addition to problems of race and class bias, allowing evidence of certain con-
duct during pregnancy may, in a maternal rights hearing, make culprits of many
victims, as studies suggest that physical or sexual abuse of women during pregnancy
is not uncommon. See Michael Campbell, Study: 17% of Pregnant Women Abused,
CHI. TRIB., June 18, 1992, § 1, at 6. Evidence also suggests that female drug addicts
“often have histories of sexual, physical and emotional abuse.” Wendy Chavkin et
al., Drug-Using Families and Child Protection: Results of a Study and Implications
OREGON LAW REVIEW

III

THE NEXT DECADE: PROTECTING THE UNBORN FROM PREGNANT DADS

A crystal ball is necessary, however, to predict whether there will soon be widespread debate over new laws addressing harm caused the unborn by pregnant dads. While attempted criminal prosecutions of expectant fathers has not accompanied the surge in prosecutions of expectant mothers, clearly the prebirth paternal acts of pregnant dads such as Karl Smith and Robert Hollis should be subject to prosecution. Special criminal statutes directed at pregnant dads should be adopted. Furthermore, recent civil law reforms directed at reducing harmful prebirth paternal conduct should be recognized more widely and should be expanded.

New laws on prebirth paternal conduct seem appropriate as there is today, unfortunately, much harm caused to the unborn by pregnant dads. Proscribed activities in new laws should extend far beyond the conduct of Karl Smith or Robert Hollis, embodying acts which may fall outside the ambit of an integrated series of criminal statutes protecting potential human life and, thus, inside the ambit of new civil statutes and administrative regulations. Consider the expectant father who may have knowingly supplied a pregnant Melanie Green with the cocaine that led to Bianca’s death,72 or the future dad who may have endangered Sierra by knowingly supplying a pregnant Tammy Gray with cocaine. Further, consider the expectant father who joined Pamela Rae Stewart in disregarding her doctor’s advice about sex during pregnancy.

The exploration of new criminal and civil laws governing prebirth paternal acts can begin with a Florida case which shows how existing criminal child abuse and neglect laws might be

---

72 In fact, Ill. Comp. Stat. Ann. ch. 720, § 5/12-4.7 (Smith-Hurd 1993), provides: “Any person who violates . . . the Illinois Controlled Substances Law by unlawfully delivering a controlled substance to another commits the offense of drug induced infliction of great bodily harm if any person experiences great bodily harm . . . as a result of the . . . ingestion of any amount of that controlled substance.”

There is also the possible use of aiding or abetting laws against pregnant dads when their mates act criminally. See, e.g., People v. Peters, 586 N.E.2d 469 (Ill. App. Ct. 1991) (mother aided boyfriend in murdering her son, where boyfriend killed son outside mother’s presence and where mother had no specific intent to facilitate the abuse of her son); see Cal. Penal Code § 270 (West 1988) (failure to provide prebirth financial support); Note, supra note 37, at 994.
adapted to the conduct of expectant fathers. The recent Florida Supreme Court decision in *In Re Adoption of Doe*\textsuperscript{73} involved the prebirth child care provided by an unwed, biological father. The father sought to participate in an adoption proceeding commenced by a couple who had assumed custody of his son shortly after birth. Under state law, the father’s right to participate hinged, in part, on whether he had abandoned his son before, or shortly after, birth.\textsuperscript{74} The court found abandonment prior to birth, relying chiefly on the father’s failure to evince “a settled purpose to assume parental duties.”\textsuperscript{75} In particular, the father was found not to have provided his son’s mother with “meaningful, repetitive and customary support” prior to birth,\textsuperscript{76} including a failure to pay “monies toward prenatal medical bills, food, or medications.”\textsuperscript{77} In determining that the father had no right to participate in the adoption case, the court spoke in more general terms of prebirth paternal duties. It said:

> Because prenatal care of the pregnant mother and unborn child is critical . . . the biological father, wed or unwed, has a responsibility to provide support during the prebirth period. Respondent natural father’s argument that he has no parental responsibility prior to birth . . . is not a norm that society is prepared to recognize. Such an argument is legally, morally, and socially indefensible.\textsuperscript{78}

