ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6343 SENATE JUDICIARY

alaska judicial council

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Chief Justice
Supreme Court

February 27, 1990

Chris Christensen
Office of Senator Jan Faiks
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

RE: CSSB384 (SA)

Dear Chris:

I am writing to propose a change in CSSB384 as it was proposed by Senate State Affairs so that the proposed legislation does not conflict with existing legislation relating to the Alaska Judicial Council. The proposed legislation states that agencies of the state may not use the funds to support or oppose a ballot question. The Alaska Judicial Council is allowed by AS 22.05.100, 22.07.060, 22.10.150, and 22.15.195 to provide information and recommendations to the voters on judges who are standing for retention elections. The proposed legislation does make an exception for state agencies providing neutral information. However, the above cited statutes concerning the Judicial Council allow us not only to make information available to the voters, but also to make recommendations concerning whether judges should be retained.

In order to remedy this inconsistency, I propose that one more exception be added to section 3 amending AS 15.13.070(a). I would add a section (a)(4) to read:

> (4) the Alaska Judicial Council from providing information and recommendations to the voters on judges standing for retention elections pursuant to AS 22.05.100, 22.07.060, 22.10.150, and 22.15.195.

Please feel free to give me a call if you have any questions.

Very truly yours,

William T. Cotton

William T. Cotton
Executive Director

WTC/jmz

6-1857Ja
Bradley

A M E N D M E N T

OFFERED IN THE SENATE BY THE JUDICIARY COMMITTEE

TO: CSSB 384 (State Affairs)

Page 3, line 15:

Delete "or"

Page 3, line 21, after "15.13.110"

Insert "; or"

(4) the Alaska Judicial Council from providing information and recommendations to the voters under AS 22.05.100, AS 22.07.060, AS 22.10.150, and AS 22.15.195 on a justice or judge seeking retention in office"

3/8/90

6-1857Ja
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3/8/90

STATE OF ALASKA

STEVE COWPER, GOVERNOR

REPLY TO:

☑ 2221 E. Northern Lights, Room 128
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(907) 276-4176

☐ Juneau Branch Office
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ALASKA PUBLIC OFFICES COMMISSION

March 7, 1990

Senator Jan Faiks
P.O. Box V
Juneau, Alaska 99811

Dear Senator Faiks:

I am writing with regard to CSSB 384 (State Affairs), an act relating to election campaigns.

It is my understanding that this measure will be heard in the Senate Judiciary Committee on Thursday, March 8, 1990. The Alaska Public Offices Commission would greatly appreciate it if the Committee would consider the following comments as it reviews this measure.

Section 1

This section exempts municipal campaigns with financial activity under $1,000 from filing campaign disclosure reports.

The commission supports this provision. Because the commission for many years has lacked the resources to monitor these small campaigns and summarize their disclosure reports, the commission as a matter of policy has exempted these campaigns from reporting requirements. This policy also has benefitted candidates with limited financial ability who have found it unduly burdensome to comply with reporting requirements. The exemption is in keeping with the reporting exemption in current law for candidates in municipalities with populations of 1,000 or less (AS 15.13.010). Codification would give the commission's policy the force of law.

#1 technical

The commission suggests one minor technical change. By inserting the word "totally" in line 11, page 1, and by changing the second "or" to "and", the statutory language would clarify that municipal candidates who accept contributions and make expenditures totalling less than $1,000 need not file disclosure reports.

The amended provision would read: "Except for a municipal candidate who accepts contributions totalling less than $1,000 and makes expenditures totalling less than $1,000 in seeking election ...", candidates must file campaign disclosure reports.

Section 2

Paragraph (a) of section 2 establishes contribution deadlines. This section would prohibit post-election fundraising by state candidates after December 31 of the election year, and by local candidates 45 days after the local election.

Although the commission prefers an end to contributions as of the date of the election, the commission supports the establishment of a contribution deadline.

It would be helpful if the bill clarified that a candidate may not accept contributions if they are postmarked after December 31 or after the 45th day after a local election, since many last minute contributions mailed at the end of a year do not reach campaigns until the beginning of the new year.

Paragraph (b) of this section provides that campaign surpluses can be used for only five purposes: transferring funds up to $10,000 to an account for a future election campaign, transferring the funds to a legislative office account for expenditures qualifying as business expenses, donating the funds to charitable organizations under 26 USC 501(c), donating the funds to a general fund, or returning the funds to contributors.

Current commission regulations do not restrict the manner of disposition of surpluses (2 AAC 50.400). In the absence of legislative action, as part of the upcoming revisions to its regulations the commission anticipates restricting disposition of surpluses to charitable donations or return to contributors (assuming such action is within the scope of its statutory authority). The return to contributors, in the view of some commission members, should be a pro rata return applicable only to those persons who contributed more than $100 to a candidate.

Although the commission does not believe campaign surpluses should be transferred to office accounts or future campaigns, the commission notes that the committee substitute resolves a potential conflict with commission regulations by clearly stating that surplus funds up to $10,000 may be transferred to a future campaign.

