Arming the Pregnancy Police: More Outlandish Concoctions?

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Emotions abound when encountering a newborn with disabilities which will inevitably lead to an early death or to a less than whole and healthy life. It is especially painful when such disabilities were preventable. Anger swells, fingers are pointed, fault is assigned, initiatives are promised, tears are shed. To seek to assure that more humans are born with sound minds and healthy bodies seems as American as apple pie. Governmental efforts appear appropriate.

For several years now, a national debate—often heated and impassioned—has focused on the legal treatment of disabilities attributable to prenatal drug or alcohol use. What, if anything, may and should governments do to limit such disabilities? What non-financial constraints, if any, operate when such a mission is undertaken? And, as our understanding of the causes and cures of such disabilities grows, what in fact have we been doing? This paper addresses these questions, dwelling particularly on coercive laws designed to protect potential human life.

It will be urged first that the widespread view that Roe v. Wade bars significant governmental protection of the unborn is misguided; that the case, in fact, suggests there are a variety of legitimate avenues for protective efforts (whether or not the unborn are deemed persons); and, that in the years since Roe, there have been many noteworthy initiatives. Recent reforms include coercive laws seeking to reduce drug or alcohol-related birth disabilities. Such laws require close scrutiny when constitutional interests are present.

After generally reviewing contemporary initiatives on behalf of the unborn, efforts in Winnebago County, Illinois will be examined in detail. These inquiries will reveal some of the difficulties with state protection of potential human life. Sexually discriminatory initiatives, as well as inconsistent enforcement of state policy, will be found. Suggestions for change will then be offered, including the view that the arming of the pregnancy police should not be limited to an arsenal used only against


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pregnant women, but should encompass arms against all who act against
the unborn.

I. PROTECTING THE UNBORN UNDER ROE V. WADE

The promotion of live births and the prevention of disabilities in
newborns certainly constitute legitimate governmental interests. As such
pursuits typically involve state action prior to human birth, many have
characterized them as involving the protection of potential human life.
The United States Supreme Court, in Roe v. Wade, expressly recognized
and approved a government's "important and legitimate interest in pro-
tecting the potentiality of human life."2 Seemingly, potential human life
is protected through laws promoting live and healthy births, whereas
human life is protected through laws promoting the continuing live and
healthy condition of those crawling or walking on earth today. Potential
human life is today protected by laws within such diverse areas as torts,
crimes, and child custody.

On occasion, lawmakers will seek to protect potential human life
by equating certain unborn with those already born. For example, an
already-born child and a developing fetus may each be the possible
victim of parental abuse and neglect,3 while both a pregnant woman
and her unborn child may be patients of a certain doctor.4 On other
occasions, lawmakers protect potential human life though rejecting any
equation involving the unborn and those already born. For example,
some states have both homicide and feticide laws within their criminal
codes.5

The protection of potential human life can be significantly promoted
through many forms of law. Certain protections are most appropriate
for state governments (criminal, tort, and child custody laws), while
others are best undertaken at the national level (laws financing research

2. Id. at 162, 93 S. Ct. at 731.
3. Cal. Penal Code § 270 (West 1988) ("If a parent of a minor child wilfully omits,
without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance,
or other remedial care for his or her child, he or she is guilty of a misdemeanor . . .
A child conceived but not yet born is to be deemed an existing person insofar as this
section is concerned.").
4. While most state courts allow children to sue their mothers' doctors for injuries
resulting from conduct after their conception but prior to their birth, some courts recognize
claims for injuries resulting from preconception conduct. See, e.g., Renslow v. Mennonite
(first degree feticide); Ill. Rev. Stat. ch. 38, ¶¶ 9-1 (first degree murder), 9-1.2 (intentional
(murder in the first degree), 609.2661 (West 1987) (murder of an unborn child in the
first degree).
and access to prenatal care). Laws protective of potential human life can serve the unborn exclusively or can simultaneously promote other interests, such as maternal health. At times, the protection of potential human life is only an unintended (or peripheral) consequence of a law chiefly serving other goals.

Laws can protect potential human life in a variety of ways. They can make money, food, and medical care available to pregnant women. They can help to educate future parents and others on how to promote live births and prevent birth disabilities. And, they can work in more coercive ways. Tort claims or criminal prosecutions for acts harmful to some unborn will deter similar conduct, and may serve compensatory or retributive aims. Coercive legal action can also seek to prevent foreseeable harm to certain unborn by enjoining the conduct of those then involved in the childbearing process. At the extreme, onerous conditions might be imposed.

In protecting potential human life, governments are subject to traditional, non-financial constraints. Laws must be neither arbitrary nor capricious; they must promote some legitimate goal. Thus, laws protecting the unborn must at least be founded on nontrivial connections between the conduct regulated and some chance for promoting live and healthy births. There are further limits when laws burden constitutionally-protected interests. Such limits, as well as the difficulties in observing such limits, can be well illustrated by reviewing more fully the often-misunderstood decision in Roe v. Wade.

At issue in Roe was a state statute which effectively prohibited most pregnant women from procuring abortions. The statute thus protected potential human life, thereby serving an interest which the Court deemed "important and legitimate." Yet, because the statute burdened a woman's right to choose to terminate her pregnancy, a right which was found within the federal constitutional privacy domain, and because the state's interest in all fetuses was not "compelling," the statute was invalidated. The Court did observe that the state had a compelling interest in protecting all viable fetuses so that third-trimester abortions generally could be outlawed.

