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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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STATE OF FLORIDA,

Petitioner,

vs.

KAWANA ASHLEY,

Respondent.

Case No. 87,719
2d DCA Case No. 95-0510

KAWANA ASHLEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 87,750
2d DCA Case No. 95-0510

RESPONDENT/PETITIONER'S INITIAL BRIEF

AND ANSWER BRIEF

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INTRODUCTION

Kawana Ashley, a single, 19 year old, mother of a three year old boy, unhappily pregnant and desperate, took a gun and shot herself in the stomach on March 27, 1994. The State labels this self-destructive action as either attempted suicide or attempted abortion. (R. 98, 103). Under either label, it was a life-threatening action that would have qualified her **for** a life saving abortion at any stage of pregnancy, even before Roe v. Wade, 410 **U.S. (1973).** She was taken to the hospital, where among other medical treatments, an emergency Cesarean section or hysterotomy[1] was performed. She delivered, at 25 or 26 weeks of pregnancy, a nonviable infant who was born alive and subsequently died. (R. 3-4). Ms. Ashley recovered, however, and was released from the hospital.

The State of Florida has decided that Ms. Ashley's actions constitute more than a self-destructive tragedy; that she committed a crime. The problem this case presents is that there exists no criminal statute in Florida that addresses or can **be** twisted to fit this fact pattern. By rewriting existing statutes to apply to Ms. Ashley's behavior, the State preempts the legislative process. Moreover, all the Florida criminal statutes they propose to use fit the facts so imperfectly that fundamental rudiments of due process are violated. As early as The Federalist Papers, the framers of our Constitution recognized --

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[1] Defendant believes this was a hysterotomy because the fetus was pre-viable. See Cunningham, et al., eds., Williams Obstetrics 683 (19th ed. 1993).

with the explicit guarantees against ex post facto laws and bills of attainder -- that due process must first and foremost accord the accused forewarning that her actions constitutes a specific crime.

Ms. Ashley is charged with third degree murder **or**, in the alternative, manslaughter by criminal negligence. The State describes her act of shooting herself alternatively as either an abortion or an attempted suicide. (R. 98, 103). Yet, attempted suicide is not illegal in Florida, and a woman who seeks or self-**induces** an abortion, is not liable under Florida's criminal abortion statutes, nor Florida's feticide statute.

In order to charge murder or manslaughter in Florida, the State has to charge that **Ms**. Ashley killed a "human **being**," However, the State of Florida does not allege that a fetus, viable or nonviable, is a human being. Rather, the State argues that if any fetus is "born alive" -- whether at **18** or 30 weeks of pregnancy[2] -- then, for the purposes of the homicide statutes, it will be deemed to have been a human being at the time of any self-mutilation that affected the fetus prenatally.

Despite well-established Florida law which immunizes parents from tort actions brought by their children, Ard v. Ard, **414** So. 2d 1066 (Fla. 1982), the lower court held that "a child born alive[3] has a cause of action in tort against his or her mother

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[2] a full term pregnancy is 40 weeks. See generally Williams Obstetrics (19th ed. 1993).

[3] **As** was the case here, a fetus can be "born alive" even if it is not viable. See Roe v. Wade, 410 U.S. at 160, 163 (1973)

for the mother's negligent conduct that results in prenatal injury."[4] Slip op. at 13. The lower court then imported this newly invented duty of care creating tort liability into the criminal law to uphold both the manslaughter and third degree murder charges against Ms. Ashley.[5] This prosecution would have this Court establish for the first time, then, not only that the Florida parental immunity doctrine be overturned, but also that, "`[t]he [pregnant woman] will be held to the same standard **of** care [to her fetus] as that required **of** her once the child is born.'" Slip op. at 13, quoting Bonte, 616 A.2d at 466.

But the lower court provides **no** guidance as to the scope of this new standard, It would appear, though, that any volitional act of self-destruction **or** self-mutilation by a pregnant woman, if severe enough to **bring** on premature labor or cause an abortion could subject her to prosecution for homicide. (R. 62). a woman could have failed to stay on bed rest, **or** had sex against doctors orders. If such activities brought on premature delivery, liability would attach.[6] Under this broad standard, any infant

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(distinguishing a fetus **born** alive from one which has obtained the stage of viability); Colautti v. Franklin, 439 U.S. 379, 387 (1979) (viability requires potentiality of meaningful life, not merely "momentary survival").

[4] Only one other court in the country has found tort liability under these circumstances, see Bonte v. Bonte, 616 **A.2d** 464, **136 N.H. 286** (1992), and another rejected this conclusion, Stallman v. Youngquist, 531 **N.E.2d** 355 (Ill. 1988).

[5] The court went on to dismiss the murder charge for other reasons. See infra.

[6] See People v. Stewart, No. M508197, Reporter's Transcript, at 4 (Cal. Mun. Ct. San Diego Cty. Feb. 26, 1987) (pregnant woman

who is injured as a result of a mother's actions prior to the birth and who lived for one minute **or** one month and then died, -- but who was not viable and never had a chance for meaningful life -- could still be considered a victim of murder by its mother,

The new standard of care which is sought to be established by this case is also unsupported **by** the common law "born alive" doctrine. At both common law and under the Model Penal Code, the "born alive'' rule excludes the pregnant woman's actions which intentionally or accidentally terminate a pregnancy. Neither the prosecution nor the court below can point to any court precedent in this country -- **or** in Great Britain -- which applied the born alive rule to hold a pregnant woman criminally liable for acts she has done to herself. While the Florida legislature could seek to abrogate the common law rule, it has not done so.

Ms. Ashley does not argue that the State of Florida could not design legislation to hold that a pregnant woman owes a duty of care to her fetus that is recognizable under the criminal law; only that it has not. The **lower court's** application of the existing Florida criminal statutes to Ms. Ashley's aberrant conduct[7] directly conflicts with this Court's prior decisions,

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charged under a criminal child support statute for failing to follow doctor's advice to get bed rest, to abstain from sexual intercourse and to seek prompt medical attention when she experienced bleeding; charges dismissed).

[7] Such conduct is distressingly common. At least one study prior to Roe reported that approximately one-fourth of female minors who attempt suicide **do** so because they are, or believe they are, pregnant, Teicher, "a Solution to the Chronic Problem of Living: Adolescent Attempted Suicide," in Current Issues in

cannot be justified by any Florida statute, and is contrary to the intent of the Florida legislature to treat a pregnant woman differently from third parties who harm a fetus, as evidenced in the Florida feticide statutes abortion statutes and parental immunity doctrine.

Not only does the prosecution seek to depart from settled law, it also asks that this new criminal theory be applied retroactively to Kawana Ashley shooting herself, thereby operating as an ex post facto law. But it is **a** fundamental tenet of our constitutional protections that unforeseeable interpretations of criminal law cannot be applied retroactively. Even if this court decides to create this new duty **of** care, then, the charges against Ms. Ashley must **be** dismissed. Because this prosecution would represent a "radical incursion upon existing law," see Johnson v. State, 602 ***So.*** 2d 1288, 1294 (Fla. 1992), Ms. Ashley asks this Court to:

> decline[] the [prosecutor's]invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread.

Id. at 1297.

Adolescent Psychiatry 129, **136** (J. Schoolar ed. 1973). Here, abortion is legal in Florida but was inaccessible to Ms. Ashley because she had **no** money to obtain one. Recently, acts **of** self-mutilation have become the subject of study when they involve the **poor** and desperate. See Herbert J. Buchsbaum, M.D., and Pelham P. Staples, Jr..D., "Self-Inflicted Gunshot Wound to the Pregnant Uterus: Report of Two Cases," 65 Obstetrics and Gynecology 32S (March 1985); Franger, M.D., et al., 'Abdominal gunshot wounds in pregnancy," 160 Amer. J. Obstetrics & Gynecology 1124 **(1989).**

STATEMENT OF FACTS

The State alleges that on March 27, 1994, Ms. Ashley, a nineteen year old mother of one, who was approximately 25 to 26 weeks pregnant, shot herself in the stomach. (R. 1-6). She did this at her home, near other people, and did not refuse hospital care. (R. 3). When Ms. Ashley was taken to the hospital, among other medical treatments, an emergency Cesarean section was performed delivering her infant. According to the prosecution, the infant died on April 11, 1996 as the result of complications of prematurity. (R. 1-6). Although viability can occur anytime between 24-28 weeks of pregnancy, see Roe, 410 U.S. at 160; Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992), it is obvious from its death that **the** fetus here was not viable, and different doctors may make different viability determinations. See Fla. **Stat.** s 390.001(5) (viability is when life "may with a reasonable degree of medical probability be continued indefinitely outside the womb"); Roe, 410 at 163.

On August 26, 1994, Ms. Ashley was charged with manslaughter under Fla. Stat. § 782.07 (1995) and third degree murder (felony murder) under Fla. Stat. § 782.04 (4) (1995) for the **death** of her newborn caused by her shooting herself while she was pregnant.[8] The statutes provide as follows:

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[8] Both crimes charged constitute second degree felonies which are punishable by a term of imprisonment not exceeding 15 years. Fla. Stat. § 775.082 (3) (c) (1995).

***782.07* Manslaughter**

The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775,084.

* * *

782.04 Murder

. . .

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, **or** in the attempt to perpetrate, any felony other than any:

[list of excluded felonies]

is murder in the third degree and constitutes a felony of the second degree, punishable **as** provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. §§ 782.07 and 782.04 (4) (1995) (emphasis added).

STATEMENT OF THE CASE

On November 23, 1994, Ms. Ashley filed a Motion to Dismiss the Information.[9] After hearing argument on January 23, 1995, the trial court granted Ms. Ashley's motion ***to*** dismiss the third degree murder charge, but denied her motion to dismiss the manslaughter charge. (R. 168-173). The State appealed and Ms. **Ashley** cross-appealed to the Second District Court of Appeal.

The Second District Court of Appeal affirmed the trial court's order on March 22, 1996. Slip op. at 7-10. The court

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[9] The State's Motion to Strike the Motion to Dismiss was denied by the trial court, (R. 112), and was abandoned by the State on appeal.

held that the third degree murder charge must be dismissed because women who seek to self-induce abortions are not liable for criminal abortion, the only underlying offense in the third degree murder charge.[10] The court also held, however, that Ms. Ashley could be charged with manslaughter, and then certified all issues in the case to this Court as questions of great public importance. Both sides petitioned this court for review.

SUMMARY OF ARGUMENT

Ms. Ashley's desperate and dysfunctional action in shooting herself in the stomach is certainly self-destructive but it **does** not constitute third degree murder or manslaughter under existing Florida law. And it is the legislature, not the courts, that must write criminal statutes.

Ms. Ashley cannot be liable for third degree murder for three reasons. First, third degree felony murder cannot be sustained when the underlying felony charged is criminal abortion. As the trial court found, (R. 171-172), such a charge is internally inconsistent; the underlying felony, criminal abortion, requires a specific intent to cause fetal death, whereas in third degree murder, death is "accidental." Hieke v. State, 605 *So.* 2d 983, 983 (Fla. 4th DCA 1992).

Second, as the Second District Court of Appeal held, slip op. at 7-10, Florida's criminal abortion statutes have never

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[10] The State's brief is somewhat confusing on this point; State's **Br.** at 6-7; it was the trial court, not the Court **of** Appeals, that held that the criminal abortion statute could be applied to Ms. Ashley. The appellate court held to the contrary.

imposed liability on the pregnant woman herself. Therefore, Ms. Ashley cannot be liable for third degree murder where she cannot be found guilty of the underlying offense.

Finally, the plain language of the Florida third degree murder statute precludes its application to a woman's actions on her own body, because it literally requires, as a precondition, the killing of one person by another separate person. On March 27, 1994 there was one human being, Ms. Ashley, who existed. The fetus which existed inside her was not a separate human being, and, **as** the record demonstrates, was not even viable. (R. 4) (death was "result **of** complications of prematurity").

In order to **create** a human being retroactively to the time of the self-mutilation, the State relies on the "born alive" rule cited **by** the Second District Court of Appeal. But the "born alive" rule is applied in a novel way here; it has never before been used to hold a pregnant woman criminally liable when she causes harm to herself and, thereby, almost inevitably to any fetus, viable or nonviable, she may or may not know is inside her. In fact, all previous attempts to extend the "born alive" rule to hold a pregnant woman criminally liable for prenatal conduct have been explicitly rejected by the Florida courts and, indeed, by every other court in the nation to address the issue. Moreover, application of the born alive rule to establish liability is inconsistent with common law tort development in Florida, which, unlike most states, immunizes parents from tort liability to their children. Ard, 414 So.2d at 1070.

In addition, the lower court's decision upholding the manslaughter charge must be reversed for two reasons. Like the murder statute, the manslaughter statute requires the killing of one person by another separate being. When Ms. Ashley shot herself, her fetus was part of her own body, neither separate nor capable of independent sustained survival. For the same reasons outlined above, the "born alive" rule cannot be applied here to criminalize Ms. Ashley's self-destructive act.