Paragraph (c) provides that campaign accounts shall be closed by January 12 of the year after the election. Paragraph (d) of section 6 subsequently provides that a closing report shall be filed with the commission by January 31. The commission notes that

a similar measure in the House (CSHB 327) extends the deadline for the report to the commission to February 15. The reasoning appears to be that a February deadline would give candidates time to receive information about banking transactions the previous January. If the Senate committee adopts this viewpoint and extends the date for the report to the commission to February 15, the campaign account close-out deadline should be extended to February 12.

Section 3

This section amends existing law in two ways. First, it provides that persons or groups may contribute no more than $10,000 in the aggregate a year to a political party and its subdivisions. The commission does not favor limitations on contributions to political parties, in the belief that such limitations would further weaken the party system.

Second, this section provides that state and local governments may not use public funds to support or oppose the election of a candidate, or on behalf of or in opposition to a ballot question. However, information could be provided for neutral informational purposes in conjunction with a ballot proposition or question, with a report of these expenditures to APOC.

The commission is concerned that this section as written does not provide adequate guidance to public entities. For example, it would be helpful to define public funds. As an alternative, the commission suggests the Committee consider the wording in a similar statute adopted in the State of Washington (Attachment 1).

The Executive Director of the Washington State Public Disclosure Commission indicates that the provision barring the use of public funds generates more work for his agency than almost any other provision administered by the Washington State commission. The Alaska Public Offices Commission likewise anticipates a need for additional resources to advise public entities about the scope of the prohibition, and to handle complaints.

The commission further suggests that the Committee consider adopting a specific penalty for violations of this section. Without additional language, the applicable penalty under AS 15.13 would be criminal prosecution for a misdemeanor. This could result in incarceration of borough assemblies and other municipal or state entities, which does not seem a rational remedy. The commission proposes including language authorizing the commission to assess

a penalty, including personal liability for those persons who have authorized these expenditures, in an amount up to three times the amount expended. This would give the commission the flexibility to provide a penalty which is rationally related to the type of conduct involved. This approach is not unique to APOC; a similar penalty structure has been proposed for licensees or permittees found who have violated the alcoholic beverage laws (see CSSB 157).

#7 Additionally, the prohibition on use of public funds should extend to support of or opposition to groups and political parties, as well as to candidates.

Section 4

This section provides that a contribution accepted by a candidate may not be used by the candidate as personal income at any time. The commission supports this concept. However, it is likely that the commission will receive complaints that candidates have improperly used contributions for personal purposes rather than campaign purposes, generating additional work for the commission. Attachment 2 lists types of expenditures which have been questioned in other states with similar prohibitions.

#8 a) alt: "surplus funds may not be taken as personal income (for personal purposes)
b) also a civil penalty might be made

Section 5

This section restricts participation by lobbyists in political fundraising. The commission has no objection to this section, since the term "lobbyist" has been defined to exclude volunteer and representational lobbyists.

Section 6

This section provides that a report to the commission is due January 31 after an election.

Section 7

The commission supports this section, which closes the current two-day pre-election reporting gap for large contributions.

Section 8

This section redrafts AS 15.13.125 by breaking it down into separate paragraphs. Additionally, this section permits the commission to assess a civil penalty of not more than $250 for failure to properly identify a political communication. Under

current law, each instance of a failure to properly identify a communication must be handled as a complaint, with a theoretical possibility of criminal prosecution. Permitting the commission to assess a civil penalty allows the commission to resolve these matters more informally when warranted.

The commission spends a substantial portion of its time dealing with inadvertent, technical violations of AS 15.13.090, which requires identification of all political communications. The commission believes it would be less burdensome for campaigns and also for APOC if the legislature revised existing law to provide a more flexible approach to identification of political communications. Suggested language is attached (Attachment 3). Alternatively, the commission suggests the statute be amended to provide that political communications must be clearly identified as to source of payment, but that the remainder of existing law be deleted, with the commission given authority to determine by regulation what constitutes a clear communication. Amendments to AS 15.13.090 could result in a positive change for both candidates and the commission, and the commission urges your careful consideration of these concerns.

Fiscal Impact

Based on the commission's belief that enactment of CSSB 384 would generate new complaints and requests for advice and assistance, the commission has submitted a fiscal note requesting $65,300 in funding for one new full-time and one new part-time position to handle the anticipated workload increases (Attachment 4).

Although the commission does not agree with all of the proposed revisions in this bill, the commission commends the legislature for giving serious consideration to these issues. The commission will be glad to work with the Committee to suggest alternative wording or to offer any other assistance as appropriate.

Thank you for the opportunity to submit comments.