While Roe v. Wade was concerned with privacy in pregnancy termination, the Court's decision suggests that a "compelling state interest" will be necessary to sustain any law protecting potential life but burdening comparable constitutional concerns. Other relevant concerns include pri-

7. Id. at 163, 93 S. Ct. at 731-32.
8. Id. at 163-64, 93 S. Ct. at 732 (noting that late abortions could not be barred if the preservation of the life or health of the mother was involved).
9. Id. at 155, 93 S. Ct. at 728. More recently, members of the Court have looked for undue burdens. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992)
vacy in childbegetting, childrearing, medical decisionmaking, and bodily integrity.

Because governments are much freer to act where constitutional concerns are neither present nor unduly burdened though present, and because pregnant (as well as fertile) women often can raise such concerns when subjected to laws seeking to protect their future offspring, most laws promoting live and healthy births involve nonmaternal conduct. Of course, where the conduct of prospective mothers is addressed, the protection of potential human life is usually welcomed by would-be mothers, as these women typically join the state in seeking live and healthy births. In only limited circumstances will a state determine that it should regulate a woman’s conduct against her wishes in order to benefit her future offspring. When such regulation sufficiently burdens constitutional concerns, the rationale(s) supporting governmental action must, of course, be compelling.

II. RECENT LAWS PROTECTING THE UNBORN

Within the limits of Roe v. Wade, American governments have recently undertaken significant initiatives protective of the unborn. An examination of these initiatives reveals wide variations in the types of laws now concerned with promoting live and healthy human births.

A major development in the regulation of nonmaternal conduct involves statutes characterizing the unborn as victims of crime. Early in 1986, Minnesota created a distinct statutory scheme providing broad criminal law protection of the unborn.10 The scheme encompasses varying forms of culpable conduct (premeditated, intentional, grossly negligent, and negligent acts) and of injury (involving either the termination of potential life or birth disabilities). Later that year Illinois adopted a similar scheme, with the unborn deemed possible victims of intentional homicide, voluntary manslaughter, involuntary manslaughter, reckless homicide, battery, and aggravated battery.11 In 1987, North Dakota added several crimes against the unborn, including murder, manslaughter, negligent homicide, aggravated assault, and assault.12 Since then, Washington has redefined assault in the second degree to include acts harming an unborn quick child.13 Of course, such alterations in criminal laws often encourage related civil laws to extend greater potential life protection.

Another significant development in the regulation of nonmaternal conduct involves the expansion of tort laws to cover claims by those

whose birth disabilities were caused by the defendants' actions. In many states, claimants can include those who were previable at the time of the tortious conduct. Some states have expanded tort laws even further, permitting claims by those who were preconceived at the time of the tortious conduct. Where laws protecting the unborn address the conduct of prospective parents, there is often little controversy. For instance, consider laws providing for better prenatal care (nutritional food supplements to low-income pregnant women); treatment of drug or alcohol abuse on a voluntary basis; warning labels on products which cause disabilities at birth; and, financial support of scientific research on human procreation and birth. Such laws are relatively noncontroversial because they are noncoercive.

Laws protecting the unborn are usually most controversial when they operate coercively, especially against pregnant women. As noted earlier, when such laws unduly burden constitutional concerns, they must serve a compelling state interest. Yet, state interests are often difficult to assess, as it is hard to evaluate (or even describe) the consequences of coercive laws before (and even after) their implementation. Since laws protecting the unborn often are premised on speculation about human conduct, they require continuing reassessment.

Laws involving drug use by pregnant women illustrate some of the difficulties. Laws may or do allow drug use during pregnancy to justify:

1. a criminal prosecution;
2. the suspension or termination of parental rights; and/or,
3. restrictions on the activities of a pregnant woman and those around her.

Criminal child abuse (or similar) prosecutions of women who ingest illegal drugs during pregnancy may now be possible in some states. In California, for example, the Penal Code defines as a misdemeanor a parent's willful omission, without legal excuse, to furnish necessary medical attendance or other remedial care for his or her child, and thereafter characterizes one conceived but not yet born as a child. The provision seemingly can be applied in at least some settings with no infringement upon constitutional rights, and such applications would clearly promote what the *Roe* majority called the “important and le-

gitimate interest in protecting the potentiality of human life.'\textsuperscript{17} The much-publicized California trial court dismissal in 1986 of child abuse charges against Pamela Rae Stewart (who, while pregnant, ignored a doctor's warning about taking certain drugs) casts a cloud on the statute's applicability to prebirth maternal conduct.\textsuperscript{18} Successful criminal child abuse prosecution of women bearing drug-exposed newborns may require the enactment of even more particular statutes.

On the civil side, a court may be able to suspend a mother's custodial rights on account of her prebirth conduct or to restrict a pregnant woman's conduct in order to protect her future offspring. Given a trial court finding that certain forms of prenatal drug use may cause significant harm to developing fetuses, can such conduct ever support (alone or with other acts) an order suspending at birth a woman's interest in her newborn or in her earlier-born children? And, assuming constitutional concerns are implicated, may there ever be a sufficiently compelling governmental interest (especially in noncriminal conduct) to sustain an injunction restricting a pregnant woman's drug intake in order to protect the potentiality for life?

Courts and legislatures involved in child custody laws have been increasingly concerned with the prebirth conduct of all prospective parents. Some lawmakers have recently determined that drug-exposed infants can be deemed neglected under custody laws by mothers who took controlled substances during pregnancy.\textsuperscript{19} Such findings usually do not result in the full loss of parental rights; rather, they typically trigger only a temporary loss, or the imposition of conditions (such as drug rehabilitation and counselling) for the new mother. Not long ago, the Florida Supreme Court ruled that a man who fails to support his unborn

\textsuperscript{17} Roe v. Wade, 410 U.S. 113, 162, 93 S. Ct. 705, 731 (1973).


