

Increasing Victimization Through Fetal Abuse Redefinition

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INCREASING VICTIMIZATION THROUGH FETAL ABUSE REDEFINITION

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INTRODUCTION

The past four years saw an upsurge in abortion restriction regulation.¹ As of November 1, 2012, the Guttmacher Institute reports twenty states with laws specifically aimed at restricting women's abortion rights.² Louisiana and Utah have an abortion ban under permanent enjoinder by court order.³ A tension between state powers of regulation and the autonomy of the human person

1. Chip Reid, *Since 2010, 32 States Have Restricted Abortions*, CBS NEWS (Aug. 26, 2012), <http://www.cbsnews.com/news/since-2010-32-states-have-restricted-abortions/> ("In the first six months of 2012, 15 states passed 39 restrictions on abortion. Last year, 24 states passed 92 restrictions, an all-time record.").

2. GUTTMACHER INST., STATE POLICIES IN BRIEF: ABORTION POLICY IN THE ABSENCE OF *ROE* (2012) [hereinafter STATE POLICIES IN BRIEF], available at http://www.guttmacher.org/statecenter/spibs/spib_APAR.pdf. In the event that *Roe v. Wade* is overturned, Louisiana, Mississippi, North Dakota, and South Dakota would criminalize abortion except to protect the life of the woman. Thirteen states have abortion bans on state law that predate *Roe v. Wade*, although the laws are largely unenforced. Besides the life-protection exception, Alabama, Colorado, Delaware, and New Mexico include an exception for the health of the woman, of which only Alabama does not include "mental health." Colorado, Delaware, Mississippi, and New Mexico contain an exception for rape, and all but New Mexico extend an exception for incest. The Guttmacher Institute identified seven states with "laws that express their intent to restrict the right to legal abortion to the maximum extent permitted by the U.S. Supreme Court in the absence of *Roe*." (Arkansas, Illinois, Kentucky, Louisiana, Missouri, North Dakota, and Ohio). *See id.*

3. *Id.*

underlies these laws. The commonly accepted state interest that allows the state to infringe on the mother's rights is "protecting potential life."⁴ The Supreme Court accepted "safeguarding health" and "maintaining medical standards" as additional state interests, but legislation's focus on protecting the life of the fetus over the mother's health strongly indicates where the states' concerns lie.⁵

Recently, states have begun to push for a legal redefinition of "person" to include "unborn children," arguably as part of the anti-abortion legislative wave.⁶ Traditionally, resistance to fetal personhood stemmed from the concern that the fetus's rights would eclipse the mother's fundamental rights.⁷ Critics of the 2010 to 2012 fetal personhood bills include an argument beyond the usual Fourteenth Amendment objections, identifying the bills as part of the "War on Women."⁸ This argument highlights the growing trend in legislation regarding the larger social conception of the role of women, essentially codifying patriarchal mentality and establishing a woman's body as belonging to almost everyone except herself.⁹ Extreme positions exist on both sides of the debate, but abortion laws that do not grant an exception for the mother's health—let alone the complete bans—invite analysis into state motivation.¹⁰ While the compelling state interest might be protecting life, a state's concentration on controlling women's bodies instead of improving children's welfare services should foster skepticism about whether the real interest is

4. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

5. *Id.* at 155; see also STATE POLICIES IN BRIEF, *supra* note 2.

6. *Monthly State Update: Major Developments in 2012*, GUTTMACHER INST. (Dec. 1, 2012), <http://www.guttmacher.org/statecenter/updates/2012/nov.html>. Oklahoma and Virginia defeated attempts to redefine "person" to legally include "unborn children," largely because of concerns that the redefinitions were attempts to facilitate abortion bans. In Oklahoma, the attempt included redefining the public health code and the constitution. In Virginia, the bill attempted to extend a legal redefinition broadly. *Id.*

7. Jean Reith Schroedel et al., *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89, 99 (2000) (arguing that "[f]etal rights erode women's fundamental rights to: due process, privacy, bodily integrity, self sovereignty, and equal protection).

8. See, e.g., WAR ON WOMEN, <http://uswaronwomen.wordpress.com/> (last visited Mar. 30, 2014); *The GOP Takes Its War on Women to the States*, PEOPLE FOR THE AM. WAY, <http://www.pfaw.org/media-center/publications/gop-takes-its-war-women-states> (last visited Mar. 30, 2014).

9. *Id.*

10. STATE POLICIES IN BRIEF, *supra* note 2; see also Mary C. Curtis, *Irish Abortion Debate After Woman's Death Resonates in U.S.*, WASH. POST (Nov. 16, 2012), <http://www.washingtonpost.com/blogs/she-the-people/wp/2012/11/16/irish-abortion-debate-after-womans-death-resonates-in-u-s/> (exploring the concern and fear surrounding the Irish abortion law requiring "real and substantial risk" to life, not health, that has ostensible roots in Christianity, and a victim's mother's poignant demand: "In an attempt to save a 4-month-old fetus they killed my 30-year-old daughter. How is that fair, you tell me?").

the preservation of life, the control of women, or even reelection by way of hot-button issues.

Some states, however, have taken additional steps that reinforce the legitimacy of the compelling state interest with the laws chosen for fetal personhood redefinition: South Dakota and Wisconsin amended their child abuse statutes to identify “child abuse” as including harm caused to an unborn child.¹¹ If a state has removed the traditional argument against making fetal abuse a form of child abuse,¹² and the anti-abortion laws are passed in defense of the fetus’s life, the next step these states should take is to redefine their laws to make abuse of a pregnant woman an additional crime of child abuse.

This Note does not analyze the new “anti-abortion” laws; instead, it considers the impact of the alleged state interest behind the laws and whether the interest is legitimate. Because the anti-abortion laws are passed in defense of the fetus’s life to the extent that states are trying to give the fetus the protection of the full force of the law, this Note explores whether the next step these states should take is to redefine their laws to make abuse of a pregnant woman an additional crime of child abuse. This Note will argue that a redefinition of child abuse will have a greater negative impact on the victim of domestic violence than a positive impact on preventing the violence. In the cases where states have already made the change, the Note analyzes the constitutionality of a redefined child abuse law. It determines that the law would negatively affect parental rights, including the abusive partner’s automatic or presumptive paternal legal rights and the impact on the victim’s parental rights. The Note concludes that the benefits of redefining abuse of a pregnant woman as child abuse instead of fetal abuse do not outweigh the harmful consequences.

I. WOMEN, PREGNANCY, AND ABUSE IN THE LAW

A. *Domestic Violence During Pregnancy*

Domestic violence is a broad category that includes child maltreatment, elder maltreatment, and intimate partner violence.¹³ An individual is a victim of intimate partner violence when he or she suffers from “physical, sexual, or psychological harm by a current or

11. WIS. STAT. ANN. § 48.02 (West 2012) (amended 2012); WIS. STAT. ANN. § 48.981L (West 2012); S.D. CODIFIED LAWS § 26-8A-1 (2012) (law valid through 2012).