Sincerely,

ALASKA PUBLIC OFFICES COMMISSION

Karla L. Forsythe
Executive Director

Attachments

cc: Senator Pourchot
Senator Kelly
APOC Members
APOC Senior Staff
Sioux Plummer, Special Assistant, DOA
Nancy Gordon, Assistant Attorney General

WASHINGTON STATE STATUTE

USE OF PUBLIC FUNDS IN CAMPAIGNS

RCW 42.17.130 Forbids use of public office or agency facilities in campaigns. No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees or the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency: Provided, That the foregoing provisions of this section shall not apply to the following activities:

(1) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;

(3) Activities which are part of the normal and regular conduct of the office or agency.

ATTACHMENT 1

CALIFORNIA

EXAMPLES OF PERSONAL USE QUESTIONS

Psychiatric care.
No.

Candidate borrowing money to buy commodities futures.
No.

Auto insurance for a state-leased car.
Yes.

Attorney's fees for action against election opponent.
Yes.

Attorney's fees for libel action.
No, if for damages. Yes, if for retraction.

Attorney's fees for defense of criminal indictment for crime arising before official took office.
No, because alleged crime occurred before assuming office.

Trip to China.
Depends if governmental related or social.

Purchase of a computer.
Yes, if for election use only.

Purchase of a van.
Yes, if used for election or governmental purposes. If sold, proceeds must be paid to campaign committee.

Home security system.
Yes, if title is kept in committee's name and value is returned to committee upon sale of home or when the official retires from office.

Publishing a book where royalties are given to official.
No, because of the royalties.

Health club dues.
No.

Purchase tickets to LA Lakers basketball games which are given to constituents.
Yes.

Spanish lessons to communicate with constituents.
Yes.

Tuxedo and shoes.
Yes, if only used for political events.

Briefcase.
Yes.

Reading glasses. No.

EXAMPLES IN KANSAS OF PERSONAL USE OF CAMPAIGN FUNDS

175 meals for incumbent's birthday party

Christmas party given for the press

Registration fees paid for volleyball teams

Printing and mailing of Thanksgiving and Christmas cards

Purchase of 250 marble base paper weights

Membership fees for country clubs, Chambers of Commerce, Rotary, etc.

Gifts to Chinese Government and Israili Government

Riembursement for mileage to drive to and from work each day

Purchase of groceries

Payment for personal income taxes

Purchase of paint to paint residence

Purchase of car, tag, and payment of personal property taxes

Repair and maintenance of personal car

Day care expenses

Purchase of pocket pager

Travel and lodging for incumbent's staff to attend seminars out-of-state

Outright transfer of residual funds to candidate's personal account

KENTUCKY

EXAMPLES OF PERSONAL USE QUESTIONS

Legal fees for action filed against an opponent.
Yes - Campaign related.

Purchase of an auto to be used for campaign purposes.
Yes - Dispose of vehicle at end of campaign and return proceeds from sale to campaign fund.

Purchase of clothing for extended campaign travel.
Yes - Campaign related.

Purchase of clothing for inauguration.
Yes - Campaign related.

Air travel to Florida for R & R after campaign, meetings with potential contributors and campaign advisor RE: inauguration.
Yes - Campaign related.

Lease/purchase of computer during campaign.
Yes - Dispose of at end of campaign, return proceeds to campaign fund.

Purchase tickets to Kentucky Derby.
Yes.

Contribute to campaign fund of a friend.
No - Make a personal contribution. Restore funds to original condition.

Contribute to Boy Scouts, Girl Scouts, church pie suppers, person whose home burned, church building fund.
No - Make a personal contribution. Restore funds to original condition.

Proposed Addition to SB 384

Sec. 15.13.090 Repeal and rewrite to read:

Sec. 15.13.090. **Identification of advertising.**

(a) Advertisements, including handbills, billboards, yard signs and other communications intended to influence the election of a candidate or outcome of a ballot proposition or question, shall be clearly identified with the words "paid for by" followed by the name and address of the candidate, group, or individual paying for the advertisement.

(b) Lettering in an advertisement other than a newspaper shall be at least 3/8 inches high if the advertisement exceeds 12 inches in length or width.

(c) In radio and television advertisements the words "I paid for this ad" may be used and the address omitted if the words are spoken by the candidate.

(d) The "paid for by" line may be omitted from advertising items less than 3 inches in length or width and from motor vehicle bumper or window stickers.

If the above language is deemed to contain too much detail for a statute, rewrite Sec. 15.13.090, in order to allow more flexibility about the "paid for by" line, to read:

Sec. 15.13.090. **Identification of communication.**
Advertisements, including handbills, billboards, yard signs, other communications intended to influence the election of a candidate or outcome of a ballot proposition or question, and radio and television advertisements shall be identified as to payer in accordance with regulations promulgated by the commission.

