TORT LAW — PRENATAL INJURIES — SUPREME COURT OF ILLINOIS REFUSES TO RECOGNIZE CAUSE OF ACTION BROUGHT BY FETUS AGAINST ITS MOTHER FOR UNINTENTIONAL INFLICTION OF PRENATAL INJURIES. — *Stallman v. Youngquist*, 125 Ill. 2d 267, 531 N.E.2d 355 (1988).

Although the issue of a fetus' right to life has received most prominent attention in the abortion debate, a number of states have extended protection to the unborn in other contexts, through both criminal statutes and common law tort doctrines. Indeed, some commentators have urged states to expand the conception of "fetal rights" to permit a fetus to sue its mother in tort for prenatal injuries resulting from the mother's actions during pregnancy.[1] In *Stallman v. Youngquist*,[2] the Supreme Court of Illinois rejected such an expansion. The court concluded that a pregnant woman's interest in privacy and bodily integrity, as well as the difficulty in establishing a consistent or just standard of "reasonable" prenatal care, militated against recognizing a fetus' right to sue its mother for the unintentional infliction of prenatal injuries. Although the court in *Stallman* dealt exclusively with the fetus' capacity to sue its mother for her negligent behavior during pregnancy, the case raises the broader policy and constitutional considerations that argue against using civil liability to control the behavior of pregnant women.

Bari Stallman was five months pregnant in 1981 when her automobile collided with another car driven by Clarence Youngquist. Her subsequently born daughter, Lindsay Stallman, filed suit against both her mother and Youngquist, and alleged that their negligent driving resulted in serious prenatal injuries that became apparent at birth.[3]

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[1] *See, e.g.*, Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 438 (1983); Note, *Maternal Tort Liability for Prenatal Injuries*, 22 SUFFOLK U.L. REV. 747 (1988); *see also* Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325 (1984) (analyzing the extension of third-party liability for infliction of prenatal injuries, as well as the parent-child tort immunity doctrine, to fetal-maternal tort suits). One state court has already ruled that a fetus has the right to sue its mother for the negligent infliction of prenatal injury. *See* Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1981). Other writers prefer to discuss fetal protection in terms of state policy interests, rather than the concept of "fetal rights." *See, e.g.*, Note, *Maternal Substance Abuse: The Need To Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1223 (1987) [hereinafter Note, *Fetal Protection*] ("When a woman has chosen not to obtain an abortion, the state should be able to assert its right to prohibit conduct likely to result in injury *in utero*."). For criticism of the "fetal rights" concept, based on the dangers such a conceptualization poses to the constitutional rights of women, see Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); and Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994 (1988) [hereinafter Note, *Maternal Rights*].

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

[3] *See* Stallman v. Youngquist, 129 Ill. App. 3d 859, 473 N.E.2d 400 (1984). The plaintiff

The trial court dismissed Lindsay's complaint against her mother after finding that the Illinois parent-child tort immunity doctrine applied to negligence suits between a mother and her fetus.[4] Holding that Lindsay should have the opportunity to show that her mother's actions fell outside the ambit of parental tort immunity doctrine, the Illinois Appellate Court reversed.[5] On remand, the trial court concluded that the parental tort immunity doctrine did apply to the facts of the case, and granted the mother's motion for summary judgment.[6] Once again, the court of appeals reversed. The court partially abrogated the parental tort immunity doctrine to hold that a fetus, like any minor child, may recover damages in a suit brought against its mother for injuries resulting from the mother's negligence.[7]

The Supreme Court of Illinois reversed. Writing for the court, Judge Cunningham found it unnecessary to address the issue of parental tort immunity in ruling that a fetus has no cause of action against its mother for the unintentional infliction of prenatal injuries.[8] In reaching its decision, the court distinguished such suits from precedents that allow fetal suits for harms arising from third-party negligence.[9] First, the court pointed out that such causes of action would establish "a legal duty, as opposed to a moral duty, to effectuate the best prenatal environment possible,"[10] and would render a mother potentially liable for any act or omission.[11] Not only would the creation of such a duty make mother and fetus "legal adversaries from the moment of conception until birth";[12] it would also require the mother "to guarantee" the health of that potential adversary.[13]

Second, the court stated that, whereas holding a third party liable for prenatal injuries to a fetus "does not interfere with the defendant's

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brought suit by her father and next friend, Mark Stallman. *See id.* Because the plaintiff sought to recover damages from Mrs. Stallman's automobile insurance policy, Mrs. Stallman's insurer controlled her trial defense.