Second, Ms. Ashley could not be found to have violated any duty of care she owed to her fetus where she could have met that duty of care had she been informed of all her options. Based on her self-destructive actions, Ms. Ashley was eligible for an abortion, an action which is statutorily exempt from any duty of care she owed her fetus.

Moreover, a ruling that a pregnant woman owes a duty of care to her fetus that can be enforced by the third degree murder or manslaughter statutes, would raise many serious constitutional concerns. Under this rationale, a prosecution for manslaughter would lie for the death of a non-viable fetus at 16 weeks gestation, so long as the fetus was born alive and lived for 30 seconds, as well as for the death of a 15 year old teenager where the death was caused by an injury inflicted prenatally. Obviously, such a broad statute fails to provide adequate warning of prohibited acts. But even accepting, for arguments sake, that such a statute or crime is constitutional, the crime cannot now be invented and applied retroactively in this case. Post hoc

recognition of this duty of care would constitute an "unforeseeable judicial enlargement of a criminal statute" which would operate as an ex post facto law in violation of Ms. Ashley's constitutional right to due process. See, e.g., Bouie v. City of Columbia, 378 U.S. 347, 353 (1964); Wilson v. State, 288 So. 2d 480, 482-83 (Fla. 1974). In addition, the prosecutor's theory violates privacy guarantees, as well as guarantees against cruel and unusual punishment, by imposing or enhancing penalties based upon the fact that a women is pregnant.

ARGUMENT

The State of Florida does not deny that this is a very unusual case, unusual in the facts, and unusual in the way that it seeks to apply Florida criminal statutes to these facts. Recognizing that there are some issues of statutory interpretation, the State asks this Court to review the statutes with one standard in mind -- whether criminalizing Ms. Ashley's behavior would be in the "public benefit." State's Br. at 13. This novel standard of construction cannot be supported.

Rather, it is beyond dispute that under the "principle of lenity" adopted by the Florida Legislature, "courts [must] strictly construe criminal statutes." Fla. Stat. § 775.021(1) & (4)(b) (1995); Johnson, 602 So. 2d at 1290. In so doing,

> only those terms which are "clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature" are to be considered as included in the statute.

Id. at 1290 (citation omitted). See also id. at 1293 ("[l]egislative intent is the polestar by which the courts must

be guided" in construing a statute). Accordingly, "'when the language [of a statute] is susceptible to differing constructions, [the statute] shall be construed most favorably to the accused.'" Id., quoting Fla. Stat. § 775.021(1); Flowers v. State, 586 *So.* 2d 1058, 1059 (Fla. 1991) (where penal statute admits of two constructions, "that which operates in favor of liberty is to be taken") (citation omitted). Therefore, any doubt as **to** whether the Florida third degree murder or manslaughter statutes should apply to the circumstances in this case must be resolved in favor of **Ms. Ashley.** Fla. Stat. § 775.021(1).

I. THE COURT OF **APPEALS WAS** CORRECT **IN HOLDING** THAT THE THIRD DEGREE MURDER CHARGE ***CANNOT STAND.***

Third degree murder is defined as "the unlawful killing of a human being . . . without any design to effect death [while committing or attempting to commit] any felony" other than those listed in the statute.[11] Fla. Stat. § 782.04 (4) (emphasis added). The underlying felony charged in this case is "the felony offense of abortion," (R. 1), which is found at **Fla.** Stat. § 390.001.

There are three reasons why third degree murder cannot apply

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[11] The felonies excluded under Fla. Stat. § 782.04 (4) are trafficking, arson, sexual battery, robbery, burglary, kidnaping, escape, aggravated child abuse, aircraft piracy, unlawful throwing, placing, or discharging of a destructive device or bomb, or distribution of a controlled substance. Unlawful killing during the commission of one of these felonies is considered first degree felony murder under Fla. Stat. § 782.04 **(1)(a).**

to these facts. First, the underlying felony, criminal abortion, requires a specific intent to cause death, whereas in third degree murder, death is "accidental." Second, a woman cannot be charged for self-inducing an abortion, so there exists no requisite felony for the third degree murder charge. Third, murder requires two human beings in existence at the time of the act; in this case, only one human being existed, Ms. Ashley, who shot her own body.

A. The Underlying Felony Offense Of Criminal Abortion Contradicts The Third Degree Murder Charge.

The strain of charging this action under the murder statute is recognized by the trial court's holding, (R. 170-172), that the charge **of** third degree murder cannot stand where the elements of the underlying felony are inconsistent with the elements of the third degree murder statute. The third degree murder statute provides an enhanced penalty for accidentally causing a death while in the commission of another felony. Fla. Stat. §782.04(4); Hieke, 605 So. 2d at 983 ("[U]nder third degree [murder], the death is accidental.") (citations omitted).[12] Yet the underlying felony Ms. Ashley is alleged to have committed, criminal abortion, requires a specific intent of terminating pregnancy "other than to produce a live birth or remove a dead fetus." Fla. Stat. §390.011(6) (emphasis added). Death *of* the

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[12] See also Mahaun v. State, 377 So. **2d 1158,** 1160 (Fla. 1979) (third degree murder is an unlawful killing committed by a person engaged in an nonenumerated felony "when there is no premeditated design to effect the death of the victim") (emphasis added).

fetus in a criminal abortion is not "accidental" but is rather the intent of the act. Simply trying to end a pregnancy or cause premature labor is not covered by Florida's definition of abortion. Just as second or first degree murder -- neither of which are enumerated felonies under the first degree felony murder statute -- can not be the underlying felony for third degree murder, neither can criminal abortion.[13] Death could not be accidental if Ms. Ashley intended to cause the death of the fetus by abortion. "That is an oxymoron." Hieke, 605 So. **2d** at 983.

In Hieke, the court overturned a conviction for solicitation to commit third degree murder because "there cannot be a solicitation to kill someone without any design to effect death because one cannot solicit an unintentional death." Id. See also Miller v. State, 430 So. 2d 611, 615 (Fla. 4th DCA 1983). Similarly here, if the death of the infant due to prematurity after the termination of pregnancy was accidental, then Ms. Ashley was not attempting an abortion. On the other hand, if Ms. Ashley possessed the requisite intent to kill the fetus to constitute an abortion,[14] she could never be acting accidentally

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[13] The prosecution fails to address this contention when it argues that an abortion is a proper underlying felony third degree murder because it is a nonenumerated felony under Fl. Stat. § 782.04(4). If this were true, then both first and second degree murder could properly be underlying felonies as well.

[14] As shown below, even with the requisite mens rea, the charge of abortion cannot lie where the actions are taken by the woman herself.

as required for a charge of third degree murder. See Hieke, 605 So. 2d at 983,

B. The Florida Legislature Has Never Imposed Criminal Liability on a Woman Who Seeks an Illegal Abortion or Who Intentionally Self-Induces an Abortion or Accidentally Causes Miscarriage.

As the Second District Court of Appeals held, the Florida Legislature has never imposed criminal liability on a woman who obtains an illegal abortion, who intentionally self-induces an abortion, or who accidentally causes a miscarriage. No conviction of a woman obtaining **or** attempting to obtain an illegal abortion has **ever** been upheld in this state. This immunity for the pregnant woman in Florida has its roots in the common law, and Florida's current criminal abortion statute, enacted in 1979,[15] did nothing to abrogate it. Slip op. at 7-10.

1. Common Law

As the court below recognized, slip op. at 8, at common law a woman was immune from criminal penalties for obtaining an abortion or ending her own pregnancy, and none of the statutes

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[15] The current statute provides:

> (10) (a) [a]ny person who willfully performs, or participates in, a termination of a pregnancy in violation of the requirements of this section is guilty of a felony of the third degree . . . (b) [a]ny person who performs, or participates in, a termination of a pregnancy in violation of the provisions of this section which results in the death of the woman is guilty of a felony of the second degree . . .

Fla. Stat, § 390.001 (10) (emphasis added).

criminalizing abortion adopted in America between 1821 (when Connecticut passed the first statute) and 1841 punished the woman herself in any way. James Mohr, Abortion in America at 20-45 (1978) (hereafter "Abortion in America").

The immunity was not limited, as the State suggests, State's Br. at 14, to those circumstances where someone else performed the abortion, but, as the lower court makes clear, also covered those circumstances where the woman self-induced an abortion. Slip op. at 8, quoting State v. Carey, 76 Conn. 342, 56 A. 632, 636 (Conn. 1904) ("At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage was an indictable offense, but it was not an offense in her to so treat her own body, or **to** assent to such treatment from another.") (emphasis added). See also, e.g., State v. Prude, 24 So. 871 (Miss. 1899) (criminal abortion statute not applicable where pregnant woman herself takes a substance or uses an instrument with intent to destroy the child in her womb).

While some states took action in the mid-nineteenth century to eliminate this common-law immunity, most, like Florida, declined to do so. Abortion in America at 205. See also e.g., Roe v. Wade, 410 U.S. at 151; Prude, 24 So. 871; In re Vince, 67 A.2d 141, 144 (N.J. 1949) (woman not criminally liable for abortion; "the statute regards her as the victim of crime, not as the criminal"); Rodman et al., The Abortion Question 174 (1987); Witherspoon, "Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment," 17 St. Mary's L. J. 29,

58-61 (1985).

2. The Florida Abortion Statutes Have Never abrogated the Common Law Rule Exempting the Presnant Woman from Liability

As the lower court found:

> [T]he presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.

Slip op. at 9, citing Thornber v. City of Fort Walton Beach, *568 So.* **2d** 914, **918** (Fla. 1990). In this case, not only is there no indication that the Legislature intended to alter the common law,[16] a careful review[17] of the history of the abortion statutes shows the common law immunity for the pregnant woman was

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[16] In contrast to Florida, when other state legislatures did abrogate the common law immunity of the pregnant woman herself, they did so in no uncertain terms. See e.g., N.Y. Penal Law of 1875, c. I, Title 2, § 10 (enacted as c. 181 of 1872 N.Y. Laws) (providing that "[a]ny woman pregnant with child who shall take any medicine, **drug,** substance or thing whatever, or shall use or **employ,** or suffer any other person to use **or** employ, **or** submit to the use **or** employment of any instrument or other means whatever, with the intent thereby to produce the miscarriage of the child of which she is so pregnant . . ." would be guilty of criminal abortion) (emphasis added). See also Abortion in America at 222-23 (1873 Minnesota law made the woman who consented to an abortion **as** well as the woman who "perform[ed] upon herself any operation of any sort or character whatever, with the intent thereby to cause or produce miscarriage, **or** abortion, **or** premature labor" subject to punishment for the first time under Minnesota law) (emphasis added).

[17] We apologize to the Court for the length of the discussion that follows but a detailed review of the legislative history is necessary.

carefully retained by the Legislature.

-- 1868 Statutes

The State admits that, State's Br. at 17, the first statutes criminalizing abortion in Florida, adopted by the first Florida Legislature in 1868 and remaining in effect **for** over 100 years, did not apply to a pregnant woman who either sought an illegal abortion or self-induced an abortion: "[T]he mother is not contemplated as one of the class of aborters, not being mentioned as one in the criminal statute. . . . [N]owhere is there a provision, express **or** implied, for punishing women who abort themselves, either directly or indirectly."[18] Walsingham v.

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[18] The full text of those statutes provided:

> Whoever with intent to procure miscarriage of any woman unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine or other noxious thing, or unlawfully uses any instrument **or** other means whatever with the like intent, or with like intent **aids** or assists therein, shall, if the woman does not die in consequence thereof, be guilty of a felony of the third degree . . .

Laws **1868**, c. 1637, subc. VIII, § 9, amended by 71-136, §770, repealed by 72-196 (emphasis added).

> Every person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever or shall use **or** employ any instrument, **or** other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, **or** shall have been advised by two physicians **to** be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter, a felony in the second degree . . .

Laws 1868, c. 1637, subc. III § 11, amended by 71-136, § 718, repealed by 72-196 (emphasis added).

State, 250 So. 2d 857, 863 (Fla. 1971) (Ervin, J., concurring). The State admits this despite the use of the terms "whoever" and "every person" to describe the perpetrator.

-- 1972 Statute

In 1972, this Court held the 1868 statutes unconstitutional because the phrase "necessary to preserve the life of such mother"[19] was vague in violation of the due process clauses of both the Florida and United States Constitutions.[20] State v. Barquet, 262 So. 2d 431, 438 (Fla. 1972). In response to the Court's demand that it "solve the problem," **id,,** the Legislature enacted Chapter 72-196 allowing abortions, inter alia, where "continuation of the pregnancy would substantially impair the life **or** health of the female." Ch 72-196, § 2 (effective **April** 13, 1972). The statute continued the common law immunity of the pregnant woman.[21]

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[19] In Carter v. State, 155 *So,* 2d 787 (Fla. 1963), this court had interpreted the 1868 statutes as allowing for abortions where necessary to preserve the life of the mother.