12. That the law would affect the mother’s right to abortion, or endanger the definition of personhood.

13. *Domestic Violence*, U.S. DEP’T OF JUSTICE, <http://www.ovw.usdoj.gov/domviolence.htm> (last visited Mar. 30, 2014).

former partner or spouse.”¹⁴ Intimate partner violence is frequent and serious enough that the Centers for Disease Control and Prevention identified it as a public health problem.¹⁵ The National Institute of Justice estimates that, in the United States, approximately 1.5 million women experience intimate partner violence annually.¹⁶ Debate continues about how exactly to define intimate partner violence, but three classifications generally hold: rape, physical assault, and stalking.¹⁷ This Note focuses on physical assault, specifically against pregnant women.¹⁸

Statistics on abused pregnant women vary.¹⁹ In a 1996 survey of studies, the *Journal of the American Medical Association* estimated that between 3.9 percent and 8.3 percent of pregnant women faced abuse, which translates to between 156,000 and 332,000 women.²⁰ A clear number cannot be determined, likely because of under-reporting.²¹ Two issues of concern arise: the phenomena of intensified violence during pregnancy, and the target area of the violence.²² Although little scholarship on the subject exists, evidence suggests that for many women in abusive relationships the violence actually escalates during pregnancy.²³ The abuse does more than intensify, however, as studies suggest that the abuser changes his

14. *Violence Prevention: Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL (Mar. 7, 2014), <http://www.cdc.gov/ViolencePrevention/intimatepartnerviolence/index.html>.

15. *Id.*

16. Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey* iii (July 2000), available at <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>. Women are not the only victims of intimate partner violence. Although women are more likely to experience violence than men, the National Violence Against Women Survey estimates that 834,732 men suffer intimate partner violence annually. *Id.*

17. *Id.* at 5.

18. While this Note primarily addresses the redefinition of fetal abuse in the context of intimate partner violence against pregnant women, the general analysis can also apply to violence against pregnant women not perpetrated by an intimate partner. A stranger who batters a pregnant woman, however, would not be impacted by the discussion on parental rights.

19. Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 670 (2006).

20. Julie A. Gazmararian et al., *Prevalence of Violence Against Pregnant Women*, 275 J. AM. MED. ASS'N 1915, 1918–19 (1996).

21. *Id.*; see also Tuerkheimer, *supra* note 19, at 670 n.11 (stating that the variances in the data concerning the prevalence of pregnancy violence may be a result of women under-reporting their abuse as well as due to the varying methods of collecting the data (citing Jacquelyn C. Campbell, *Abuse During Pregnancy: Progress, Policy, and Potential*, 88 AM. J. PUB. HEALTH 185–87 (1998))).

22. JAMES DWYER, FAMILY LAW 300 (2012); Tuerkheimer, *supra* note 19, at 672.

23. DWYER, *supra* note 22, at 300; see also Constance MacIntosh, *Conceiving Fetal Abuse*, 15 CAN. J. FAM. L. 178, 189 (1998) (“American research has indicated that pregnant women are more likely than non-pregnant women to be battered, and that the battering is usually more intense.”).

target and the violent acts focus on the abdominal region instead of the face.²⁴ The mother is not the only direct victim of the battery; the fetus will often suffer damage, including fractures, low birth weight, and death.²⁵

Additional factors escalate the danger to the fetus.²⁶ Research demonstrates that pregnant women's abusive partners will often prevent their victims from seeking medical treatment.²⁷ The strong correlation between abuse victims and drug abuse continues into pregnancy.²⁸ Women in abusive relationships are at high risk for what could be seen as "self-medicating" drug abuse.²⁹ One way to escape the pain and constant fear is to turn to drug or alcohol use, and if the violence escalates during pregnancy, so too will the pain and fear.³⁰ Intimate partner violence during pregnancy exposes the fetus to danger from the external physical abuse as well as the internalized drugs.³¹

B. The State of the Law

When a fetus suffers harm, liability falls on the perpetrator under the charge of fetal abuse, not child abuse.³² Tort law illustrates the

24. MacIntosh, *supra* note 23, at 189 ("Both Canadian and American research confirm that when pregnant women are battered, the violence is directed against the part of the woman's body which most vividly represents her pregnancy. While violence against non-pregnant women usually consists of strikes to the face and breasts, violence against pregnant women is most often kicks and blows to the abdominal region.").

25. *Id.*; see Tuerkheimer, *supra* note 19, at 672 (identifying fetal harm from external physical abuse as "including miscarriage, stillborn birth, preterm labor and delivery, direct fetal injury, fetal hemorrhage, and placental abruption").

26. Tuerkheimer, *supra* note 19, at 672–73 ("[V]iolence during pregnancy has been associated with maternal substance abuse, smoking, unhealthy diet, low weight gain, delayed entry into prenatal care, and low birth weight."); see also MacIntosh, *supra* note 23, at 189–90 ("Battered pregnant women are twice as likely to miscarry as non-battered pregnant women. As well as causing miscarriage, blows to a pregnant woman's abdomen is known to directly affect pregnancy by causing *abruptio placentae*, fetal loss, premature labour, fetal fractures, low birth weight, and premature delivery, while the woman may suffer rupture of the uterus, liver, or spleen, pelvic fractures, antepartum hemorrhage uterine contractions and premature rupture of the membranes.").

27. MacIntosh, *supra* note 23, at 190.

28. *Id.* at 193–94 ("Stewart and Cecutti found extremely different rates of substance abuse between abused pregnant women and pregnant women who were not abused. Specifically, they found that only 1.2 [percent] of the Ontarian women whose pregnancies were not marked with abuse used illicit drugs, while 55.6 [percent] of the abused women used illicit drugs during their pregnancy. Alcohol use exhibited a similar trend, where just under 20 [percent] of non-abused women drank regularly while pregnant, compared with just under 70 [percent] of abused women. Both American and Canadian medical researchers have explicitly acknowledged a causal link between abuse while pregnant and subsequent substance abuse during pregnancy.").

29. *Id.*

30. *Id.*

31. *Id.*

32. RESTATEMENT (SECOND) OF TORTS § 869 (1979).

difficulty associated with a charge of fetal abuse: conceptualizing the unborn child's rights without personhood together with the impact the violence will have made on a legal person in the definitive and near future.³³ The Restatement (Second) of Torts recommends conditioning liability for harm on the child's state at birth.³⁴ If the child is alive, the tortfeasor is liable for harm; if the child is not, liability depends on the state's wrongful death statute.³⁵ In the Unborn Victims of Violence Act, federal law provides another possible approach to handling this distinction between the unborn child's rights and the future person's future rights.³⁶ The law treats injury to or unintentional death of the fetus the same as if it was the injury or death of the mother, but intentional death receives treatment as the death of a separate human being.³⁷

This delicate handling reflects a heightened awareness of the conflict between the unborn child's constitutional rights and the mother's constitutional rights, and it is one that states and even pro-life groups often avoid or ignore.³⁸ Criminal law generally side-steps the issue of abuse and penalizes violence under fetal homicide laws.³⁹ Despite the constitutional issues surrounding the definition of a fetus as a "person," many states acknowledge a viable fetus as a person under homicide statutes.⁴⁰ Additional state approaches include criminalizing the harm to the mother if the result is fetal death and aggravated sentences for killing or injuring a pregnant woman.⁴¹

33. *Id.*

34. *Id.*

35. *Id.* ("One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive. If the child is not born alive, there is no liability unless the applicable wrongful death statute so provides.").

36. 18 U.S.C. § 1841 (2006).

37. *Id.* ("[T]he 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 If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall [be punished] . . . for intentionally killing or attempting to kill a human being.").

