

# Maternal-Fetal Rights and Substance Abuse: Gestation Without Representation

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In the field of forensic psychiatry we are accustomed to working with attorneys on a regular basis in a variety of circumstances. We take access to attorneys for granted. We should not take it for granted. A pregnant woman arrested for alleged addiction to opiates should have an attorney appointed to defend her before she undergoes forced treatment. This was not the case with Alicia Beltran.

Ms. Beltran, in her second trimester of pregnancy, was arrested for refusing to follow the recommendations of her nurse practitioner. She had been advised to continue buprenorphine (Suboxone), even after tapering herself off of opiates when she learned she was pregnant. She was evaluated by an emergency room physician, who indicated that inpatient treatment was not necessary. Ms. Beltran was taken to court for a hearing, but she was not appointed an lawyer. Her fetus, on the other hand, already had an assistant district attorney and guardian *ad litem* appointed for representation. The judge ordered Ms. Beltran to substance abuse treatment in a halfway house for a substantial portion of her early pregnancy.<sup>1</sup>

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## The Cocaine Mom Act

How could this happen? These events unfolded under Wisconsin Act 292 of 1997, also known as the Cocaine Mom Act.<sup>2</sup> Wisconsin courts are given original jurisdiction over fertilized eggs, embryos, fetuses, and pregnant women at all stages of pregnancy where the pregnant woman “habitually lacks self-control” in the use of alcohol or controlled substances “to a severe degree.” There must be a “substantial risk” that the health of the egg, embryo, fetus, or newborn infant will be “seriously affected.” Under this law, the state is empowered to appoint a guardian *ad litem* to represent the best interest of the unborn child, arrest the pregnant woman, and place her in physical custody for the length of her pregnancy. The woman may be subjected to involuntary medical examinations, testing, and treatment. She may have to stand trial for negligence, with possible deleterious effects on her right to parent her child once it is born.

## *Beltran v. Loenish et al.*

Ms. Beltran filed a lawsuit<sup>3</sup> claiming numerous violations of her constitutional rights. She had not been given due process as guaranteed by the Fifth and Fourteenth Amendments. She was detained, despite the fact that she had stopped using controlled substances and that there was evidence her fetus was healthy. The Act does not provide sufficient procedural safeguards for the possible loss of liberty and it violates the Fourteenth Amendment’s guarantee of equal protection under the law, as it singles out women. Ms. Beltran’s Eighth Amendment right was violated, in that the Act promotes deliberate indifference. As a result she was involuntarily committed to

a facility that did not provide treatment for her drug-related problems or medical or prenatal care. The Act also effectively bans access to abortion by confining women so that they have no access to abortion services. The Act penalizes the status of addicts who are pregnant, without any requirement for *actus reus*. The lawsuit also claimed that her Fifth Amendment right to avoid self-incrimination had been violated. She was also deprived of her Sixth Amendment right to counsel.

The case of Ms. Beltran brings attention to maternal-fetal rights and to substance use in pregnancy. In an ideal world, pregnant women would not abuse drugs or alcohol, but that is not the world we live in. Where do we draw the line? When is it appropriate, if ever, for medical practitioners or lawmakers to dictate how a woman handles her pregnancy? Isn't the woman who has an occasional glass of wine with dinner a far cry from the intravenous drug user? On this slippery slope the answer lies somewhere in the middle.

### Historical Perspective

The status of pregnant women has historically resided in the hands of the law.<sup>4</sup> William Blackstone wrote in his *Commentaries on the Laws of England* that life "begins in the contemplation of law as soon as an infant is able to stir in the mother's womb" (Ref. 5). The "born alive" rule was originally a principle of common law in England that was carried to the United States. It was first formulated by William Staunford (1509–1558), and it was later set down by Edward Coke (1552–1634) in his *Institutes of the Laws of England*. Sir Coke wrote:

[I]f a woman be quick with childe, and by a potion or other-wife killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great mifprifion, and no murder: but if the childe be born alive, and dieth of the potion, battery or other cause, this is murder: for in law it is accounted a refoorable creature, in *rerum natura*, when it is born alive [Ref. 6].

