Fetal-maternal conflicts

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Since the early 1970s a great deal of attention has been paid to what we might term "conflicts of interest" between a fetus and the woman carrying it. The most dramatic of these conflicts occurs when pregnancy is unwanted and the woman desires to have an abortion. However, conflicts can arise even when the pregnancy is wanted and the fetus brought to term. Improvements in medical knowledge and technology, combined with alterations in women's social roles and expectations, have revealed or created a broad range of potential clashes between the well-being of the mother and that of the fetus. Fetal-maternal conflicts of this type can occur in the following kinds of cases:

1. The pregnant woman has the choice of introducing a substance into her body that would have differential effects on herself and the fetus. Salient examples include cases in which the woman consumes alcohol, coffee, tobacco, cocaine, or heroin. Other cases include the woman's medications during pregnancy or delivery (for example, aspirin, anticonvulsant and anticoagulant medications, drugs to relieve morning sickness, or drugs to reduce pain during labor and delivery) that may be necessary for her own health or comfort, but deleterious to the health of the fetus. Conversely, the woman may take – or refuse to take – medications or substances that improve the prospects of the fetus but compromise her own health or comfort. An example of this is provided by a PKU mother who must choose whether to undertake a burdensome and unpleasant low-phenalylanine diet during pregnancy in order to avoid severe mental retardation, microcephaly, and congestive heart disease in her fetus.

2. The pregnant woman has the choice of undergoing surgery that would have differential effects on her own and the fetus's well-being. She may choose – or reject – delivery by Caesarian section, or intrauterine surgery on fetal abnormalities. Such surgery would improve the fetus's chances of unimpaired survival but expose the mother to the risks, discomforts, and disabilities brought on by major abdominal surgery. Similarly the woman may choose – or reject – interventions that would improve her own health or longevity but compromise fetal health or longevity.

3. The pregnant woman may choose to behave in a manner that risks physical impairment or death for the fetus. Sustained bedrest and avoidance of sexual intercourse may be necessary to avoid miscarriage in certain high-risk pregnancies; extremely vigorous exercise may induce premature labor in normal pregnancies; lack of sufficient exercise may render delivery more difficult and dangerous to the fetus; while certain physically dangerous pursuits, such as ice-skating or hang-gliding, may jeopardize the fetus's health or life.

4. The pregnant woman may choose to expose the fetus to environmental dangers. Holding a job in a workplace containing substances hazardous to fetal health may expose the fetus to risk of miscarriage and death or to a variety of disabilities and malformations. Living in a household with a heavy tobacco-using spouse may expose the fetus to the effects suffered by "passive smokers." Residing in a community with polluted water or soil may expose the fetus to chemical fetotoxins.

Most pregnant women want what is best for their children and choose their behavior accordingly. However, patterns of social behavior and actual individual incidents involving maternal-fetal conflicts of the kinds described have been widely reported over the last ten years. An estimated one baby out of ten is born with some illicit drug in its blood; babies born to mothers on crack suffer severe and often permanent neurological defects.[1] Women who use drugs during pregnancy have been charged with child abuse, and in at least one case, with the felony of delivering drugs to the baby.[2] Courts in Michigan and Illinois have held that a child can sue his or her mother for actions which may have adversely affected the child's development prior to birth. The Michigan case involved a mother who took tetracycline during pregnancy and thereby allegedly stained the teeth of her baby.[3] By 1987 courts in at least eleven states had ordered women to undergo Caesarean sections against their will.[4] Dramatic advances in fetal intrauterine surgery have occurred in the last several years; most recently a San Francisco surgeon successfully repaired a diaphragmatic hernia in a 24-week-old fetus who survived to normal birth. The availability of such remedies places increasing pressure on pregnant women to make use of them, even though they may involve the traumas to the mother of major abdominal surgery, and in some cases may promise only slight or low-probability benefits for the fetus. Although the fetal hernia repair was necessary to save the fetus's life, the surgeon who performed it cites the fact that intrauterine surgery leaves no scarring as a reason to correct such defects before rather than after birth in cases where either is possible.[5] In the case of workplace hazards, women are often not being permitted to make the choice for themselves. A number of important firms, including DuPont, General Motors, B.F. Goodrich, Olin, Gulf Oil, Allied Chemical, Monsanto, and American Cyanimid, have adopted employment policies excluding all fertile women from reproductively hazardous jobs. These policies have resulted in several notorious cases in which women have had themselves sterilized rather

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than lose their jobs or be transferred to safer but less well-paying positions.[6] Finally, some states have considered adopting a very broad approach to fetal-maternal conflicts: in 1987 Arkansas voters narrowly defeated a proposed constitutional amendment to make it a state responsibility to protect "every unborn child from conception to birth."[7]

Fetal-maternal conflicts arise because the pregnant woman and the fetus are physically linked in such a way that what affects the one may unavoidably affect the other as well. But family ties that bind parents to their children *after* birth may operate in much the same manner, giving rise to comparable conflicts of interest. The above cases form a continuum with ones in which conflict arises after the child's birth. A parent's smoking in the house poses a threat to other family members; crack-using parents often abuse and neglect their children[8]; parents who fail to buy smoke detectors expose their children to risk of death or injury by fire; parents who uproot the family to pursue career goals may subject children to disruption of important social ties or inferior schools; parents who fail to use an automobile child restraint system increase the child's chance of being killed or maimed in an accident; parents who reside in heavily polluted areas expose their children to the associated health risks; parents who purchase a lightweight fuel-efficient car increase the child's chance of being killed or disabled in an accident.

These cases remind us that there is an extremely general problem about the duties of parents in general, including pregnant women, to their children. In this paper I shall initially focus on only one component of this problem, the duties of a pregnant woman to her fetus when no abortion is planned. In examining this problem, I shall phrase the issue as follows: Does a fetus have a right that its mother engage in conduct that will maximize its chances of leading a healthy and unimpaired existence? In asking whether a fetus has such a *right,* I shall mean a *strong moral claim,* the kind that ought (at least prima facie) to be enforced by society, if necessary through the use of the criminal code. We can also express this question by asking whether the mother has a *duty to the fetus* to conduct herself so as to maximize the fetus's chances of leading a healthy and unimpaired existence.