\textsuperscript{19} See, e.g., Okla. Stat. Ann. tit. 10, §§ 1101 (West Supp. 1992) ("[D]eprived child" includes some children born in a condition of dependence on a controlled dangerous substance), 1130 (West 1987) (circumstances under which a deprived child can be subject to termination of parental rights); In re Ruiz, 500 N.E.2d 935 (Ohio C.P. 1986) (finding of child abuse by juvenile court can be predicated solely upon mother's prenatal conduct involving heroin use). Compare In re Steven S., 178 Cal. Rptr. 525, 529 (App. 3d 1981) (finding a fetus is not a person able to be adjudged dependent by a juvenile court and thus a pregnant woman's detention was illegal, but in a setting where the prospective mother was allegedly mentally ill and where the state had not afforded her a commitment hearing); In re Dittrick Infant, 263 N.W.2d 37, 39 (Mich. Ct. App. 1977) (Probate Code does not permit custody order regarding unborn child, though Code amendments are desirable). For a general review of recent statutes, see Julia Elizabeth Jones, Comment, State Intervention in Pregnancy, 52 La. L. Rev. 1159, 1164-65 (1992).
child's mother prior to his child's birth loses his standing in (and thus his need to give his consent to) a later adoption proceeding. Specifically, the court stated, "Because prenatal care of the pregnant mother and unborn child is critical to the well-being of the child and of society, the biological father, wed or unwed, has a responsibility to provide support during the prebirth period." 

Comparably, there have been new laws which seek to prevent harm to the unborn. Some courts have ordered that pregnant (or nonpregnant fertile) women using controlled substances, or otherwise acting dangerously toward their unborn, must take certain action to protect potential human life. Orders have been issued by courts with jurisdiction over family, juvenile, and criminal matters. While criminal court orders against women during sentencing have met with difficulty, civil court orders have met with more success. Particularly troublesome, of course, are orders against women whose condemned conduct is not otherwise criminal. Orders on alcohol consumption or smoking during pregnancy come to mind. In 1983, a court was asked to assume custody over a previable fetus and to order a pregnant woman to undergo a "purse string" operation so that her cervix would better hold the pregnancy. In declining the request, the Supreme Judicial Court of Massachusetts reflected the uncertainties when it said:

We do not decide whether, in some situations, there would be justification for ordering a wife to submit to medical treatment in order to assist carrying a child to term. Perhaps the State's interest, in some circumstances, might be sufficiently compelling ... to justify such a restriction on a person's constitutional right of privacy.

20. In re Adoption of Doe, 543 So. 2d 741 (Fla. 1989).
21. Id. at 746; see also State ex rel. Lewis v. Lutheran S. Serv., 227 N.W.2d 643 (Wis. 1975) (prebirth acts of father constitute child abandonment).
23. Taft v. Taft, 446 N.E.2d 395, 397 (Mass. 1983); see also Debra C. Moss, Labor of Love, A.B.A. J. 32 (Dec. 1986) (describing case of pregnant, brain-dead woman whose life support system was ordered continued at the prospective father's request notwithstanding her parents' objections).
As noted earlier, it is often difficult to assess the utility of laws mandating behavior by potential parents and others. Difficulties arise in determining the causal connection between certain conduct and unacceptable risks for the unborn. Medical assessments of risk are difficult. And, the imposition of legal obligations in order to protect the unborn often has a chilling effect on the lawful conduct of potential parents or others, where the effect at times may do the unborn more harm than good. Thus, account must be taken of the prospect that laws seeking to protect the unborn might deter too much beneficial conduct or promote too much undesired conduct. Protective laws could discourage pregnant women from seeking prenatal care, inhibit pregnant women from disclosing important information to their medical attendants, or encourage pregnant women to procure abortions.

Thus, caution is needed in developing coercive laws protective of the unborn. Many difficulties can be avoided by employing narrowly-focused statutes, rules and precedents which specifically address forms of coercive state interventions on behalf of potential life. There is no question today about the relationship between certain forms of conduct and harm to the unborn. Governments should generally choose to intervene only where the assessments of risk are beyond dispute and the dangers posed are significant. While the chilling effect on access to prenatal care, the doctor-patient relationship, and the like must always be considered, along with the difficulties in assessing a law's utility, legal protection of the unborn by coercion is warranted in certain settings because there exist weightier countervailing interests. Further, the danger in overestimating the nature and degree of chilling effects should not be overlooked. Preexisting laws may already trigger a significant chill so that the effects of new laws may be minimal. Consider, for example, the marginal chilling effect of an occasional criminal prosecution involving especially egregious prenatal drug use when there already exist child abuse reporting laws covering drug-exposed newborns. Further, there are significant educational benefits which should flow from the mere existence of coercive laws. Public misunderstanding of the holding

24. Dawn Johnsen, Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty, 43 Hastings L.J. 569, 601-04 (1992) (access to prenatal care and medical information); John A. Robertson, Procreative Liberty and the Control of Conception, Pregnancy and Childbirth, 69 Va. L. Rev. 405, 447 n. 129 (1983) (concerns over encouraging abortion). Of course, as we now often choose to discourage abortions to protect potential human life, Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671 (1980) (no federal constitutional violation in public funding of childbirth, but not abortion, expenses), we may choose in the future to encourage certain abortions. Irving B. Harris and Nancy F. Schulte, The Crisis in Cook County, Chi. Trib., June 16, 1992, § 1, at 19, col. 3 (denial of public funds for abortion in Cook County Hospital often leads to babies born with serious health problems, “exacerbating the already difficult circumstances they and their families face”).
in *Roe v. Wade* would diminish as sensitivity grew regarding the potential legal protections which could be afforded the unborn outside the abortion setting. Finally, while coercing conduct to protect the unborn involves important and legitimate state interests, such interests should be uniformly promoted. That is, laws protecting potential human life must apply comparably to all those whose acts endanger whole and healthy births. Women, or pregnant women, alone should not be targeted. And certainly, the poor alone should not be the subjects of state coercion. Laws regarding a prospective father's legal duties to his unborn child, as well as tort and criminal laws protecting the unborn from hostile acts by strangers, are needed. Such laws usually inure to the benefit of women seeking the birth of live and healthy children, and their enforcement negates notions that laws relating to the unborn discriminate against the poor or women.