38. Schroedel et al., *supra* note 7, at 99, 111.

39. Tuerkheimer, *supra* note 19, at 686.

40. 41 AM. JUR. PROOF OF FACTS 2d 1 (1985) (citing *Commonwealth v. Cass*, 392 Mass. 799, 808, 467 N.E.2d 1324, 1330 (Mass. 1984); *Bailey v. State*, 191 S.W.3d 52, 55 (Mo. Ct. App. 2005)). See *State v. Lamy*, 158 N.H. 511, 519, 969 A.2d 451, 459 (N.H. 2009) (upholding the "born alive" rule); see also *State v. Soto*, 378 N.W.2d 625, 628-30 (Minn. 1985) (holding that a fetus is not a person under the vehicular homicide statute, but superseded by MINN. STAT. ANN. § 609.2662 (West 2013) that criminalize homicide of an unborn child).

41. Tuerkheimer, *supra* note 19, at 696 (citing KAN. STAT. ANN. § 21-3440 (1995); N.H. REV. STAT. ANN. § 631:1 (1996); N.M. STAT. ANN. § 30-3-7 (West 1994) as state laws criminalizing injury to the mother leading to fetal death and citing CONN. GEN. STAT. §§ 53A-59A (2001 & SUPP. 2005); DEL. CODE ANN. tit. 11, § 612 (2001 & SUPP. 2004); VA. CODE ANN. §§ 18.2-31, 32.1 (2004); and WYO. STAT. ANN. § 6-2-502 (2005) as state laws without the fetal death element).

In state law, only South Dakota and Wisconsin treat harm caused to an unborn child as actual child abuse.⁴² Some states, specifically Ohio and Pennsylvania, step beyond civil charges for an unborn child's death and have revised murder laws that include unborn children.⁴³ Ohio categorizes purposeful death of an unborn child as aggravated murder.⁴⁴ Pennsylvania's protection arguably extends beyond the typical locality of an unborn child in the mother's womb to include eggs fertilized in a petri dish by defining an "unborn child" and "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth."⁴⁵ But while one could hope that the two extremes—avoidance and absolute coverage—might balance out in general state policy, critics warn that these laws are not designed to protect the unborn child from physical abuse against the mother.⁴⁶

C. Prosecuting Mothers

Many laws that address fetal abuse focus on the mother's use of drugs and give a passing mention—if any—to external violence.⁴⁷ Common treatment of fetal abuse mirrors *Whitner v. State*, in which South Carolina established maternal drug use as grounds for child abuse prosecution.⁴⁸ South Dakota, which recently amended its child abuse statutes to include unborn children, also allows for the involuntary commitment of pregnant women who drink or do drugs.⁴⁹ Wisconsin, the only other state that identifies fetal abuse as child abuse, also allows for such control of pregnant women.⁵⁰ An amendment to the Wisconsin definition of "abuse" and "physical injury" under the Children's Code declares,

When used in referring to an unborn child, serious physical harm inflicted on the unborn child, and the risk of serious physical

42. See WIS. STAT. ANN. § 48.02 (West 2012) (amended 2012); WIS. STAT. ANN. § 48.981L (West 2012); S.D. CODIFIED LAWS § 26-8A-1 (2012).

43. OHIO REV. CODE ANN. §§ 2903.01, 2903.09 (West 2013); 18 PA. CONS. STAT. ANN. §§ 2601–09 (2013).

44. OHIO REV. CODE ANN. § 2903.01(A).

45. 18 PA. CONS. STAT. ANN. § 3203 (West 2012); see Schroedel et al., *supra* note 7, at n.162 ("The sponsor of the Pennsylvania bill was asked in legislative debates if someone who entered a medical clinic and knocked over a petri dish containing fertilized eggs, could be charged with multiple homicide. The sponsor said, 'If you knew, and it was your intent, then yes.'").

46. See Schroedel et al., *supra* note 7, at 94, 106, 111.

47. *Id.* at 105–06, 111.

48. *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998); Schroedel et al., *supra* note 7, at 102.

49. S.D. CODIFIED LAWS § 34-20A-70(3) (2012) (law valid through 2012); S.D. CODIFIED LAWS § 26-8A-2(9) (2012) ("Who was subject to prenatal exposure to abusive use of alcohol, marijuana, or any controlled drug or substance not lawfully prescribed by a practitioner . . ."); Schroedel et al., *supra* note 7, at n.127.

50. WIS. STAT. ANN. § 51.20 (West 2012).

harm to the child when born, caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.⁵¹

In a case in Wyoming, a woman filed a domestic violence complaint, but she was arrested herself for child abuse in the form of drinking alcohol while pregnant, despite the legality of her actions.⁵²

The danger of this focus on prosecuting the mother appears most clearly when there is more attention on mothers endangering their unborn children rather than when a third party threatens them both. The logic is not difficult. In the first instance, a mother endangers herself when she uses drugs, but the unborn child can be seen as the true victim because the mother made the choice. In the second instance, neither the mother nor the unborn child chose the violence. The mother is most likely the intended victim; in the abuser's mind, harm to the unborn child is incidental.⁵³ There are two victims.

A closer analysis, however, shows that the first case will very often contain two true victims. Given the connection between drug abuse and physical abuse, the pregnant woman who uses drugs may very likely be a victim herself, and prosecuting her for child abuse while ignoring the external threat does not remedy the situation or protect the unborn child. The basis for this failure of our legal system is unclear. It might be the same bias that impacts regular child abuse cases in which a mother arguably is held to a higher duty of care than the abuser, or it could be a cultural blindness to the fact that there are individuals who would attack a pregnant woman.⁵⁴ As fetal abuse laws stand today, pregnant women faced with physical abuse may feel—and might be correct—that little protection exists for them.

II. MAKING THE CHANGE FROM FETAL ABUSE TO CHILD ABUSE

The predominant fear behind further legislative acts criminalizing harm to a fetus concerns the impact on the mother.⁵⁵ In the wake of the anti-abortion laws from the past two years, women's

51. *Id.* § 48.02.

52. Schroedel et al., *supra* note 7, at n.163 (citing Lynn M. Paltrow, *Punishing Women for Their Behavior During Pregnancy: An Approach that Undermines the Health of Women and Children*, DRUG ADDICTION RES. & THE HEALTH OF WOMEN (NIDA) 1998, at 468).

53. MacIntosh, *supra* note 23, at 189.

54. Schroedel et al., *supra* note 7, at 94; *see also* Jean Reith Schroedel & Paul Peretz, *A Gender Analysis of Policy Formation: The Case of Fetal Abuse*, 19 J. HEALTH POL. POL'Y & L. 335, 349 (1994).