ATTACHMENT 3

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSSB 384
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: 2/26/90
Title: an Act relating to election campaigns
Sponsor: Senator Pourchot
Requestor: _____

Agency Affected: Dept. of Administration
BRU: Alaska Public Offices Commission
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	60.2	62.1	64.0	66.0	68.0	70.1
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	5.1	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	65.3	62.1	64.0	66.0	68.0	70.1
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	65.3	62.1	64.0	66.0	68.0	70.1
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	65.3	62.1	64.0	66.0	68.0	70.1

POSITIONS:

FULL-TIME	1	1	1	1	1	1
PART-TIME	1	1	1	1	1	1
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

SEE ATTACHED

Prepared by: Karla M. Forsythe, Executive Director
Phone: 276-4176
Division: Alaska Public Offices Commission
Date: 3/6/90

Approved by Commissioner: Annie Laurie Howard, Acting Chair
Date: 3/6/90
Agency: Alaska Public Offices Commission

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

ATTACHMENT 4

NARRATIVE

This bill makes both major and minor changes in the Campaign Disclosure Law. Major changes include providing a campaign contribution and account closing date, restricting uses of surpluses, limiting contributions to political parties, and prohibiting use of public funds for political purposes. Minor changes include exempting small municipal campaigns from reporting requirements, closing the two-day pre-election reporting gap, and permitting the commission to assess a $250 maximum civil penalty for failure to identify political communications properly.

Virtually all of these changes will require some transition activity, to publicize the changes in the law and to make certain that those subject to it are adequately apprised as to how the change will impact them. Also, Commission regulations would be revised and reprinted. The commission will need to develop major new regulations in some areas, including the prohibitions on use of public funds and use of contributions as personal income. Although the commission's work on these regulations will be absorbed as part of normal commission meetings, additional staff time will be needed to work on these changes.

Commission staff currently respond to numerous interpretation questions from persons subject to the law. The commission anticipates that requests for informal and formal advice will increase as a result of restrictions on disposition of surpluses, the prohibition on use of contributions as personal income, and the prohibition on the use of public funds.

Additionally, the commission anticipates that complaints will increase substantially as a result of prohibitions on disposition

of campaign surplus, the establishment of a campaign contribution and account close-out date, the prohibition on the use of public funds, and the prohibition on use of contributions as personal income.

In order to absorb this additional work, the commission would need an additional staff paraprofessional position classified as a Range II Paralegal. This position would investigate complaints, and would provide informal advice and assistance to candidates, groups and public entities with regard to ongoing questions attributable to these changes. Because the commission only has one secretary at the present time, an additional half-time Range 10 Secretary will be required to handle typing, photocopying and data entry attributable to these activities. Although the commission has one surplus computer terminal and printer, a new computer terminal with a laser printer, a desk, and moveable partitions would be needed to equip the new clerical position.

The FY 91 salary, benefits and equipment costs for these positions are set out below:

	Salary and Benefits
Paralegal II (Range 16) full-time	$44,382
Secretary I (Range 10) part-time	15,822
1 Personal Computer, Laser Printer	3,993
1 Desk/Chair	875
Moveable Partitions	200
	$65,272

ing the year of application is not eligible to receive a permanent fund dividend under AS 43.23.005 — 43.23.095.

(c) Notwithstanding the physical presence requirement in 15 AAC 23.655(f), a child who was born before April 1 of the year of application but after October 1 of the year immediately preceding the year of application is eligible to receive a permanent fund dividend under the provisions of AS 43.23.005 — 43.23.095 if (1) timely application is made on behalf of the child; (2) the child is a state resident on the date of application; and (3) the individual through whom the child claims residency under 15 AAC 23.655 (f)(1) or (2) was a state resident for the six-month period described in (a)(2) of this section and that individual makes timely application on his or her own behalf. If the individual through whom the child claims residency does not apply for a dividend payment, information must be provided with the child's application that shows that the individual was a state resident for the period described in (a)(2) of this section.

(d) An alien with resident alien status or a refugee otherwise qualifying under AS 43.23.005 — 43.23.095 and 15 AAC 23.605 — 15 AAC 23.795 is eligible to receive a permanent fund dividend.

(e) An application may not be made on behalf of a state resident after that resident has died. A personal representative may redeem a dividend payment to a deceased state resident and process it as part of the deceased individual's estate only if the individual's application for the dividend payment was made before the individual died and at the time of application the individual met the eligibility requirements of AS 43.23.005 — 43.23.095 and 15 AAC 23.605 — 15 AAC 23.795.

(f) An individual who has reached majority, or who has become an emancipated minor, may apply to the department if (1) he or she was a child during the six-month period described in (a)(2) of this section, (2) a permanent fund dividend application was not filed on the individual's behalf or was not timely filed, and (3) the individual was eligible to receive a payment under AS 43.23.005 — 43.23.095. The department, in its discretion, will waive the time limit provided in 15 AAC 23.625 for that individual. A waiver of the time limit under this subsection will not extend beyond one year after the individual reaches majority or becomes an emancipated minor. (Eff. 5/12/83, Register 86; am 4/28/84, Register 90)

Authority: AS 43.23.015 AS 43.23.055
AS 43.23.025 AS 43.23.095

15 AAC 23.625. APPLICATIONS. (a) An application for a dividend payment under AS 43.23.005 — 43.23.095 must be filed before July 1 of the year of application on a form provided by the department. An application postmarked June 30 or earlier will be considered timely filed.

ing the year of application is not eligible to receive a permanent fund dividend under AS 43.23.005 — 43.23.095.