While the goals behind establishing maternal and paternal duties to the unborn may be comparable, their implementation obviously will differ. The Florida Supreme Court did not elaborate on, or urge the legislature to address more fully, the nature of prebirth paternal duties in adoption proceedings. Nor did the

\textsuperscript{73} 543 So. 2d 741 (Fla.), cert. denied, 493 U.S. 964 (1989).
\textsuperscript{74} Id. at 745. Once abandonment occurred, it could not be overcome easily in Florida. In this case, the father “filed an acknowledgment of paternity” only a week after birth, about four days after the couple hoping to adopt his son assumed custody, and over a month before the adoption petition was filed. Id. The father’s attempt to gain custody coincided with both the mother’s reconciliation with (and later marriage to) the father, and with her attempt to withdraw her consent to the adoption five days after it was given. These events occurred more than one month before the adoption petition was filed. Id. at 743; cf. *In re Adoption of J.R.G.*, 617 N.E.2d 377 (Ill. App. Ct. 1993) (holding that biological father was unfit under statute because he failed to demonstrate responsibility for the child’s welfare within 30 days after birth, and thus his consent was not required in his child’s adoption).
\textsuperscript{75} *Adoption of Doe*, 543 So. 2d at 747.
\textsuperscript{76} Id. at 747 n.3 (adopting the trial court findings found in *In re Adoption of Doe*, 524 So. 2d 1037, 1042 (Fla. Dist. Ct. App. 1988)).
\textsuperscript{77} *Adoption of Doe*, 543 So. 2d at 747 n.3 (adopting trial court finding).
\textsuperscript{78} Id. at 746.
court discuss prebirth paternal duties applicable to criminal conduct, financial support, or suspension of parental rights cases not involving an adoption. It should be noted that Florida recently did seek to protect the unborn from prenatal maternal drug use by enacting mandatory reporting laws covering newborns physically dependent upon drugs, as well as mothers who used a controlled substance during pregnancy. Florida officials also recently undertook the criminal prosecution of Jennifer Johnson for transmitting illegal drugs through the umbilical cord.

In considering civil and criminal laws governing pregnant dads, attention must be paid to the two major types of expectant fathers under law: biological fathers and presumed fathers. Not all biological fathers have legal obligations or rights regarding their offspring, therefore, only certain expectant biological fathers should be assigned prebirth paternal duties. For example, in settings involving artificial insemination through an anonymous donor where the pregnant woman’s husband has consented, the donor typically has no legally recognized parental interests. Presumed fathers have legal duties, but no biological connection, to their future offspring. Generally, men married to women who conceive, carry, or bear children during the marriage are presumed fathers under law, though the presumption may, but need not, be rebuttable.

In focusing on the prebirth duties of prospective fathers, the lessons from recent prebirth stranger and maternal conduct cases should be applied. The likes of Karl Smith and Robert Hollis clearly should be subject to criminal prosecution for harming their unborn offspring, with the charges extending beyond any crimes addressing the harm caused their former mates. Worthy of enactment are special statutes addressing the harmful conduct

---

79 FLA. STAT. ANN. § 415.503(9)(a)(2), (g) (West 1993) (defining harm to child's health or welfare); id. § 415.504(1) (mandatory reporting duty).
81 In Illinois, the husband of a pregnant woman is legally presumed to be the father of a child if the child is born or conceived during that marriage. This presumption may only be overcome by clear and convincing evidence. ILL. COMP. STAT. ANN. ch. 750, § 45/5 (Smith-Hurd 1993).
82 Compare id. ch. 750, § 45/7(b) (action to declare nonexistence of parent/child relationship may be brought by presumed father) with LA. CIV. CODE ANN. art. 188 (West 1993) (in absence of mother’s fraud, man may not disavow paternity if he married knowing that his bride was pregnant) and B.H. v. K.D., 506 N.W.2d 368 (N.D. 1993) (man who had sex with a woman shortly before her wedding has no standing to assert paternity of a child born seven months after the wedding).
of pregnant dads toward their unborn. In the alternative, general statutes embodying crimes against the unborn could carry enhanced penalties if the defendant is the prospective father of the unborn victim.\textsuperscript{83} Everyone now has duties under criminal laws not to cause certain harm. However, for those who are parents of the children who are victims, such duties are usually greater. Should the expectant father of Pamela Rae Stewart’s fetus be prosecuted separately for 1) harming his unborn child if he supplied Pamela with illegal amphetamines, 2) joining her in disregarding her doctor’s advice about sex during pregnancy, or 3) failing to help pay for Pamela’s medical expenses during pregnancy, even if such acts would not result in similar criminal prosecution of persons who were not pregnant dads? There is much to commend at least the first and third forms of special criminal prosecution.\textsuperscript{84} In fact, Pamela Rae lived “with a violent, abusive husband, who beat her and regularly threatened her and other family members.”\textsuperscript{85}