[20] The constitutionality of the statutes had been called into question the year before in Walsingham. See Walsingham, 250 So. 2d at 862 (questioning whether statute which only allowed abortions where necessary to preserve the life of the pregnant woman, and not where the health of the woman would be impaired, was constitutional); id. at 863 (Ervin, **J.**, concurring) (finding no compelling state interest in abortion ban and that statute's ban on "unlawful" abortions vague and indefinite).

[21] The statute provided that:

> Section 6. Penalties --
>
> (1) Any person who performs or participates in the termination of a pregnancy in violation of the requirements in section 2 of this act, which does not result in the death of the woman, shall **be** guilty of a felony of the third

-- **Fla. Stat. § 390.001**

Florida's current criminal abortion statute, enacted in 1979 as part of the Medical Practice Act,[22] replaced the 1972 abortion laws with more detailed requirements, including spousal and parental consent provisions, a ban on fetal experimentation, and a standard of medical care to be used during viability. Ch. 79-302, Part 11, Section 458.505 (Medical Practice Act). See also Miami Herald, Page 1, **Col.** 2 (June **13**, 1979). The purpose of that Act was not, as the State claims, State's Br. at 17, **to** abrogate the pregnant woman's common law immunity in response to Judge Ervin's concurring opinion written eight years earlier in

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degree . . .

(2) Any person who performs **or** participates in the termination of a pregnancy in violation of the requirements in section 2 of this act, which results in the death of the woman shall be guilty of a felony of the second degree . . .

Chapter 72-196, § 6 (emphasis added). **As** in the 1868 statutes, "the woman" and "the person" cannot be the same.

[22] The state misleadingly implies that the difference between this statute and a 1978 abortion clinic licensing statute, see c. 78-382 (codified at Fla. Stat. § 797.03), is that Fla. Stat. § 797.03 only prohibits "abortion on a pregnant woman **by** another," while **Fla.** Stat. § 390.001 also applies to abortions performed by the pregnant woman by herself. This is simply wrong. Fla. Stat. § 797.03 requires that clinics have licenses and that third trimester abortions be performed in hospitals. Interestingly, the State takes the position that Fla. Stat. § 797.03 applies only to abortions performed by someone other than the pregnant woman even though that statute contains that same supposedly all-encompassing language, "any person." Fla. Stat. § 797.03 ("any person who willfully violates any provision of this section is guilty of a misdemeanor of the second degree . . .").

Walsingham v. State.[23] Rather:

> . . . The sole legislative purpose in enacting this chapter is to ensure that every physician practicing in this state meets minimum requirements for safe practice. It is the legislative intent that physicians who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state.

Florida Laws 1979, c. 79-302, § 458.0015.

Copying the 1972 law,[24] the legislature once again did nothing to abrogate the pregnant woman's common law immunity. The State argues that the phrase making "any person who willfully performs, or participates in, a termination **of** a pregnancy" liable for criminal abortion applies to the pregnant woman. However, this construction ignores that the Legislature retained the old statutes' use of separate and mutually exclusive terms to refer to the perpetrator ("person") and to the pregnant woman receiving an abortion (''woman'') Fla. Stat. §§ 390.001(10)(b) &

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[23] **Moreover, mere** "appearance" of this intent, see State's Br. at 17, would not be enough to establish that the Legislature intended to abrogate the common law, Holler v. Int'l Bankers Ins. Co., 572 ***So.*** 2d 937, 939 (Fla. 3d DCA 1990) ("Statutes intending to alter the established case law must show that intention in unequivocal terms."), especially in a criminal case. See Fla. Stat. § 775.021 (1995).

[24] The only difference between the penalty provisions of the 1972 and the 1979 acts was the removal of the phrase "which does not result in the death of the woman," from the third degree felony description. That phrase was unnecessary, given that the second degree felony was limited to those cases "which result[] in the death of the woman." Florida Laws 1979, c. 79-302 §458.505 (9) & (10). Removal of the phrase also gave prosecutors the discretion to choose either charge, based on the facts of each case.

390.001(5).[25] Jews for Jesus v. Jewish Comm. Relations Council of N.Y., 968 F.2d 286, 293 (2d Cir. 1992) ("The clear juxtaposition of the terms 'person' and 'corporation' in various sections of the New York Civil Rights Law plainly indicates that the legislature intended to refer to different entities when it used those terms."). Because "person" has been narrowly defined **to** exclude the pregnant woman in §§ 390.001 (5) & (10) (b), the same narrow definition must be applied in § 390.001 (10) (a). See In re St. Laurent, 991 F.2d 672, 679 (same definition "applies to each subsection of [a statute] absent clear [legislative] intent to the contrary"), corrected on reh'g on other grounds, 7 Fla. Law Weekly Fed. 529 (11th Cir. 1993).[26]

Even if the Court finds that the statute does not clearly exclude the pregnant woman from liability, the statute *is* at the

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[25] As used in § 390.001 (10) **(b) of** the statute, "person" cannot include a pregnant "woman" because that section anticipates the death **of** the pregnant "woman." In addition, the "person who performs or induces the termination of pregnancy" in § 390.001 (5) **is** not the pregnant "woman." In none of the cases cited **by** the State, State's Br. at 9-12, was the term "any person" used in a way which limited its meaning, as it is in this case. Moreover, neither of the only two cases cited by the State which interpreted criminal statutes, see C.W. v. State, 655 So. 2d 87, 89 & n.1 (Fla. 1995); Flanagan's Enterprises v. Barnett Bank of Naples, 614 So. 2d 1198, 1201 (Fla. 5th DCA 1993), concerned abrogation of a common law rule.

[26] See also, e.g., Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (holding that more limited definition of "child support" should be operative throughout Social Security Act); Outdoor Resorts/Palm Springs Owners' Ass'n v. Alcoholic Beverage Control **Appeals** Bd., 273 Cal. Rptr. 748, 750 (Cal. Ct. App. 1990) (giving effect to narrow interpretation of "rights and privileges'' in liquor licensing scheme because only that reading would 'eliminate[] an apparent conflict between other provisions of the statutory system").

least ambiguous on the subject, Van Pelt v. Hilliard, 78 So. 2d 693, 693-695 (Fla. 1918) (where "the sense in which [a term] is used" is unclear, the term is ambiguous, even if it has a generally accepted popular meaning), requiring this Court to construe it in Ms. Ashley's favor. See State v. Robertson, 614 So. 2d 1155, 1157 (Fla. 4th DCA 1993) ("Under the provisions of section 775.021(1), judges are obliged to employ the one of two equally plausible constructions that favors the defendant.") (citing Lambert v. State, 545 So. 2d 838 (Fla. 1989)).

Because Ms. Ashley cannot be guilty of criminal abortion, the underlying felony in the third degree murder charge, and because the underlying felony is an essential element of the crime, the Court should affirm the lower court's order and dismiss the third degree murder charge. See Mahaun, 377 So. 2d at 1161 (Fla. 1979) (reversing conviction for third degree murder where defendant not guilty of underlying felony).

C. The Third Degree Murder Statute Rewires that Two Separate Human Beings Existed at the Time of the Act; the "Born Alive" Theory Cannot Be Used to Create A Human Being Retroactively in This Case.

The third degree murder statute does not apply on its face to Ms. Ashley's shooting herself.[27] The State does not dispute that the statute was intended to apply to two separate

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[27] The third degree murder statute defines murder in the third degree as the "unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony . . . " Fla. Stat. § 782.04(4) (emphasis added).

individuals;[28] if it was not, the statute would create a felony-suicide law, which was not intended by the Legislature. See 15A Fla. Jur. 2d Criminal Law § 3405 at 271-72, (1992) (suicide is not illegal under Florida law); Blackwood v. Jones, 149 So. 600, 601 (Fla. **1933).** At the time she shot herself, however, Ms. Ashley was not "another" person separate and apart from her fetus. Indeed, Ms. Ashley's conduct -- directed against herself -- affected the fetus only because it was part of her own **body.**

When the legislature intends to include a fetus within the ambit of a criminal statute, it does so explicitly, See Fla. Stat, § 782.09 (1995).[29] The absence of similar language protecting against fetal injury in the murder statute precludes its application here.

To evade the plain language of the statute, the State relies on the "born alive" rule to argue that a pregnant woman owes a duty of care to her fetus that is recognizable both under tort law and under Florida's homicide statutes. See also slip **op.** at 12-13. But reliance **on** the "born alive" rule here is misplaced for three reasons.

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[28] In light of this clear language, the Florida homicide statutes have always been applied to punish the killing **of** one **person** by another separate person. See e.g., Heath v. State, 498 So. 2d 660 (Fla. 1994) (defendant convicted for robbing and shooting traveling salesman).

[29] The feticide statute also demonstrates the legislature's consistent limitation of liability for fetal injuries to persons other than the pregnant woman. Fla. Stat. § 782.09 (1995) (because statute is directed at actions injuring a pregnant woman which result in fetal death and "would be murder" if they caused the woman's death, it clearly can not apply to the pregnant woman herself).

1. Florida's parent-child immunity doctrine precludes application of the born alive rule here.

The lower court ignores that Florida continues to adhere to the parent-child immunity doctrine. In Florida, there can be no action in tort on behalf of a child injured by its mother after it was born, much less by a child injured by its mother before it was born. The sole exception to this firm rule is tort actions for negligence where insurance coverage is available. Ard, 414 So, 2d at 1070 (parental immunity waived "to the extent of her available insurance coverage, but not otherwise") (emphasis added).[30] Id. That the Legislature has never abrogated the immunity doctrine for tort purposes, reveals that applying the doctrine to create criminal liability for "parental actions" here was beyond Legislative intent.

2. The "Born Alive" Theory is not Applicable Where an Abortion Has Occurred Under Florida Law.

When an abortion results in a fetus being born alive, the Florida abortion statute precludes the application of the Florida manslaughter or murder statutes. The Legislature anticipated that some fetuses may be born alive as the result of an abortion,

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[30] The availability of insurance also distinguishes Bonte v. Bonte, 616 A.2d at 467, 136 N.H. at 288-89, the only court ever to allow a cause of action in tort by a child against its mother for injuries inflicted prenatally. Holding that "`the effect of general insurance coverage by most motorists should be considered," id. at 288 (citation omitted), and discussing the availability of coverage under the mother's insurance policy, the court allowed a child's cause of action against its mother for injuries inflicted when she crossed a street negligently while she was pregnant. The Bonte case is a complete anomaly in this country's jurisprudence.

Fla. Stat. § 390.001 (5),[31] and created a duty of care for precisely those circumstances. If the fetus is born alive and later dies, and if the abortion was illegal, the proper charge is violation of the abortion statute, not murder. See Evans v. People, 49 N.Y. 86, 93 (1872) (doctor causing premature birth and death of twins would have been guilty of abortion, not homicide, notwithstanding the fact that the twins had been born alive and lived for a few days).

When addressing the possibility that the aborted fetus could be born alive, the Legislature has preempted application of the born alive rule to the more general (and more punitive) murder and manslaughter charges. **Adams v. Culver**, 111 So. 2d 665, 667 (Fla. 1959) (where two statutes address the same subject, "[the] special statute covering a particular subject matter is controlling over . . . [the] general terms") (citations omitted). See also McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994);

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[31] Fla. Stat. 390.001 (5) provides in full:

> If **a** termination of pregnancy is performed during viability, no person who performs or induces the termination of pregnancy shall fail to use that degree of professional skill, care, and diligence to preserve the life and health of the fetus which such person would be required **to** exercise in order to preserve the life and health of any fetus intended to be born and not aborted. "Viability" means that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb. Notwithstanding the provisions of this subsection, the woman's life and health shall constitute an overriding and superior consideration **to** the concern for the life and health of the fetus when such concerns are in conflict.
>
> Fla. Stat. 390.001(5).

Fayerweather v. State, 332 So. 2d 21, 22 (Fla. 1976) (where "irreconcilable conflict" exists between two laws, special statute governs over general).[32]

If the Florida Legislature wanted the homicide statutes to apply to abortions, it must specifically so state, as Florida's 1868 abortion statutes did. See Laws 1868, c. 1637, subc. III § 11 (anyone performing an abortion in the later stages of pregnancy, would "be deemed guilty of manslaughter, a felony in the second degree''), amended by 71-136, §770, repealed by 72-196; see also Colautti, 439 U.S. at 394-97 (discussing §5(d) of Pennsylvania 1974 abortion statute explicitly subjecting a physician to homicide statute for violation of abortion statute; struck down on vagueness grounds). The Florida Legislature has rejected this approach. In 1972, it re-wrote the abortion statute in response to constitutional challenges, and eliminated the penalty of manslaughter, specifically rejecting equating criminal abortion -- even in the later stages of pregnancy -- with manslaughter. The Legislature's amendment making the penalty for criminal abortion a third degree -- not second degree -- felony is additional evidence that the Legislature never intended for the homicide statutes to apply to abortions at any stage of pregnancy. See Johnson, 602 So. 2d at 1294 (disallowing prosecution under child abuse statutes for self-destructive acts

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[32] The abortion statutes did not preempt application of the born alive rule in Knighton because that case did not involve a woman's intentional termination of pregnancy, but rather involved an attack on a pregnant woman. See Slip op. at 5.

during pregnancy where Legislature "considered and rejected" the use of the statutes in those circumstances).