(c) Notwithstanding the physical-presence requirement in 15 AAC 23.655(f), a child who was born before April 1 of the year of application but after October 1 of the year immediately preceding the year of application is eligible to receive a permanent fund dividend under the provisions of AS 43.23.005 — 43.23.095 if (1) timely application is made on behalf of the child; (2) the child is a state resident on the date of application; and (3) the individual through whom the child claims residency under 15 AAC 23.655 (f)(1) or (2) was a state resident for the six-month period described in (a)(2) of this section and that individual makes timely application on his or her own behalf. If the individual through whom the child claims residency does not apply for a dividend payment, information must be provided with the child's application that shows that the individual was a state resident for the period described in (a)(2) of this section.

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(d) An alien with resident alien status or a refugee otherwise qualifying under AS 43.23.005 — 43.23.095 and 15 AAC 23.605 — 15 AAC 23.795 is eligible to receive a permanent fund dividend.

(e) An application may not be made on behalf of a state resident after that resident has died. A personal representative may redeem a dividend payment to a deceased state resident and process it as part of the deceased individual's estate only if the individual's application for the dividend payment was made before the individual died and at the time of application the individual met the eligibility requirements of AS 43.23.005 — 43.23.095 and 15 AAC 23.605 — 15 AAC 23.795.

(f) An individual who has reached majority, or who has become an emancipated minor, may apply to the department if (1) he or she was a child during the six-month period described in (a)(2) of this section, (2) a permanent fund dividend application was not filed on the individual's behalf or was not timely filed, and (3) the individual was eligible to receive a payment under AS 43.23.005 — 43.23.095. The department, in its discretion, will waive the time limit provided in 15 AAC 23.625 for that individual. A waiver of the time limit under this subsection will not extend beyond one year after the individual reaches majority or becomes an emancipated minor. (Eff. 5/12/83, Register 86; am 4/28/84, Register 90)

Authority: AS 43.23.015 AS 43.23.055
AS 43.23.025 AS 43.23.095

15 AAC 23.625. APPLICATIONS. (a) An application for a dividend payment under AS 43.23.005 — 43.23.095 must be filed before July 1 of the year of application on a form provided by the department. An application postmarked June 30 or earlier will be considered timely filed.

ing the year of application is not eligible to receive a permanent fund dividend under AS 43.23.005 — 43.23.095.

(c) Notwithstanding the physical-presence requirement in 15 AAC 23.655(f), a child who was born before April 1 of the year of application but after October 1 of the year immediately preceding the year of application is eligible to receive a permanent fund dividend under the provisions of AS 43.23.005 — 43.23.095 if (1) timely application is made on behalf of the child; (2) the child is a state resident on the date of application; and (3) the individual through whom the child claims residency under 15 AAC 23.655 (f)(1) or (2) was a state resident for the six-month period described in (a)(2) of this section and that individual makes timely application on his or her own behalf. If the individual through whom the child claims residency does not apply for a dividend payment, information must be provided with the child's application that shows that the individual was a state resident for the period described in (a)(2) of this section.

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SB
386

December 19, 1989

TO: Jim Hall
Assistant City-Borough Manager

FROM: Michael S. Gelston
Chief of Police

SUBJECT: Crosswalk Enforcement

I agree with the concern raised by Assembly Member Peterson on the issue of crosswalk violations by motorists in the Juneau area. It appears as if there is a general attitude on the part of the motoring public that there is no sanctity for pedestrians attempting to properly use crosswalks.

In addition to the above, attempts by Juneau Police Department personnel at enforcement are not as vigorous as possible. This stems from a long standing inability to successfully prosecute crosswalk violations that have been issued to offending motorists. It has traditionally been the interpretation of the court of CBJ ordinance, and a correct interpretation, that the pedestrian must be actively asserting their right to the traveled half of the roadway in order for a motorist to be in violation. I am sure you will agree that in practice few pedestrians are aggressive enough to make this assertion.

Police Department staff are certainly willing to work to ensure crosswalk compliance. Enforcement, in conjunction with education and engineering will create an atmosphere more conducive to pedestrians feeling at ease when using pedestrian crosswalks. In this vein I met with Pepper McCollum, Jon Alhgren and Rick Purvis from the State of Alaska, DOT/PF in an attempt to coordinate state and local efforts pertinent to this issue.

However, in order to make enforcement a viable course of action to pursue, it will of necessity entail a modification of our ordinance, 72.02.155, through some type of change to 13AAC02.155 (a) to allow us to pursue a more aggressive enforcement stance.

I have attached to this memorandum a memorandum I received from John Corso dated August 28, 1987. At that time I had requested that he look into a modification of our ordinance to allow for more productive enforcement of crosswalk violations. The essence of his memorandum was that without a change to state law no changes of city ordinances were possible.