I

In approaching this question, we must recognize two different kinds of case: those in which maternal conduct would either risk or result in fetal death, and those in which maternal conduct would either risk or result in less grave fetal impairment or ill-health. From a practical point of view it is somewhat artificial to separate these two kinds of cases since many forms of maternal conduct that risk one kind of result may risk the other as well. However, since the moral issues raised by the two kinds of case are importantly different, they must be considered separately. In this paper I shall focus primarily on maternal conduct that may affect the fetus's health or functioning, but not affect its chance of survival. In addition, I shall only consider cases in which the fetus retains sufficient health and level of functioning so that its postnatal life is worth living. Cases in which the fetus survives, but would be better off dead than in its resulting condition, require a different analysis.

What I shall call lethal fetal injury involves fetal death before the normal term of the pregnancy. *Nonlethal fetal injury,* the type we shall consider here, involves injuries that do not cause fetal death. Nonlethal fetal injury might involve fetal suffering or discomfort while the fetus is still *in utero.* However, most nonlethal fetal injuries primarily involve suffering for the fetus after it is born – the suffering of pain, disability, cosmetic deformity, ill-health, mental retardation, or a shortened lifespan. I shall restrict my attention to cases involving postnatal injuries of this sort.

Does a fetus have a right not to suffer such postnatal, nonlethal injuries? Strictly speaking, the fetus does not, because it is not the fetus but rather the child or adult whom it becomes that would suffer the evil of these injuries. But if the fetus survives, then the child or adult which it becomes *does* have a right not to suffer from pain and disability. Any action which wrongfully inflicts these evils on the child or adult violates a duty not to cause pain and suffering, *even though that action only causes this suffering by first affecting the fetus.* The mere fact of a gap in months or years between the time of the injurious action and the resultant suffering does not undermine the duty not to cause this suffering. Consider a terrorist who plants a time bomb that detonates and injures someone ten years later. This terrorist's act is morally no better than the act of a second terrorist who pushes the plunger and detonates his bomb immediately, causing an instant similar injury to a second victim. Assuming the two terrorists have equally certain knowledge of the consequences of their acts, the moral quality of the acts is the same, despite the difference in rapidity with which the consequences occur. Consider a third terrorist, who plants a bomb that explodes ten years later, injuring a child who was still *in utero* at the time the bomb was planted. His act is just as heinous as the acts of the first two terrorists. The reason for this is that the child has a right not to suffer, and *this* right is violated by the action of the terrorist ten years earlier – even though the child was still a fetus at that time.[9] Such a duty would be a duty to the child or adult which the fetus would become. It would not be a duty to the fetus itself, since it is not the fetus but rather the child or the adult who would experience the suffering. By the same token, any such right would be a right possessed by the child or the adult, not by the fetus. However, for brevity of exposition I shall allow myself in such cases to speak loosely of a duty to the fetus, or a right of the fetus, with regard to nonlethal injury.

If this is correct, then in considering any action which involves less-than-

lethal postnatal injury to a fetus, we must view the fetus as though it were a child or adult, because it will develop into a child or adult whose rights may be violated by our action. From this point of view we can see that the conflicts of interest between a pregnant woman and her fetus are more closely allied to the conflicts of interest between a parent and a child after birth than we may initially have supposed. But acknowledging this parallel does not, in itself, tell us what the mother's duty to the fetus (on behalf of its future selves) is. In the next section I shall sketch three different approaches to the problem and argue that one of them provides the best framework for determining what a pregnant woman's concrete duties to her fetus are. I shall discuss the apparent implications of this framework for certain kinds of concrete cases, without attempting a definitive resolution of these cases.

II

One way of ascertaining the woman's duty to the fetus is by doing a utilitarian calculus. According to this approach, the woman is morally obliged to choose the alternative, among those open to her, that would have the least bad net effect on the welfare of everyone involved. Let us take the example of a pregnant woman who is considering whether or not to remain in a job where fetotoxins pose significant hazards to the health of her fetus. To determine her duty according to a utilitarian calculus, one details the possible consequences of her retaining the hazardous job: damage to the well-being of the child or adult that the fetus would become, secondary suffering of the immediate family, financial drain on society, and so forth – counterbalanced to some degree by the benefits of the mother's retaining a productive and remunerative job. One then details the possible consequences of her various alternatives. For example, the consequences of her quitting work might include financial strain and emotional stress affecting the entire family, possible health damage to the fetus from inadequate nutrition if the woman cannot find alternative employment, social loss of a productive worker, and so forth – counterbalanced to some degree by birth of a baby whose well-being has not been compromised by workplace fetotoxins. These various effects are assigned values, weighted by their probabilities of occurrence, and the resulting sums for each of the mother's alternatives are compared. If the net effect of the pregnant woman's retaining the job is worse than the effect of quitting, then she has a duty to quit; if the reverse is true, then she has a duty to remain on the job, even though doing so imperils the fetus.

If one can carry out such a utilitarian calculus, one can derive a definite answer to the question of whether or not the pregnant woman has a duty in any particular case to avoid activity that threatens the fetus's well-being. However, it is notorious that the answers provided by utilitarianism are often unsatisfactory. The reasoning behind this dissatisfaction might be expressed as follows: "Suppose it turns out that the woman ought to keep the job, even at a severe cost to the health of the fetus. Then the fetus (or the child it becomes) is being directly harmed in order to secure benefits for other people, for example, self-esteem for the woman, a higher standard of living for the family, cheaper manufactured goods for society. In starker terms, the fetus is *being sacrificed* for them. But it is immoral to sacrifice one person in order to benefit others, even when the gain for them outweighs the loss for the victim. Utilitarianism misses this point, and so goes astray in this case as in many others."