3. The Common Law Born Alive Rule Excluded a Pregnant Woman's Actions.

Lastly, application of the born alive rule to a pregnant woman's own prenatal actions is completely without support in the common law and directly contradicts this Court's decision in Johnson. First, to support its argument that the born alive rule is applicable to a woman's conduct, the lower court relies upon one ancient commentary -- 3 Coke, Institutes (1648), slip op. at 3, but fails to point out that Coke's accuracy on the entire subject is placed in doubt by the United States Supreme Court in Roe, 410 U.S. at 135-36, 161 ("traditional rule of tort law **denied** recovery **for** prenatal injuries even though the child was born alive"), and that the interpretation of the common law by a contemporary of Coke, Sir Matthew Hale, was "diametrically opposite''to Coke's interpretation. See Williams v. State, 550 A.2d 722, 725 (Md. Ct. Spec. App. 1988). Even pro-life commentators argue that the common law did not treat the fetus as a person in relation to the pregnant woman herself. *'See* e.g., C. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U.L. Rev. 563, 618, 622-23 (1987).

Rather, as the Model Penal Code makes clear, the born alive doctrine -- under which a human being is defined as "a person who has been born and is alive," ALI, Model Penal Code § 210.0 -- excludes a woman's volitional termination of pregnancy, such as

that charged here. ALI, Model Penal Code, Explanatory Note for §§ 210.0 - 210.6 (definition of human being as "a person who has been born and is alive" excludes abortion from the law of homicide). In a case exactly on point, New York's highest court ruled in 1872 that a doctor who caused the premature birth and death of twins would have been guilty of abortion, not homicide, notwithstanding the fact that the twins had been born alive and lived for a few days. Evans, 49 N.Y. at 93.

Most importantly, however, using the born alive doctrine to support the prosecution of a pregnant woman for prenatal actions that might have caused the death of her fetus directly contradicts this Court's holding in Johnson.[33] There, this Court reversed the appellate court's decision which had relied -- like the lower court **here** -- on the born alive rule to **hold** that because "under Florida law a person comes into being upon birth," Johnson, 578 *So.* 2d 419, 419 (5th DCA 1991), rev'd, 602 *So.* 2d 1288 (Fla. 1992), statutes criminalizing drug delivery to "persons,"[34] applied to the fetus which was later born alive. See also State v. Carter, No. 89-6274, slip op. at 2 (rejecting application of drug delivery statute to prenatal conduct because

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[33] The lower court implicitly recognized the conflict between its decision and this Court's holding in Johnson, when it wrote that "prosecutions or civil actions for a woman's negligent decision making regarding her pregnancy or ignoring the advice of her doctor" are "highly unlikely" given this Court's decision in Johnson and the "protections provided in our courts, as illustrated by Johnson." Slip op. at 13-14.

[34] In Johnson, the defendant was charged under the drug delivery statute which, like the homicide statutes, criminalized conduct affecting a "person," not a fetus.

fetus wasn't "another person" separate from pregnant woman at the time the act occurred), aff'd 602 So. 2d 995, 996 (1st DCA 1992).

The Florida courts are not alone. Every court to address the issue has rejected the use of the born alive doctrine to hold a pregnant woman criminally liable for her prenatal conduct whether the woman is charged under homicide statutes[35] or other criminal statutes.[36] These courts based their decisions on the unique relationship between a pregnant woman and her fetus. As the Illinois Supreme Court held in rejecting the use of the born alive doctrine to hold a pregnant woman liable in tort for her prenatal conduct:

> Since anything which a pregnant woman does or does not do may have an impact, either positive or negative, on her developing fetus, any act or omission on her part could render her liable to her subsequently born child . . . Mother and child would be legal adversaries from the moment of conception until birth . . . Holding a third person liable for prenatal injuries furthers the interests of both the mother and the subsequently born child and does not interfere with the defendant's right to control his or her own life. Holding a mother

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[35] See State v. Osmus, 276 P.2d 469, 475, 73 Wyo. 183 (1954) (woman whose newborn died as a result of her negligent failure to obtain proper prenatal care or medical care at birth could not be guilty of manslaughter); State v. Barnett, No. 02D04-9308-CF-611, Opinion from the Bench (Ind. Super. Ct. Feb. 11, 1994) (dismissing reckless homicide charges against woman who allegedly used drugs during pregnancy where baby was born alive and then died) (R. 72); People v. Jones, No. 93-5, Transcript of Record (Cal. J. Ct. Siskiyou County July 28, 1993) (finding that the legislative history did not support application of murder statute to death of woman's newborn caused by prenatal drug use) (R. 74); People v. Jaurique, No. 18988, (Cal. Super. Ct. Aug. 21, 1992) (finding that neither legislative history nor fetal homicide statute's language supported prosecution of mother for stillborn which was allegedly the result of prenatal drug use) (R. 82), writ denied, (Cal. App. 1992).

[36] Twenty-one states have so held, See Exhibit 1 hereto.

> liable for the unintentional infliction **of** prenatal injuries subjects to State scrutiny all the decisions a woman must make in attempting to carry a pregnancy to term, and infringes on her right to privacy and bodily autonomy . . . Logic does not demand that a pregnant woman be treated in a court of law as a stranger to her developing fetus . . . As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus.

Stallman, 531 **N.E.2d** at 359-60.[37]

Even in states which, like Florida, have applied the born alive theory to hold third parties liable for harm to a fetus which was later born alive and then died, the courts have rejected prosecutors' attempts to apply the doctrine to a pregnant woman's own prenatal actions. Compare State v. Dickinson, 275 N.E.2d 599, 601 (Ohio 1971) (Ohio'svehicular homicide statute would apply to the death of a fetus which had been born alive) with State v. Gray, 584 N.E.2d 710, 712 (Ohio 1992) (distinguishing Dickinson on, inter alia, the grounds that "the unique relationship between a pregnant woman and the developing fetus requires a careful look at what activities will

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[37] In a similar case, the Georgia Court of Appeals held that:

> [a]lthough it is true . . . that [the fetus] eventually became a 'living breathing person' when she was born, at the time any transfer of cocaine metabolites could have taken place from [her mother], [the fetus] was not a 'person' within the meaning **of** the statute. After she became a person for legal purposes, it was physically impossible for the transfer to have taken place.

State v. Luster, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992), cert. denied, No. S92C1020, 1992 Ga. LEXIS 467 (Ga. June 4, **1992).**

be deemed criminal, and at what point during the pregnancy");[38] and Keeler v. Super. Ct., 470 P.2d 617 (Cal. 1970) with People v. Jones, No, 93-5, Transcript of Record (Cal. J. Ct. Siskiyou Cty. July 28, 1993) (R. 74) (legislative history did not support the application of the murder statute to the death of a woman's newborn caused by her actions). See also Reyes v. Super. Ct., 75 Cal. App. 3d 214 (4th Dist. 1977).

In addition, the requirements of adequate notice, strict construction, and the rule of lenity, prohibit using tort doctrines against pregnant women to criminalize their behavior which may **be** harmful to their pregnancy. State v. Gonzalez, 467 So. 2d 723, 726 (Fla. Dist. Ct. **App.)** ("even when statutory classifications are carved out to extend rights **to** fetuses, there is a different standard of construction which must be applied when comparing criminal law with the law of tort **or** property.") review denied, 476 So. 2d 675 (Fla. 1985).

The criminal cases relied on by the State, see, e.g., R. 99), are not to the contrary. They each involve third party attacks on pregnant women and three explicitly limit themselves to such circumstances. See, e.g., People v. Hall, 158 A.D.2d 69, 76, appeal denied, 76 NYS2d 940 (1990 1st Dept.) ("any attempt to equate defendant's situation with that of an individual

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[38] Moreover, despite the Ohio court's 1971 ruling, the State declined to prosecute a pregnant 17 year old who attempted suicide by shooting herself in the abdomen because she did not have the $600 cash needed to pay for an abortion in a Cleveland hospital. "Suicide Attempt Failure for Teen, But Fetus Dies," The Plain Dealer, July 28, 1979, at 5a, col. 1.

performing or being the recipient of an abortion is unavailing"); State v. Anderson, 343 A.2d 505, 509 (N.J. Super. 1975) ("fetuses which are the victims of a criminal blow or wound upon their mother and are subsequently born alive, and thereafter die . . . may be victims of murder"); Williams v. State, 561 A.2d 216, 218 (Md. Ct. App. 1989) (noting that in each case in which the "Coke" language had been used as a basis for conviction for criminal homicide, manslaughter or murder, the "injuries were feloniously inflicted upon a pregnant woman whose child, born alive, died as a result of the prenatal injury") (emphasis added). The only Florida criminal case cited, Knighton v. State, 603 *So.* 2d 71, 73 (Fla. 4th DCA 1992) (Downey, J.), similarly involved prosecution of a third party for death of a fetus which was **born** alive and **then** died as a result **of** the defendant's attack on **a** pregnant woman,[39] In addition, in State v. Gethers, 585 *So.* 2d 1140 (Fla. 4th DCA 1991) (Downey, J.), the same court and the same judge which applied the born alive rule to a third party's actions in Knighton, refused to apply the rule to a woman charged under child abuse statutes. Id. at 1141-42 (child abuse statute did not reach conduct directed against the fetus, even though the fetus was subsequently born alive). See also Johnson, 602 *So.* 2d at 1296 (describing holding of Gethers).

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[39] The court's reliance on a tort case involving a third party attack on a pregnant woman in its attempt to create criminal liability in the absence of legislative action is similarly misplaced. See Day v. Nationwide Mutual Insurance *Co.*, 328 So. 2d 560 (Fla. 2d DCA 1976).

II. THE COURT OF APPEALS DECISION UPHOLDING THE MANSLAUGHTER CHARGE MUST BE REVERSED

A. For the same reasons outlined above, the born alive theory cannot be used to create a human being retroactively for purposes of the manslaughter statute.

Like the third degree murder statute, the manslaughter statute requires the killing of one person by another separate being.[40] For the same reasons described above, then, supra at Section I.C., Ms. Ashley cannot be held culpable for a self-destructive act taken when the fetus was part of her own body, and no separate being was yet in existence.

B. Ms. Ashley Could Not Have Violated the Duty of Care where She was Eligible for a Legal Abortion

To escape the inescapable conclusion that Ms. Ashley has not violated the clear mandate of the manslaughter statute, the lower court held that pregnant women in Florida owe a duty of care to their fetus which, if breached, could constitute "culpable negligence" for purposes of the manslaughter statute. See Fla. Stat. § 782.07 (manslaughter statute criminalizes the "killing of a human being by . . . culpable negligence of another") (emphasis added).[41] But the lower court never defined the bounds of this

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[40] The manslaughter statute specifically premises liability on the "killing of a human being by the act, procurement, or culpable negligence of another." Fla. Stat. § 782.07 (emphasis added).

[41] "Culpable negligence" for purposes of the manslaughter charge here is defined as:

> . . . of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or

duty, nor instructed pregnant women which if any self-destructive acts will violate this standard. As the dissenters in Bonte warned:

> What will be the judicially defined standard of conduct for a pregnant woman? Indeed, is it possible to subject a woman's judgment, action, and behavior as they relate to the well-being of her fetus to a judicial determination of reasonableness in a manner that is consistent and free from arbitrary results? We have serious doubts.

Bonte, 136 N.H. at 292 (Brock, C.J. and Batchelder, J., dissenting).

Many self-destructive or negligent actions pregnant women engage in every day could rise to the level of culpable negligence. Accepting or declining certain medical treatment necessary to a pregnant woman's health may be detrimental to her pregnancy and cause low birth weight or premature labor resulting in neonatal death. (R. 62).[42] For example, a woman who had a miscarriage after having sex against doctor's orders could be prosecuted under this standard. Even the culpably negligent operation of a motor vehicle which resulted in fetal death would

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> recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

Smith v. State, 65 So. 2d 303, 305 (Fla. 1953) (citations omitted).

