Spring 1989

The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawyers

Elizabeth L. Thompson
Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Health Law and Policy Commons, Law and Gender Commons, and the Medical Jurisprudence Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol64/iss2/5

This Note is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.
The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers

INTRODUCTION

In 1985 Pamela Rae Stewart was pregnant with her third child. Stewart and her husband lived with their two young daughters in a motel in San Diego County, California. During the third trimester of her pregnancy, Stewart sought and obtained prenatal care. At one of her visits it was found that her pregnancy was complicated by a condition known as placenta previa. On November 23, 1985, Stewart began bleeding heavily and was taken to the hospital by ambulance, where she immediately consented to a caesarian section. Her baby, Thomas Monson, Jr., was born with severe brain damage and died on New Year's Day, 1986.

Eight months after the birth of her child, Stewart was arrested and charged with violating California's criminal child neglect statute which includes in its definition of "child" those "conceived but not yet born."
The prosecution charged that Stewart had disobeyed her doctor's advice by taking illegal drugs, engaging in sexual intercourse with her husband, and failing to go to the hospital as soon as she noticed any bleeding, thereby causing the outcome of her pregnancy.\(^5\)

A San Diego judge later granted Stewart's demurrer on the grounds that she had been charged under an inappropriate statute.\(^6\) In his dismissal, however, Judge Amos encouraged the legislature to enact a statute "protecting the life of the unborn child under certain narrowly defined conditions."\(^7\)

Although the case of Pamela Rae Stewart is one of the few attempts to impose criminal sanctions on a woman for her conduct during pregnancy, it will likely not be the last.\(^8\) The subsequent session of the California legislature saw the introduction of just such a bill as Judge Amos suggested, and other states with criminal child neglect and endangerment statutes are free to extend those statutes to include fetuses, or draft entirely new legislation which would create the crime of "fetal endangerment" or "fetal abuse."

The purpose of this Note is to consider whether conduct by a pregnant woman that may result in harm to her fetus should constitute a crime. This question will be addressed first by examining the recent expansion of maternal liability and the "geography"\(^10\) of pregnancy, then by discussing principles of criminal law and punishment theory and analyzing the costs and benefits to society of such criminalization. While most studies of this issue have defined the problem as one of a conflict between the rights of mother and fetus,\(^11\) this Note argues that a final determination that maternal conduct should not be regulated through the use of the criminal sanction

---

5. Bonavoglia, supra note 1, at 93.
6. Id.; Chambers, Charges Against Mother in Death of Baby Are Thrown Out, N.Y. Times, Feb. 27, 1987, at A25, col. 1. The legislative history of § 270 of the California Penal Code reveals that its purpose was to guarantee that parents provide financial support for their children, and that a 1923 amendment expanding the definition of "child" was simply to require fathers to provide financial support to the women who were pregnant with their children. See In re Clarke, 149 Cal. App. 2d 802, 309 P.2d 142 (1959); People v. Yates, 114 Cal. App. 782, 298 P.2d 961 (1931); Defendant's Memorandum of Points and Authorities, supra note 1.
7. Bonavoglia, supra note 1, at 93.
9. S. 1070, 1987-88 Reg. Sess. (1987). The bill was later withdrawn and was reintroduced in the subsequent session of the legislature. The bill was introduced to amend § 273(a) of the California Penal Code ("Willful cruelty or unjustifiable punishment of child; endangering life or health"). The amendment reads in part: "(3) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully commits any illegal act which causes any fetus to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, is punishable by imprisonment ... not to exceed one year ... ." Id.
need not rest on a resolution of that conflict, but rather, can and must be informed by an interest in promoting healthy pregnancy outcomes at the least cost to the individual woman, her fetus, and society.\textsuperscript{12}

I. THE CALL FOR CRIMINALIZATION

A. The Expanding Concept of Maternal Liability

Historically, courts have refused to recognize an action for harm to a fetus which occurred \textit{in utero} unless the fetus was subsequently \textit{born alive}.\textsuperscript{13} This "live birth" requirement was consistent with the view that the fetus was part of the woman who carried it,\textsuperscript{14} and that, except in "narrowly defined situations," the fetus was not recognized as a person requiring protection separate from that afforded the mother.\textsuperscript{15} Recently, however, courts have allowed recovery even if the cause is not based on subsequent live birth,\textsuperscript{16} and have expanded the protectable interests of the fetus beyond those held by the pregnant woman.

By separating the interests of the fetus from those of the mother and granting the fetus even limited legal status, the door has been opened for a woman to be considered a legal adversary of the fetus she is carrying and to be held liable for her conduct that may cause it injury.\textsuperscript{17} Prenatal tort


\textsuperscript{14} Johnsen I, supra note 12, at 601.