This objection rests on a view about morality that provides the foundation for the second and third approaches to our central question. According to this view, there is an important moral distinction between harming another person and failing to help that person. People have a *right* not to be harmed, and this right creates a strict duty on the part of others. But generally speaking people have no right to be helped, and there is no *duty* to assist others, although it may be morally admirable to do so. Thus, you have a duty not to harm another person by stealing his money, but you have no duty to help him out by giving him your money. Similarly, you have a duty not to injure someone with your car, but you have no duty to assist the victim of an accident caused by someone else. Helping people in need is an act of Good Samaritanism which morality commends but generally speaking does not require. The latter qualification is necessary because some people feel that there is a duty to help others *if the cost of doing so would be minimal*. On this view there may be a duty to help the accident victim by some minimally costly act, such as calling an ambulance, but there is no duty to help the victim by providing artificial respiration for forty-five minutes until the paramedics arrive. But the duty not to harm others holds whether or not the cost of avoiding harm would be minimal: even if the cost to you is major, you have a duty not to steal, and a duty not to injure someone with your car. One sign of the difference between harming and failing to help is the fact that it is appropriate for society to forbid harmful acts and to enforce this prohibition by imposing criminal sanctions, but, by and large, it is not appropriate for society to use criminal penalties to compel acts of assistance or charity. The predominant exceptions to the latter involve acts of assistance that would involve minimal cost to the agent, or acts that occur within relationships of trust, such as the family.[10]

There is currently a good deal of philosophical controversy about the view that causing harm is morally worse than failing to help. However, the view is deeply entrenched in ordinary moral consciousness and informs much of our common and statutory law. It will repay us to ask how the distinction applies to the problem of the fetus's right vis-à-vis the mother. Clearly (on this view) a woman has a strict duty not to positively harm her fetus by, for example, shooting it while it is still *in utero* and causing it to be paralyzed. On the other

hand, there may be acts of assisting it which even as a parent she has no strict duty to perform. For example, if the fetus's intelligence could be raised twenty points by a series of prenatal treatments, she has no strict duty to undertake the treatments. Indeed, if the cost to her is high – if, for instance, the treatments are extremely painful to the mother, or if financing them would require her to give up her own college education – the moral pressure on her to undertake the treatments is minimal or nonexistent.

In order to trace the implications of this moral perspective for maternal-fetal conflicts, we must know what kind of conduct on the part of a pregnant woman counts as "positively harming" her fetus, and so is prohibited. There seem to be two possible approaches to answering this question. I shall call these approaches the "Simple Causal View" and the "Contextual View." According to the Simple Causal View, whether or not an act counts as harming someone simply depends on the causal nature of the act. If the agent *actively produces* the injury, then he counts as having harmed the victim. If, on the other hand, the agent does not intervene to prevent already existing conditions from producing an injury, or if he does not actively produce an improvement in the victim's situation, then he counts as merely having failed to assist the person. Thus, a person who shoots a child harms him, but a person who passively stands by while another individual shoots the child, fails to assist him.

On the Simple Causal View, the mother's ingesting toxic substances such as drugs or alcohol counts as positively harming the fetus, because she acts in a way that positively produces fetal injury. Similarly, her undergoing surgery that benefits herself but injures the fetus, or her engaging in damaging physical activity such as overly vigorous exercise or hang-gliding, would count as positively harming the fetus. By the same token, the mother's exposing a fetus to toxic workplace chemicals would appear to count as positively harming it. Of course exposing a fetus to toxins in the workplace is not, in terms of causal structure, precisely like firing a gun at it. But it is not necessary personally to pull the trigger in order to actively produce a gunshot wound: It would be sufficient to carry the victim onto a military target range where he is hit by the gunfire of others. Carrying someone within range of firing guns actively produces a situation in which the person will be injured, and so counts as harming the person. On the Simple Causal View, carrying a fetus into a hazardous workplace is analogous to carrying the child onto a firing range. When the fetus suffers, the mother has harmed it. On this view, since the fetus has a right not to be so harmed, the mother has a strict duty not to undertake work that is hazardous to it.[11] Since maternal activities such as smoking crack, drinking excessively, undergoing surgery beneficial to herself but harmful to the fetus, or exposing it to a hazardous workplace count as *harming* it, a pregnant woman has a strict duty not to engage in these activities, however burdensome the avoidance of these activities may be to her personally. At least up to certain extreme limits, she evidently cannot justify the pursuit of these activities by pointing out the personal sacrifices by her forgoing them.

The Simple Causal View is initially plausible, and many writers on fetal-maternal conflicts have assumed it is correct. For example, John A. Robertson and Joseph Schulman, in discussing PKU mothers who refuse to follow a diet necessary to preserve the fetus's health, refer repeatedly to "The mother's . . . behavior occurring during pregnancy [that] directly injures babies who could be born healthy," her "harmful conduct," more generally to "obligations to refrain from harming children by prenatal actions," and to "women who will not or cannot comply with proper conduct [who] will wind up injuring a child who could be born healthy."[12] Similarly Dawn Johnsen states that "pregnant women make countless decisions that pose some threat to their fetuses," and says they "should not and cannot make . . . decisions solely on the basis of what is most likely to reduce the chance of harming the fetus."[13] The Simple Causal View has a strong grip on our initial understanding of fetal-maternal conflicts. However, I think this understanding is faulty. There is another way of interpreting the situation that results in a different judgment, and that seems to me more adequate. This approach, which I call the "Contextual View," maintains that whether or not an act counts as harming does not depend solely on the causal structure of the act. It also depends on the context, or background conditions, in which the act takes place. When this is taken into account, our understanding of fetal-maternal conflicts is altered. To see how contextual factors affect the question of whether or not an act counts as a harming, let us consider the following two cases.