55. Tuerkheimer, *supra* note 19, at 696.

rights supporters are on edge that women are being relegated back to the role of child-making machine instead of equal person.⁵⁶ An inclusion of unborn children under child abuse statutes might further “an agenda of control over women’s bodies and lives.”⁵⁷

A. *Eclipsing a Victim*

Typically, a woman’s right to control her body in abortion cases carries the implication that she has the right to control whether she carries the fetus within her.⁵⁸ But the right to control one’s body extends beyond what occurs within it; the right is not only about what the woman can do, but what others can do to the woman.⁵⁹ This includes the most basic tort of battery. A woman’s—or any person’s—right to control her body preserves her right to be free from harm by third parties. Concern over women’s rights, therefore, is not limited to abortion, but her very right to live in safety. Redefining fetal abuse as child abuse carries the possibility of a dangerous consequence. The mother’s own victim status may be eclipsed by the unborn child’s victimization once their interests are severed into two distinct categories.⁶⁰ The legal system’s focus on the harm to the unborn child “effectively precludes an account of the nature of [the pregnant woman’s] suffering, or even recognition of her existence as a person who has been harmed. The suffering of pregnant victims of domestic violence is thus rendered invisible, leaving real injuries to women unremedied.”⁶¹

There is the possibility that a severance of interests could be in the pregnant woman’s interest. Every state has taken on the burden of child protection, including investigating and prosecuting child abusers.⁶² Not every state, however, criminally prosecutes domestic violence. In Virginia, for example, the victim may request a protective order, but this is a civil matter and is the victim’s responsibility to acquire.⁶³ Charges for assault and battery can be prosecuted, but this

56. These concerns are certainly not unfounded, given the rhetoric surrounding the bills and laws. See Adam Peck, *Georgia Republican Compares Women to Cows, Pigs, and Chickens*, THINKPROGRESS (Mar. 12, 2012, 4:40 PM), <http://thinkprogress.org/health/2012/03/12/442637/georgia-rep-compares-women-to-animals/?mobile=nc>.

57. Tuerkheimer, *supra* note 19, at 696.

58. *Id.* at 700–03.

59. *Id.* at 696–97.

60. *Id.*

61. *Id.*

62. DWYER, *supra* note 22, at 445, 641.

63. An emergency protective order can be requested by the responding police officer. If the abuser violates the protective order, the state may prosecute. VA DEP’T OF CRIMINAL JUSTICE SERVS., AN INFORMATIONAL GUIDE FOR DOMESTIC VIOLENCE VICTIMS IN VIRGINIA:

also depends on the victim's willingness or ability to speak against her attacker.⁶⁴ If abuse of an unborn child became child abuse, the state's child protective services would take over the investigation, and as the unborn child still resides within the pregnant woman, she would also receive the benefit of the abuser's removal.⁶⁵

1. *Punishing the Victim*

Child abuse proceedings might bring the pregnant victim relief from violence, but it could be a double-edged sword if proceedings are brought against the victim for exposing the child to domestic violence.⁶⁶ Most states decide not to prosecute the domestic violence victims for failing to remove her child from the situation, but in states that are willing to deny women the right to control their own bodies, even in instances of rape, the legislature and the courts might hold pregnant victims to an even higher duty of care, since they ostensibly control what happens to the unborn child within them.⁶⁷ Some states do suggest that a child's exposure to domestic violence can be treated as failure to protect the child, or neglect, although Florida is the only state that specifically allows the victim to be charged with neglect.⁶⁸ If states focused on the harm to the unborn child, and placed that harm above the victim's own suffering, the benefits derived from the switch would disappear, and the pregnant victim would return to a state of punishment from which the legal system has sought to release abused mothers.⁶⁹

Child witnesses to domestic violence are different than children in direct physical harm, however. The responsibility to protect a child from an abusive situation is legislated mainly regarding sexual abuse. Many states authorize termination of parental rights if the parent has actual knowledge that a third party sexually abused the child

UNDERSTANDING THE LEGAL PROCESS FOR VICTIMS OF FAMILY ABUSE 2 (2010), available at <http://www.dcjs.virginia.gov/victims/documents/domviobr.pdf>.

64. Robert F. McDonnell, *Attorney General of Virginia, Domestic and Sexual Violence in Virginia: 2008 Annual Report* 4 (2008), available at http://www.oag.state.va.us/Programs%20and%20Resources/Domestic%20Violence/08_AttyGeneral_AnnualReport.pdf.

65. DWYER, *supra* note 22, at 486–87.

66. *Id.*

67. *Id.*

68. FLA. STAT. ANN. § 39.01(44) (West 2012). Section 1012 of the New York Family Court Act enables neglect charges against the victim, but under a heightened standard with attention given to the domestic violence victim's circumstances. See *Nicholson v. Scopetta*, 3 N.Y.3d 357, 371 (2004) (holding that “[w]hether a particular mother in these circumstances has actually failed to exercise a minimum degree of care is necessarily dependent on facts such as the severity and frequency of the violence, and the resources and options available to her”).

69. DWYER, *supra* note 22, at 444–45.

and the parent did not act to protect the child.⁷⁰ Termination can also occur when the parent “refused to accept that the abuse was occurring.”⁷¹ In some states, the law puts an arguably undue burden of responsibility on mothers when they fail to remove the child from an abusive situation in which the child is the direct physical victim.⁷² The child’s physical exposure to the domestic violence, as opposed to merely witnessing it, could increase the chances that the pregnant victim would be charged with failure to protect.

2. *Punishing Minorities and the Poor*

Criminalizing harm to a pregnant woman as child abuse brings another concern already well-established in the field of child abuse law: the disparate impact neglect charges have on minorities and poor women.⁷³ “Poor, non-white women” are “easy targets” of fetal protection statutes.⁷⁴ These classes of women cannot afford the level of care the unborn child might require to pass a neglect statute’s standard.⁷⁵ They are less likely to have access to or be able to afford prenatal care, such as vitamins.⁷⁶ And if a complication arises during pregnancy that requires bed rest, the woman may have to choose between working to keep the required level of income to support a child and her own care, or resting to preserve the unborn child’s health.⁷⁷

The current child abuse statutes that include unborn children contain a high risk for disparate impact, since their focus seems to be on punishing pregnant mothers who abuse drugs.⁷⁸ Minority and poor women are more likely to use public hospitals, where testing for drug use is more common.⁷⁹ In a 1990 report, the American Civil Liberties Union reported that “more than half of all arrests for prenatal exposure to harmful narcotics occurred in South Carolina,

70. 53 A.L.R. 5th 499, § 3 (1997) (citing multiple cases in which the parent whose parental rights the court terminates for failure to protect is the mother).

71. States will also terminate parental rights if the parent should have known about the abuse. Because the pregnant woman would actually be aware of the abuse against herself, and would either fail to act to protect the child or would refuse to accept that she was being abused, these two categories of “failure to protect” are most applicable. 53 A.L.R. 5th 499, § 4, 5 (1997).

72. *Id.*

73. Schroedel et al., *supra* note 7, at 110 n.154.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Schroedel et al., *supra* note 7, at 110.

79. *Id.*; Tuerkheimer, *supra* note 19, at 691 n.129 (quoting Dorothy E. Roberts, *Creating and Solving the Problem of Drug Use During Pregnancy*, 90 J. CRIM. L. & CRIMINOLOGY 1353, 1364 (2000)).

where all the women arrested were poor and a majority were African-American.”⁸⁰ These disproportionate numbers are affected by personal biases emerging from stereotypes, such as medical staff more likely to test a black pregnant woman for drug use than a white pregnant woman.⁸¹

An additional factor that cannot be forgotten is the already disparate numbers of minority women who suffer from domestic violence compared to white women.⁸² This increases a minority pregnant woman’s chances of being a substance abuser, because of the correlation between drug abuse and intimate partner violence.⁸³ To critics who argue that drug users continue to abuse drugs in disregard of their unborn child’s welfare, studies respond that resources are slim for the women who would seek help with substance abuse problems.⁸⁴ The American Civil Liberties Union reported a 1989 survey in New York City that found “[fifty-four percent of drug treatment facilities] refuse to accept pregnant women, [sixty-seven percent] refuse to accept pregnant women on Medicaid, and [eighty-seven percent] refuse to accept pregnant crack users on Medicaid.”⁸⁵ If a change from fetal abuse to child abuse laws did occur, the states with a compelling interest in protecting human life should consider that human life continues past birth, and work to help victims recover, not punish them.