\textsuperscript{16} Commonwealth \textit{v. Cass}, 392 Mass. 799, 467 N.E.2d 1324 (1984) (holding that the fetus was a person for purposes of Massachusetts' vehicular homicide statute).

\textsuperscript{17} Johnsen I, supra note 12, at 600. See Sherman, supra note 8.
INDIANA LAW JOURNAL

claims,\textsuperscript{18} once meant to compensate for parents' loss,\textsuperscript{19} have been increasingly directed at parents.\textsuperscript{20} Courts in Michigan, and until recently in Illinois, have held that a woman may be sued for action taken during her pregnancy that adversely affects the development of her child prior to birth.\textsuperscript{21} And in decisions perhaps most dramatically representative of this separation of interests, several courts have ordered women to submit to caesarian sections against their wishes when physicians believed vaginal birth might result in harm to the fetus.\textsuperscript{22}

The concept of maternal conduct as constituting "abuse" or "neglect" has found increasing acceptance in the interpretation of statutes. In New Jersey, the Bureau of Child Services may take custody of an "unborn child" when the child's welfare is endangered by the conduct of its mother.\textsuperscript{23} After a Michigan court held that the state could introduce evidence of a mother's "abusive" or "neglectful" conduct during pregnancy in a subsequent custody hearing,\textsuperscript{24} the Indiana, Oklahoma, and Florida legislatures followed suit by amending their states' child abuse statutes to "allow authorities to investigate and possibly take custody of children who are born suffering from their mothers' substance abuse."\textsuperscript{25}

Thus far this expanded definition of maternal liability has not extended to the criminal law,\textsuperscript{26} which has grown steadily in its "protection" of the fetus. Many states have enacted criminal "feticide" statutes that make the

\begin{itemize}
\item \textsuperscript{19} The right of a fetus which is subsequently born alive to maintain a cause of action for prenatal injuries was first recognized in 1946. \textit{Id.} at 336-37 (citing Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946)). That right is now recognized in every American jurisdiction. \textit{Id.} at 337. If the child is born alive and subsequently dies from the injuries inflicted, then an action can be maintained for wrongful death. \textit{Id.} at 336-37. See, e.g., Mone v. Greyhound Lines, 368 Mass. 354, 331 N.E.2d 916 (1975).
\item \textsuperscript{20} Gallagher, \textit{supra} note 10, at 401.
\item \textsuperscript{21} See \textit{Parental Liability, supra} note 12.
\item \textsuperscript{24} N.J. STAT. ANN. § 30:4C-11 (West 1981). Exactly how the Bureau would "take custody" is uncertain and evidently has not been tested.
\item \textsuperscript{25} \textit{In re Baby X}, 97 Mich. App. 111, 293 N.W.2d 736 (1980).
\item \textsuperscript{26} Sherman, \textit{supra} note 8, at 24.
\end{itemize}
destruction of a fetus a crime parallel to homicide of a born person. In California and New York, the fetus is expressly included in the general homicide statutes. In 1986 the Minnesota legislature adopted a comprehensive statutory scheme of "crimes against unborn children," which includes the premeditated and intentional murder of a fetus, and negligent acts which cause injury to the fetus. The Minnesota laws are unique however, in that they encompass acts which do not necessarily result in the destruction of the fetus. These crimes include assault of a fetus, and injury of a fetus in the commission of a crime. They are also unique in that the pregnant woman has been expressly excluded from the statute as a potential criminal actor. While the history of other "feticide" statutes would suggest that they are directed at criminalizing acts of third parties against the fetus itself or against the mother, it is uncertain whether they may be used to sanction injurious maternal conduct.

The concept of maternal liability has seen the greatest expansion, however, in recent commentaries urging lawmakers to adopt new or more comprehensive statutes for the purpose of "extending protection and respect for

27. See Ill. Ann. Stat. ch. 38, para. 9-1.2 (Smith-Hurd 1988) ("A person commits the offense of intentional homicide of an unborn child if, in performing acts which cause the death of an unborn child, he without lawful justification: (1) either intended to cause the death of or do great bodily harm to the pregnant woman or her unborn child or knew that such acts would cause death or great bodily harm to the pregnant woman or her unborn child . . . ."), See also Iowa Code Ann. § 707.7 (West 1979); Mich. Comp. Laws Ann. § 750.322 (West 1968); Miss. Code Ann. § 97-3-37 (1973); N.H. Rev. Stat. Ann. § 585.13 (1986); Okla. Stat. Ann. tit. 21, § 713 (West 1983); Utah Code Ann. § 76-5-201 (1988); Wash. Rev. Code Ann. § 9A.32.060 (1988); Wis. Stat. Ann. § 940.04 (West 1982). The majority in Cass noted, "Many of the courts which have considered the question have decided that the destruction of a fetus should be considered homicide but, because that rule would conflict with established precedent, have concluded that establishing such a rule requires legislative action." Cass, 392 Mass. at 803, 467 N.E.2d at 1327.