Rest assured that I am desirous of working from an enforcement perspective to enhance pedestrian use of our crosswalks and will undertake what is necessary from that perspective to accomplish our desired end once we have the necessary resources.

MSG/ps

Authority: AS 28.05.011

Article 4. Pedestrian Rights and Duties

13 AAC 02.150. PEDESTRIAN OBEDIENCE TO TRAFFIC-CONTROL DEVICES AND TRAFFIC REGULATIONS. (a) Pedestrians must comply with traffic and pedestrian-control signals as provided in secs. 10 and 15 of this chapter and are subject to the applicable restrictions in this chapter.

(b) No pedestrian may enter or remain upon a bridge or its approach beyond the bridge signal, gate, or barrier after a bridge-operations signal indication has been given; nor may a pedestrian pass through, around, over, or under a crossing gate or barrier at a railroad grade crossing or bridge while the gate or barrier is closed or is being opened or closed. (In effect before 7/28/59; am 12/15/61, Register 3; am 8/10/66, Register 22; am 12/31/69, Register 31; am 6/28/79, Register 70)

Authority: AS 28.05.011

13 AAC 02.155. PEDESTRIAN RIGHT-OF-WAY IN SAFETY ZONES. (a) Except as provided in sec. 195 of this chapter, when traffic-control signals are not in place or not in operation, the driver of a vehicle shall yield the right-of-way to a pedestrian who is on a sidewalk, vehicular way or area, or who is crossing a roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger.

(b) No pedestrian may leave a curb or other place of safety and walk or run into the path of a venicle which is so close as to constitute an immediate hazard.

(c) When a vehicle is stopped at a marked crosswalk or at an unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, no driver of another vehicle approaching from the rear may overtake and pass the stopped vehicle.

(d) Pedestrians shall move, whenever practicable, upon the right half of the crosswalk.

having stopped, a driver shall yield the right-of-way to a vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard.

(c) The driver of a vehicle approaching a yield sign shall slow to a speed reasonable for the existing conditions and, if required for safety, stop as required in (b) of this section. After slowing or stopping, the driver shall yield the right-of-way as provided in (b) of this section. (In effect before 7/28/59; am 12/15/61, Register 3; am 8/10/66, Register 22; am 12/31/69, Register 31; am 6/28/79, Register 70)

Authority: AS 28.05.011

13 AAC 02.135. VEHICLE ENTERING ROADWAY. (a) Repealed 6/28/79.

(b) The driver of a vehicle about to enter or cross a roadway from a place other than another roadway shall yield the right-of-way to all vehicles approaching on the roadway so closely as to constitute an immediate hazard. (In effect before 7/28/59; am 12/15/61, Register 3; am 8/10/66, Register 22; am 12/31/69, Register 31; am 6/28/79, Register 70)

Authority: AS 28.05.011

13 AAC 02.140. DRIVING OF VEHICLES ON APPROACH OF AUTHORIZED EMERGENCY VEHICLES. (a) Upon the approach of an authorized emergency vehicle making use of a visual signal meeting the requirements of 13 AAC 04.090 and audible signals meeting the requirements of 13 AAC 04.210(d), or a police vehicle making use of either a visual or an audible signal, the driver of every vehicle proceeding in any direction shall yield the right-of-way by slowing, stopping, changing lanes, or pulling to the right-hand edge of the roadway clear of an intersection to await passage of the emergency vehicle.

(b) Except for a driver of an authorized emergency vehicle responding to an emergency, a driver of a vehicle shall yield the right-of-way as provided in (a) of this section to a vehicle displaying a flashing blue light as prescribed in 13 AAC 04.100. The vehicle displaying a flashing blue light shall yield the right-of-way to an authorized emergency vehicle which is responding to an emergency.

(c) The provisions of this section do not relieve the driver of an authorized emergency vehicle or a vehicle displaying a flashing blue light from the duty to drive with regard for the safety of all persons using the highways. (In effect before 7/28/59; am 12/15/61, Register 3; am 8/10/66, Register 22; am 12/31/69, Register 31; am 6/28/79, Register 70)

Alaska Statutes

Title 28. Motor Vehicles.

Chapter

Revisor's notes. — The provisions of this title were redrafted in 1984 to remove personal pronouns pursuant to § 4, ch. 58, SLA 1982, and to make other minor word changes.

NOTES TO DECISIONS

Stated in Buckalew v. Holloway, 604 P.2d 240 (Alaska 1979).

Chapter 01. Scope and Interpretation of Title.

Section

Sec. 28.01.010. Provisions uniform throughout state. (a) The provisions of this title and the regulations adopted under this title are applicable within all municipalities of the state. A municipality may not enact an ordinance that is inconsistent with the provisions of this title or the regulations adopted under this title. A municipality may not incorporate into a publication of traffic ordinances a provision of this title or the regulations adopted under this title without specifi-

cally identifying the provision or regulation as a state statute or regulation.