[4] *See id.* at 860, 473 N.E.2d at 401.

[5] *See id.* at 864–65, 473 N.E.2d at 403–04.

[6] *See* Stallman v. Youngquist, 152 Ill. App. 3d 683, 685, 504 N.E.2d 920, 922 (1987).

[7] *See id.* at 691–94, 504 N.E.2d at 925–27.

[8] *See* 531 N.E.2d at 355.

[9] *See id.* at 357–58 (citing Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953), which recognized a cause of action under Illinois' wrongful death statute for the death of an infant, who, while in a viable condition, sustained prenatal injuries due to the negligence of a third party; Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973), which permitted a wrongful death action on behalf of a stillborn fetus for injuries suffered *in utero* as a result of third party negligence; and Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), which held that a fetus subsequently born alive may sue for prenatal injuries arising out of an allegedly negligent blood transfusion to the mother eight years prior to conception).

[10] *Id.* at 359.

[11] *See id.*

[12] *Id.*

[13] *See id.*

right to control his or her own life," imposing such liability on a mother "subjects to State scrutiny all the decisions a woman must make" during pregnancy, and "infringes on her right to privacy and bodily autonomy."[14] Third, the absence of any clear, objective standard of due care during pregnancy would create the danger that "prejudicial and stereotypical beliefs about the reproductive abilities of women"[15] might skew jury determinations of liability. Finally, noting that "pregnancy does not come only to those women who have within their means all that is necessary to effectuate the best possible prenatal environment,"[16] the court suggested that disparities in wealth, education, and access to health services would further prevent the fair application of any legal standard of prenatal care.[17]

The *Stallman* court acknowledged the Illinois legislature's power to establish a mother's legal duty to her fetus, but emphasized the need for "thorough investigation, study and debate"[18] prior to such legislative enactment. Even in that case, the court argued, the best way to achieve the laudable public policy of ensuring healthy newborns "is not . . . through after-the-fact civil liability in tort for individual mothers, but rather through before-the-fact education of all women and families about prenatal development."[19]

Stallman represents a thoughtful approach to an increasingly heated area of legal controversy.[20] The case highlights the unsuitabil-

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[14] *Id.* at 360.

[15] *Id.*

[16] *Id.*

[17] *See id.*

[18] *Id.* at 361.

[19] *Id.*

[20] Although only one other jurisdiction thus far has explicitly considered the issue of a fetus' right to sue for prenatal injuries resulting from its mother's negligence during pregnancy, *see* Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1981), almost all United States courts agree that a fetus, subsequently born alive, may bring suits against a third party. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368 (5th ed. 1984). In addition, a majority of states now include fetuses who die *in utero* as "persons" under wrongful death statutes, *see id.* at 370 & n.32, and several have extended homicide laws to cover the intentional destruction of a fetus by a third party. *See, e.g.*, CAL. PENAL CODE § 187 (West Supp. 1986). Courts have generally imposed criminal or tort liability on third persons by analogy to the right of action possessed by minor children. *See, e.g.*, Smith v. Brennan, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960); Evans v. Olson, 550 P.2d 924, 927 (Okla. 1976). Such "fetal rights" have already served to justify the introduction of evidence of "prenatal abuse" in proceedings to take custody of newborn children from mothers, *see In re* Baby X, 97 Mich. App. 111, 293 N.W.2d 736 (1980); court orders compelling a woman to undergo cesarean delivery when a vaginal delivery threatened the survival of a thirty-nine-week-old fetus, *see* Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981) (per curiam); and prosecutions under state child abuse statutes, *see* People v. Stewart, No. M508197, slip op. (San Diego County Mun. Ct. Feb. 26, 1987). The issue of prenatal "abuse" has become increasingly urgent in light of the growing number of babies born addicted to substances abused by their mothers during pregnancy. *See, e.g.*, Lewin, *When Courts Take Charge of the Unborn*, N.Y. Times, Jan. 9, 1989, at A1, col. 1.

ity of fetal-maternal tort suits as vehicles for promoting fetal health; it also indicates the dangers such causes of action present to women's autonomy, and the need for a constitutional framework to constrain future attempts to expand "fetal rights."