28. Cal. Penal Code § 187 (West 1988) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); N.Y. Penal Law § 125.00 (McKinney 1987) ("Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks . . . .").

30. Id. at § 609.2662.
31. Id. at § 609.267 ("Assault of an unborn child in the first degree"); id. at § 609.2671 ("Assault of an unborn child in the second degree"); id. at § 609.2672 ("Assault of an unborn child in the third degree").
32. See supra note 31.
34. Id. at § 609.265.
36. Section 187 of the California Penal Code, see supra note 28, was enacted after the California Supreme Court held that the state's homicide statute did not apply to a man who violently assaulted his former wife to purposefully destroy her fetus in Keeler v. Superior Court, 2 Cal. 3d 619, 481 P.2d 617, 87 Cal. Rptr. 470 (1970).
the unborn." Under laws proposed by these commentators, a woman could be held criminally liable for failing to eat well, for using alcohol, tobacco, or drugs, or for exposing her fetus to hazards in the workplace. One commentator has asserted that a woman should be subject to retrospective criminal liability for all damaging acts and omissions before a child is born, and suggests that criminal penalties be imposed on pregnant women at risk who fail to undergo certain prenatal screening.

B. Maternal Conduct and the "Geography" of Pregnancy

Those who propose subjecting maternal conduct to criminal penalties maintain that such liability is justified based on increased medical knowledge about the unique way in which a pregnant woman may affect the outcome of her pregnancy and the life of her future child. They argue that the use of the criminal law is justified by a desire to "promote for the unborn a healthy maturation until live birth, as well as a healthy life after birth." While it is certainly true that virtually every act undertaken by a pregnant woman affects and may pose a potential threat to her fetus and that "the fetus cannot be harmed . . . in any way except through the woman's body," it is worthwhile to examine the factors affecting the development of a fetus and influencing pregnancy outcomes before summarily advancing maternal liability.

Approximately six million American women become pregnant each year. Of these, 3.7 million give birth, and nearly 900,000 suffer miscarriages or


40. Shaw, supra note 12, at 73.
41. Robertson II, supra note 37, at 352 n.92.
42. Robertson I, supra note 37, at 449.
43. Parness II, supra note 37, at 197. Others have questioned the legitimacy of this justification and have asserted that the expansion of maternal liability and fetal rights is motivated, in fact, by opposition to abortion and is deliberate in its attempt to separate fetal from maternal interests. See Johnsen, A New Threat to Pregnant Women's Autonomy, HASTINGS CENTER REP. Aug., 1987, at 33, 36 [hereinafter Johnsen II]; Johnsen I, supra note 12, at 611-12.
44. Johnsen II, supra note 43, at 35.
45. Defendant's Motion to Dismiss, supra note 1, at 3.
still births.\textsuperscript{47} One in seven mothers have problems during pregnancy, and about nine in ten of those problems are major.\textsuperscript{48} Only four in ten mothers go through pregnancy without experiencing any medical problem.\textsuperscript{49} Although pregnancy and childbirth are generally safe, they are not risk free. Every year, approximately eight women in 110,000 die from childbearing complications.\textsuperscript{50} This risk of death is three and one-half times greater for black women than for whites.\textsuperscript{51}

Twenty percent of all infants born each year experience some form of health problem, and almost ten percent of all babies born each year have serious medical conditions.\textsuperscript{52} About seven percent of all newborns weigh less than 2,500 grams.\textsuperscript{53} Such low birthweight is the greatest single determinant of fetal mortality in the United States.\textsuperscript{54} Low birthweight is an indicator of inadequate fetal growth as a result of premature birth or poor weight gain for a given period of gestation.\textsuperscript{55} Two-thirds of the infants who die in the first twenty-eight days of life are low birthweight babies.\textsuperscript{56} Those who do survive this neonatal period are five times more likely to die in their first year of life than normal birthweight babies.\textsuperscript{57} Furthermore, low birthweight infants are more likely to suffer significant congenital anomalies and neurodevelopmental handicaps.\textsuperscript{58}