[42] Not following a physician's recommendations, and having a stressful job are among the many factors that contribute to low birth weight, which in turn is the greatest single determinant of infant mortality in the United States. Committee to Study the Prevention of Low Birthweight, Division of Health Promotion and Disease Prevention, Institute of Medicine, Preventing Low Birth Weight - Summary 1 (1986) at 1-7; (R. 56-63).

expose a pregnant woman to liability under this extraordinary interpretation of the manslaughter statute. In light of the high infant mortality rate in Florida, many women would be vulnerable to prosecution each year.[43] As the Florida Supreme Court noted in Johnson:

> To construe the statute[s] in [the manner suggested by the prosecution] would mean that every expectant woman who ingested a substance with the potential of harm to her child, e.g., alcohol or nicotine, would be criminally liable under [the statute].

602 So, 2d at 1294 (quoting State v. Gray, No. L-89-239, 1990 W.L. 125695, (Ohio Ct. App. August 31, 1990)). The prosecutor's theory here, if accepted, would lead to similar absurd and unacceptable results.

The only clear legal guidance we have about the extent of the pregnant woman's duty of care to her fetus is that the act of abortion does not violate that duty, since the right to abortion is constitutionally protected, Roe, 410 U.S. 113; In re T.W., 551 So. 2d 1186, 1192-93 (Fla. 1989), and specifically authorized by statute. Fla. Stat. § 390.001. Ms. Ashley's self-mutilation, whether it was an attempted suicide or attempted abortion, qualified her for a legal abortion under Fla. Stat. § 390.001(2) (allowing abortions in the third trimester where the termination is "necessary to save the life or preserve the health of the

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[43] In 1993, the infant mortality rate in Florida was 8.7 per 1000 live births, which translates into an estimated 1, 674 deaths. In approximately half of those deaths, something a woman did or did not do during pregnancy could have affected the outcome of the at pregnancy. (R. 59-60).

pregnant woman"),[44] and even for Medicaid **coverage** for the abortion. See, e.g., Fla. Admin. Code r. 10C-7.038 (physician services) (Medicaid coverage available for abortions where "the life of the mother would be endangered if the fetus were carried to term").

Ms. Ashley was never informed of her right to have an abortion, nor of the legal and/or medical consequences of having a Cesarean section versus a late abortion by some other method.[45] Without this knowledge, she could not have given informed consent to the Cesarean section.[46] Charging Ms. Ashley with manslaughter for violation of a duty of care that she would have been **able** to meet had she been given complete and accurate medical advice, violates notions of fundamental fairness. See Kush v. Lloyd, **616 *So.* 2d 415,** 417 (Fla. 1992) (psychic damages available for wrongful birth; "`[w]rongful birth' is that species of medical malpractice in which parents give birth to an imparied . . . child and allege that negligent treatment or advice deprived **them**

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[44] Even prior **to** Roe, attempted suicide or acts of dangerous self-abortion made women eligible for "life-saving" legal abortions. Belsky, "Medically Indigent Women Seeking Abortion Prior to Legalization: New York City, 1969-1970," 24 Fam. Plan. Persp. 129, 130 (June 1992) (appended hereto for the Court's convenience as Exhibit 2). This was regardless of stage of pregnancy.

[45] See supra at n. 42.

[46] In fact, while the State repeatedly refers to the medical procedure performed as a Cesarean Section, the same procedure in medical terminology is considered a hysterotomy when it is a pre-viability Cesarean section. This is a rarely used and more dangerous method **of** abortion. See Colautti, 439 U.S. at 398 (discussing hysterotomy); Williams Obstetrics 683 (19th ed. 1993).

of the opportunity **or** knowledge . . . to terminate the pregnancy") (citing Black's Law Dictionary 1621 (6th ed. 1990).[47] And the fact that her doctors who may have violated their duty of care to her, are not charged criminally points up the dangers of arbitrary and discriminatory enforcement against which the due process clause and the doctrine of vagueness was intended to protect. As the United States Supreme Court has found:

> if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, **judges**, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement.

Gravned **v.** City of Rockford, 408 U.S. 104, 108 (1972). See also Kolender v. Lawson, 461 **U.S.** 352, 357-58 **(1983).**

III. APPLYING THE HOMICIDE STATUTES IN THIS CASE WOULD VIOLATE FEDERAL AND STATE CONSTITUTIONAL GUARANTEES.

Even if this Court were somehow inclined to give credence to the prosecutor's theory in this case, constitutional guarantees preclude adopting it for it is axiomatic that courts must interpret statutes, whenever possible, consistent with constitutional guarantees. Capitol Citv Country Club, Inc. v. Tucker, 613 So. 2d 448, 452 (Fla. 1993).

A. Application of the Homicide Statutes to Ms. Ashley Violates Due Process of Law for Three Reasons.

First, the principle that criminal statutes must be strictly

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[47] A jury awarded **$1.2** million to a woman whose obstetrician failed to give her the option of an abortion. "Illinois: Decatur Family Wins Suit Against Doctor," Abortion Report, Nov. 29, 1994; available in LEXTS, News Library, Abtrpt File.

construed "ultimately **rests** on the due process requirement that criminal statutes must say with some precision exactly what is prohibited." Perkins v. State, 576 ***So.*** 2d 1310, 1312 (Fla. 1991); Fla. Const. Art. I, § 9; U.S. Const. Amend. V & XIV, § 1. As the Florida Supreme Court has explained, "our system of jurisprudence is founded on **a** belief that everyone must be given sufficient notice of those matters that may result in a deprivation of life, liberty, or property." Id. (citations omitted).

The radical interpretation of the homicide statutes championed by the prosecution in this case has been rejected **by** every court in this country to address the issue. Moreover, the Florida Legislature has consistently declined to **impose** tort liability on parents, or criminal liability on women **for** feticide, illegal abortion or **for** their prenatal conduct, see supra at Section IA, **or** to apply the homicide statutes either to self-inflicted harm like that at issue here or other suicide attempts. Indeed, Florida courts have already rejected other prosecutors' attempts to apply the born alive theory to hold pregnant women criminally liable for prenatal conduct. Application of the third degree murder and manslaughter statutes to the facts of this case was "unforeseeable" and, therefore, violates Ms. Ashley's right **to** due process under both the federal and state constitutions. See Wilson v. State, 288 So. 2d 480, 482 (Fla. 1974) ("radically new interpretation" of rape statute violates due process); Douglas v. Buder, 412 U.S. 430, 432 (1973)

("unforeseeable application" of new interpretation of statute violates due process); Wainwright v. Stone, 414 U.S. 21, 23 (1973) (notice requires "'interpretation by [the state court] put[ting] these words in the statute as definitely as if it had been so amended by the legislature'") (citations omitted).

Indeed, the facts of this case, where a pregnant woman is charged with homicide for causing the death of her fetus, are so far removed from a standard homicide case that only a person with the most far-fetched imagination would have conceived of applying the homicide statutes. As the trial court stated, "the legislature . . . has not seen fit to address a lot of the issues that are **here.**" (R. 170). Because a woman of common intelligence could not even have known that the prosecutor would charge her under these facts for criminal abortion, much less homicide, Ms. Ashley did not have fair warning. See Dunn v. United States, 442 U.S. 100, 112 (1979); Buder, 412 U.S. at 432; Bouie v. City of Columbia, 378 U.S. 349, 351 (1964); Gluesenkamp v. State, 391 So. 2d 192, 198 (Fla. 1980), cert. denied, 454 U.S. 818 (1981); People v. Davis, 94 Daily Journal D.A.R. 6630, 6634 (Cal. 1994).[48]

Second, even if the court were to hold that pregnant women could be held liable under the homicide statutes for prenatal conduct which causes fetal death, Ms. Ashley cannot **be** held

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[48] The Davis court found that its holding -- that viability was not an element under California's feticide statute -- should not be applied to the defendant because it was an "unforeseeable judicial enlargement of a criminal statute." Davis, 94 Daily Journal D.A.R. at 6635.

liable here. Any "radically new interpretation [of a criminal statute which] punishes as criminal conduct that which was not criminal under the existing statute[] at the time of the incident . . . violat[es] the Due Process Clause of the United States Constitution and the Florida Constitution as being ex post facto in its application." Wilson, 288 So. **2d** at 482. See also Cohen v. Katsaris, 530 F. Supp. 1092, 1097 (N.D.Fla. 1982); Davis, 94 Daily Journal D.A.R. at 6634 ("unforeseeable judicial enlargement of criminal statute, applied retroactively, operates in the same manner as an ex post facto law."). See also Brown v. State, 629 So. 2d 841, 842-43 (Fla. 1994).

B. Application of the Manslaushter Statute to Prenatal Conduct Would Violate Women's Rights of Privacv.

The Florida Constitution provides for a "fundamental and wide-ranging 'right to be let alone.'" In re T.W., 551 ***So.*** 2d at 1191 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Bradeis, J., dissenting)). This right "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." Id. at 1192. ~~See also~~ Winfield v. Division of Pari-Mutuel Wagering Dept of Business Regulation, 477 So. 2d 544, 548 (Fla. 1985). In particular, it strongly protects bodily integrity, including intimate and personal decisions regarding pregnancy and medical decision-making. In re T.W., 551 So. 2d at 1186; Matter of Dubreuil, 629 So. 2d 819 (Fla. 1993), corrected, 18 **Fla.** L. Weekly S636 (Fla. 1993). Therefore, the state has the heavy burden of demonstrating such infringement is narrowly tailored to

serve a compelling state interest. In re T.W., 551 So. 2d at 1192.

Because applying the manslaughter statute to prenatal conduct would subject pregnant women to state scrutiny and regulation via the homicide statutes of many intimate aspects of their lives, see supra at 14-15, including medical decision-making which might be considered culpably negligent,[49] Stallman, 531 N.E.2d at 359, it would clearly constitute a gross invasion of these rights of privacy. And while there are certainly many compelling reasons to prosecute persons for homicide in appropriate circumstances, the prosecution here could not meet its heavy burden of demonstrating that its broad interpretation of the statute is narrowly tailored to meet that state interest. See In re T.W., 551 So. 2d at 1194-96; Matter of Dubreuil, 629 So. 2d at 827-28. Indeed, the prosecution's theory would open up a pandora's box of invasive governmental regulation of women's lives without furthering its penal interests. Because the overbroad construction clearly fails the "narrowly tailored" prong of the strict scrutiny standard mandated by the Florida Constitution, it violates fundamental privacy guarantees. See In re T.W., 551 So. 2d at 1190.

Moreover, this type of prosecution will have the effect of

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[49] Indeed, any medical decision that a woman makes, which results in premature labor, a live birth and deaht of the infanct could subject her to criminal liability under the manslaughter statute under the prosecutor's theory. This is particularly the case if the woman makes that decision independent of, or contrary to, her physician's advice.

driving women to choose abortion over risking the chance there might be a live birth if they choose a Cesarean section. If Ms. Ashley had done nothing, had a miscarriage, and delivered a stillborn she could not have been charged. If she had decided she wanted an abortion and had a D & X method, there would not have been a live birth and she would not have been charged. Women will desperate to avoid the chance of live birth which could not be a more direct infringement of privacy rights.

Moreover, if the state is truly interested in preventing such tragedies, provision of state aid to help low income women obtain legal and safe abortions, is both more effective and less intrusive on privacy. Providing Medicaid coverage for all necessary reproductive health care, including abortion, would help women like Ms. Ashley and other women facing these tragic circumstances.[50] Punitive measures, an avenue taken only by prosecutors and not the state legislature, will not prevent recurrence of this type of tragedy, and will do nothing but further punish women already failed **by** the public health care system.

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[50] One out of five medicaid-eligible women seeking abortion are forced to carry to term due to lack of funding. See Torres, et al., "Public Benefits and Costs of Government Funding for Abortion," **18** Fam. Plan. Persp. 111 (1986); The Alan Guttmacher Institute, The Cost Implications of Including Abortion Coverage Under Medicaid, (August 1993); Mark Evans, et al., "The Fiscal Impact of the Medicaid Abortion Funding Ban in Michigan," 82 Obstetrics & Gynecology 555 **(1993).** In extreme cases, such as this one, women risk their lives by attempting suicide or to self-induce the procedure. Id.

C. Applying the Homicide Statutes to Prenatal Conduct Constitutes a Penalty Based on a Presnant Women's Status.

Under the lower court's ruling establishing a pregnant woman's duty of care to her fetus, the very fact that a woman is pregnant could expose her to criminal prosecution under the homicide statutes for conduct that is otherwise not covered by those statutes. In other words, two individuals -- one who is pregnant and one who is not -- could both attempt suicide, but, under the prosecutor's theory, only the pregnant woman would be liable under the homicide statutes.