In 18th century Europe, there was controversy surrounding whether the mental activity of a pregnant woman could cause her fetus to become misshapen or malformed at birth. The idea of "maternal impressions,"<sup>7</sup> held that a pregnant woman's longings, if ungratified, would mark her fetus. It was believed that a pregnant woman had to avoid disturbing experiences at all cost, or else the negative experience would be mirrored in a related physical

deformity in her child. A famous example is the Elephant Man.<sup>8</sup> According to legend the Elephant Man's mother was frightened by an elephant at a circus, and as a result, her son was born deformed. Joseph Merrick actually had a chromosomal abnormality, neurofibromatosis type I. We can equate her experience to the current trend of criminalizing the behavior of pregnant women in relation to their gestating fetuses.

### Case Law

In the case of *Dietrich v. Inhabitants of Northampton*<sup>9</sup> the Massachusetts Supreme Court under Justice Oliver Wendell Holmes addressed questions of civil liability and maternal autonomy. A mother was denied cause for the wrongful death of her fetus after a slip and fall. The holding stated that the fetus is part of the mother and is not owed a separate duty of care. *Bonbrest v. Kotz*<sup>10</sup> was the first case in which a fetus was recognized as a "distinct individual." The court ruled that "where the child was viable, it was not part of its mother and therefore it should have its own right of action from prenatal injuries." The court introduced the concept of fetal "personhood," holding that, through the father, an infant has a right of action for injuries sustained as a result of allegedly being removed from her mother's womb through professional malpractice. *Verkennes v. Corniea*<sup>11</sup> from the Minnesota Supreme Court was the first case in which recovery was allowed for the wrongful death of a stillborn child. Verkenne's wife and child died as a result of allegedly negligent hospital care. The Minnesota Supreme Court allowed the father to recover, even though the child was not born alive. The court required that the child be viable at the time the injuries were sustained. Viability is considered to be the point at which the child is capable of life independent of its mother. The definition of viability is ever changing. A fetus is generally considered viable at 24 weeks, moving the time of viability closer and closer to conception.

*Roe v. Wade*<sup>12</sup> resulted in the legalization of first-trimester abortions on the grounds that restriction of the procedure is a violation of a woman's 14th Amendment right to privacy. The right must be balanced against the state's interest in regulating abortions, protecting prenatal life, and protecting women's health. *Roe v. Wade* established that a woman has a right to an abortion until the fetus reaches viability.

A dilemma is raised by Magnuson and Lederman: “If tort law recognizes preborn life and a preborn right to live independent of the mother, why should there be no consideration of the ‘rights’ when they collide with the intention decision of the mother to destroy that life” (Ref. 13, p 776). The simple answer lies in consent. A mother consents to a legal abortion, whereas in a wrongful death or personal-injury action on behalf of a fetus, the mother obviously has not consented to the death of the fetus.

## Federal Law

The Federal Unborn Victims of Violence Act of 2004, Laci and Conner’s Law, was passed after Scott Peterson was convicted and sentenced to death for the murder of his wife and their unborn child. The Act provides in part that:

(1)(a) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

(2)(a) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child’s mother [Ref. 14].

## State Law

Thirty-eight states have fetal homicide laws that provide some level of criminal protection for the unborn, and 23 of these states have laws that protect the fetus from conception until birth. Specific laws for each state can be found online.<sup>15</sup> Typically, prochoice organizations oppose such laws because they raise the question of restricting abortion and dismantling *Roe v. Wade* by giving the fetus rights independent of its mother. Will laws that criminalize the killing of unborn children infringe on the right of a woman to choose to have an abortion? In some cases, yes; in others, no.