A major study of the problem of preventing low birthweight conducted by a committee of the National Institute of Medicine identified categories of risk factors whose presence in an individual woman indicate an increased chance of bearing a low birthweight infant.\textsuperscript{59} Significantly, however, the study reveals that environment and maternal behavior such as smoking, poor nutrition, substance abuse and exposure to occupational hazards constitute only one category of risk factors that may affect pregnancy outcome.\textsuperscript{60} Other factors include demographic characteristics, medical risks that can be identified before pregnancy and those that can be identified

\begin{itemize}
\item 47. Defendant's Motion to Dismiss, \textit{supra} note 1, at 3.
\item 49. \textit{Id.}
\item 51. \textit{Id.}
\item 52. \textit{Id.}
\item 53. \textit{Id.}
\item 54. \textit{Committee to Study the Prevention of Low Birthweight, Division of Health Promotion and Disease Prevention, Institute of Medicine, Preventing Low Birthweight—Summary 1 (1986) [hereinafter Low Birthweight].}
\item 55. \textit{Id.} at 2.
\item 56. \textit{Id.}
\item 57. \textit{Id.}
\item 58. \textit{Id.} at 3-4.
\item 59. \textit{Id.} at 5.
\item 60. \textit{Id.} at 4-15.
\end{itemize}
only during pregnancy, and risks associated with health care.\textsuperscript{61} The study also indicates the possibility that factors such as stress may have some bearing on low birthweight, although the connection is less certain.\textsuperscript{62}

Of behavioral factors, the dangers of smoking\textsuperscript{63} and drinking\textsuperscript{64} during pregnancy are probably most understood, yet experts still do not agree on the level of use which may present a danger to a developing fetus.\textsuperscript{65} The study also identified a connection between certain demographic data and a wide range of environmental factors' effect on pregnancy outcome:

The relationship between socioeconomic status and low birthweight suggests that a woman's response to her environment may have an impact on pregnancy outcome; it may be, for example, that poverty is a risk factor for low birthweight because of the high levels of stress associated with being poor. Two types of stress have been examined in numerous studies: physical stress and fatigue, particularly as related to employment during pregnancy, and psychological distress resulting from maternal attitudes toward pregnancy or from external stressors in the environment.\textsuperscript{66}

Because demographic factors that indicate an increased risk of low birthweight are often interrelated, it has been difficult to define particular independent effects.\textsuperscript{67} What is known, however, is that teenagers and women with less than twelve years of education are at greater risk of bearing a low birthweight baby, and non-white infants are twice as likely to be born at low birthweight and twice as likely to die in the neonatal period as white infants.\textsuperscript{68}

The study further concluded that the overwhelming weight of the evidence proves that prenatal care reduces low birthweight, and that those programs of care which are most effective go beyond routine services to include "flexible combinations of education, psychosocial and nutrition services."\textsuperscript{69} It was also disclosed that the number of women in the United States actually receiving quality prenatal care in the first trimester of pregnancy may be declining.\textsuperscript{70} The study cited the following as barriers to early receipt of prenatal care:

\begin{itemize}
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{64} See E.L. Abel, \textit{Fetal Alcohol Syndrome and Fetal Alcohol Effects} (1984).
\item \textsuperscript{65} This is particularly true of alcohol use. \textit{Low Birthweight, supra note 54}, at 12. See Mills, Graubard, Harley, Rhoads & Berendes, \textit{Maternal Alcohol Consumption and Birthweight: How Much Drinking During Pregnancy Is Safe?}, 252 J. A.M.A. 1875 (1984).
\item \textsuperscript{66} Low BIRTHWEIGHT, supra note 54, at 12.
\item \textsuperscript{67} Id. at 6.
\item \textsuperscript{68} Id. at 6-8.
\item \textsuperscript{69} Id. at 18-19.
\item \textsuperscript{70} Id. at 21.
\end{itemize}
financial constraints such as inadequate insurance or lack of Medicaid funds to purchase care; limited availability of maternity care providers, particularly providers willing to serve socially disadvantaged or high-risk pregnant women; insufficient prenatal services in some sites routinely used by high-risk populations, such as Community Health Centers, hospital outpatient clinics, and health departments; experiences, attitudes, and beliefs among women that make them disinclined to seek prenatal care; poor or absent transportation and child care services; and inadequate systems to recruit hard-to-reach women into care.

Finally, the study concluded that full access to prenatal care will be assured only if the public sector assumes fundamental responsibility for making such services available. These "geographical" realities of pregnancy and childbirth must be considered in the criminalization decision.

II. THE EFFECTS OF CRIMINALIZATION

In a system of criminal law, the legislature serves as the principal lawmaker. As such, it must make decisions about the behavioral content of its jurisdiction's penal code. These decisions, in turn, must necessarily be based on each lawmaker's understanding of the purpose for invoking criminal punishment and its potential effectiveness in achieving the desired result. In assessing the utility of the criminal sanction to control maternal conduct for the purpose of promoting fetal health, lawmakers must weigh this proposed benefit with the costs to the individual woman, her fetus, and society. This analysis begins with a brief examination of the rationale of the criminal sanction followed by an application of the rationale to maternal conduct. It concludes with a discussion of the costs of such criminalization in the form of deterrence of socially valuable behavior, the destruction of legally protected relationships and the diminished legitimacy of the criminal law.