In the first case a motorist, driving through an uninhabited desert, comes upon the figure of a woman sprawled by the roadside. Inspection reveals that she has been bitten in the leg by a rattlesnake, has lapsed into unconsciousness, and will certainly die if not given expert medical aid. The motorist cannot render this aid, and there is no probability that anyone else will pass by in time to save the snakebite victim. The only way to save her life is to transport her to the nearest hospital, which involves going several hundred miles out of the motorist's way. Most motorists would undoubtedly be happy to perform this service. But according to the tradition that helping is morally optional, there is no strict duty to do so. Note that since the snakebite victim is unconscious, no hope of rescue would be raised in her mind by the motorist's arrival or dashed by his unfeeling departure: If the motorist decides not to rescue the victim, or abandons a rescue effort at some stage, he leaves her no worse off than she would have been had he never come along. Let us imagine, however, that humanitarianism moves the motorist to take the snakebite victim to the hospital. On his arrival, the doctor informs him that their facilities

are limited; although they will be able to save the victim's life, they will not be able to prevent gangrene from necessitating amputation of her leg. In another community there is a hospital possessing adequate facilities to save both the victim's life and leg, but unfortunately the local ambulance has broken down. In fact the only way for the victim to get to the second hospital would be for the motorist to transport her an additional hundred miles out of his way. Does the fact that the motorist has undertaken to render *some* assistance to the snakebite victim mean that he is now obliged to render her *further* assistance – to prevent her losing her leg as well as prevent her losing her life? It seems clear that there is no strict duty to render this second act of assistance any more than there was to render the first one. We might not admire a motorist who refuses to render this higher level of aid, but the snakebite victim has no *right* to it.

Now consider a second case. The scenario is much the same: if the motorist takes the snakebite victim to a hospital several hundred miles away, the victim's life will be saved. Seeing the victim's plight, the motorist places her in the car and starts for the hospital. However, he realizes that the shortest route to the hospital involves traversing an extremely rough stretch of road, and that the inevitable jolting will traumatize the victim's leg, causing it become gangrenous and ultimately to require amputation. There exists an alternative route over a smoother road, but taking this route would send the motorist an additional hundred miles out of his way. Does he have a strict duty to take the longer route and avoid loss of the victim's leg?

There is an obvious sense in which the motorist's taking the shorter route would *cause* the victim to lose the leg. If we rely solely on this fact, as the Simple Causal View does, we must say that the motorist who takes the shorter route positively *harms* the victim, and so is morally required to take the longer route to the hospital if he attempts to rescue the victim at all. But in fact the motorist's taking the shorter route to the hospital seems morally on a par with his failing to take the victim to the second hospital in the first case described. In the first case, rendering the lower level of aid merely involves ceasing efforts on behalf of the victim, while in the second case, it involves physically injuring the victim in the process of rescuing her. But because in both cases the victim is better off than she would have been if no assistance had been rendered at all, we cannot say her rights have been violated. Thus, the Simple Causal View presents *too* simple a picture of what harming consists in. Certain acts that would count as harming when looked at from a purely causal point of view are not harms when they take place within a context of rendering aid, and indeed qualify as *ways* of rendering aid. Then they count merely as rendering a lower level of aid than would have been possible. Since rendering aid at the highest possible level is not required, such acts are morally permissible. It is just as permissible in the second case for the motorist to take the shorter, rougher route as it was in the first case for him to refuse to take the victim to the second hospital.[14]

The lesson to be learned from these two cases is this. Just as a person's rights are not violated by failure to render her aid, so her rights are not violated by provision of aid at less than the optimal level. Sometimes rendering a less-than-optimal level of aid involves ceasing one's efforts on her behalf, but sometimes it involves treating the person, in the course of the rescue effort, in a manner that would otherwise constitute harming her. But in this context the treatment does not count as harming her – rather it merely counts as rendering her a lower level of aid, and so does not violate her rights.

Let us apply this lesson to the problem of fetal-maternal conflicts in which the pregnant woman can choose to act in a manner that would result in postnatal nonlethal fetal injury. To do so, we must first recognize that a pregnant woman is someone who is *benefiting* or *assisting* her fetus.[15] She is providing it with the use of her body for shelter and nourishment while it develops. Her act of carrying the child to term should be seen as morally parallel to the act of donating a kidney to someone dying of renal disease. Special considerations aside, the pregnant woman is not morally required to provide this assistance, just as the donor is not morally required to donate his kidney.

The pregnant woman is therefore morally on a par with the motorist engaged in saving the life of the snakebite victim by transporting him to the hospital. If the woman acts in a manner that results in postnatal fetal injury, for example, if she exposes the fetus to toxic substances in her workplace, her act is parallel to the motorist's act of transporting the victim to the hospital by the shortest, but rough, route. Just as there is an obvious sense in which the motorist's act causes the victim to lose his leg, so there is an obvious sense in which the woman's act causes her fetus to suffer disability or ill-health.[16] But, just as the victim is better off overall to have been rescued in this fashion than not to have been rescued at all, so the fetus is better off overall to have been given life under these circumstances than not to have been given life at all. Because the woman is engaged in a course of assisting the fetus, her act of exposing it to workplace toxins does not count as harming it. Instead the act counts as providing the fetus with a lower level of aid. Hence, no right of the fetus is violated by this act.

On the Contextual View, as I have outlined it, it appears that a fetus has no right that its mother avoid activities that would result in postnatal nonlethal injury to the fetus. Such activities should be construed as the mother's rendering the fetus a lower level of aid than she might have done. But since she is not morally required to render aid at all (at least if doing so would require significant personal cost), she is certainly not required to render the highest possible level of aid. Hence, these activities are morally permissible, and

violate no right of the fetus. Earlier in this section I pointed out that the duty not to harm another person holds even when the cost of avoiding harm would be heavy: Whether one has a duty not to harm another does not vary with the cost to oneself of fulfilling such a duty. But one only has a duty to assist another person in circumstances where the cost of carrying out that duty would be minimal. Hence, if a pregnant woman's activities that risk nonlethal injury to her fetus are understood as *failures to assist* the fetus, rather than as *harms* to the fetus, the moral quality of these activities alters considerably. If these activities harm the fetus, she cannot justify pursuing them by citing the cost to her of foregoing the activities. From this point of view, Robertson's and Schulman's contention that fetal-maternal conflicts are to be resolved by "a careful balancing of the offspring's welfare and the pregnant woman's interest in liberty and bodily integrity" makes little sense.[17] No such balancing is appropriate. But if these activities merely fail to assist the fetus at the highest possible level, then the pregnant woman can justify pursuing them by citing the cost to her of failing to do so. Adopting the Contextual View, rather than the Simple Causal View, has a dramatic effect on the kinds of moral judgments we can render in cases of fetal-maternal conflict.