The Guttmacher Institute is an organization whose mission is “advancing sexual and reproductive health worldwide through research, policy analysis and public education.”<sup>16</sup> They have gathered information on each state’s policies on substance abuse during pregnancy, and as of April 1, 2015 the following policies are in effect:

One state allows assault charges to be filed against a pregnant woman who uses certain substances [Tennessee]. 18 states consider substance abuse during pregnancy to be

child abuse under civil child-welfare statutes, and 3 consider it grounds for civil commitment. 15 states require health care professionals to report suspected prenatal drug abuse, and 4 states require them to test for prenatal drug exposure if they suspect abuse. 19 states have either created or funded drug treatment programs specifically targeted to pregnant women, and 11 provide pregnant women with priority access to state-funded drug treatment programs. 4 states prohibit publicly funded drug treatment programs from discriminating against pregnant women [Ref. 17].”

## Additional Cases

The issue of substance abuse during pregnancy has been debated among policymakers since the late 1980s. *Johnson v. State*<sup>18</sup> was the first successful prosecution of a pregnant woman in the United States for prenatal damage to a fetus. The defendant was convicted for “gestational substance abuse” and sentenced to drug rehabilitation and 15 years’ probation. In *Whitener v. South*,<sup>19</sup> the South Carolina Supreme Court held that pregnant women who risk harm to their viable fetuses may be prosecuted under the state’s child abuse laws. Specifically targeted are women who use illegal drugs during pregnancy. In *Arkansas Department of Human Services v. Collier*,<sup>20</sup> the judge detained a pregnant woman for using illegal drugs. In South Carolina, a 23-year-old African American woman gave birth to a stillborn child and was arrested and charged with homicide by child abuse for her alleged cocaine use. She was found guilty and sentenced to 12 years in prison. Under the Alabama Chemical Endangerment Act of 2006, a pregnant woman was charged after testing positive for methamphetamines.<sup>21</sup> Her son was born at 25 weeks and lived only 19 minutes. Her older daughters were removed from her custody, and she was allowed only supervised visits for 90 days. She had to attend court-mandated parenting classes and drug treatment. She pleaded guilty and received the minimum sentence of 10 years. In Mississippi, a woman gave birth to a stillborn child at 31 weeks after using methamphetamines during her pregnancy.<sup>22</sup> A Lamar County grand jury indicted her for culpable-negligence manslaughter under the Mississippi Code, which defines manslaughter as the “killing of a human being, by the act, procurement, or culpable negligence of another.”<sup>23</sup> The Supreme Court of Mississippi later dismissed the case. Lynn M. Paltrow, JD, the Executive Director of the National Advocates of Pregnant Women, published a review of 413 cases<sup>24</sup> and found that low-income women,

primarily in the South are more vulnerable to state actions and that African American women are more likely to be arrested and subjected to felony laws.

## Opinions

The implications of these laws may destroy the doctor–patient relationship for women who believe that they cannot be honest with their doctors for fear of punishment, or they may avoid prenatal care altogether. Some women may choose abortion rather than dealing with consequences of seeking treatment for substance abuse. The additional stress of these laws could negatively affect the woman’s pregnancy and create an adversarial relationship between the mother and child.

The Committee Opinion from the American College of Obstetricians and Gynecologists is as follows:

Drug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus. Incarceration and the threat of incarceration have proved to be ineffective in reducing the incidence of alcohol or drug abuse. Obstetrician–gynecologists should be aware of the reporting requirements related to alcohol and drug abuse within their states. They are encouraged to work with state legislators to retract legislation that punishes women for substance abuse during pregnancy [25].

There is a great deal of evidence of the effects of alcohol on fetuses, but the data on drug use are much less clear. Although substance abuse poses a risk of harm, the magnitude necessary to cause fetal harm have not been clearly delineated empirically.

The question remains: when, if ever, is it appropriate for lawmakers to interfere with the actions and decisions that a pregnant woman makes when it involves her fetus and its well-being? When the woman blatantly abuses drugs or alcohol, without regard for the welfare of the fetus, society and lawmakers have the responsibility and duty to step in and make an effort to protect the fetus. Protection of the unborn, however, does not mean stripping a woman of her rights, denying her legal representation, locking her up, and calling her a criminal. Rather, it should mean providing support, education, and a safe place for rehabilitation. A woman who is taking steps to have a healthy pregnancy should not be punished. She and her fetus should be supported and cared for.

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