71. Id.
72. Id.
74. The problem of drafting a statute that would criminalize harmful maternal conduct is not insignificant. In fact, one of the strongest arguments against criminalization is that it is impossible to draft a statute that would give sufficient notice as to specific conduct that is prohibited. It is an established principle of criminal law that a statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden" is void for vagueness. U.S. v. Harriss, 347 U.S. 612, 617 (1954). For the purposes of the following discussion, the language contained in § 270 of the California Penal Code, see supra note 4, will be used as a model of proposed legislation. Although the statute was held to be inappropriate in People v. Stewart, (Cal. Mun. Ct. Feb. 23, 1987) (No. M508197), that determination was based on legislative history rather than content. See supra note 6.
A. The Rationale of the Criminal Sanction

Henry Hart stated that it is the role of the criminal law to define "the minimum conditions of man's responsibility to his fellows and [to hold] him to that responsibility." By defining minimum obligations, the criminal law functions in two ways: First, it declares societal standards of valuable moral behavior to be followed by its members, and second, it establishes specific conduct to be prevented. That is, the criminal law functions by preventing conduct and by condemning conduct. Thus a decision to criminalize particular conduct may not rest solely on society's ability to prevent it, but may also rest on the value to society in institutionally condemning such conduct. In addition, pronouncing values and norms to be promoted allows society to declare conduct which falls below those norms as wrong or blameworthy—under some theories of criminal law a requirement for criminal action. Therefore, the justification for the use of the criminal law in the case of maternal conduct must be found in the value asserted by society in condemning harmful behavior and in its attempt to prevent the behavior.

B. The Benefits of Criminalization

As mentioned above, the criminal law may be employed for its preventative effects. These effects can be categorized as general deterrence, the power the law has to cause the general population to conform to its standard, and individual deterrence, the ability of the criminal law to prevent harmful activity in a single individual. Individual deterrence may be further defined as the power to compel conformity through intimidation, rehabilitation, and incapacitation.

General deterrence is closely connected to the concept defined above as the assertion of societal norms. It is "the ability of the criminal law and

77. For example, the National Commission on Marihuana and Drug Abuse explained: If society feels strongly enough about the impropriety of certain conduct, it may choose to express this norm through the criminal law even though the behavior is largely invisible and will be reduced only through effective operation of other institutions of control. The benefits consist of the value of society reaffirming certain norms, together with a reinforcement of self-restraint by those who accept society's judgment.
NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE 255 (1973), quoted in Rosenthal, supra note 75, at 146.
78. H. Packer, supra note 73, at 62 ("It is a necessary but not sufficient condition of punishment that the person on whom it is imposed is found to have committed an offense under circumstances that permit his conduct to be characterized as blameworthy.").
79. Id. at 39-61.
80. Id. at 45-61; Rosenthal, supra note 75, at 147.
81. See supra notes 76-77 and accompanying text.
its enforcement to make citizens law-abiding” through its “frightening,” “educational,” and “habit-forming” effects. Through identifying minimum responsibilities and demonstrating the costs of falling below that minimum, members of the population at large will adjust their own behavior to conform.

Proponents of criminalization hold that this form of deterrence would work to protect the fetus by providing “punishment that looms large in the minds of those who might act negatively toward the unborn.” They claim that the creation of crimes that punish women who endanger their fetuses would educate the public through “the publicity accompanying the trial, conviction, and sentencing” of the “proper distinctions between good and bad behavior.”

Of course, the degree to which general deterrence may prevent harmful conduct will depend on a number of factors, such as how extensively “fetal abuse” crimes are prosecuted and how a woman distinguishes her own behavior. If criminal laws are adopted but rarely enforced, their power to educate the public is greatly reduced and may, in fact, have the effect of diminishing the perceived value asserted. In addition, although a pregnant woman might believe that endangering her fetus is wrong, if she does not understand her conduct to be specifically forbidden, it will likely continue.

82. Andenaes, General Prevention—Illusion or Reality, 43 CRIM. L., CRIMINOLOGY & POLICE SCI. 176, 179-80 (1952).

83. Andenaes describes the conforming effects as “moralizing” and “habit-forming”:

The idea is that punishment as a concrete expression of society’s disapproval of an act helps to form and to strengthen the public’s moral code and thereby creates conscious and unconscious inhibitions against committing crime. Unconscious inhibitions against committing forbidden acts can also be aroused without appealing to the individual’s concepts of morality. Purely as a matter of habit, with fear, respect for authority, or social imitation as connecting links, it is possible to induce favorable attitudes toward this or that action and unfavorable attitudes toward another action.

Id. at 179. This analysis of general preventative effects assumes to some extent a rational actor who will respond by maximizing pleasure and reducing pain. Packer, however, stresses that the impact of general deterrence does not require a rational actor, but is effective against all whose response to social institutions is largely automatic, i.e., to “all those who are sufficiently socialized to feel guilty about breaking social rules and whose experience has led them to associate feelings of guilt with forms of punishment.” H. Packer, supra note 73, at 42.