III

I believe the conclusion reached in the last section is correct in its essentials. However, it needs qualification, and it must be defended against certain apparently plausible objections. In this section I will revisit the case of pregnancy and develop a more adequate application of the Contextual View to the duties of the pregnant woman towards her fetus. In the following section I will refine the Contextual View to rule out certain unacceptable conclusions that might seem to follow from the analysis so far.

An immediate objection to my conclusion about the pregnant woman's duty toward her fetus might be stated as follows: "So far you have drawn a strict parallel between the case of the motorist and the case of the pregnant woman. But there is a glaring disparity between them: The motorist is a complete *stranger* to the snakebite victim, while the pregnant woman is the *parent* of her fetus. And parenthood is a paradigmatic example of a *fiduciary relationship* that generates strict duties to render assistance in circumstances where such duties would not hold among strangers. A parent is morally bound to help his children, for example to feed and clothe them – something no mere stranger is obligated to do for them. According to the analysis so far, a pregnant woman's subjecting her fetus to nonlethal injury, for example, by exposing her fetus to toxic substances in the workplace, counts as (merely) failing to help it. But because parents are strictly obligated to help their children, it appears the pregnant woman has a strict duty to avoid subjecting her fetus to these injuries after all."

I believe, however, that the fact of parenthood does not imply the pregnant woman is strictly prohibited from subjecting her fetus to these injuries. It is certainly true that parents have the duty to aid their children. However, they do not have the duty to aid their children in every conceivable way or at the highest possible level. A parent is required to feed his child, but not required to give him steak – to educate his child, but not required to send him to Harvard, even though he can afford to do so. Similarly, a parent is morally required to provide medical care for his child. But there are limitations to this duty too: He is not required to move from his community, severing all his ties and giving up his job with no prospect for another, in order to secure a greater level of medical expertise and a greater chance of curing the child of debilitating symptoms. How much a parent is required to do for a child seems to depend partly on the benefit to the child, and partly on the cost to the parent. Similarly, how much a pregnant woman – as a parent – may be required to do for her fetus may depend partly on the benefit to the fetus, and partly on the cost to the woman.[18] The presence of the parental relation in the fetal hazard case seems not to radically alter the analysis we arrived at by comparing it to the motorist case. What it shows is that at some level of potential benefit to the fetus, and some level of personal cost to the mother, it becomes the woman's duty not to subject the fetus to nonlethal harms, because to do so would be to fall below the level of aid that parents are required to provide their children. But at other levels the woman's failure to aid her fetus at the highest possible level remains morally optional.

What this implies for particular kinds of injurious activities the pregnant woman might undertake varies from case to case. In the case of workplace toxins that might injure the fetus, whether or not the mother should (say) quit her job will depend on the level of risk for the fetus and the alternatives available for the mother. If avoiding exposing her fetus to nonlethal hazards requires the mother to quit her job, when that job is the sole or a major support for the family, and when no other job is likely to be available either now or at the end of the pregnancy, this option seems to be on a par with leaving one's community to increase the chance of finding a cure for one's ailing child. If the latter is not morally required, neither is the former (which is not to say that many parents would not choose these courses of action).[19] On the other hand, if the mother can procure another decent and hazardless job, then she may be morally required to do so in order to avoid injuries to the fetus. The case of the mother's consuming fetotoxic substances is more complex. If the mother, in order to sustain her own health, must take medications, such as anticonvulsant drugs, that could be injurious to the fetus, then this activity appears morally permissible.[20] Parents are not morally required to undergo substantial harms to their own bodies or health in order to assist their children.[21] But what about the case of the mother who takes illegal drugs or drinks significant quantities of alcohol that risk serious detriment to the fetus?[22] A pregnant woman who is

already a drug addict will suffer significant anguish from the withdrawal process if she quits in order to protect her fetus. From this point of view the cost to her of benefiting the fetus in this way is substantial. On the other hand, most of us would want to say that the mother would be objectively better off to rid herself of the addiction, even though the process of doing so is temporarily painful. The mother herself may even agree with this judgment, at least when the process is completed. From this broader perspective there is no *net cost* to the mother, but rather a *net benefit*, of acting in a manner that best promotes the health of her fetus. If we look at it this way, the mother has a moral duty to quit using drugs, because doing so significantly benefits her fetus without any net cost to herself.