In addition, where the conduct was otherwise illegal, the prosecutor's theory would enhance penalties because a woman is pregnant. For example, if a woman is pregnant and in the course of committing another felony goes into premature labor resulting in a born alive child who subsequently dies, she could be guilty of third degree murder. It is her pregnancy that makes her liable for additional penalties, beyond the penalties for the underlying felony, under this theory and not any additional conduct on her part. Thus, the prosecutor is making pregnancy an element of the crime in violation of federal and state privacy guarantees.[51]

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[51] See also Fla. Const. Art. 1, § 17; U.S. Const. Amend. 8; Robinson v. California, 370 U.S. 660, 666 (1962) (status of narcotic addiction impermissible grounds for criminal offense); Rodriquez v. State, 378 So. 2d 7, 10 n.6 (Fla. 2d DCA 1979) ("there is no criminal illegality attached to the status of pregnancy.") As pregnancy is not conduct, but rather status, the prosecutor's interpretation of the homicide statutes directly violates those guarantees.

CONCLUSION

For all the foregoing reasons, the defendant respectfully requests that this Court affirm that portion of the lower court's Order dismissing the charge of third degree murder, and reverse that portion of the Order upholding the charge of Manslaughter.

Dated this 24th day of May, 1996.

Respectfully submitted,

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ADDENDUM

The following cases hold that prosecutions relying on the born alive theory to hold a woman criminally liable for her conduct during pregnancy which harmed her child were without legal basis, or unconstitutional or both.

ARIZONA:

State v. Reinesto, No. 1 CA-Sa 94-0348, Order (Ariz. Ct. App. March 14, 1995) (dismissing on special appeal, child abuse charges against woman based on her alleged use of heroin during pregnancy).

CALIFORNIA:

Reves v. Superior Court, 75 Cal. App. 3d 214, 219 (1977) (child endangering statute does not refer to an unborn child or include a woman's alleged drug use during pregnancy). People v. Jones, No. 93-5, Transcript of Record (Cal. J. Ct. Siskiyou County July 28, 1993) (finding that the legislative history did not support application of murder statute to death of woman's newborn caused by prenatal drug use) (R. 74).

Peosle v. Jaurique, No. 18988, slip op. (Cal. Super. Ct. Aug. 21, 1992), (R. 82) writ denied, (Cal. **App.** 1992) (dismissing fetal homicide charges against a woman who suffered a stillbirth allegedly as a result of her prenatal drug use, finding that neither legislative history nor the statute's language suggested that a mother could be prosecuted for murder for the death of her fetus).

People v. Stewart, No. M508197, slip op. (Cal. Mun. Ct. Feb. 26, 1987) (criminal child support statute that explicitly covered "a child conceived but not yet born" is not intended to impose additional legal duties on pregnant women).

CONNECTICUT:

In re Valerie D., 613 A.2d 748, 765 (Conn. 1992) (legislative history does not support application of civil child abuse statute where child was born with positive toxicology and other symptoms after mother had injected cocaine several hours prior to giving birth).

FLORIDA:

Johnson v. State, 602 So. 2d 1288, 1297 (Fla. 1992) (reversing conviction for "delivering drugs to a minor" where woman had taken drugs shortly before giving birth).

State v. Carter, 602 So. 2d 995, 996 (Fla. App. 1992) (affirming the trial court's decision to dismiss charges of child abuse against woman who allegedly used illegal drugs while pregnant).

State **v.** Gethers, 585 So. 2d 1140, 1143 (Fla. App. 1991) (dismissing child abuse charges on ground that such application misconstrues the effect of the law).

GEORGIA:

State v. Luster, 419 S.E.2d 32, 35 (Ga. App. 1992), cert. denied, S92C1020 (June 4, 1992) (statute proscribing delivery/distribution of cocaine did not encompass prenatal transmission).

INDIANA:

State v. Barnett, No. 02D04-9308-CF-611, Opinion from the Bench (Ind. Super. Ct. Feb. 11, 1994) (dismissing reckless homicide charges against woman who allegedly used drugs during pregnancy where baby was born alive and then died) (R. 72).

KENTUCKY:

Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993) (affirming reversal of child abuse conviction, finding that to construe the child abuse statute to apply to a woman's prenatal conduct would make the statute impermissibly vague and violate legislative intent).

MASSACHUSETTS:

Commonwealth v. Pellegrini, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990) (right to privacy and principles of statutory construction, due process, and separation of powers do not permit extension of drug delivery statute to women who give birth to substance-exposed newborns).

MICHIGAN:

People v. Hardy, 469 N.W.2d 50, 52-53 (Mich. App. 1991), appeal denied, 471 N.W.2d 619 (Mich. 1991) (statute prohibiting delivery of cocaine to children was not intended to apply to pregnant drug users). People **v.** Bremer, No. 90-32227-FH, slip op. (Mich. Cir. Ct. Jan. 31, 1991), appeal dismissed, No. 137619 (Mich. App. July 14, 1992) (dismissing drug delivery charges on principles of statutory construction, due process, and privacy, holding that the interpretation of the drug delivery law to cover ingestion of cocaine by **a** pregnant woman would be a radical departure from existing law). People **v.** Cox, No. 90-53454 FH, slip op. (Mich. Cir. Ct. July 9, 1990), aff'd, No. 131999 (Mich. App. Feb. 28, 1992) (granting motion to dismiss, finding that drug delivery statute is not intended to regulate prenatal conduct and that prosecution would not be in the best interest of public health, safety, and welfare).

NEBRASKA:

State **v.** Arandus, No. 93072, slip op. (Neb. Dist. Ct. June 17, 1993) (quashing indictment on child abuse because application of the statute to unborn children is not supported by legislative intent).

NEW YORK:

People v. Morabito, 580 N.Y.S.2d 843, 845-46 (Geneva City Ct. 1992) aff'd slip op. (Ontario County Ct. 1992) (dismissing child endangerment charges against woman who allegedly smoked cocaine during her pregnancy, because the court may not extend the reach of the statute to allow a fetus to be included within the definition of "child," and because public policy and due process considerations militate against such prosecutions).

NEVADA:

Sheriff, Washoe County, Nevada v. Encoa, 885 P.2d 596 (Nev. 1994) (child endangerment statute does not apply to mother's prenatal substance abuse which results in the transmission of illegal substance to child through the umbilical cord during the time after the child leaves the womb).

NORTH CAROLINA:

State v. Inzar, Nos. 90CRS6960, 90CRS6961, slip op. (N.C. Super. Ct. Apr. 9, 1991), appeal dismissed, No. 9116SC778 (N.C. **App.** Aug. 30, 1991) (dismissing charges against a woman who allegedly used crack during her pregnancy under statute prohibiting assault with a deadly weapon and delivery of a controlled substance, finding that a fetus is not a person within the meaning of the statutes).

OHIO:

State v. Gray, 584 N.E.2d 710, 713 (Ohio 1992) (mother cannot be convicted of child endangerment based solely on prenatal substance abuse, finding that the plain meaning of statute does not extend to fetuses or prenatal conduct). State **v.** Andrews, No. JU 68459, slip op. (Ohio C.P. June 19, 1989) (child endangerment statute is not intended to apply to any situation other than that of a living child placed at risk by actions that occurred after its birth).

OKLAHOMA:

State v. Alexander, No. CF-92-2047, slip op. (Okla. Dist. Ct. Aug. 31, 1992) (dismissing charges of unlawful possession of a controlled substance and unlawful delivery of a controlled substance to a minor brought against a woman who ingested illegal drugs while pregnant, finding that the presence of drug in defendant's system does not constitute possession and transfer of the drug through the umbilical cord is not "volitional").

PENNSYLVANIA:

Commonwealth v. Kemp, 75 Westmoreland L.J. 5 (Pa. Ct. C.P. 1992), aff'd 643 A.2d 705 (Pa. Super. Ct. 1994) (affirming dismissal of charges of recklessly endangering another person or endangering the welfare of a child against a pregnant woman who allegedly ingested cocaine while pregnant; finding that neither "child" nor "person" include an unborn "fetus").

SOUTH CAROLINA:

Crawley v. Evatt, No. 94-CP-04-1280, Slip op. (S.C., Anderston, Oct. 17, 1994) (granting habeas corpus petition for a woman who pled guilty to child abuse after her newborn tested positive for cocaine).

Rickman v. Evatt, 94-CP-04-138, slip op. (S.C. Anderson, Sept. 9, 1994) (granting habeas corpus relief to reverse conviction under the state's child neglect law of woman who used drugs while pregnant).

State v. Crawley, 93-GS-04-756, slip op. (S.C., Anderson Nov. 29, 1993) (quashing indictment under state child neglect statute of woman who allegedly used drugs while pregnant, finding that the plain and ordinary meaning generally given to the word "child" does not include "fetus").

Lester v. State, 93-CP-23-2984 (S.C. Greenville, Nov. 22, 1993) (granting post-conviction relief of woman who pled guilty to child abuse charges based on her use of drugs while pregnant).

Tolliver v. State, No. 90-CP-23-5178, slip op (S.C. Greenville Aug. 10, 1992) cert. denied (S.C. Mar. 10, 1993) (granting post-conviction relief for a woman who pled guilty to child neglect under finding that application of statute to a woman who used drugs while pregnant violated statute's plain meaning and legislative intent).

Whitner v. State, 93-CP-39-347, slip op. (S.C. Ct. C.P. Nov. 22, 1993) cert. sranted, (June 30, 1994) (granting post-conviction relief to woman who plead guilty to child neglect based on her use of cocaine during pregnancy).

Sullivan v. State, No. 93-CP-23-3223, Slip op., (S.C. Ct. C.P., Dec. 19, 1994) (granting post-conviction relief to a woman who plead guilty to child abuse for her use of cocaine during pregnancy).

TEXAS:

Collins v. State, No. 08-93-00404, slip op. (Tex. Ct. App., Dec. 22, 1994) (dismissing injury to a child charges against a woman who allegedly used drugs during pregnancy, finding that applying statute to prenatal conduct violates due process).

VIRGINIA:

Commonwealth v. Wilcox, No. A-44116-01, slip op. (Va. Dist. Ct. Oct. 9, 1991) (dismissing child abuse charges against a woman who allegedly used cocaine during pregnancy, finding that application of the statute to these facts would extend it by means of creative construction to acts not intended by the legislature).

Commonwealth v. Smith, No. CR-91-05-4381, slip op. (Va. Cir. Ct. Sept. 16, 1991) (dismissing child abuse charges against a woman who allegedly used drugs during pregnancy, finding that child abuse statute is not intended to apply to fetuses or to prenatal conduct).

Commonwealth v. Turner, No. 91-054382, slip op. (Va. Cir. Ct. Sept. 16, 1991).

WASHINGTON:

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COMMENT

Medically Indigent Women Seeking Abortion Prior to Legalization: New York City, 1969–1970

By Judith E. Belsky

If the efforts now underway to limit access to abortion services in the United States are successful, their greatest impact will be on women who lack the funds to obtain abortions elsewhere. There is little published information, however, about the experience of medically indigent women who sought abortions under the old, restrictive state laws. This article details the psychiatric evaluation of 199 women requesting a therapeutic abortion at a large municipal hospital in New York City under a restrictive abortion law. Thirty-nine percent had tried to abort the pregnancy. Fifty-seven percent had concrete evidence of serious psychiatric disorder. Forty-eight percent had been traumatized by severe family disruption, gross emotional deprivation or abuse during childhood. Seventy-nine percent lacked emotional support from the man responsible for the pregnancy, and the majority were experiencing overwhelming stress from the interplay of multiple problems exacerbated by their unwanted pregnancy. (Family Planning Perspectives, 24:129, 1992)

After the U. S. Supreme Court ruled in *Roe* v. Wade in 1973 that abortion was a private matter between a woman and her physician, safe and legal abortions became widely available. As abortion became a commonplace procedure, a new generation of medical personnel was trained that had little concept of the profound emotional distress experienced by women seeking an abortion under the old laws. Recent efforts to severely restrict or prohibit abortions, and the increasing limits placed on public funding of abortions, raise the prospect that unwanted pregnanaes may again become a source of severe stress, particularly for low-income women who lack funds to pay for safe abortions or to travel to places where they might be obtained.

In the years before Roe v. Wade, most states had laws forbidding abortion unless a pregnancy was life-threatening. "Therapeutic" abortions were the only legal abortions available. As the medical management of complicated pregnancy became more sophisticated and successful, the physical grounds for abortion diminished, and psychiatric indications became relatively more prominent. A woman who was certified to be suicidal could usually obtain a legal abortion. However, as this option was rarely available to women lacking private medical care, poor women were severely limited in obtaining legal abortions. For example, there was a marked disparity in the number of therapeutic abortions and in the indications for which they were performed between private patients and ward patients who did not have a private doctor. The number of poor women resorting to dangerous illegal abortions at that time is reflected in statistics on maternal mortality due to abortion and in data on infected, or septic, abortions.

The New York City Department of Health compiled the most complete statistics on abortion during the pre-Roe period, and much of the available information on abortion in the United States during that time is based on those statistics.