The issues raised in *Stallman* suggest the difficulties of importing principles applied in fetal-third party suits into the unique realm of the mother-fetus relationship. Suits by a fetus against third parties provide an additional deterrent to unwanted intrusions on a woman's bodily integrity.[21] In contrast, fetal-maternal tort suits would have a negligible deterrent effect on most pregnant women, who already have a powerful interest in bearing a healthy child.[22] Fetal-maternal suits may satisfy a fetus' immediate compensation interests where the mother carries liability insurance. However, insurers are likely to pass on the costs of maternal liability through higher premiums or restrictive provisions for all women of child-bearing age, and the burdens of compensating injured fetuses may thereby fall disproportionately on women as a group.[23]

The difficulties of administering fetal-maternal tort suits, and the dangers such liability presents to the constitutional rights of women, outweigh any putative compensation and deterrence benefits that such suits might bring. In the context of the care of unemancipated children, two factors have made courts extremely reluctant to impose affirmative caretaking obligations on parents.[24] First, courts have

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[21] *See* Johnsen, *supra* note 1, at 611.

[22] *See* Note, *Maternal Rights*, *supra* note 1, at 1011. The interest in bearing a healthy child would generally serve as an insufficient deterrent only when the woman is either unaware of the impact her behavior has on her child, or because (as in the case of a drug-addicted mother) she is unable to control her behavior. As the *Stallman* court suggested, the solution to the first problem is prenatal education; the solution to the latter problem involves an expansion of drug-treatment facilities for pregnant women, which currently remain in notoriously short supply. *See, e.g.*, Sachs, *Here Come the Pregnancy Police*, TIME, May 22, 1989, at 104 (reporting that only five full-time drug-treatment programs accept pregnant women in California, each with waiting lists of up to six months). In either of these circumstances, imposing civil liability on mothers may be as likely to deter the carrying of pregnancies to term as to deter maternal negligence during pregnancy, and in some circumstances liability may only discourage prenatal examinations. *See* Note, *Maternal Rights*, *supra* note 1, at 1011 nn.94–95.

[23] Although the increase in automobile and homeowner's insurance has provided part of the justification for dismantling parental tort immunity doctrine, "[t]he mere presence of insurance without additional justification has never before been the basis for recognizing a cause of action." Beal, *supra* note 1, at 340. Policymakers interested in spreading the costs of accidents resulting in prenatal injuries can, and should, accomplish such goals through social insurance schemes that will not target women as a class or infringe on their daily activities.

[24] Only California and Minnesota utilize a "reasonable parent" standard under which a parent may be held liable to his or her child for failure to perform a broad range of parental duties. *See, e.g.*, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 2881 (1971) (holding that a father who instructed his child to get out of their stalled vehicle on a busy highway was liable for failing to meet an "ordinarily reasonable and prudent parent" standard); Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980) (adopting a "reasonable parent" standard for the failure

recognized the profound difficulties in setting consistent standards of "reasonable" parental care that can be applied fairly across a broad spectrum of the population.[25] As the *Stallman* court rightly observed, fetal-maternal tort suits promise far greater problems of standard setting, given the tremendous range of pregnant women's activities that may have a substantial impact on fetal development.[26] Courts have also found that the imposition of affirmative duties on parents of minor children may encroach upon the parents' constitutionally protected privacy and child-rearing interests.[27] The physical connectedness between mother and fetus suggests that fetal-maternal tort suits affect even more fundamental interests of bodily integrity and privacy, and should thus be subject to even greater constitutional scrutiny.

Unfortunately, the constitutional framework for analyzing future cases or legislation remains unclear. Most proponents and critics of the creation of a fetus' right to sue its mother agree that the approach taken in the Supreme Court's abortion decisions — balancing a woman's right to privacy and bodily autonomy against the state's interest in protecting the fetus — provides a starting point for analyzing the constitutionality of fetal-maternal tort suits.[28] Commentators also agree that courts should weigh these interests differently in cases where a woman has decided to carry her pregnancy to term, and that the issue of fetal-maternal tort suits therefore demands a separate doctrinal framework. For example, fetal-maternal tort suits might entail far more intrusive scrutiny of a woman's behavior than the scrutiny involved in the discrete regulation of the abortion decision.[29] On the other hand, the state may also have a more compelling interest in ensuring that fetuses carried to term do not suffer from debilitating injuries than it does in ensuring that any particular fetus is born.[30]

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to supervise the child adequately after the child was struck by a car driven by a third party). A few other states have recognized a limited duty to supervise, *see, e.g.*, Petersen v. City of Honolulu, 51 Haw. 484, 462 P.2d 1007 (1969), but most states have allowed child custody and child abuse statutes to define minimal standards of parenting. *See, e.g.*, Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

[25] *See, e.g.*, Pedigo v. Rowley, 101 Idaho 201, 205, 610 P.2d 560, 564 (1980).