III. PROTECTION OF THE UNBORN IN WINNEBAGO COUNTY, ILLINOIS

A. Introduction

The variety of coercive governmental actions on behalf of the unborn, the integration of such actions with noncoercive state initiatives, the desirability of uniformly applying legal protections afforded the unborn, and the continuing misunderstanding of the limits posed by *Roe v. Wade* can all be reviewed through an examination of recent events in Winnebago County, Illinois. This geographical area is well-suited for the inquiry due to the strong history in Illinois of protecting the unborn and to the recent vigorous pursuit of this interest by Winnebago County officials. In this area, much attention has been directed toward one Winnebago County, Illinois, official. In 1989, State’s Attorney Paul Logli undertook an attempted criminal prosecution of Melanie Green for delivering cocaine to her unborn baby.\(^\text{25}\) Criticism and praise followed, with the debate extending far beyond the county and the state. Unfortunately, this debate rarely—if ever—including reference to other Illinois state action on behalf of the unborn. A more complete exploration of recent state and local efforts provides a better avenue for critiquing the attempted prosecution of Melanie Green and, more generally, for examining American governmental policies on the unborn.

The inquiry into Winnebago County events will be done chronologically. This permits a contextual analysis, especially of the well-publicized failure of a grand jury to indict Melanie Green. The review

will begin with events following Roe v. Wade, and demonstrate how
the decision served as a lightning rod for efforts to protect the unborn
in Winnebago County, in Illinois, and in the country.

B. The Aftermath of Roe v. Wade in Winnebago County, Illinois

Not long after the decision in Roe v. Wade, the houses of the
Illinois General Assembly adopted a joint resolution on abortion which
it then sent to Congress. The resolution, based on its displeasure with
Roe, was aimed at extending protection to "all unborn human life
throughout its development," as well as at assuring unborn human life
the equal protection of law.26 Shortly thereafter, the Assembly revised
state abortion laws in order "to protect the right to life of the unborn
child from conception," specifically declaring that if Roe v. Wade ever
fell, then there shall be reinstated the former policy prohibiting abortions
unless necessary to preserve maternal health.27 The former policy seem-
ingly exempted women seeking abortions from criminal prosecution as
it defined abortion as including the use by "a person" of an instrument,
drug or other substance "with the intent to procure a miscarriage of
any woman."28

A few years later, the Illinois Supreme Court reasserted its com-
Mennonite Hospital,29 the court removed the requirement that a tort
plaintiff must have been conceived prior to the conduct on which the
claim is based. Renslow was founded on the determination that in Illinois
there was "a right to be born free from prenatal injuries foreseeably
caused by a breach of duty to the child's mother,"30 as well as a
longstanding "public policy . . . to protect children not in being at the
time of a particular wrongful act."31 The decision had been preceded
by earlier tort law rulings favoring the unborn. One case involved a
claim by the administratrix of the estate of a child who suffered prenatal
injuries, was thereafter born alive, but then died.32 The court held that
a claim could be pursued against those whose negligence caused the
death, saying the claim operated for the benefit of the child's next of
kin. The court relied, in part, on the right of a child to commence life
unimpaired by physical or mental defects caused by negligence to a

30. Id. at 1255.
31. Id. at 1259 (Dooley, J., concurring).
viable child *en ventre sa mere*. Another early case recognized an action on behalf of an infant for personal injuries resulting from acts undertaken while the infant was a viable fetus; the decision was similarly based on the interest in promoting the commencement of life unimpaired.44

Protection of the unborn under criminal law was considered by Illinois' high court a few years after *Renslow*. In the 1980 case of *People v. Greer*,35 Alan Greer had killed both his girlfriend and her eight and a half month-old fetus by beating the girlfriend with his fists, kicking her with his feet, and striking her repeatedly with a broomstick which broke during the beating. The Illinois Supreme Court ruled Alan Greer could not be prosecuted for the death of the fetus under the existing homicide statute since the fetus had never been born alive.36 The court recognized the legitimacy of a feticide law, however, when it said, "Although . . . the State's argument that the intentional destruction of a viable fetus should be included in the definition of murder might well be adopted by the General Assembly, the fact is that a contrary intent is manifest."37

A feticide law followed a year later.38 Yet, it afforded the unborn only limited protection. First, the new crime of feticide required that the defendant knew, or reasonably should have known, that the fetus' mother was pregnant.39 Second, it required that the defendant either intended to commit a felony against the pregnant woman or acted in a way which evidenced knowledge that there would likely be death or great bodily harm to the mother.40 Thus, seemingly excluded from the new law were acts of pregnant women. More important, excluded were assaults against women not visibly pregnant or otherwise reasonably known to be pregnant. Most importantly, only fetuses capable "of sustained life outside the mother's womb" could be victims.41 Such limited coverage was not assuaged by the legislative declaration that prosecutions under other laws were not prohibited,42 since the born alive rule of *Greer* remained.