One study reported that the therapeutic abortion rate in New York City from 1943 through 1947 was 5.1 abortions per 1,000 live births.[1] The author noted that therapeutic abortions were done later in pregnancy for ward patients than for private patients, and commented on the steadily increasing proportion of abortions done for psychiatric reasons. The abortion rate declined during the 1950s and early 1960s as hospitals, seeking to safeguard their respectability, established therapeutic abortion committees, which effectively limited the number of abortions performed. As the abortion rate fell, the gap in access between private and ward patients grew. From 1951 through 1953, when the therapeutic abortion rate in New York City was 2.9 per 1,000 live births, the rate in private hospitals was 6.3 per 1,000; among private patients in voluntary hospitals, 3.6 per 1,000; among ward patients in voluntary hospitals, 1.9 per 1,000; and in municipal hospitals (which have no private patients), 1.2 per 1,000.[2] The proportion of abortions done for psychiatric reasons was substantially higher among private patients than among ward patients:

Municipal hospitals had the lowest incidence of therapeutic abortions done for psychiatric reasons—15.8% (15 of 95 abortions) for 1951–1953.[3] At Bellevue Hospital, a large municipal facility in New York City, a total of 77 abortions were performed for medical reasons (most commonly tuberculosis) from 1950 through 1955, but only 1.0–1.5 abortions per year were performed on psychiatric grounds, even though Bellevue had a large psychiatric service.[4]

A subsequent study reported that the therapeutic abortion rate in New York City in the period 1960–1962 dropped to 1.8 per 1,000 live births.[5] This decrease was most marked in the municipal hospitals, where the rate fell from 1.2 per 1,000 in 1951–1953 to 0.1 per 1,000. By ethnic group, rates were 2.6 per 1,000 among white women, 0.5 per 1,000 among black women and 0.1 per 1,000 among Puerto Rican women. More than 90% of therapeutic abortions were obtained by white women. One author noted that of 96 therapeutic abortions reported by 11 teaching hospitals in 1959, only one was done for a black patient, even though 27% of obstetric patients at these institutions were black.[6]

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According to data from 1950–1960, therapeutic abortions at a prominent teaching hospital in New York City were done four times more frequently for private patients than for ward patients.' Furthermore, those done for psychiatric reasons represented one per 104 deliveries among private patients, but only one per **1,149** deliveries among ward patients. The author commented that therapeutic abortions were more common among private patients "for all the more debatable conditions,'' including arthritis, inactive tuberculosis and rubella. The investigator also surveyed 60 other major American hospitals and found the frequency of therapeutic abortion to be **3.6** times greater on private services than on ward services.

Estimates of the number of illegal abortions **in** the United States prior to ***Roe*** v. ***Wade*** range from 200,000 to **1,200,000** per year? Of 1,248 women admitted to the gynecology service at Bellevue Hospital for incomplete abortion with fever from October **1934** to August **1937, 108** admitted induction of the abortion by means of a drug, 126 admitted mechanical interference with the pregnancy and 117 alleged trauma, such as a kick, a blow or a fall down **stairs,** as the cause of the abortion?

Of over **7,000** cases of incomplete abortion treated on the Bellevue gynecology service from **1940** to **1954,** more than **2,500** showed clinical evidence of infection. The outcome was fatal in **22** cases. Among seven cases presented in detail, two women admitted using a catheter to induce an abortion, three attributed the abortion to a fall and one to a child jumping on her abdomen. One other woman denied interfering with her pregnancy, but had previously demanded termination of the pregnancy at the prenatal **clinic.**[10]

A subsequent **report** estimated that 60% of incomplete abortion cases treated at Bellevue **Hospital** were illegally **induced."** Another investigator reported that from 1951 through **1962,** while the therapeutic abortion rate ih New York City was decreasing, there was a rise in the maternal mortality rate and in the number of deaths due to abortion. Among nonwhite and Puerto Rican women in 1960–1962, one out of two maternal deaths was caused by abortion, compared with one in four deaths among white **women.**[12]

The Setting

In the **1960s,** during my training as a medical student and **a** house staff officer at Bellevue Hospital, I encountered children who had been abandoned, neglected and abused, and pregnant women who had aborted after "falling down the stairs." I **joined** the attending staff before New York State liberalized its abortion law.

I began evaluating patients for therapeutic abortion in December **1968.** Initially, as a child psychiatry fellow working evenings in Bellevue's family planning clinic, I was asked to evaluate some women who were pregnant, despite their use of a contraceptive method, to *see* if they might qualify for therapeutic abortion on psychiatric grounds. To my **surprise, many** had significant psychopathology, and **I** was able to recommend abortions for them. Later, after I became the first psychiatric consultant assigned to the department of obstetrics and gynecology, many **more** women with unwanted pregnancies **were** referred for similar evaluations. Because I was the most junior member of the staff, my recommendations for therapeutic abortion had to be thoroughly and carefully **documented** in order to be credible. To this end, I took very detailed histories from these patients. These histories provide a window on this population during a time when a very restrictive law was still in place.

As pressure has mounted to again restrict women's access to abortion, it is **useful** to analyze these files and describe this population. There is little published information about economically disadvantaged women who sought abortion under restrictive laws. Past reports, some of them moralistic and judgmental, tended to focus on women who could afford private care and on the issue of psychiatric sequelae to abortion. (An exception was a report of 40 women from all social classes who were evaluated for abortion in New Haven.[13]) This article describes a large group of medically indigent women with unwanted pregnancies whose precarious situations, severe distress and desperate **behavior** are relevant and important in considering the potential impact on their counterparts today of increased restrictions on abortion.

The Patients

Until July 1, 1970, New York State law permitted an abortion only if a pregnancy was a threat to the woman's life. The law was vague and did not define life or threat. At Bellevue, applications for therapeutic abortion on psychiatric grounds had to be supported by letters from two psychiatrists; however, what constituted psychiatric grounds was not explicit. In evaluating patients, I assumed that the threat to a woman's life had to be physical, in terms of the potential for suicide or for dangerous attempts at abortion.

Bellevue did not require payment from patients at the time of the abortion. No limits were set on number of abortions performed, residence of patients or source of referral. Abortions were not done later than the 20th week of pregnancy. Parental consent was **required** for childless women under **21** who were unmarried and supported by their parents.

My data encampass the period from December **1968** to late April 1970, when the New York State Legislature passed a law removing moat restrictions on abortion. **Those** who were recommended for and obtained an abortion made up **90%** of women who had therapeutic abortions at Bellevue during that period. Women whom I could not recommend for abortion at Bellevue were referred elsewhere whenever possible. (I later contacted some whom I did not recommend for abortion to obtain information about the outcome of their pregnancies.) Because the application process was cumbersome and lengthy, a lapse of two or more weeks between the patient's first psychiatric interview and scheduling of the abortion was common. Some patients could not tolerate the delay and obtained illegal abortions. Others disappeared.

The data examined in this article include **all** 199 patients whom I evaluated, whether or not they were recommended for abortion, and whether or not they completed the application process. (Not included are women who requested and were referred for private care, one woman who was found to be not pregnant and one woman who had already decided to deliver and place the child for adoption, but **came** to the interview to satisfy her parents.)

Information on the women was taken from my original interview notes, rather than from the letters recommending abortion, to ensure the greatest accuracy. The presence of psychotic symptoms, serious substance abuse, occurrence of suicide attempts and psychiatric hospitalization were tabulated as concrete evidence of ***serious*** psychiatric disturbance. Attempts to induce an abortion were also tabulated, as they illustrated the desperate recklessness with which some of these women acted.

Patients' threats to kill or abort themselves were not tabulated, nor were observations or complaints of depression, anxiety and other nonpsychotic symptoms, to exclude possible exaggeration of distress by the patients or bias in interpretation by the interviewer. Past history of psychiatric treatment (inpatient or outpatient), suicide attempts, psychosis and seriously disabling nonpsychotic symptoms (such as severe agoraphobia) were

considered objective evidence of previous psychiatric disturbance. Past symptoms of depression, anxiety, psychosomatic problems, difficulties in adjustment or feelings of inferiority were not tabulated, as they were more subjective and possibly distorted. In assessing childhood trauma, I did not tabulate reports of parental divorce or absence of the father.

Results

Background Characteristics

Only 14% of the patients I evaluated were referred by psychiatric agencies, including the Bellevue psychiatric service; 47% were referred by the Bellevue obstetrics and gynecology service, 4% by other Bellevue services and about 2% by other hospitals in New York City. Abortion referral groups and family planning clinics referred 11% and 9%, respectively. Twelve percent were referred by their friends. (The source of referral was unrecorded for 2%.) The vast majority (89%) lived in New York City, and another 10% lived in the surrounding metropolitan area.

Twenty-two percent of the women were on public assistance, in some cases to supplement very low wages. Seven percent had no source of income and were eligible for public assistance. About 42% supported themselves with low-paying jobs—as factory workers, cleaning women, health aides, clerical workers and sales clerks. Nearly 10% were in the middle-income range, but three-quarters of these had financial difficulties. Twenty percent of the patients were full-time students. Students from middle-income families were seeking abortions at a public facility either because they could not tell their families they were pregnant or because serious financial problems precluded their paying for private medical care. White patients were most likely to have outside employment and least likely to receive or need public assistance.

The patients ranged in age from 14 to 41. Twenty-five percent were under age 20, 61% were 20–29, 13% were 30–39, and 2% were 40 or older. Forty-three percent were white, 30% were black, 23% were Hispanic and 4% were from other ethnic groups. (Ethnicity was not recorded for one patient.) Forty-four percent were Catholic, 33% were Protestant, 14% were Jewish, almost 3% were from other religious groups and 6% were of unknown religious background. Sixty-two percent of the group had never been married, 20% were currently married and 18% were separated, divorced or widowed.

Fifty-six percent of the women had been pregnant before. Fifteen women (almost 8%) had had induced abortions in the past, only four of which were legal. Two percent had previously given a child up for adoption. The applicants had 1–8 living children. Fifteen percent had an infant under one year of age, including two sets of twins, and nearly 8% had infants aged six months or younger, including one set of twins. Twenty-men percent of the pregnancies occurred because of contraceptive failure; an additional 5% of the women had been using a contraceptive method incorrectly.

Table 1. Number of therapeutic abortion candidates, by initial abortion decision, according to ultimate pregnancy outcome, Bellevue Hospital, New York, 1969–1970

Decision	Pregnancy outcome					
	Total	Ther. abor.	Spon. abor.	Illegal abor.	Cont. preg	Unknown
Total	199	151	6	13	6	23
Induced abortion at Bellevue	150	150	0	0	0	0
On psychiatric grounds	149	149	0	0	0	0
On medical grounds	1	1	0	0	0	0
No Induced abortion at Bellevue	49	1	6	13	6	23
Had spontaneous abortion	6	0	6	0	0	0
Had illegal abortion during application period	6	0	0	6	0	0
Changed mind, chose to carry to term	9	0	0	1	3	5
Rejected by abortion committee	3	1	0	1	1	0
Not recommended by psychiatrist	10	0	0	2	1	7
Lacked parental consent	5	0	0	3	1	1
Lost to follow-uo	10	0	0	0	0	10

The educational attainment of the group as a whole was limited. Although 52% had graduated from high school, 32% had dropped out prior to graduation; another 10% were current high school students, and the remaining 7% were of unknown educational attainment. One-third of the drop outs had attained less than a ninth-grade education. Almost 9% of the group were college graduates, 10% had had some college education in the past and 12% were current college students. Educational attainment was highest among the white patients and lowest among the Hispanic patients.

Outcomes

Table 2 shows that 150 of the 199 women (75%) obtained a therapeutic abortion at Bellevue, all but one (who had severe hypertension) on psychiatric grounds. Of the remaining 49 women, six were classified as having had a spontaneous abortion, although one admitted to having ingested quinine and other unidentified medications to induce abortion. Another six obtained illegal abortions during the time of the application process. One of these women was psychotic and abusive of her children, and later was hospitalized for treatment of septic abortion caused by a Lysol douche.

Nine women did not complete the application process because they decided to carry the pregnancy to term; four of these had tried to self-abort. Four had severe psychopathology, and two had made suicide attempts during the pregnancy. For five of these women, the final outcome of the pregnancy could not be determined; three completed their pregnancy, and one (also psychotic and abusive of her children) was subsequently hospitalized for treatment of septic abortion caused by a Lysol douche.

Three women were recommended for abortion but were rejected by the abortion committee. One, a 36-year-old woman with eight children who became pregnant while using an IUD, was judged to have insufficient psychiatric grounds; she later obtained an illegal abortion. Two others were rejected because they were more than 20 weeks pregnant upon admission. One of these, a 22-year-old woman with three children, who had made a suicide attempt during the pregnancy and had attempted self-abortion, continued her pregnancy and placed the baby in foster care; the other, a 17-year-old who was abusing her child, who had tried to self-abort and who had threatened to drink lye, later obtained a therapeutic abortion at another hospital.