84. Parness I, supra note 26, at 117.

85. Id. at 117-18 (citing W. LaFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 23-24 (1972)). While the existence of such a crime might serve to educate the public because of the unique way that maternal conduct may be condemned, see supra notes 43-72 and accompanying text, the crime might be perceived as functioning exclusively against women. Isolating a segment of the population in such a manner would have an additional coercive effect.

86. See infra text accompanying notes 114-18.

87. See supra text accompanying notes 81-85. This is, perhaps, the cost to society of a vague statute. A statute that makes a general crime of “fetal neglect” or “fetal endangerment” would most certainly leave doubts about the degree to which normally value-neutral conduct, such as smoking, is prohibited during pregnancy.
In addition to general deterrent effects, the criminal law is said to promote individual or "special deterrence." This notion is based on the theory that once subjected to the pain of punishment, a criminal actor is less likely to recidivate. It is, as Andenaes stated, "the effect of punishment on the punished." The inhibiting force of special deterrence operates specifically through the effects of rehabilitation and incapacitation on the individual actor.

Rehabilitation refers to the attempt by society to prevent recidivism by improving the lot of the criminal. This concept is often thought of as "treatment" of the offender. At first, using rehabilitation as a justification for criminalizing maternal conduct seems humane and consistent with the goal of promoting healthy pregnancy outcomes. However, as Packer points out, "[W]hat we do to the offender in the name of reform is being done to him by compulsion and for our sake, not for his." Rehabilitation as a goal of criminal punishment is elusive. Aside from the ethical and constitutional limitations to imposing behavioral reform on an offender, there is simply no means of assessing its effectiveness. Because it is so difficult to predict individual criminal behavior, we cannot determine when rehabilitation is complete or whether non-recidivism is a result of treatment or intimidation.

If, however, rehabilitation is not seen as a purpose of the criminal sanction, but as a collateral objective which may be sought within a criminal system, one must ask if there are not more appropriate ways of "treating" women who endanger their fetuses. Certainly prison is not the best method or place for such a rehabilitation program. The alternatives to imprisonment are equally problematic. Imposition of a fine may serve to aggravate an already desperate financial situation, which may have contributed to the

88. H. Packer, supra note 73, at 45-48. Packer calls this form of deterrence "intimidation." Id. at 45.
89. Andenaes, supra note 82, at 180, quoted in Rosenthal, supra note 75, at 154.
90. H. Packer, supra note 73, at 54. It is important to remember that "treatment" in this context would mean reform of the woman's behavior, not to be confused with medical treatment or attention to her fetus.
91. Consider, for example, the due process implications in using the threat of criminal prosecution to coerce an offender into a treatment program.
92. Criminal Law, supra note 75, at 21-22.
93. Additionally, for a woman who is still pregnant when sentenced, imprisonment could be extremely dangerous for her fetus. See Barry, Quality of Prenatal Care for Incarcerated Women Challenged, Youth L. News, Nov.-Dec. 1985, at 1, 3 (representing the results of a survey of women prisoners, indicating that only 44% of pregnancies in prison end in live birth, while 34% end in miscarriages). Despite these obvious dangers, a superior court judge in Washington, D.C. sentenced to prison a pregnant woman who had been found guilty of forging $700 worth of checks until she gave birth. Although the woman's first-time offense would not normally warrant jail time, the judge indicated that he wanted to protect her fetus from her cocaine addiction. Sherman, supra note 8, at 1.
harmful behavior. Indeed, to the extent that neglect is a result of ignorance and education seen as a remedy, one must ask why such programs would be available only after a woman has been judged an offender. When the mother's use of illegal drugs creates a risk for her fetus, the real question is why the criminal law has not already been successful in dealing with the underlying offense.

The argument for incapacitation as a means of individual deterrence suffers from some of the same shortcomings as the argument put forth for rehabilitation. The rationale for incapacitation is that as long as the offender is incarcerated, she cannot recidivate. The limit to the use of this rationale in the instance of maternal conduct is immediately apparent, and it brings into question the motivation behind the punishment. Is a woman who has been convicted of "fetal endangerment" to be incarcerated for the duration of her current pregnancy or to prevent her from conceiving again? Given the relationship of pregnancy, a woman can never be truly incapacitated vis à vis her fetus.

Primarily because of the problems in quantifying the behavioral impact of criminalization, assessing its benefits has proven difficult. Moreover, another problem exists in the need to isolate the incremental preventative effects of criminalization beyond those achieved by other forms of social control. This determination, of course, rests to some extent on how the problem is initially defined. Commentators who believe that existing means of control are insufficient have pointed to the criminal law not only as increasing protection, but as a source for expanding civil liability by allowing courts to look to criminal statutes to find social policy. A final difficulty in assessing the benefits of criminalizing specific conduct is determining at what level of enforcement the costs of such criminalization begin to outweigh the benefits. For example, the optimal scheme of enforcement to maintain the effects of general deterrence may be far higher than the ability of the criminal justice system to efficiently process the potential offenders.