B. Beneficial Extensions?

Extending violence against a pregnant woman to include a charge of child abuse could directly and negatively impact the mother, sacrificing her for the child’s welfare, but a combination of child protection law and domestic violence law could also catalyze a change in judicial approaches to intimate partner abuse. The high recidivism of domestic abusers—which does not account for unreported cases—indicates that prosecution is far from a complete solution. The comingling of laws might shift judicial and legislative focus toward rehabilitation, similar to the focus in child protection law and drug

80. Schroedel et al., *supra* note 7, at 110.

81. Tuerkheimer, *supra* note 19, at 691 n.129 (“A study of pregnant women in Pinellas County, Florida, found that despite similar rates of substance abuse, Black women were ten times more likely than whites to be reported to government authorities.”).

82. *Id.* at 691.

83. MacIntosh, *supra* note 23, at 194–95.

84. Renee I. Solomon, *Future Fear: Prenatal Duties Imposed by Private Parties*, 17 AM. J.L. & MED. 411, 417–18 (1991).

85. *Id.* (citing Memorandum from A.C.L.U. Found. Reproductive Freedom Project and Women’s Rights Project to A.C.L.U. Affiliates, *Discriminatory Punishment of Pregnant Women* 5 (Feb. 15, 1990)).

offender law. In cases where prosecution occurs against the pregnant woman, specifically in cases that would fall under the identification of battered woman syndrome, the additional defense that she was protecting her child's life could gain greater traction if the law recognizes the unborn child as a person when exposed to danger.

1. Interrelating Drug Law, Domestic Violence, and Child Protection Services

The impact of a change to child abuse would depend on the attitude of the jurisdiction toward domestic violence, similar to the importance of a jurisdiction's attitude toward drug offenders.⁸⁶ There are distinct similarities between drug offenders and domestic abusers. Domestic abusers are often drug users.⁸⁷ Both offenses often originate from a sense that the offender lacks control over his life, and there is a correlation with unemployment rates.⁸⁸ Both have high recidivism rates, and offenders in both categories often commit additional crimes.⁸⁹ Public perception of the two offenses differs on the question of government interference, but these perceptions are firmly rooted in morality. Drug regulation in the United States increased in the twentieth century War on Drugs, but the public's willingness for government restriction appeared before this, most notably during the Prohibition Era with an actual amendment to the United States Constitution.⁹⁰ Domestic violence, meanwhile, carried an acute awareness that regulation of such a crime involved intrusion into the private life.⁹¹ In a malignant patriarchal approach, violence against

86. See Jeannie Brooks et al., *Domestic Violence Courts and Batterer's Treatment Programs*, in THE BATTERED WOMAN SYNDROME 311 (2009).

87. *Id.* at 317.

88. *Id.* at 318 (citing L. FEDER & L. DUGAN, U.S. DEP'T OF JUSTICE, TESTING A COURT-MANDATED TREATMENT FOR DOMESTIC VIOLENCE OFFENDERS: THE BROWARD EXPERIMENT (2004), a study of domestic violence treatment programs in which "the number of months [a participant was] employed was significantly and inversely related to the likelihood of rearrest."); SUPREME COURT OF VA, EVALUATION OF VIRGINIA'S DRUG TREATMENT COURT PROGRAMS (PHASE 1) 18 (2004), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/c86c2b17a1cf388852570f9006f1299/82c03793ce42b31785256ec500553b91/\\$FILE/RD40.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/c86c2b17a1cf388852570f9006f1299/82c03793ce42b31785256ec500553b91/$FILE/RD40.pdf).

89. A strong factor for recidivism is the lack of rationality behind both offenders' actions. Drug abusers are driven by their addiction, and domestic abusers are often driven by emotion and the heat of the moment. Brooks et al., *supra* note 86, at 314 (explaining that "[m]any states have recognized that the domestic crimes need to be handled differently than non-domestic crimes in the court system . . . these crimes are emotionally charged and involve people who have relationships, which will not necessarily end with the adjudication of the case"). Drug offenders often are associated with theft, and domestic abusers often carry charges for assault and battery outside the home as well as arson.

90. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

91. Although drug regulation laws tend to address selling differently from using, this still stands in contrast to the blanket acceptance of domestic violence which extended so

women did not always rise to the level of a crime.⁹² English common law notoriously permitted the “rule of thumb”: limiting beatings of a wife or child to wooden instruments no thicker than the husband or father’s thumb.⁹³ The fact that this law was intended to reduce violence against women and children highlights the prevalent acceptance of domestic violence as a private issue.⁹⁴

While the contemporary criminal justice system tackles domestic violence more firmly than the 1980s, and our societal acceptance of an alleged male prerogative to control his female partner is sharply diminished, the rhetoric surrounding domestic violence still contains a reluctant sense of privacy and an unwillingness toward government interference.⁹⁵ This reluctance echoes in child protection law, as legislatures and courts prefer that child protective services place a greater emphasis on offering services and attempting rehabilitation than removing children from their homes.⁹⁶ Despite the privacy difference between drug offenses and domestic violence, the child protection focus on providing services matches the current preferred judicial approach to drug offenders: drug treatment programs.⁹⁷ Perhaps a commingling of rehabilitation-based child protection law with domestic violence law under a redefined pregnancy abuse statute would have a positive effect and further move the criminal justice system toward a domestic abuser treatment program.

Beginning in the 1970s, the criminal justice system experimented with “therapeutic justice” through drug treatment programs designed and run through drug courts.⁹⁸ These courts use court monitoring

far as to include marital rape. Margaret A. Rosenbaum, *The Prosecution of Domestic Violence: An Overview*, 68 FLA. B.J. 52 (1994); see also Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1492 (2008) (“Police customarily refused to arrest batterers. Instead, they either let violent incidents take their course or employed ineffective methods like informal mediation or ordering the offender to ‘walk around the block and cool off.’ If an arrest did occur, prosecutors typically declined to pursue criminal charges. When cases came to court, judges routinely denied relief, viewing domestic violence as a family matter to be worked out by the parties themselves.”).

92. Rosenbaum, *supra* note 91, at 52.

93. *Id.* at 52 n.2 (citing Terry Davidson, *Wife Beating: A Recurring Phenomenon Throughout History*, in *BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE* (1977)).

94. *Id.*

95. *Id.*

96. See *Nicholson v. Scopetta*, 3 N.Y.3d 357, 374 (2004) (acknowledging “the Legislature’s expressed goal of ‘placing increased emphasis on preventive services designed to maintain family relationships rather than responding to children and families in trouble only by removing the child from the family’”) (citing *Mark G. v. Sabol*, 93 N.Y.2d 710, 719, 695 N.Y.S.2d 730, 717 N.E.2d 1067 (1999)).