Ten women were not recommended for an abortion. Seven lacked psychiatric grounds; among these was a 41-year-old mother of seven (including one retarded child and one brain-damaged child) who had become pregnant while using an IUD. (We tried unsuccessfully to obtain an abortion for her on genetic grounds.) Three women from this group could be followed up: Two had illegal abortions, and one continued her pregnancy. The other three women who were not recommended for therapeutic abortion were beyond the 20th week of pregnancy, and so were not eligible for an abortion at Bellevue. Two of these patienb were minors afraid to tell their parents, and one was an intellectually limited adult abandoned by her husband.

Five minors did not have a therapeutic

abortion because they could not obtain parental consent, including one 18-year-old who had made several attempts to self-abort and another whose psychotic father had tried to strangle her and whose mother rejected and abused her. Three of the five subsequently obtained illegal abortions, one continued her pregnancy and one was lost to follow-up.

Finally, 10 either failed to keep their second psychiatric appointment or could not be located after the abortion had been approved. Four had tried to self-abort and two had threatened to do so; four had severe psychopathology — attempted suicide, psychosis, substance abuse or mental retardation.

In all, 151 women were known to have received a therapeutic abortion, 13 obtained an illegal abortion, six had a spontaneous abortion, six completed their pregnancy and 23 were lost to follow-up.

Attempts to Induce an Abortion

Prior to the psychiatric interview, 66 patients (33%) had either attempted to abort the pregnancy themselves or had had another individual (such as a "midwife" or a physician) try to induce an abortion. Eight of these women had successfully self-aborted or obtained an illegal abortion during a previous pregnancy.

The methods employed for illegal abortion ranged from the use of ineffective folk remedies to the ingestion of dangerous substances and the insertion of foreign bodies and irritating solutions into the uterus and vagina. Many had employed multiple methods and had made repeated attempts to self-abort. Two of the 66, plus 11 women who had not attempted to abort the pregnancy before the interview, subsequently induced an abortion or obtained an illegal abortion. In all, 77 women (39%) are known to have tried, successfully or not, to abort their pregnancy,

Rape

Ten patients *(5%)* were pregnant as a result of rape. (Marital rape was not included.) Only *three* of these incidents were reported to the police. In *six* instances, the rapist was known to the patient, who feared reprisal if she reported the rape. Five of these 10 women had tried unsuccessfully to self-abort, and a sixth obtained an illegal abortion before her second interview.

Psychiatric Disturbance

Concrete evidence of psychiatric disturbance, past or present, was found in 57% of the patients, even though many of them tried to conceal evidence of serious psychopathology and past psychiatric hospitalization, out of shame and fear of being thought "crazy" *(see* Table 2). Some of the reported suicide attempts were very serious, such as driving a motorcycle off a road, jumping from a ferry, and taking near-fatal overdoses. Six patients had made suicide attempts during a previous pregnancy.

Table 2. Number and percentage of therapeutic abortion candidates at Beilevue Hospital who exhibited concrete evidence of psychiatric disturbance

Evidence	No.	%
Total	114	57.3
Past history of suicide attempt(s)	53	26.6
Suicide attempt(s) during current pregnancy	10	5.0
Past psychiatric hospitalization	37	18.6
Psychiatric hospitalization during current pregnancy	9	4.5
Psychotic during current pregnancy	15	7.5
History of untreated psychosis or other severe disturbance	15	7.5
Current severe substance abuse	20	10.1
Outpatient psychiatric treatment, past or present*	38	19.1

*No inpatient treatment.

Of the nine patients hospitalized for psychiatric reasons during the current pregnancy, three were admitted after the psychiatric interview. Four were psychotic and the remaining five, although not psychotic, were seriously suicidal. The substance abusers were using alcohol, heroin, barbiturates, amphetamines, hallucinogens and cocaine, either alone or in combination. Patients who received outpatient rather than inpatient treatment were not necessarily less disturbed, and some were psychotic.

History of *Severe Childhood Trauma*

Many women in the group came from extremely troubled families. Forty-eight per cent reported severe psychological trauma — loss of one or both parents, severe parental psychopathology or abuse during childhood. Twenty-six percent had lost one or both parents as a result of death, abandonment or severe rejection, such as unwarranted long-term institutional placement; 19% had a parent or guardian who was psychotic, alcoholic or drug-addicted, and 17% had been abused. Most of the abuse reported was physical rather than sexual; however, a history of abuse was not actively sought in the interviews.

Patients' Abuse of Their *Children*

Although this study does not focus on child abuse by the patients, 11 of the women volunteered that they were abusing their children; their behavior ranged from hitting the children to inflicting severe beatings causing injury (two patients) and stuffing rags or socks in a baby's mouth to mufflecrying (two patients). Ten of these women had suffered severe emotional trauma or deprivation during their own childhood, and three had been abused. Three were psychotic, either currently or in the past, and one was retarded.

Seven additional women did not have custody of their children. Six of these women had been severely deprived or abused as childreri, five had previously been hospitalized for psychiatric reasons and four had had serious problems with substance abuse.

Other Stress

Seventy-nine percent of the women lacked emotional support from their male partner or the person by whom they were pregnant. These included women whose marriage was foundering, whose husband or boyfriend had abandoned them, or whose partner did not want to take responsibility for a child, as well as women who were pregnant by a man whom they did not know well or with whom they had a poor relationship. Two women were seeking abortion because of the violent death of their partner: One husband had been murdered, and the 21-year-old fiance of another patient had been killed in an automobile accident.

Seventeen women had been brutally abused by their legal or common-law husband. One woman had had a miscarriage six months earlier after having been kicked in the abdomen by her husband. Another had been hospitalized because of injuries inflicted by her husband. Eight legal or common-law husbands were alcoholics, and eight were drug addicts. Four husbands were psychotic, and a fifth had been totally disabled by severe phobias for two years.

In some instances, the serious health problems of the husband, children or the patient herself were major sources of stress. One husband was dying of cancer, and another was severely ill with sarcoidosis. Ten women had children who were identified as being emotionally disturbed or retarded. Three women were under stress because of the death of their children — one in an accidental fall, another from crib death, two in a fire, and one in a traffic accident. Nine women had serious physical problems, including severe hypertension, pyelonephritis, diabetes, severe asthma, multiple sclerosis, hyperthyroidism and impending blindness.

Discussion

An increasing number of therapeutic abortions were performed at Bellevue from 1967 on, which may reflect a changing attitude toward abortion in the 2–3 years preceding the liberalization of New York's abortion law in 1970. Statistics from University Hospital, a neighboring hospital that served primarily private patients, show a similar increase during that period (see Table 3). Another contributing factor was that the assignment of a psychiatric consultant to the Bellevue obstetrics and gynecology service established a mechanism for evaluating patients for therapeutic abortion where none had previously existed, and provided these women with an advocate.

Bellevue Hospital and University Hospital shared virtually the same gynecologic and psychiatric staffs, as well as the same abortion committee. The consistently larger number and higher rate of abortions performed at University Hospital each year between 1964 and 1969 suggests that women who could afford private care had easier access to legal abortion than medically indigent women, even though the criteria for therapeutic abortion were presumably the same at both institutions.

This difference parallels the disparity in abortion rates between private and ward patients documented in the studies reviewed earlier. It may reflect better rapport between private physicians and their patients and greater sensitivity to their needs. One investigator noted a "social class differential" in abortion referrals by family doctors of Scottish women with out-of-wedlock pregnancies—the proportion of professional women and students referred was triple the proportion of fishworkers referred-and commented that "doctors will attribute feelings and motives to their clients which will be less accurate the greater the social distance between the interactants."[14]

The incidence of severe psychiatric disturbance in the group of women at Bellevue Hospital was high, even though most were referred from nonpsychiatric settings and even though past and current symptams such as depression, anxiety and suicidal ideation were excluded from tabulation of psychopathology. Although patients referred by community family planning clinics and abortion referral groups were selected for psychopathology, the hospital's gynecology patients were routinely referred to me if they wanted an abortion, and women referred by their friends were also an unselected group. Moreover, most of the patients were unsophisticated women who were unaware of the legal requirements for a therapeutic abortion. The high incidence of severe childhood psychological trauma and deprivation among these women is consistent with a high incidence of psychopathology.

Table 3. Number and rate (per 1,000 live births) of therapeutic abortions at Bellevue Hospital and *University Hospital*, 1964–1969

Year	Bellevue*		University	
1964†				
1965				21.8
1966		1.8		15.6
1967	9	7.1	33	28.4
1968	23	22.3	66	44.9
1969	57	45.2	110	71.1

*Between 1964 and 1967, most abortions were on medical or genetic grounds: those on psychiatric grounds were far psychiatric inpatients only. †Rubella epidemic.

The extent of family disorganization and pathology reported may be related to the economic deprivation of this group. Poverty, with its attendant stress, exacerbates other problems. For example, a longitudinal study conducted in New Haven found that poverty in itself increased the risk for new episodes of psychiatric disorder.[15] Another study reported that almost 43% of indigent women seeking an abortion under California's liberalized abortion law had been hospitalized for or had sought psychiatric treatment in the past.[16] One investigator noted that 75% of the women he evaluated for therapeutic abortion under a restrictive law had preexisting psychiatric problems.[17]

The fact that severe stress and psychopathology can impair a woman's childrearing ability is illustrated by some of these women's experiences, both as abused children and as abusive parents. Too many children spaced too closely compounded the stress for many of them. The general lack of support from their male partners amplified their distress, and was usually an important factor in their decision to seek abortion. Severe marital conflict and serious family health problems were also profound sources of stress.

For about half of the women who ultimately did not have a therapeutic abortion at Bellevue, their psychopathology or distress itself probably contributed to the outcome. Marked ambivalence was a prominent aspect of the psychopathology of the disturbed women who changed their minds. Some of those who came too late for an abortion were also immobilized by ambivalence, and others were minors too frightened to tell their families they were pregnant. For some women, the delay, uncertainty and sense of being judged may well have exacerbated their suffering, and this subgroup included some of the study's most disturbed and impulsive patients, who were least able to tolerate the delay of awaiting the committee's decision. The dangers of a lengthy, stressful application process for abortion are underscored by the fact that these disturbed women often disappeared or self-aborted.

The proportion of women in the group who attempted to self-abort may actually have been higher. I made routine inquiries about such attempts only after a number of patients had spontaneously reported them. Researchers have reported that in interviews of 889 parous women aged 18–38 randomly selected from poor neighborhoods in New York City in 1965 and 1967, 8% said they had attempted to self-abort at some time, and 38% knew someone who had tried to abort a pregnancy.[18] Other investigators analyzed 17 illegal-abortion deaths reported between 1975 and 1979 and found that blacks and Hispanics were disproportionately represented; one-third had sought illegal abortions because legal abortions were too expensive or were unavailable.[19]

The abortion attempts reported here reflect the desperation of these women, their ignorance or mistrust of legal channels for obtaining abortions, and the widespread unavailability of legal abortions for indigent women at that time. The number of pregnancies terminated by illegal abortion would likely have been higher in this group if therapeutic abortion had not been offered to most of these women.

Some of the women I evaluated had severe chronic psychiatric disorders and would have been disturbed even without the stress of an unwanted pregnancy. Their symptoms might have been exacerbated had they been forced to bear an unwanted child. In a study of women on an inpatient psychiatric service, eight who had continued an unwanted pregnancy later felt that having and caring for the children contributed to their emotional breakdown."

Other women among my patients had longstanding problems with depression and anxiety. Their symptoms were seriously aggravated by the uncertainty of outcome and judgmental procedure imposed by a restrictive abortion law. Although my analysis of psychopathology for this report excluded symptoms of reactive or situational depression, agitation and anxiety, these symptoms were nevertheless intense, and were the result of stress created by a restrictive law. They are seldom observed when abortion is available on request.

Whether women with reactive symptoms would have become more disturbed

had they been forced to continue their pregnancies cannot be determined. That possibility is certainly suggested, though, by fallow-up studies of Swedish, Scottish and English women who were refused abortions, which show that they fared worse in psychological and social dysfunction than women who obtained abortions, even though they were deemed emotionally more stable at the outset?' Two long-term studies, one set in Sweden and one in Czechoslovakia, have found that children born to women refused abortions do less well than controls on several measures.[22]

The social and emotional distress and disorder described in this article have not disappeared from the Bellevue Hospital patient population. I continue to work as the psychiatric consultant on the obstetrics and gynecology service, and continue to see similarly disturbed individuals and families. Social conditions are, if anything, worse now than they were 20 years ago. An increasing number of patients are homeless, many more abuse drugs, and the number we report to child protective agencies has been growing yearly.

Broad restrictions on abortions, if enacted, may result in severe distress among these patients, possibly leading to dangerous attempts at self-abortion and to emotional breakdown. The experiences of the group of women described emphasize the importance of access to abortion on request in meeting the physical and psychological health needs of disadvantaged women.

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