But is this a moral duty of the kind with which we began: one which ought (at least prima facie) to be enforced by society, if necessary through the use of the criminal code? This is a difficult issue that cannot be adequately addressed here. However, several relevant considerations can be pointed out. On the one hand, it is clear that although we feel strongly that parents have certain duties to aid their children, we have historically been reluctant to incorporate more than a bare minimum of these duties into our criminal code. On the other hand, possession or use of illegal drugs is by definition illegal in itself, whether or not the user is pregnant. Hence, there should be no bar to enforcing this prohibition on pregnant women. But ought society – or may society – take stronger measures to enforce such a prohibition on pregnant women than it takes to enforce the prohibition on other citizens? For example, may society incarcerate pregnant women who are convicted of drug use during their entire pregnancy to keep them drug-free, despite the fact that similarly harsh preventative measures are not employed on men convicted of drug use?[23] We do not impose such restrictive measures on drug-addicted parents of minor children, even though their activities are likely to impose significant harms on their children. However, perhaps we cannot draw any conclusions from this fact, because the two kinds of case are not strictly parallel: The threatened children can always be removed from the care of the parents, whereas the threatened fetus cannot be removed from its mother.[24] On the other hand, a woman who is incarcerated in order to protect her fetus is thereby forced to suffer a very high cost – the restrictions, indignities, discomforts, risks, and disruptions of incarceration itself – in order to benefit her fetus. Her case is very unlike the case of the woman who is persuaded to quit drugs voluntarily. The latter woman does something that is arguably in her own interest in order to benefit her fetus. The incarcerated woman is forced to pay a very high price in order to benefit her fetus. My sense here is that we may not morally require parents to pay this high a price to benefit their children. If this is correct, then society may not impose this price on them. Society may and should strive to persuade drug-addicted pregnant women to give up drugs, but it may not impose substantially harsher drug-prevention measures on them than it does on men or on women who are not pregnant. Finally, we must keep in mind that enforcing a legal prohibition on most of the activities with which we are concerned would be extraordinarily intrusive: It would invade, in the most objectionable manner, the conduct of ordinary private life. Thus even if we conclude that pregnant women have a moral duty, for example, not to smoke and not to drink alcoholic beverages, we need not conclude that smoking and drinking should be made illegal during pregnancy.[25] Enforcing such prohibitions would necessitate invasions in the lives of private citizens that most of us are not prepared to tolerate. If pregnant women have a moral duty not to drink or smoke, we should conclude that there is a *prima facie* claim, but no more than a *prima facie* claim, that society ought to enforce this duty. Because this prima facie claim is overridden by claims of citizens to protection from intolerable invasions by the state into their private life, we would reject the conclusion that society ought *all things considered* to enforce this claim.

IV

We now need to refine the notion of failing to render a higher level of aid. In Section II, I stated that a woman has a strict duty not to shoot her fetus *in utero* and cause it to be paralyzed in later life, because doing so would count as positively harming the fetus. However, the Contextual View seems to imply that *any* maternal conduct detrimental to the fetus, so long as it leaves the fetus better off alive than dead, merely counts as failing to render it the highest possible level of aid, and so as potentially permissible (so long as the parental duty to aid a child would not prohibit such conduct). But it seems absurd to say that a woman shooting her fetus *in utero* is simply failing to render the highest level of aid – more needs to be said to distinguish this case from the case of a mother who exposes her fetus to workplace toxins or who drinks and causes the fetus to suffer from Fetal Alcohol Syndrome.

To deal with this problem we must elaborate the Contextual View. Let us turn to a new snakebite example. Suppose the scenario is the same as in the Rough Route case, with adequate facilities for saving the victim's life available at the nearest hospital several hundred miles away. The motorist starts to town with the victim. However, in this version, the motorist is a sadist, who uses the opportunity of having a helpless person in his grasp to beat the victim cruelly. He then continues to town. The victim's life is saved, but she loses her leg as a direct consequence of the motorist's beating. It seems intuitively clear that the sadistic motorist *harms* the victim, and violates a strict duty, by beating her. But nothing that has been said so far rules out an interpretation of the Contextual View according to which the sadistic motorist simply renders the victim a lower level of aid than he might have done, because his overall

course of action leaves the victim better off than she would have been if the motorist had not rescued her at all. Hence, the view seems to imply that the beating cannot count as harming the victim, and so is perfectly permissible.

Fortunately, we can avoid this unwanted result. There are important differences between the Rough Route case and the Sadistic Motorist case that make it appropriate to say in the former that the motorist simply renders a lower level of aid, while in the latter that the motorist harms his victim. The difference between the two cases can be brought out by noticing that in the Sadistic Motorist case, but not in the Rough Route case, we can say that the motorist *uses* the victim to enhance his own welfare. Why is this true in the one case but not in the other? A full analysis of this difference exceeds the scope of this paper, but two relevant features of the cases may be mentioned here. First, in the Rough Route case, the action that causes the leg injury – transporting the victim over a rough road – is *a way* of rescuing the victim, just as calling an ambulance or flagging down another motorist might be ways of rescuing someone. But in the Sadistic Motorist case, the action that causes the leg injury – beating the victim – is *not* a way of rescuing the victim. Rather it is an adjunct activity made possible by the victim's plight and the occurrence of the rescue. Second, if we compare the benefits the two motorists gain by taking courses of action that are inferior from the point of view of the victim, it is clear that these benefits arise in structurally different ways in the two cases. In the Rough Route case, the motorist who takes the rough route gains a relative benefit (taking a shorter route) that would have been available to him whether or not he interacted with the victim; indeed whether or not the victim even existed. But in the Sadistic Motorist case, the motorist who beats the victim gains a relative benefit (the pleasure of sadism) that is *only* available to him because he interacts with the victim; indeed is only available to him because of the existence of the victim. It is these kinds of features that make it appropriate to view the Rough Route motorist as merely rendering a lower level of aid, and by contrast to view the Sadistic motorist as *using* the victim, and so as harming her by beating her on the way to the hospital.

Comparison of these two cases shows that we can distinguish between a rescuer's harming the person in need of aid versus his merely rendering the needy person a lower level of assistance. The latter may be permissible, but the former is morally prohibited. Clearly, the pregnant woman who exposes her fetus to workplace toxins is parallel to the Rough Route motorist rather than to the Sadistic motorist. She does not use her fetus to enhance her own welfare. Her working in the hazardous job is a way of continuing to rescue the fetus, since it involves continuing to support and nurture the fetus. And the benefits she gains by continuing to work rather than quitting her job (her salary, fringe benefits, and so on) are ones available to her whether or not she "interacts" with the fetus; indeed whether or not the fetus exists at all. Hence, we may understand her as merely rendering the fetus a lower level of aid. Similar remarks hold for the woman who drinks while pregnant and causes her fetus to suffer from Fetal Alcohol Syndrome.