Potential life protection would be especially well-promoted by a few well-considered prosecutions of such pregnant dads. Though convictions did not follow, the recent criminal prosecutions for prebirth maternal conduct have served “the educational function of criminal law.”\textsuperscript{86} Comparably, the prosecution of a few men would better assure an increasing awareness that, as the Florida Supreme Court noted, the absence of male “parental responsibility prior to birth . . . is not a norm that society is prepared to recognize.”\textsuperscript{87}

The failure of pregnant dads to financially support their un-

\textsuperscript{83} An issue not addressed here involves whether criminal action should be punished differently if there is a presumed father (the man married to the mother) who is not the biological father. \textit{See}, e.g., \textit{People v. Smith}, 129 Cal. Rptr. 498, 500 (Cal. Ct. App. 1976) (concerning a husband’s attack on his pregnant wife motivated by his belief that she had “interracial intercourse” outside the marriage).

\textsuperscript{84} The trial court in Pamela Rae’s case, \textit{People v. Stewart} (Cal. Mun. Ct. 1987), acknowledged the criminal liability of fathers who refuse to pay pregnancy expenses. \textit{See} Note, supra note 37, at 994; \textit{see also} text accompanying note 50. Supplying the mother with illegal drugs may already be actionable under existing general criminal law—assuming a child is born alive. \textit{See} supra note 27.

\textsuperscript{85} Oberman, supra note 69, at 506. Professor Oberman opined that the father bore “some responsibility” for the prenatal harm, but further said (wrongfully, I hope) that laws directed at the substance abuse of expectant fathers “would never be permitted” because they would cover the “white middle class” (and men). \textit{Id.} at 506, 534.

\textsuperscript{86} Parness, supra note 1, at 163-65.

\textsuperscript{87} \textit{In re Adoption of Doe}, 543 So. 2d 741, 746 (Fla.), \textit{cert. denied}, 493 U.S. 964 (1989).
born need not only be considered after birth during criminal prosecutions, or during pre-adoption hearings involving issues of child abandonment. Prebirth financial support should be considered in postbirth settings beyond adoption, including marriage dissolution and male-initiated paternity actions raising custody or visitation issues, as well as in settings prior to birth where harm to the unborn may still be prevented.

One way to prevent harm is to expand opportunities for paternity actions brought by expectant mothers so that expectant fathers can be compelled to provide needed financial support for their unborn. Unfortunately, such actions are now usually unavailable. Even when prebirth paternity actions are filed, typically the proceedings are stayed until after birth. Such prebirth paternal support can extend beyond money supplied to pregnant women to include such important matters as insurance coverage.

Further, the recognition of tort claims by children against their fathers for prebirth conduct resulting in birth disabilities would seemingly help prevent birth disabilities, and involve different public policy concerns than are involved in claims by children against strangers or against their birthmothers. Expectant fathers have special relationships with their future offspring which many strangers do not have, and yet these fathers do not possess as many constitutional interests in prebirth activities as do expectant mothers. At the least, a compelling case can be made for