33. Id. at 416-17.
35. 402 N.E.2d 203 (Ill. 1980).
36. Id. at 209.
37. Id.
39. Id. at 92 n.8 (§ 9-1.1(a)(4)).
40. Id. at 92 n.8 (§ 9-1.1(a)(1-3)).
41. Id. at 92 n.8 (§ 9-1.1(b)).
42. Id. at 93 n.8 (§ 9-1.1(e)).
Yet, the born alive rule was not always applicable. Consider the 1982 conviction in Winnebago County of Terry Bolar for reckless homicide.\textsuperscript{43} Bolar, while intoxicated, sped his car through a stop sign, hitting a car carrying Kelly Oswald, who was more than eight months pregnant. The collision caused Kelly's placenta to separate from the uterine wall prematurely, triggered an emergency cesarean section, and ultimately resulted in the death of her child who exhibited only a few heartbeats and died within minutes after birth.

Protection of the unborn in a child custody setting was at issue in a Champaign County, Illinois, case in 1984.\textsuperscript{44} In the case, a woman who had given birth to a heroin-addicted child appeared before a trial judge for a custody hearing. The hearing resulted from a finding that the woman's drug use during pregnancy constituted child abuse. At the hearing, the judge learned that the woman was again pregnant and still addicted to heroin. The judge ruled that the fetus was an abused minor and appointed an officer of the Illinois Department of Children and Family Services (DCFS) as guardian of the fetus. He ordered the woman to cooperate with DCFS and to try controlling her heroin intake. DCFS moved to vacate the order, arguing that there was no juvenile court authority and that the order created serious practical problems and policy issues. After the woman gave birth to a nonaddicted child, the DCFS withdrew its motion to vacate the order.

The General Assembly returned to the criminal code in 1986. It repealed the feticide act of 1981 and replaced it with a more comprehensive scheme.\textsuperscript{45} New laws deemed the unborn a possible victim of intentional homicide, voluntary manslaughter, involuntary manslaughter, reckless homicide, battery and aggravated battery. The new scheme thus broadened the forms of culpable conduct resulting in the termination of potential life. More importantly, it broadened the forms of relevant injury to include disabilities at birth. As with the earlier abortion and feticide laws, prosecutions were disallowed against pregnant women whose unborn children were harmed.

As early as 1987, a child custody proceeding was initiated in Winnebago County as a result of a birth of a drug-exposed newborn.\textsuperscript{46} In

\textsuperscript{43} People v. Bolar, 440 N.E.2d 639 (III. App. Ct. 2d Dist. 1982).

\textsuperscript{44} The case description is gleaned from Letter from Thomas Bruno to Jeffrey A. Parness (May 11, 1984) and from Memorandum in Support of Motion to Vacate, Illinois DCFS, ex rel. Baby Doe Ridgeway, No. 82-J-319 (6th Cir. Ill.) (copies on file with author). See also Marianne Taylor, 'Addicted' Fetus Sparks Court Battle, Chi. Trib., Apr. 9, 1984, § 1, at 1).


\textsuperscript{46} Information was gleaned in the Fall of 1991, from a review of Winnebago County
one 1987 case, birth was to a woman with a history of mental illness who was ordered by the court to cooperate with DCFS and whose parental rights were terminated (as they had been with other children). Similar cases have risen dramatically since late 1989, largely in response to the legislation which is later described.47

In 1988, the Illinois Supreme Court addressed again the parameters of tort law protection of potential human life. In Stallman v. Youngquist,48 a child sued her mother for injuries sustained during an automobile collision when mom was approximately five months pregnant with the child. The court refused to recognize the claim by the child against her mother for the unintentional infliction of prenatal injuries. The court found state law did not recognize that a fetus had rights superior to those of the mother, though it hastened to emphasize the ruling was not intended otherwise to minimize the public policy favoring healthy births.49 The court recognized some room for legal change as it conceded the legislature, after thorough investigation, study and debate, might impose a legally cognizable duty on the part of pregnant women to their developing fetuses.50

In 1989, several new laws protective of the unborn were passed. Most significantly, the Abused and Neglected Child Reporting Act was amended to include within its definition of "neglected child" a newborn whose blood or urine contained any amount of a controlled substance.51 Amendments also expanded those required to report (to DCFS) such neglected children to include "substance abuse treatment personnel," who were mandated to make referrals to help pregnant addicts obtain needed counseling and treatment.52 At the same time, DCFS was obligated by law to give priority to pregnant women in residential drug and alcohol treatment and counseling centers, and to "develop special programs for case finding and service coordination for addicted pregnant women."53 Further, in 1989 the Juvenile Court Act of 1987 was amended

State’s Attorney’s case files (undertaken with the cooperation of State’s Attorney Paul Logli), as well as from interviews with present and former Winnebago County prosecutors (especially Gary Golian on November 5, 1991).

47. According to one former prosecutor, Gary Golian, supra note 46, before the new laws were enacted, cases were brought under a variety of statutes, including those involving physical injuries to minors, substantial risk of physical injuries to minors, and parental failure to provide necessary care. See Ill. Rev. Stat., ch. 37, ¶ 802-31 (1989).


49. Id. at 359.

50. Id. at 361.


to include as a neglected minor any newborn whose blood or urine contains a controlled substance;54 this amendment eased the way for local prosecutors and DCFS to question parental custody of such infants. In addition, the Illinois Public Aid Code was amended to require medical or health care providers servicing public aid recipients to refer pregnant women suspected of drug abuse or addiction "to a local substance abuse treatment provider," where the cost of treatment would be covered and where there would be no sanctions on account of such substance abuse.55 Other enactments mandated the creation of programs for the care and treatment of addicted pregnant women.56 Related laws, which became effective the first day of 1990, required county clerks to provide with each marriage license a pamphlet describing the causes and effects of fetal alcohol syndrome and required sellers of alcoholic liquors to post a sign in plain view which warned of the risks of birth defects caused by pregnant women who drink.57