But what about the woman who shoots her fetus *in utero* and causes it to be paralyzed? Of course it is difficult to imagine a realistic case of this sort. But let us imagine that the woman was raped by her estranged boyfriend. As the resulting pregnancy progresses, the woman comes to hate her ex-boyfriend and is possessed by an overwhelming desire to punish him for the rape. Since she cannot reach her ex-boyfriend, in a confused state of mind she decides to punish him by injuring his offspring, and so shoots the fetus.

In this case, it seems to me that she must be understood as *using* the fetus to accomplish her ends, and so as harming it, rather than merely as rendering it a lower level of aid. Her shooting the fetus is an adjunct activity to her continuing the pregnancy, not a way of continuing the pregnancy. Moreover, in shooting the fetus she gains a relative benefit (satisfaction at "punishing" her ex-boyfriend) that she can only gain by interacting with the fetus. Indeed, this particular benefit is only available to her because of the existence of the fetus. For these reasons her shooting the fetus counts as harming it. What she does is morally impermissible.

There are other versions of the case in which this would not be so. If the woman regularly engages in target practice as a matter of sport, and shoots herself in the abdomen by accident while practicing, we should view her shooting the fetus as her rendering it a lower level of aid. She was merely engaged in what was for her a normal activity, so that her shooting was not an adjunct activity to her continuing the pregnancy. She gained no relative benefit from the fact that the fetus as well as herself was injured by the shot. This woman does not wrongfully use her fetus to advance her own welfare. Rather she fails to render the higher level of aid she could have provided by avoiding engaging in a dangerous activity during pregnancy. The contrast between these two versions of the shooting case supplies further support for the central theme of this paper, namely that a simple causal account of an activity cannot demonstrate whether or not it is a case of causing harm. The shootings in these two cases have the same causal structure, but they are morally quite different. The context as well as the causal structure of the activity must be taken into account in order to assess its moral quality.

V

This paper has examined the question of whether or not a pregnant woman has a strict moral duty to avoid conduct that would subject her fetus to nonlethal postnatal injuries. If such a duty exists, it is a duty to the child or adult the

fetus would become, rather than a duty to the fetus itself. I rejected a utilitarian answer to this question in favor of a traditional approach that draws an important moral distinction between harming another person and failing to assist another person. This approach holds that there is a strong moral duty not to harm another, but no such duty to assist others (at least if the cost of doing so is nontrivial). I then asked what kind of conduct on the part of a pregnant woman counts as harming her fetus. Using the snakebite cases I argued that the Simple Causal answer to this question must be rejected in favor of a Contextual View that takes into account the context in which an action occurs as well as its causal structure. Combining the Contextual View with the assumption that a woman who carries a fetus to term must be understood as benefiting the fetus, I argued that many cases in which a pregnant woman's activities risk nonlethal injury to her fetus must be seen as ones in which the woman's activities count, not as harming her fetus, but rather merely as rendering it a lower level of aid. Whether or not the woman has an obligation to avoid those activities depends on what kind of duty of aid a parent owes his or her children, a matter that seems to depend on the potential benefit to the child as well as on the level of personal sacrifice required of the parent in order to provide that benefit. Using this approach, we can see the continuity between cases in which a pregnant woman smokes, drinks, uses cocaine, or exposes her fetus to workplace toxins, and cases in which parents fail to install smoke detectors in their houses or child restraint devices in their cars, or refuse to move their families from residential areas contaminated by toxic chemicals. In all these cases, the parent fails to render the highest possible level of care for his or her child: the remaining issue is what level of care is morally required of parents – and what level of parental care can be legally compelled.[26]

Notes

1 "Cocaine Use Linked to Infant Brain Defects," *The Arizona Daily Star*, Monday, January 19, 1987; and "Crack Addiction Can Make Parent Shun Child, Experts Say," *The Arizona Daily Star*, Sunday, March 18, 1990, 10A.

2 "Mother of Addicted Baby Faces Felony Drug Charge," *The Arizona Daily Star*, December 17, 1988, 22A.

3 Dawn Johnsen, "A New Threat to Pregnant Women's Autonomy," *The Hastings Center Report* 17 (November 1987): 34.

4 "The Troubling Question of 'Fetal Rights'," *Newsweek*, December 8, 1986, 87; and Johnsen, *op. cit.*, 34.

5 John Barbour, "Surgery's New Frontier," *The Arizona Daily Star*, August 11, 1990, 5B.

6 Ronald Bayer, "Women, Work, and Reproductive Hazards," in *The Hastings Center Report* (August 1982): 15. In *International Union et al. v. Johnson Controls* the Supreme Court unanimously struck down a policy imposed since 1982 by Johnson Controls, Inc., which barred fertile women from potentially risky jobs involving the handling of lead in auto battery manufacture. Against company advice, some women had themselves sterilized in order to retain their jobs. Males working in the company also face the possibility of reproductive compromise from exposure to lead. *Arizona Daily Star*, March 21, 1991, 1A.

7 "The Troubling Question of 'Fetal Rights'," *Newsweek*, December 8, 1986, 87.

8 "Crack Addiction Can Make Parent Shun Child, Experts Say," *The Arizona Daily Wildcat*, Sunday, March 18, 1990, 10A.

9 Clearly, the act of someone who causes the *death* of a fetus cannot be analyzed in the same way. We cannot say that it violates the right of the adult into which the fetus will develop, because when the fetus dies, that adult never comes into existence. Hence, there never is a future right which is violated by the act which causes death now.

Note that because the fetus has not yet been born, there is realistically some uncertainty as to whether it will survive to term and eventually live long enough for the bomb to injure it. Thus, actions that have the potential to injure a child or adult into whom a fetus develops may always be somewhat less heinous than actions that immediately injure a child or adult, because the former actions involve risk rather than certainty.

10 For a general discussion of these issues, see Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984), chapter 4.

11 Of course in many cases the pregnant woman who harms her fetus by carrying it into a hazardous workplace helps others at the same time, namely other children in the family, who benefit from her wages. It is unclear how the moral view we are assuming must deal with this fact. It certainly must recognize that occasionally it is morally necessary to harm one person in order to fulfill obligations to others.