(b) A municipality may adopt by reference all or a part of this title and regulations adopted under this title, and may request and shall receive from the Departments of Public Safety and Community and Regional Affairs assistance in the drafting of model ordinances for adoption by reference. Notwithstanding (a) of this section, a municipality may enact necessary ordinances to meet specific local requirements.

(c) A copy of all traffic ordinances enacted by a municipality shall be forwarded to the commissioner and specific notice of any inconsistent ordinances shall be given by the municipality when the copy of the ordinances is forwarded. So far as practicable, the section number identifying a particular municipal traffic ordinance must be the same as the section number identifying a corresponding provision of this title or regulations adopted under this title.

(d) A municipality shall erect necessary official traffic control devices on streets and highways within its jurisdiction that as far as practicable conform to the current edition of the Alaska Traffic Manual prepared by the Department of Transportation and Public Facilities.

(e) Copies of all traffic ordinances enacted by a municipality shall be incorporated in a manual and made available to the general public.

(f) Regulations adopted pertaining to a matter partially or wholly governed by this title must be mutually consistent and compatible, and must complement each other, as far as practicable. For the purpose of uniformity, the department shall offer and receive reasonable assistance in the coordination and adoption of these regulations.

(g) Regulations adopted under this title must, as far as practicable, conform to the recommendations of the current edition of the Uniform Vehicle Code adopted by the National Committee on Uniform Traffic Laws and Ordinances. (§ 1 ch 91 SLA 1974; am §§ 1, 2 ch 241 SLA 1976; am §§ 1 — 5 ch 178 SLA 1978)

Revisor's notes. — Pursuant to E.O. No. 39, § 11, a reference to Department of Transportation and Public Facilities was substituted for Department of Highways in (d) of this section in 1977.

NOTES TO DECISIONS

A city ordinance, to the extent it is in conflict with the state traffic regulations, constitutes an exercise of home-rule power expressly prohibited by the legislature. Adkins v. Lester, 530 P.2d 11 (Alaska 1974).

The word "inconsistent" describes that which reveals lack of uniformity in over-all purpose or design. Cremer v. Anchorage, 575 P.2d 306 (Alaska 1978).

Similarity to Uniform Vehicle Code. — Subsection (a) is similar in substance and purpose to the provisions of § 15-101 of the Uniform Vehicle Code Annotated adopted by the National Committee on Uniform Traffic Laws and Ordinances in

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CS SB 386 (b) (Trsp)
PUBLISH DATE: 1/24/90

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to pedestrian use of crosswalks."
Sponsor: Senator Duncan
Requestor: Senate Transportation

Agency Affected: Public Safety
BRU: Alaska State Troopers
Component: Detachments

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necess----)

No fiscal impact anticipated.

Changes in CS SB 386 (TRSP) have no fiscal impact. This fiscal note is appropriate. CM

JAR 1/19/90 Prepared by: Francis C. Allan Phone: 269-5691
Division: Alaska State Troopers Date: 01/19/90

Approved by Commissioner: [illegible]

Alaska State Legislature

SENATOR JIM DUNCAN

P. O. BOX V JUNEAU, ALASKA 99811-3100

(907) 465-4766

COMMITTEES:
FINANCE
VICE CHAIR — HEALTH EDUCATION & SOCIAL SERVICES
BUDGET & AUDIT
BANKING & ECONOMIC DEVELOPMENT

TO: SENATOR JAN FAIKS
CHAIR
SENATE JUDICIARY COMMITTEE

FROM: SENATOR JIM DUNCAN

REGARDS: SENATE BILL 386

DATE: JANUARY 25, 1990

RECEIVED
JAN 25 1990
JAN FAIKS
SENATE OFFICE

I APPRECIATE THE EARLIEST POSSIBLE HEARING FOR SENATE BILL 386 BY THE SENATE JUDICIARY COMMITTEE.

SB 386, DEALING WITH PEDESTRIAN USE OF CROSSWALKS, WAS APPROVED BY THE SENATE TRANSPORTATION COMMITTEE THIS WEEK. THE CITY AND BOROUGH OF JUNEAU ASSEMBLY ADOPTED A RESOLUTION THIS WEEK IN SUPPORT OF THE MEASURE. ZERO FISCAL NOTES WERE PROVIDED BY THE DEPARTMENTS OF PUBLIC SAFETY AND TRANSPORTATION AND PUBLIC FACILITIES. THE DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES SUPPORTED THE BILL IN ITS FISCAL NOTE.

THE BILL IS FULLY EXPLAINED IN THE DOCUMENTATION PROVIDED THE TRANSPORTATION COMMITTEE. THE COMMITTEE, AT MY SUGGESTION, AMENDED THE ORIGINAL BILL BY ADDING LANGUAGE MAKING A VIOLATION OF THIS MEASURE AN INFRACTION. BARRING THIS AMENDMENT, VIOLATORS WOULD HAVE FACED A MISDEMEANOR CHARGE.