At the time these laws were being debated, the Winnebago County State's Attorney unsuccessfully sought to indict Melanie Green for the death of her newborn. Specifically, it was alleged on May 8, 1989 that Green had earlier caused the death of her baby, Bianca, two days after birth, by "oxygen deprivation linked to cocaine exposure late in the pregnancy."58 Green was charged with involuntary manslaughter and delivery of a controlled substance to a minor. The charges were heavily criticized, with some saying the State was trespassing on Green's rights of "bodily integrity and privacy" and others saying drug-taking mothers would be scared away from treatment.59 The charges were filed amidst growing numbers of drug-exposed newborns in the county. Three weeks later, the case ended when the grand jury refused to indict. Evidently, some members of the grand jury were concerned with Green's right to privacy, as well as with the applicability of existing criminal statutes to Green's conduct.60 Many were relieved with the grand jury's action; one commentator said:

60. Isabel Wilkerson, *Jury in Illinois Refuses to Charge Mother in Drug Death of Newborn*, N.Y. Times, May 27, 1989, § 1, at 1, col. 5 (paraphrasing the State's Attorney, Paul Logli).
Yes, the real problem with the Green case is that it rests on the premise that a pregnant woman's womb is society's incubator. And if society, through its prosecutors, can control what a woman does during pregnancy, isn't the next step for that same society to tell a woman when she cannot or must become pregnant? Until we can answer those questions we should all offer a collective thank-you to grand jurors who know when to rein in a runaway prosecutor.61

Upon the grand jury's refusal to indict, that prosecutor said, "I am calling on the Illinois legislature to begin work on a scheme of legislation to address the very pressing issues brought on by this prosecution."62

These calls prompted quick action by Winnebago County officials, who within five months of the Green case introduced a proposal in the General Assembly to criminalize "conduct injurious to the unborn.63 The proposed crime encompassed acts by pregnant women who use a dangerous or narcotic drug and whose later-born children show signs of such drugs in blood or urine. In expressing support for the proposal, the State's Attorney also expressed hope that "other legislation might be introduced by the medical and social welfare communities to make more readily available treatment alternatives for women in need of prenatal care or drug treatment while pregnant."64 The proposed legislation was never seriously considered.

In early 1991 in Winnebago County, Lee Ann Moore, then pregnant, was released from jail after serving three months for felony prostitution.65 She was ordered to report regularly to a probation officer. At about the same time, the alleged father of Moore's unborn child wrote the State's Attorney with an "impassioned plea" for state intervention on

62. Joe Lamb, Grand Jury Won't Indict Coke Mom, Rockford Reg. Star, May 27, 1991, at 1. The prosecutor has indicated that the grand jury's action was prompted, in part, by its discomfort with applying general statutes on delivery of drugs and on involuntary manslaughter to maternal drug use, as well as its sympathy for the grieving mother. Logli, supra note 25, at 562 n.11. The Florida Supreme Court also recently found a general statute on delivery of controlled substances to be inapplicable to a pregnant woman's acts. State v. Johnson, 602 So. 2d 1288 (Fla. 1992).
account of Moore's drug use. Shortly after her release, Moore was arrested and charged with disorderly conduct. Because Moore's condition presented a "liability" and "financial" risk, county officials did not want to keep her, and she was released without having to post a cash bond. Thereafter, Moore failed to appear for a court-ordered interview at an in-patient facility with a program for pregnant addicts; she was later arrested for that failure—which was alleged to constitute a violation of her probation. Upon finding its probation order violated, a state trial judge ordered around-the-clock oversight of Moore at the in-patient facility. A few weeks later, Moore delivered a healthy boy at a local hospital and shortly thereafter walked away. A little while later, Moore was placed on probation and ordered into drug treatment. Moore was thereafter arrested for possession of cocaine, and a few months later was sentenced to serve a three-year term with the Department of Corrections on her conviction for prostitution.

Contemporaneous with events in the Moore case, a Winnebago County legislator introduced in the General Assembly a bill on compulsory testing for prenatal drug or alcohol exposure. Specifically, the April, 1991 proposal called for mandatory testing of all newborns; it said, "A physician shall administer to each newborn infant born under the physician's care a toxicology test to determine whether there is evidence of prenatal exposure to alcohol or a controlled substance." Positive test results would be reported under the Abused and Neglected Child Reporting Act. The proposal also required tests of pregnant women where there was evidence of prenatal exposure; it said,

A physician shall administer a toxicology test to a pregnant woman under the physician's care to determine whether there is evidence that she has ingested alcohol or a controlled substance, if the woman has obstetrical complications that are a medical indication of the possible use of alcohol or a controlled substance for a nonmedical purpose.

Positive test results here were to be confidential, though reported to the physician, the Public Health Department, and local health authorities, and would prompt offers of referral for chemical dependency assessment.

or treatment, as well as offers of referral for prenatal care. Finally, the proposal also recognized that similar services could be offered after the investigation of reports of suspected illegal prenatal exposure filed by non-physicians.

In September of 1991, the Cook County, Illinois, Public Guardian sued DCFS for needlessly confining cocaine babies to hospitals for weeks or months and for failing to provide appropriate foster or residential placements for drug-exposed infants. Hospital stays for such infants in Chicago beyond the point of medical necessity were allegedly due to the fact that the Illinois Department of Public Aid—not DCFS—paid for hospitalization. Hospital stays were said to cost up to $18,000 a month per child, while some foster-home care settings were said to cost DCFS $1000-$2500 a month per child.