C. The Costs of Criminalization

The costs of criminalizing maternal conduct are as difficult to quantify as the benefits, but they are more easily identified. These costs fall into three major categories: the deterrence of socially valuable behavior, the negative effects on the individual woman and her family, and the costs to society inherent in the under-enforcement of its criminal law.

94. Indeed, fining or imprisoning a woman who fails to secure adequate medical care during her pregnancy for financial reasons seems bizarre and even frightening.
95. CRIMINAL LAW, supra note 75, at 1074.
96. Parness I, supra note 26, at 151 (citing W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 14 (1972)).
97. CRIMINAL LAW, supra note 75, at 1075.
Perhaps the greatest danger in adopting a statutory scheme of fetal neglect or endangerment laws is that it will, in fact, deter women from seeking prenatal care for fear of "being turned in" by their doctors. There are two concerns involved in this assumption. First, women and their fetuses will not receive adequate care and the result will be more fetal and maternal health problems and deaths. Medical groups in California recognized this danger and issued the following statement after the arrest of Pamela Rae Stewart:

Such prosecution is counterproductive to the public interest as it may discourage a woman from seeking prenatal care or dissuade her from providing accurate information to health care providers out of fear of self-incrimination. This failure to seek proper care or to withhold vital information concerning her health could increase the risks to herself and her baby.98

Another important concern is the effect of criminal prosecutions on the doctor-patient relationship. Doctors currently have no affirmative duty to order treatment or to report failure by their patients to follow their advice.99 Criminal laws directed at maternal conduct would impose such a duty and have the effect of turning doctors' "advice" into "orders" and giving physicians the power of police. This is especially troublesome considering evidence that indicates that it is the already poor physician-patient interaction which may lead to misunderstandings and treatment refusals in the first place.100 Furthermore, imposing this duty on physicians separates the medical interests of women from those of their fetuses and forces doctors to treat the fetus as their primary patient. The American Committee of Obstetricians and Gynecologists recognized the danger inherent in this conflict in an opinion issued by its Committee on Ethics:

Two situations in which maternal and fetal interests can be potentially divergent are 1) the pregnant woman may refuse a diagnostic procedure, medical therapy, or a surgical procedure that may enhance or preserve fetal well-being, and if denied may result in fetal morbidity or mortality; and 2) the pregnant woman's behavior with respect to her health or lifestyle may be deleterious to the fetus. 

... Obstetricians should refrain from performing procedures that are unwanted by a pregnant woman. The use of judicial authority to implement treatment regimens in order to protect the fetus violates the pregnant woman's autonomy. Furthermore, inappropriate reliance on

98. Declaration of the California Medical Association, the Southern California Public Health Association, and the California Division of the American College of Obstetricians and Gynecologists, contained in Defendant's Motion to Dismiss, supra note 1, at 21. This was precisely the effect the Stewart prosecution had in southern California. See id. at 21-24.
100. Gallagher, supra note 10, at 553 n.224 (citing Appelbaum & Roth, Patients Who Refuse Treatment in Medical Hospitals, 250 J. A.M.A. 1296, 1301 (1983)).
judicial authority may lead to undesirable societal consequences . . . .

In addition, as one commentator has observed, the “availability of court enforcement of physician decisions may actually encourage treatment refusals by delaying necessary changes in physician attitudes and behavior.”

Not only would fetal neglect statutes force the breakdown of the relationship between a woman and her doctor, their enforcement would destroy the privilege of confidentiality where it is statutorily protected.

The second major cost of criminalization is its effect on the individual woman and her family. Arrest, prosecution, and conviction can have disastrous effects on a family unit. Imprisonment means that the woman is no longer available to care and provide for her family, and fines reduce whatever resources are available to support the family and to provide medical care for the pregnant woman herself.

The criminal law may also be seen as an intrusion into the private relationship not only of the doctor and patient, but that of the parent and child as well. The law has traditionally recognized a parental right in matters of child-rearing that is based on the presumption that parents act in their child’s interest:

The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

While courts have not found this relationship impenetrable, recognition of a mother’s medical decisionmaking as safe from state intrusion emphasizes the importance of the family as a fundamental social value. The criminal law might act to further weaken the family unit by its very methods of detection and enforcement. As one commentator noted, “[W]omen would live in constant fear that any accident or ‘error’ in judgment” could become the basis for a criminal prosecution instigated “by a disenchanted husband or relative.”