[26] *See* Johnsen, *supra* note 1, at 606–07 (citing evidence that "failing to eat properly, using prescription, nonprescription and illegal drugs, smoking, drinking alcohol, expos[ure] . . . to infectious disease or to workplace hazards, engaging in immoderate exercise or sexual intercourse, residing at high altitudes for prolonged periods, or using a general anesthetic or drugs to induce rapid labor during delivery" all may have deleterious effects on fetal development (footnotes omitted)).

[27] Several Supreme Court cases have recognized constitutional limits on permissible state intervention into family relationships. *See generally Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1351–57 (1980) (discussing the constitutional foundations of parents' rights to control the upbringing of their children).

[28] *See* Johnsen, *supra* note 1, at 614–25; Note, *Maternal Rights*, *supra* note 1, at 995–1009; Note, *Fetal Protection*, *supra* note 1, at 1219–34.

[29] *See* Note, *Maternal Rights*, *supra* note 1, at 997.

[30] *See, e.g.*, Note, *Fetal Protection*, *supra* note 1, at 1223. Because a fetus may be most

Without the benefit of a clear constitutional pronouncement on these issues, the *Stallman* court rightly concluded that, at least in cases arising out of maternal negligence, women's interests in autonomy and privacy outweigh the dubious policy benefits of fetal-maternal tort suits. However, the more difficult cases — those involving maternal activities that might be considered intentional or reckless infliction of prenatal injuries on the fetus — remain to be decided.[31] As these cases arise, states should avoid adopting constitutionally dubious laws in pursuit of ill-conceived strategies to promote fetal health. Expanded access to prenatal education and health care facilities will far more likely serve the very real state interest in preventing increasing numbers of children from being born into lives of pain and despair.

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vulnerable to a mother's negligent acts during the early months of pregnancy, *see* Note, *Maternal Rights*, *supra* note 1, at 998, the state's interest in regulating the mother may be most compelling at the same time that fetal-maternal tort liability is most intrusive. *See* Beal, *supra* note 1, at 364–65 (noting that, due to the uncertainty surrounding the diagnosis of pregnancy, "[a] standard which assumes a woman knows when she has conceived may result in the imposition of a duty on a woman to use care in the treatment of her body long before conception actually occurs"). In the abortion context, courts have generally considered the state's regulatory interest compelling only in the second or third trimester. *See* Roe v. Wade, 410 U.S. 113 (1973). *But see* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3057 (1989) (plurality opinion) (suggesting that "the State's interest in protecting potential human life" may extend to the point of conception).

[31] Discussion surrounding the implications of "fetal abuse" liability distinguishes those fetal injuries that arise out of the use of illegal drugs, injuries that arise out of maternal activities that are legal but subject to state regulation and are known to have a direct negative effect on fetal development (for example, tobacco consumption, alcohol consumption, or the use of prescription drugs), and injuries that arise out of traditionally unregulated activities that have an indirect or indeterminate effect on fetal well being (for example, exercise and nutritional intake). *See, e.g.*, Note, *Maternal Rights*, *supra* note 1, at 1006–07. Even some observers who on policy grounds object to criminal or tort liability for fetal abuse agree that laws penalizing pregnant women who engage in activities of the first category would pass constitutional muster if narrowly drawn. *See id.* Conversely, some advocates of expanding fetal rights seem hesitant to permit tort suits for a mother's negligent infliction of prenatal injuries. *See, e.g.*, Note, *Fetal Protection*, *supra* note 1, at 1237. *But see* Robertson, *supra* note 1, at 442 (arguing that the interest in protecting the unborn child justifies limiting a mother's freedom through fetal-maternal tort suits for negligent prenatal care).