97. Brooks et al., *supra* note 86, at 311.

98. *Id.*

and community probation, along with testing, addiction treatment, and skill training to rehabilitate offenders and reduce recidivism.⁹⁹ The courts utilize local and private organizations to ensure as well-rounded a rehabilitation as possible, provided that participants are willing.¹⁰⁰ The underlying rationale of the courts is the understanding that lowered recidivism translates into lowered numbers of prisoners, lowered burdens on police and first responders, less litigation, and the difficulty to calculate social values that include a safer society and safer homes for the offender's family.¹⁰¹ Since June 2009, the Hanover, Virginia juvenile drug treatment court saw thirty-two participants, and at least twenty-two success stories that included receipt of a GED or high school diploma.¹⁰² Drug treatment courts already recognize the correlation between drug abuse and child abuse. Family Drug Treatment Courts across the nation accept "addicted parents charged with child abuse and neglect."¹⁰³ With the success of drug courts, states adopted the "problem-solving court" model to domestic violence.¹⁰⁴

99. EVALUATION OF VIRGINIA'S DRUG TREATMENT COURT PROGRAMS, *supra* note 88, at 8–9 (citing the Drug Courts Program Office, United States Department of Justice that "[d]rug treatment courts are specialized court calendars or dockets specifically designed to take advantage of the court's influence over ensuring the positive development in offender behavior. The outcome and goal of this special docket is the reduction in recidivism and substance abuse among nonviolent, substance abusing offenders by increasing their likelihood for successful rehabilitation through expedited, continuous, and intense judicially supervised treatment; mandatory periodic drug testing; and the use of graduated sanctions and other rehabilitation services").

100. *Id.*

101. *Id.* at 10 ("Because of the strong association between drug addiction and crime, judges have a legitimate interest in dispositions that fit the crime and best protect public safety. Additionally, courts must look for long-term solutions to crowded dockets largely caused by repeat drug offenders and limited sanctions such as incarceration that have proven ineffective in changing an addict's habits.").

102. VIRGINIA DRUG COURT ASSOCIATION (2012), *available at* <http://www.vdca.net/drug-court-spotlight> (last visited Mar. 30, 2014). The Virginia Legislature would emphasize that the success of a treatment program depends on its policies, including termination and eligibility, but this does not detract from the overall lower recidivism rate for participants. EVALUATION OF VIRGINIA'S DRUG TREATMENT COURT PROGRAMS, *supra* note 88, at 112 ("Comparison between dissimilar drug court programs is likened to comparing the achievements of an academically gifted classroom with the achievements of a mentally disabled classroom. While both may show significant achievement gains, they do not start at the same point and therefore cannot be compared. While recidivism is impacted by offender factors, recidivism is also impacted by program factors such as eligibility criteria and termination policies. Recidivism rates of smaller drug court programs are impacted by relatively minor variations (i.e., it would take fewer recidivist offenders to affect Staunton's recidivism rate and many more recidivist offenders to affect Roanoke's graduate recidivism rate).").

103. EVALUATION OF VIRGINIA'S DRUG TREATMENT COURT PROGRAMS, *supra* note 88, at 19.

104. Brooks et al., *supra* note 86, at 311.

Programs for domestic violence offenders show a wider discrepancy in success than drug treatment programs, but the overarching conclusion seems to be that men who attended the program frequently were less likely to be rearrested for domestic violence.¹⁰⁵ In one study of domestic violence offender treatment programs, the partners of men who attended three-month programs felt safer than those of men who attended a nine-month program.¹⁰⁶ A tentative conclusion to this data was the impact of a court review as a deterrent: when the review was closer in time to the offense, the deterrent was stronger.¹⁰⁷ This reflects a recurring theme in domestic violence literature: the suspicion that “batterers are not intrinsically motivated to change their violent behavior, but will do so when external pressures are in place.”¹⁰⁸ The high recidivism rate of domestic abusers strongly indicates that prosecuting an offender will not change his behavior, and as will be addressed later under the battered woman syndrome, their victims are unlikely to force an end to the cycle of abuse.¹⁰⁹ Given the similarities between drug offenders and domestic abusers, particularly the cycle each remains in and the recognition that the threat of prosecution is not enough to readjust their behavior, domestic violence rehabilitation programs might be a plausible alternative.¹¹⁰

The difficulty becomes incentivizing attendance.¹¹¹ A 2004 study by Feder and Dugan concluded that “the men who do not seem to be deterred from missing their court-mandated treatment, are also not

105. *Id.* at 318 (citing the Feder and Dugan study of domestic violence treatment programs for convicted offenders in which “[a]lmost one quarter [(twenty-four percent)] of men in both conditions [one year probation, or one year probation with attendance of a local Spouse Abuse Abatement Program] were rearrested within the year, but the men who attended all classes were significantly less likely to be arrested, while men who attended fewer classes were 2.5 times more likely than the control group to be arrested”).

106. *Id.* at 317 (citing the Gondolph 1999 study of four groups: “a pretrial group for a three month duration with additional service referrals; a three month post-conviction group . . . with referrals and assessments with women’s groups; and a nine month post-conviction group that included evaluation and in-house treatment for substance abuse issues, mental health, and women’s casework”).

107. *Id.* at 315-17 (“Psychologists know that learning theory tells us that the consequences must immediately follow the act or the intended punishment will not be successful in stopping the offending behavior.”).

108. In a Dalton 2001 study, the level of external pressure did not correlate with a change in behavior. This study involved a program with significant flaws, however, including a requirement that the participants pay for the treatment, and failure to address substance abuse or unemployment which are extreme predictors of domestic violence. Considering the correlations among unemployment, an inability to afford a program, drug use, and domestic violence, these absences were most likely fatal to the program’s success. Brooks et al., *supra* note 86, at 317.

109. *Id.*; *infra* Part II.B.2.

110. EVALUATION OF VIRGINIA’S DRUG TREATMENT COURT PROGRAMS, *supra* note 88, at 10.

111. Brooks et al., *supra* note 86, at 318.

deterred from the consequences of rearrest.”¹¹² In the drug courts, judicial oversight attempts to fulfill the reinforcing and incentivizing factors for participation.¹¹³ The Dalton and Feder and Dugan studies indicate this might not be enough for a domestic violence offender.¹¹⁴ If the offender is guilty of violence against a pregnant woman and of child abuse, however, child protection services becomes another powerful vehicle for incentive. Regardless of the majority judicial and legislative preference for keeping a child with his family, Child Protective Services carries an implicit threat to many parents that their child will be taken from them.¹¹⁵ For domestic abusers, who are usually motivated by desires for control, this is a danger that they could prevent simply by attending a few months of counseling, and therefore might be enough to encourage them to actually attend the program.¹¹⁶ If the program works, the mother and child gain a safer environment. If the program does not work, Child Protective Services will be invested in the child’s situation and monitor the danger level, including violence against the mother. The additional agency protection for the mother and child supports the change of fetal abuse to child abuse, but cases will still exist in which the woman does not feel adequately protected by the legal system and takes her defense into her own hands.

2. *An Extra Shield in Battered Woman Syndrome*

Many jurisdictions accept evidence of battered woman syndrome as a relevant factor for the jury to consider when evaluating a self-defense claim.¹¹⁷ Battered woman syndrome coincides with the theory

112. *Id.* at 319.

113. EVALUATION OF VIRGINIA’S DRUG TREATMENT COURT PROGRAMS, *supra* note 88, at 10 (explaining that the Office of the Executive Secretary of Virginia believes “[j]udicial oversight and regular monitoring is invaluable as it ensures offender accountability to conditions of probation and compliance with treatment. The enhancement provided by the drug court judge acts as a positive reinforcement from an authority figure and further reinforces the offender’s course to recovery. There is simply greater inducement to take drug treatment seriously when the power and authority of the court is directly involved”).