Closely connected to this idea is the problem of crime detection. Proponents of criminalization have suggested that a woman should consider herself

102. Gallagher, supra note 10, at 54.
103. See, e.g., CAL. EVID. CODE § 994 (West 1966) (protecting the relationship only where criminal action is not involved).
pregnant from the first day of a missed period and would be liable for any act or omission until her pregnancy was definitely determined. Under such a statutory scheme, the state would be forced to use extremely intrusive means to observe a pregnant woman’s conduct to ensure she is conforming to the law, perhaps even forcing her doctor and husband into the role of informants. One commentator has written that in adopting any criminal prohibition, evidence that the prohibition would require systematic use of intrusive investigatory techniques should immediately make it suspect to lawmakers. Adoption of fetal neglect statutes would require the state to use methods of enforcement that offend not only an individual woman’s right to bodily privacy, but the widely shared expectations of privacy held by our society.

Finally, there are the larger costs to society involved with enforcement. This idea involves two concepts: first, the direct cost to a community in enforcement expenditures and lost “opportunity costs,” and second, the larger cost to society that occurs when its laws are under-enforced.

The actual financial costs of any statutory scheme depend to some extent on its level of enforcement. However, it is obvious that these costs must include the resources devoted to detection and punishment of criminals such as police surveillance, court costs, and imprisonment. Although the expenditures of any criminal justice system are rarely identified with the costs of enforcing a particular crime, fetal neglect laws would require special expenditures based on the nature of the “crime.” In particular, the system must be prepared to provide for the pregnancy as well as for the pregnant offender, including medical and psychological care. Furthermore, applying the rehabilitative model of punishment, the criminal justice system must develop a program to protect the fetus and to prevent recidivism. The resources consumed by enforcement would be lost to the system and could not be used to enforce other laws or provide much-needed care for the pregnant woman outside the criminal justice system.

The larger cost involved is that associated with the under-enforcement of any crime. As noted, the level of enforcement will vary depending on the nature of the crime, the pervasiveness of the conduct, and the means available to detect it. Furthermore, to the extent that a “crime” of fetal neglect is enforceable at all, it invites arbitrary prosecution and unevenness

108. Robertson I, supra note 37, at 447 n.129; Shaw, supra note 12, at 73.
109. H. FACKER, supra note 73, at 284-86.
110. See CRIMINAL LAW, supra note 75, at 1076.
111. Id.
112. Id.
113. See supra text accompanying notes 69-72.
114. See supra text accompanying note 112.
in its administration. The danger of under-enforcement of the criminal law is linked to the concept of general deterrence. The assertion of social values worthy of protection through the criminal law is greatly weakened when those laws are insufficiently enforced. As one commentator explained:

[L]aw enforcement pays a price for using the criminal law in this way. First, the moral message communicated by the law is contradicted by the total absence of enforcement; for while the public sees the conduct condemned in words, it also sees in the dramatic absence of prosecutions that it is not condemned in deed. Second, the spectacle of nullification of the legislature's solemn commands is an unhealthy influence on law enforcement generally. It tends to breed a cynicism and an indifference to the criminal-law processes which augment tendencies toward disrespect for those who make and enforce the law, a disrespect which is already widely in evidence. Finally, these laws invite discriminatory enforcement against persons selected for prosecution on grounds unrelated to the evil against which these laws are purportedly addressed.

In addition to the logistical difficulties in detecting harmful maternal conduct, the lack of a popular consensus about the validity of such a prohibition makes the dangers of under-enforcement very real.

CONCLUSION

Despite medical advances we cannot ensure that every pregnancy will result in a healthy baby. That goal must be pursued, however, by using the most effective and humane means available to society. In a desire to prevent the risks that present danger to a developing fetus, legislators have been asked to enact laws which engage the full force of the criminal law to punish women for endangering their future children. In their decisionmaking lawmakers must look beyond the argument that punishment will prevent these "crimes" and see the reality of a pregnant woman's life. They must recognize that women
do not decide in a vacuum how well they will eat, or how far into a pregnancy they will work, or when they should seek or follow the advice of a physician. They should not and cannot make these decisions solely on the basis of what is most likely to reduce the chances of harming the fetus.

115. See Defendant's Memorandum of Points and Authorities, supra note 1, at 34-35.
116. See supra notes 81-87 and accompanying text.
Lawmakers must recognize that whatever beneficial deterrent effect criminalization might achieve will be overshadowed by the chilling effect it will have on women’s access to medical care. The costs to society in the destruction of traditionally protected relationships and disrespect for the law and lawmakers are too great to justify invocation of the criminal sanction.

Finally, lawmakers must recognize that the greatest danger in the use of criminal punishment is that it will actually prevent the situation from improving. By applying the criminal law society will feel that something is really being done to promote healthy pregnancies, and will be less likely to engage in truly effective methods of protection, namely the investment of human and economic resources to ensure that prenatal services are available to every woman.

Elizabeth L. Thompson