12 John A. Robertson and Joseph D. Schulman, "Pregnancy and Prenatal Harm to Offspring: The Case of Mothers with PKU," *The Hastings Center Report* 17 (November 1987): 24–6.

13 Dawn Johnsen, *op. cit.*, 36.

14 Another way to analyze this situation would be to say that the motorist who takes the rougher route in the second case *both* harms *and* helps the victim. If harming a person is not absolutely prohibited, and can be morally overridden by simultaneously assisting that person, then we would still get the conclusion that the motorist acts permissibly in taking the shorter route, even though doing so results in the victim's losing her leg. This kind of analysis could be applied, *mutatis mutandis*, to fetal-maternal conflicts. However, in some of these cases the "harming" action and the "helping" action are so intertwined that it is difficult to clearly distinguish them in the way this analysis requires. Moreover, the principle that harming a person is permissible so long as one simultaneously assists that person is obviously too simple to be acceptable: The relation between the harming and the helping must be tighter than mere simultaneity. In view of these considerations, I prefer the approach taken in the text.

15 The view that the pregnant woman benefits her fetus, or acts as a Good Samaritan towards it, has been defended on somewhat different grounds by Judith Jarvis

Thomson, "A Defense of Abortion," in Joel Feinberg, ed., *The Problem of Abortion* (Belmont, California: The Wadsworth Publishing Co., 1973), 121–39; and by Donald Regan, "Rewriting *Roe v. Wade*," *Michigan Law Review*, 77 (August 1979), 1569–1646.

16 We should not forget that many such activities on the part of the pregnant woman *risk*, but do not *actually result in*, injuries to the fetus.

17 John A. Robertson and Joseph D. Schulman, *op. cit.*, 32.

18 We should note that the maternal-fetal relationship is different in significant ways from the more usual parent-child relationship. Because of the fetus's incomplete development, its relationship to the mother bears few of the normal hallmarks of a child's relation to its parents: for example, the ties of affection and bonds of reliance that normally characterize these relationships are utterly absent. Such features surely play a role in underpinning the moral duty of a parent to aid its child. From this point of view, the relationship of the fetus to its mother is closer to that of the snakebite victim to the motorist: since the fetus has little if any sentient life, and no awareness of any special relationship to its mother, her failure to assist it would not violate any expectations of help. On the other hand, we are primarily concerned with suffering experienced by the child or adult into whom the fetus develops. This child or adult will certainly be able to understand, and possibly condemn, its mother's failure to provide it with the highest possible level of aid.

19 Of course there is a larger policy issue here: Perhaps the best solution is for the employer to be required to provide a workplace free from toxic hazards. Most discussions of reproduction hazards in the workplace have focused on this kind of question, rather than the one which is central to this paper. I believe it is difficult to settle the obligations of the employer before having settled the obligations of the pregnant worker. However, one should not allow focus on the woman's obligations to distract one's attention from what may be even heavier obligations of society or the employer.

20 Support for this conclusion is provided by the recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. The Commission recommended that in the case of *therapeutic* research directed towards the pregnant woman, the health of the woman takes priority over that of the fetus. Treatment that would be harmful to the fetus is permitted so long as it is necessary to the health of the woman. The Commission further recommended that the woman be prohibited from undergoing *nontherapeutic* research that poses greater than minimal risk to the fetus. (*Federal Register*, November 30, 1978). One obvious difference between these two types of research involves the costs to the woman of forgoing them. In the case of forgoing therapeutic research, the woman's health will suffer, whereas in the case of nontherapeutic research, she will only suffer minor pecuniary loss, or perhaps frustration of her desire to participate in a project designed to benefit humanity. Because these latter losses are relatively minor, she may be prohibited from undergoing nontherapeutic research; because the losses to health may be major, she may not be prohibited from undergoing therapeutic research.

21 In *McFall v. Shimp* (1978), a court refused to order a man to donate bone marrow to save his cousin's life, on grounds that "to *compel* the Defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual . . ." Quoted in Dawn Johnsen, *op. cit.*, 37–8. More recently an Illinois judge refused to order 3-year-old twins to undergo tests that would determine if they could donate bone marrow to their leukemia-stricken half-brother, saying the tests would be an invasion of privacy. "Judge Refuses to Order Marrow Tests for Twins," *Arizona Daily Star*, July 19, 1990, 14.

22 The parallel here, in terms of the original snakebite cases, would be a motorist who has been drinking prior to his discovery of the snakebite victim, and who continues to drink even after placing the snakebite victim in his car and driving to the nearest hospital in order to save her life. His inebriated driving jolts her leg, hastens the onset of gangrene, and results in her losing her limb. We would not admire such a motorist as much as we admire the motorist who exercises maximum care in his rescue effort, but nonetheless it is true that the inebriated motorist merely offers a lower level of aid than he might have done. He has not violated any right of the victim, since she has no right to a higher level of aid. She is still better off than she would have been if he had offered no aid at all, an option that was morally available to him.

23 In 1984, an Illinois judge ruled that a pregnant heroin user was abusing her fetus, made it a ward of the state, and sent the mother to a drug-rehabilitation center. "The Troubling Question of 'Fetal Rights'," *Newsweek*, December 8, 1986, 87. A pregnant woman convicted of second-degree theft was sentenced by a Washington, D.C. superior court judge to jail to protect her fetus from her alleged drug abuse (*U.S. v. Vaughn*). "The Latest Word," *Hastings Center Report*, 18 (October/November 1988): 55.

24 A New York Family Court judge ordered a pregnant woman with an alleged history of child abuse and neglect to surrender her baby at birth; he subsequently indicated that the mother could regain custody by meeting several conditions, including passing drug screening tests. *In the matter of Unborn Baby Beruiti*, cited in "The Latest Word," *Hastings Center Report*, 18 (October/November 1988): 55.

25 In this context we should remember that the potential fetal harms from smoking and drinking are much less severe, and much less certain, than the potential harms caused by other activities, for example using illegal drugs.

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