---

88 See supra text accompanying note 50.
89 See Adoption of Doe, 543 So. 2d at 741.
90 Expanded opportunities for prebirth paternity support orders sought by the state for reimbursement of expenditures made on behalf of the unborn are more troubling and are not addressed herein. Also unaddressed are expanded opportunities for prebirth paternity actions initiated by men, which seemingly would be welcomed by some expectant fathers and unwelcomed by many expectant mothers.
92 Prebirth conduct even may include, at times, preconception conduct, as there is, for example, evidence of the harmful effect of damaged sperm. See, e.g., Paternal-Fetal Conflict, Hastings Center Rep., Mar.-Apr. 1992, at 3 (also noting the March of Dimes campaign, whose slogan is “Men have babies, too.”).
93 To date, similar claims against strangers have been expanding, while claims against mothers have received a chilly reception. See, e.g., supra notes 30, 31, and 61.
children's claims against expectant fathers involving prebirth acts constituting intentional felonious conduct.94 Yet another way to prevent harm to the unborn caused by the acts of pregnant dads is to allow for greater access to prebirth protection orders on behalf of the unborn. Because all women themselves can already secure protection orders requiring potential abusers to stay away,95 fetal protection orders against pregnant dads could seek to prevent harm to the unborn by addressing such conduct as facilitating access to prenatal care, food, and shelter; helping the expectant mother to comply with doctor's orders; and providing financial support or insurance. These orders may be comparable to, but distinct from, orders in any expanded version of a traditional paternity action.96 Additionally, these orders could be issued in settings where the expectant parents otherwise do not owe one another any duty of support. For example, fetal protection orders might issue against those in quasi-paternal (or quasi-parental) settings. Consider, for example, protection orders involving men (or women) who are neither biological nor presumed fathers (or mothers), but who nevertheless have developed a special relationship with, or have assumed parental duties toward, the unborn. Exemplary may be the prospective parents of a child born through a surrogacy agreement.97

Finally, new prebirth paternal conduct laws should include reforms whose chief goals are to educate men and others on the ways to protect potential human life. Thus, as information is conveyed in some states to pregnant women regarding drug use

94 Barnes v. Barnes, 603 N.E.2d 1337 (Ind. 1992) (reviewing parental tort immunity and finding it would be abrogated in circumstances involving intentional felonious acts).

95 Of course, stay away orders may be easier for pregnant women to obtain. See, e.g., Gloria C. v. William C., 476 N.Y.S.2d 991 (Fam. Ct. 1984) (allowing a pregnant woman, who had been assaulted earlier by her husband, to obtain an order of protection on behalf of her fetus of four months, and observing that it "ha[d] seen a significant number of cases where physical abuse of an expectant mother by her husband is consciously directed at her unborn child").


during pregnancy, information should also be delivered to pregnant dads about the duties of biological and presumed fatherhood. Further, as women seeking abortions are informed by their doctors of the state's interest in promoting childbirth, all pregnant women should also be informed of the prebirth support duties of expectant fathers. And, as there was much recent attention to fetal protection policies affecting fertile women in the workplace, there should be increased attention to fetal protection policies affecting fertile male workers.

CONCLUSION

There has been much recent discussion about criminal and tortious conduct against the unborn by strangers, and about the criminal and civil law duties of pregnant women toward their future offspring. To date, however, there has been only limited discussion of laws involving the prebirth acts of pregnant dads. More talk about the legal duties of expectant fathers is needed, to be followed by some tilling and harvesting of new laws protecting potential human life. While discussion should be guided by the recent dialogue about laws on prebirth stranger and maternal conduct, differences in constitutional interests and social consequences suggest that quite different legal treatment be accorded prebirth paternal acts. New civil and criminal laws addressing the duties of pregnant dads are needed.

98 See, e.g., ILL. COMP. STAT. ANN. ch. 20, § 2310/55.54 (Smith-Hurd 1993) ("statewide education program to inform pregnant women of the medical consequences of alcohol, drug and tobacco use and abuse").


100 See, e.g., Leading Cases, 105 HARV. L. REV. 177, 388 (1991) (reviewing UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) and concluding: "Employers who are concerned that their workplaces might be found unreasonably dangerous in a negligence action must formulate fetal protection policies that address health risks associated with paternal as well as maternal exposure to toxins.").

101 I recognize my failure to address the prebirth conduct of expectant mothers who are not destined to be biological moms. I thus leave for another day a more general discussion of the duties of all expectant parents. See, e.g., Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993) (lesbian may adopt her mate's biological child); A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App.) (concerning the possible joint custody of a child by two women, taking into consideration their co-parenting agreement and the child's best interest), cert. denied, 827 P.2d 837 (N.M. 1992).