A few months later, the Illinois Supreme Court expanded upon its earlier recognition in tort law that the termination of potential life caused personal injuries to those anticipating healthy births. Prior to November, 1991, prospective parents could recover certain damages under the Wrongful Death Act for "pecuniary injuries" resulting from the death of their unborn fetus—including loss of income and services which the deceased would have generated had he lived. In November, in Zee v. Sutkus, Illinois' high court ruled the parents could also recover for the loss of society (deprivation of the deceased's companionship, guidance, advice, love and affection).

The economic consequences of the increasing numbers of drug and alcohol exposed newborns was returned to the public agenda in December, 1991, when the Chicago Tribune headlined on its front page a story about the financial burdens on schools caused by cocaine babies who lived through infancy and toddlerhood. The story began, "At least 10,000 Illinois children born with cocaine in their systems are now reaching grade-school age." It went on to report that experts said "the cost in medical care, foster care and special education for these children could reach $50 million to $100 million a year." And, it said New York expected "to spend $2 billion in the next 15 years to care for and

70. Matt O'Connor, State Sued on Cocaine Baby Care, Chi. Trib., Sept. 27, 1991, § 2, at 1, col. 6. More recently, DCFS floated a "suggestion" that it would no longer take custody of all drug-addicted babies. Some have suggested such a move is founded on cost-cutting rationales though DCFS denies this. Rob Karwarth, DCFS Wants to Take Custody of Fewer Cocaine Babies, Chi. Trib., June 10, 1992, § 2, at 5, col. 1.
educate a projected 72,000 children who will have been born to crack-addicted mothers there by the turn of the century."

As well, in December of 1991, the Chicago Tribune reported on a study suggesting that while "white and black women in Illinois show similar rates of illegal drug use during pregnancy," black women who have exposed their fetuses to illegal drugs are much more likely to be reported to DCFS under the law mandating reports of any suspected prenatal exposure to illegal drugs. The study also indicates that black women were much more likely to be subjected to testing for illegal drugs than were white women.\[74\]

C. Reflections on the Illinois Responses to Roe v. Wade

The examination of the post-Roe laws in Winnebago County, Illinois indicate that there have been increasing state and local protections of the unborn with both coercive and noncoercive elements. The new safeguards address the conduct of many, including mothers and prospective mothers of children born alive.

The inquiry further reveals that efforts to protect better the unborn have been resisted at times with misplaced reliance on Roe v. Wade. That decision does not disallow all governmental protection of the unborn, does recognize such protection is more easily sustained when there are no burdens on constitutional interests, and does not extend constitutional protection to all forms of conduct by pregnant women. This seemingly was not fully understood during the attempted prosecution of Melanie Green for delivering cocaine to her fetus. While it may be that existing Illinois law did not criminalize her conduct, a prosecution clearly would not have burdened any rights of bodily integrity or privacy. Whether pregnant or not, Green had no constitutional interest in ingesting cocaine. Green did have constitutional interests in being treated fairly, with no racially or class discriminatory animus (or effect). However, such issues of fairness were apparently not raised in her case. Further, concerns about how such criminal prosecutions would scare drug-taking mothers away from treatment not only are presently unsupported empirically, but also—if true—appear overblown in Illinois given the mandates of new child abuse and neglect reporting laws (which pose an even greater deterrent).

In the Green case, as elsewhere, commentary on state efforts to protect the unborn have frequently failed to take account of related developments. The State’s Attorney in Winnebago County did not decide in a vacuum to charge Melanie Green. Whether wise or not, his conduct

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clearly reflected growing and significant state and local sentiments that the unborn should be more fully protected. If the pregnancy police were at work, they were armed with more than their own personal judgments; they were not "runaway" prosecutors.

The inquiry into Illinois law since Roe does reveal some difficulties. Particularly with respect to coercive laws, scant attention has been paid to date to the conduct of those who assist pregnant women in exposing the unborn to danger. The focus has been on the Melanie Greens and the Lee Ann Moores. Yet, should we not also consider the responsibilities of those who supplied the illegal drugs? One Illinois criminal law provides:

Any person who violates ... the Illinois Controlled Substances Act 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 or permanent disability as a result of the injection, inhalation or ingestion of any amount of that controlled substance.75

Does it not suggest that others beside Melanie Green may be criminally liable for Bianca's death? Consider as well the tort liability cases involving prenatal injuries. Do they also not indicate that legal responsibilities should be extended beyond mothers?76

Particularly worthy of attention now are the legal duties of prospective fathers outside the criminal law. Certainly the Florida Supreme Court was correct in recognizing the responsibility of "the biological father, wed or unwed, ... to provide support during the prebirth period."77 Yet, such prebirth support duties should not be considered solely when the father's rights are later weighed in an adoption proceeding. Such prebirth duties are important not only when resolving the question of terminating parental rights, but also when enforcing a prospective father's financial or other responsibilities prior to birth. Prebirth child support orders, for example, should be readily available to pregnant women.78 It seems only fair since there are now at least some mechanisms

75. Ill. Rev. Stat. ch. 38, ¶ 12-4.7 (Supp. 1990). Consider also Fox v. Custis, 712 F.2d 84, 88 (4th Cir. 1983) (state duty to protect those for whom it assumed a special custodial or other relationship); State v. Williams, 670 P.2d 122 (N.M. Ct. App. 1983) (mom convicted of child abuse for failing to seek help when dad beat their child); Jones, supra note 19, at 1180 ("Penalties for sale (of illegal drugs) to pregnant women could be increased.").
76. See, e.g., Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1255 (Ill. 1977) (finding a child, not conceived at the time of negligent acts, can nevertheless sue the tortfeasors for resulting injuries).
77. In re Adoption of Doe, 543 So. 2d 741, 746 (Fla. 1989).
for prospective fathers who seek orders directed at pregnant women and aimed at protecting potential human life (e.g., requests for caesarian sections or other medical treatment).79 Contrasted with coercive orders against pregnant women, prebirth paternity support orders are not prone to thorny constitutional issues involving autonomous decisionmaking, bodily integrity, childrearing, and the like. As well, should not the child abuse and neglect reporting laws cover the conduct of prospective fathers and others? Consider the likes of an Alan Greer,80 men who beat pregnant women with fists and broomsticks. One recent study found that the rate of domestic violence against pregnant women is greater than previously thought, with one in six having endured physical or sexual abuse during pregnancy.81