114. Brooks et al., *supra* note 86, at 317, 319.

115. *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 374 (2004).

116. Martin Daly & Margo Wilson, *The Evolutionary Social Psychology of Family Violence*, in HANDBOOK OF EVOLUTIONARY PSYCHOLOGY: IDEAS, ISSUES, AND APPLICATIONS, 448–51 (Charles B. Crawford & Dennis L. Krebs eds., 1998) (analyzing the underlying motivations of intimate partner abuse).

117. *State v. Price*, 2008 WL 5234351 at *1, *5–6 (Iowa Ct. App. 2008) (“Other jurisdictions have specifically found that expert testimony on battered women’s syndrome is relevant to the issue of a defendant’s claim of self-defense.”) (citing *State v. Hickson*, 630 So. 2d 172 (Fla. 1993); *Pickle v. State*, 280 Ga. App. 821, 635 S.E.2d 197 (Ga. Ct. App. 2006); *People v. Evans*, 271 Ill. App. 3d 495, 208 Ill. Dec. 42, 648 N.E.2d 964 (Ill. App. Ct. 1995);

of “learned helplessness,” an explanation that battered women are rendered almost incapable of acting in self-defense.¹¹⁸

To claim self-defense successfully, one bears the burden of proving that, when she resorted to violence, “she acted ‘reasonably’ in light of her perception of imminent and life-threatening danger.”¹¹⁹ Battered woman syndrome offers context for courts struggling to deal with an issue that while common in our society, our history of legal response is not well-designed to address.¹²⁰ Usually, battered woman syndrome provides evidence toward the woman’s state of mind.¹²¹ It can help courts account for her “perception” of a danger that, taken out of the context of cyclical abuse, would not be considered imminent.¹²² Battered woman syndrome also explains the victim-turned-defendant’s inability to retreat from what she perceived as a dangerous situation.¹²³

Controversy still surrounds the use of battered woman syndrome: how to introduce it, in which prong of the law to use it, how to instruct juries, and how to overcome social misunderstanding of the battered woman’s situation.¹²⁴ Battered woman syndrome is not technically a defense.¹²⁵ The defense in a case about a battered woman’s assault or homicide of her intimate partner is usually insanity, diminished capacity, heat of passion, or self-defense.¹²⁶

[E]vidence that the defendant was a battered woman is introduced to show what bearing such fact had on her mental state at the time

State v. Hundley, 236 Kan. 461, 693 P.2d 475 (Kan. 1985); Commonwealth v. Rose, 725 S.W.2d 588 (Ky. 1987), *overruled on other grounds* by Commonwealth v. Craig, 783 S.W.2d 387 (Ky. 1990); State v. Anaya, 438 A.2d 892 (Me. 1981); People v. Wilson, 194 Mich. App. 599, 487 N.W.2d 822 (Mich. Ct. App. 1992); State v. Edwards, 60 S.W.3d 602 (Mo. Ct. App. 2001); Boykins v. State, 116 Nev. 171, 995 P.2d 474 (Nev. 2000); State v. Kelly, 97 N.J. 178, 478 A.2d 364 (N.J. 1984); People v. Seeley, 186 Misc.2d 715, 720 N.Y.S.2d 315 (N.Y. Sup. Ct. 2000); State v. Koss, 49 Ohio St.3d 213, 551 N.E.2d 970 (Ohio 1990); Bechtel v. State, 840 P.2d 1 (Okla. Crim. App. 1992); Commonwealth v. Miller, 430 Pa. Super. 297, 634 A.2d 614 (Pa. Super. Ct. 1993); State v. Urena, 899 A.2d 1281 (R.I. 2006); Fielder v. State, 756 S.W.2d 309 (Tex. Crim. App. 1988)).

118. Incapable from a psychological viewpoint. Lenore Walker, *The Battered Women Syndrome Study Overview*, in THE BATTERED WOMAN SYNDROME 1, 8–9 (2009) (“The theory of learned helplessness suggests that [battered women] give up the belief that they can escape from the batterer in order to develop sophisticated coping strategies.”).

119. Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141, 144 (1995).

120. *Id.* at 145, 156–57.

121. *Id.*

122. *Id.* at n.19.

123. *Id.* at 169.

124. *Id.* at 160–61, 176–77.

125. 34 AM. JUR. PROOF OF FACTS 2d 1, § 3 (1983).

126. *Id.*

of the alleged crime. In essence, the claim is that, as a result of repeated beatings administered by the man, the woman finally reached the breaking point and assaulted or killed the man.¹²⁷

A negative consequence of using battered woman syndrome in self-defense claims arises when juries are unable to understand what caused the woman to break from the cycle of violence.¹²⁸ If the expert convinces the jury to accept her “learned helplessness” as why she was unable to leave the abusive situation, her sudden decision to use violence seems incongruous.¹²⁹ A battered woman on trial for assault and battery, or homicide or murder, seems to be inherently at odds with the learned helplessness that kept her in the abusive situation for long enough to reach the stage where she felt her life was in imminent danger.¹³⁰

If a statute protecting unborn children changed from fetal abuse to child abuse, the pregnant battered woman might have a stronger case for a sense of imminent danger, once the standard for protection of the child is higher than the standard for the fetus. The introduction of the legal child as an additional party in danger from the abuse in a pregnant woman’s case might help juries make the transition from “learned helplessness” to “fear for her life.” The woman’s defense could more easily be framed in the “traditional legal notions of justification or excuse,” which circumvents a dilemma most battered woman defenses face.¹³¹

Substantive criminal law fails to account adequately for homicides committed by women that do not fit the traditional male-patterned homicide. A woman’s acts might be understandable in light of mitigating facts, yet may fall outside of substantive criminal law doctrines such as passion and provocation, self-defense, insanity, and so-called diminished capacity. She is forced to engineer a way to present her reality within the confines of a structure that excludes her life experience.¹³²

127. *Id.*

128. Griffith, *supra* note 119, at 181.

129. *Id.*

130. *Id.* (“In such cases, a victim of domestic violence who is now on trial as a criminal defendant is confronted with evidence that the violence immediately preceding the homicide was no different than any other episode of violence between the parties. The woman who has fought back and killed her batterer is challenged to articulate what was unique or different about the final cycle of abuse that caused her to use deadly force against her batterer. Often, she is unable to do so, and her self-defense claim is undermined.”).

131. *Id.* at 157.

132. *Id.* (quoting Laura E. Reece, *Women’s Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA WOMEN’S L.J. 53 (1991)).

A case in which the woman's acts can be framed as protecting her unborn child would fit into the traditional understanding of defense-motivated violence.