Beside providing for adequate prenatal paternal support, new laws could also help educate prospective fathers about their prebirth legal duties, as well as the risks posed to future generations by their present conduct. Recent federal laws requiring warning labels on cigarette packages82 and whiskey bottles,83 as well as the Illinois laws requiring county clerks issuing marriage licenses to give notice about fetal alcohol syndrome, are only a beginning. As laws require doctors to convey certain information on abortion in order to promote informed decisionmaking, laws could also require that information be conveyed to all prospective parents on the techniques and responsibilities of proper prenatal care. Our greater contemporary understanding of the impact of prebirth maternal, rather than paternal, conduct on future children does not justify the almost exclusive focus to date on the need to convey information about good prenatal care to women. It is time to focus on men, especially as the informational gap about the causes of birth disabilities may be diminishing.84

The inquiry into Illinois law reveals difficulties beyond the inadequate attention paid third parties, especially prospective fathers. When focusing

80. People v. Greer, 402 N.E.2d 203 (Ill. 1980). Consider also Joyce C. Abma and Frank L. Mott, Substance Abuse and Prenatal Care During Pregnancy Among Young Women, 23 Fam. Plan. Persp. 117, 122 (1991) (suggesting prebirth paternal acts will promote better maternal acts when saying there is "strong evidence that prospective mothers whose children's father is not in the home are both more likely to use substances and less likely to obtain appropriate early prenatal care").
on the pregnant women themselves, state officials—perhaps unintentionally—have acted coercively against primarily poor, black women. As noted earlier, while there may be no constitutionally-protected interests in ingesting illegal drugs, the Melanie Greens and Lee Ann Moores of Winnebago County and elsewhere do have interests in fair treatment, that is, treatment not founded on racial or economic status. In and out of Illinois there is some evidence that at least certain coercive laws are enforced in a discriminatory manner. Late in 1991 it was reported that prenatal drug testing and reports of prenatal drug exposure in Illinois may be tainted by racial biases. That same year Professor Dorothy Roberts noted that the increasing, coercive governmental actions against pregnant women nationally were similarly tainted. Such discrimination must be ended. But in doing so, state officers need not abandon their coercive efforts under criminal and civil laws. As suggested earlier, there are coercive actions on behalf of the unborn which should be directed against white or rich mothers or prospective mothers as well as against nonmothers. Undertaking such actions should reduce the otherwise legitimate concerns over sex and class bias. Why have there not yet been governmental efforts in Winnebago County against doctors who have failed to act on behalf of the unborn of white, well-to-do, drug-using, pregnant patients? Similarly, why have there apparently been no noted efforts to date against prospective fathers who act in ways dangerous to their future offspring, as by delivering illegal drugs to their pregnant mates?

At least in Illinois, public policy seemingly suggests not only that coercive efforts be considered for prospective fathers, and even strangers to expectant moms, but also that certain forms of coercion may be less appropriate against pregnant women than against others. Both before and after the decision in Roe v. Wade, Illinois legislators exempted pregnant women from those subject to prosecution for criminal abortion. As well, the 1981 and 1986 Illinois criminal laws protective of potential human life from homicide, assault and the like also excluded pregnant women as potential defendants. Further, the Illinois Supreme Court

86. The harmful effects of particular biases may be significantly compounded when a woman has several distinguishing traits. See, e.g., id. at 1424 (in discussing the possible criminal prosecution of pregnant black drug addicts, Professor Roberts notes that “[b]lack women experience various forms of oppression simultaneously, as a complex interaction of race, gender and class that is more than the sum of its parts.”).
87. The local prosecutor has recognized that “legitimate concerns have been raised regarding what appears to be a racial and economic imbalance in the women being referred to the child protection system as substance abusing mothers.” Logli, supra note 23, at 565.
recently failed to sustain a claim by a child against her mother for unintentional infliction of prenatal injuries, though comparable claims against strangers had been sustained.

Finally, Illinois public policy suggests a continuation of both coercive and noncoercive efforts on behalf of the unborn. Inadequate are solely noncoercive laws, mandating such efforts as education or the availability of prenatal care, even if combined with treatment for drug or alcohol abuse. Unfortunately, there remain people—like Alan Greer—who can but are unwilling to act on behalf of the unborn for reasons few of us comprehend or condone. And, there are not now—nor will there likely soon be—adequate public resources so that potential life protection is maximized by noncoercive laws. With increasing dangers to increasing numbers of future children now the pattern, coercive governmental efforts to help stem the tide are needed.

IV. Conclusion

Notwithstanding the difficulties of constitutional interpretation, of line-drawing and balancing, and of guiding and dictating social behavior through regulation, governmental efforts protecting the unborn from the dangers posed by mom and others are on the rise. Coercive measures are appearing as voluntary governmental programs involving prenatal care, educational advancement, drug treatment, and the like have been deemed inadequate, both because necessary funding simply cannot be found and because some people continue to act in bad ways. An examination of recent legal developments nationally, and in Winnebago County, Illinois, indicates the preventable tragedies of premature infant deaths and birth disabilities can be better addressed. These tragedies should be addressed by carefully-drawn laws which are subject to constant reexamination. These laws should more fully cover those, especially prospective fathers, whose conduct poses dangers to potential human life.