In a self-defense case, the abuse the battered woman suffered most likely would have to be physical abuse.¹³³ Emotional or psychological abuse is difficult to quantify.¹³⁴ Most courts require a physical showing of harm to a victim.¹³⁵ If the victim cannot prove physical harm to herself, she would be unable to gain redress in a suit against her abuser.¹³⁶ In a case where she is the defendant, and the majority of her story rests on emotional or psychological abuse, she would be unable to meet the burden of proof regarding imminent danger.¹³⁷ If a statute changed from fetal abuse to child abuse, however, she might be able to mount a more successful claim given the impact on the child.¹³⁸ A case might be made that the abuse negatively affected the fetus, since the health of the one impacts the health of the other.¹³⁹ When a pregnant woman suffers extreme stress, the fetus can suffer physically in response.¹⁴⁰

This requires an alignment of the stars: that the battered woman breaks from her learned helplessness during pregnancy, and that juries are more willing to accept the timing of this break, especially if abuse already occurred during the pregnancy. In a state that changed fetal abuse to child abuse, the jury might be more willing to accept the explanation that the longer the woman was pregnant, the more she viewed the fetus as a child in need of protection. This defense, of course, carries the danger that the pregnant woman would be charged with neglect for failing to remove the child from the abusive

133. Even though emotional and psychological abuse can be constant and the true basis for the sense of helplessness. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 29–30 (2004).

134. Jeffrey R. Baker, *The Failure and Promise of Common Law Equity in Domestic Abuse Cases*, 58 LOY. L. REV. 559, 591 (2012).

135. *Id.* at 593–94.

136. *Id.* at 595–96.

137. *Id.* at 590 (explaining that “[v]ictims of emotional abuse have increased chances of diverse mental health complications, including depression, anxiety, post-traumatic stress disorder, and suicidal ideation. Women exposed to domestic abuse report higher incidents of intrusive thoughts, ruminations and avoidance, and symptoms of post-traumatic stress disorder. More intense trauma symptoms occur in those who have survived more severe violence”).

138. Renee Gardner, *Just Relax! Moms' Stress Is Linked to Baby's Health*, ENVIRONMENTAL HEALTH NEWS (Aug. 31, 2011), <http://www.environmentalhealthnews.org/ehs/news/2011/08/2011-0824-moms-stress-kids-health/>.

139. *Id.*

140. *Id.*

situation.¹⁴¹ The positive impacts on a battered woman's defense must be weighed against this risk.

Evidence suggests that this risk, or even the need to explain the break from learned helplessness, might not complicate a pregnant battered woman's defense.¹⁴² Battered woman syndrome has three phases.¹⁴³ The first phase includes "minor" physical abuse.¹⁴⁴ The second phase is the deadly or life threatening one, in which the intimate partner "loses control and inflicts a serious beating on his [partner]. A stage two incident may consist of prolonged beating that seriously injures or even kills the woman."¹⁴⁵ The third stage seems to be the entrapment stage, in which the batterer "regrets" his behavior and acting in a caring way, convincing his victim that he has changed.¹⁴⁶ This cycle continues as long as the second stage does not kill the victim, or the victim does not escape.¹⁴⁷ Research suggests that the second stage often occurs during a victim's advanced stage of pregnancy.¹⁴⁸ The stars, therefore, have a good chance of aligning in the battered pregnant woman's favor.

C. Constitutional Concerns

Although the constitutional issues regarding a woman's right to control her body are temporarily set aside for the purposes of this Note, once a statute chooses to identify a subject as a "child," parental constitutional rights immediately come into play.¹⁴⁹ The state has the power to create legal relationships, and provide the protection associated with each relationship.¹⁵⁰ Our society decided that natural parents are the preferred guardians for a child, and placed the power of the Constitution and the Due Process Clause behind this custody right.¹⁵¹ This right can be terminated if the best interests of the child

141. See *supra* text accompanying notes 45–52.

142. 34 AM. JUR. PROOF OF FACTS 2d 1, § 2, § 3 (1983).

143. *Id.* § 2.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* § 27.

148. 34 AM. JUR. PROOF OF FACTS 2d 1, § 2 (1983) (citing Donald L. Creach, Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615 n.39 (Feb 1982)).

149. See *supra* Part I.

150. DWYER, *supra* note 22, at 11.

151. *Id.* at 385–88; see also U.S. CONST. amend. V, XIV; 53 A.L.R. 5th 499, § 2 (1997) (stating that "[i]n the law concerning custody of minor children, no rule is more firmly established than the right of a natural parent to custody of his or her child. It is a fundamental liberty protected and guaranteed by the due process clause of the United States Constitution").

require it, but “[p]arental rights may not be terminated unless there are grounds shown by clear, cogent, and convincing evidence that such termination is in the best interest of the child.”¹⁵²

Changing a fetal abuse statute to a child abuse statute could create a situation in which parental rights can be terminated before the child is even born. In some states, domestic violence laws would need to account for the fetus’s presence in the mother’s womb.¹⁵³ Even if the fetus is unharmed by the abuse, a redefinition of “child” in child abuse law to include a fetus has wide reaching impacts on parental rights.¹⁵⁴ Not only the abuser’s parental rights would be impacted, however. The mother could face losing custody before her child is even born, if the concerns addressed above about failure to protect, neglect, and other abuse come to pass.¹⁵⁵

In an attempt to preserve parental constitutional rights, the law usually requires reasonable alternatives to removal from parents.¹⁵⁶ Two possible outcomes appear if a statute changes fetal abuse to child abuse. The state could continue to emphasize parental rights in a mis-construction of the child’s best interests, and waste resources, time, and the child’s well-being trying to fix a situation. Alternatively, the early intervention could save time, resources, and well-being by preventing the child from entering a directly abusive situation.

CONCLUSION

Domestic violence is a serious issue, with victims who are seen and unseen. Victims tend to under-report their abuse, and despite the legal system’s good intentions, victims who do report often do not receive the help they actually need.¹⁵⁷ States that changed their child abuse statutes to include fetus abuse opened up a new avenue through which the child and the mother can seek protection. Redefining child abuse to include fetus abuse could benefit women who introduce the battered woman syndrome into evidence when they see no other

152. 53 A.L.R. 5th 499, *supra* note 70, at § 2.

153. ALASKA STAT. ANN. § 47.10.011 (deciding that a child exposed to domestic violence is grounds for terminating an abuser’s parental rights).

154. *Id.*

155. This is not an unreasonable fear. In Illinois, drug use and “habitual drinking” during pregnancy is a basis “for waiving the requirement of maternal consent in an adoption proceeding.” DWYER, *supra* note 22, at 650.

156. *Id.* at 641, 650.

157. *Domestic Violence Facts*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, <http://www.ncadv.org/files/DomesticViolenceFactSheet%28National%29.pdf> (last visited Mar. 30, 2014); National Network to End Domestic Violence, *Domestic Violence Counts 2010: A 24-Hour Census of Domestic Violence Shelters and Services*, <http://nnedv.org/resources/census/2010-report.html> (last visited Mar. 30, 2014).

viable protection than violence. The risk of parental rights termination could motivate domestic abusers to attend rehabilitation programs. At the very least, attention to an abusive situation by an additional agency such as Child Protective Services could provide one more rung in a victim's support system. Although critics of such a definition change traditionally cite abortion rights concerns for why this statutory phrasing is a bad idea, dangers exist outside the constitutional abortion issue which cannot be balanced out by the positive effects. The victim could be further victimized through neglect or failure-to-protect prosecution. Disparate impact on pregnant women in minority groups is a serious concern with fetal abuse claims, which would only increase in severity when the protection toward the fetus increased. And while the cooperation among agencies such as Child Protective Services, the courts, and even hospitals could be beneficial, our social services are stretched thinly already and one cannot assume that an increase in their responsibilities would create an effective solution. Until our society can redefine its interpretation of a child's best interests or our attitude toward domestic violence as a systemic, not private, issue, this statutory redefinition will not have the positive impact it could.

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