AS EXPLAINED IN THE DOCUMENTATION, THIS ADDITION TO STATE LAW WOULD PROVIDE LOCAL GOVERNMENTS THE DIRECTION AND AUTHORIZATION THEY NEED FROM THE STATE TO ENFORCE CROSSWALK VIOLATIONS. CURRENTLY, LOCAL GOVERNMENTS MAY NOT ENACT ORDINANCES WHICH ARE INCONSISTENT WITH THIS TITLE.

YOUR CONSIDERATION OF THIS REQUEST IS APPRECIATED.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 19, 1990

SUBJECT: Pedestrian use of crosswalks - SB 386

TO: Senator Jim Duncan

FROM: Michael F. Ford
Legislative Counsel

You requested a sectional analysis of SB 386. The bill adds a new section to AS 28.35, and requires that a motor vehicle yield the right-of-way to a pedestrian within a crosswalk, or a pedestrian attempting to use a crosswalk. The bill also provides that a pedestrian does not have the right-of-way with regard to an emergency vehicle, or when an approaching motor vehicle would not have an opportunity to safely stop at the crosswalk.

Please contact me if you need further assistance.

MFF:mi
wkmi6/029

MEMORANDUM

CITY/BOROUGH OF JUNEAU
155 South Seward Street, Juneau, Alaska 99801

TO: Michael S. Gelston, Chief of Police

FROM: John R. Corso, Deputy City-Borough Attorney

SUBJECT: Amendment of CBJ 72.02.155

DATE: August 28, 1987

Sorry Chief, we can't help you. There is a state statute in the way. CBJ 72.02.155 is identical to 13 AAC 02.155(a). This is to be expected, since AS 28.01.010 provides in relevant part:

> Provisions Uniform Throughout the State. (a) The provisions of this title and the regulations promulgated under this title are applicable within all municipalities of this state. No municipality may enact an ordinance which is inconsistent with the provisions of this title or the regulations promulgated under this title. . . .

The supreme court, mindful of legislative concern for traffic law uniformity, has employed AS 28.01.010 to strike down an early attempt by Anchorage to enact a blood-level DWI ordinance when the state was still requiring evidence of actual impairment, Simpson v. Municipality of Anchorage, 635 P.2d 1197 (Alaska App. 1981). The same statute was applied to strike down a Fairbanks ordinance requiring an emergency vehicle to use audible signals at all times, while the state permitted a silent approach to a burglary scene. Adkins v. Lester, 530 P.2d 11 (Alaska 1974).

I expect that your requested amendment would meet the same fate. A requirement that the driver of a vehicle stop when a pedestrian enters any portion of a crosswalk is inconsistent with a requirement that the driver stop when the pedestrian enters a particular portion of the crosswalk.

It is unlikely that we can draft something that would fall within the savings clause of AS 28.01.010(b), which provides, in pertinent part:

> Notwithstanding (a) of this section, a municipality may enact necessary ordinances to meet specific local requirements.

Under a rule established in Simpson, application of the savings clause requires a two-fold showing be made before an ordinance inconsistent under AS 28.01.010(a) can be upheld.

> First, it is incumbent upon the municipality to demonstrate the existence of a 'specific local requirement.' Second, the municipality must show that its ordinance was 'necessary'--in other words, that the specific local problem could not be addressed in a manner consistent with the provisions of the Alaska motor vehicle code.

Unless we can establish that Juneau pedestrians are particularly fleet of foot or that Juneau drivers are in the habit of traveling on the wrong side of the roadway, I doubt we can establish a case for requiring drivers in Juneau to stop sooner than they must in other parts of the state.

This legal problem would be of less concern if the district court were willing to agree that there are occasions when a pedestrian "is approaching so closely from the opposite half of the roadway as to be in danger." In all fairness, though, I can see the court's dilemma: this "approaching so closely" exception is difficult to apply when the preceding clause appears to establish a simple "this half or that half" rule. I suggest that we resolve this dilemma by paying less attention to the pedestrian's location and more to his or her manner. Regardless of exact location, a pedestrian approaching from the opposite half of roadway is "in danger" if he or she is distracted, intoxicated, daydreaming, escorting a child, or otherwise unlikely to pause and yield at the halfway point of the crosswalk. A pedestrian who is cautious and alert, constantly scanning the street, proceeding slowing, and wearing a beanie with a flashing amber light can be expected to defer to the automobile. Unfortunately, my suggestion is difficult to apply. Few complainant pedestrians are likely to admit that they were in a mental fog while crossing the street. Drivers too, are apt to stress the apparent alertness of approaching pedestrians. Still, it's the best I can do for you right now given the uniform state rule applicable to this traffic situation.

JRC/mjm

Presented by: Assemblymember Peterson
Introduced: 01/22/90
Drafted by: J.R.C.

RESOLUTION OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

Serial No. 1422

A RESOLUTION URGING THE ALASKA LEGISLATURE TO IMPROVE TRAFFIC REGULATIONS RELATING TO CROSSWALK RIGHTS-OF-WAY.

WHEREAS, the Alaska Administrative Code provides at 13 AAC 02.155(a) that the drivers of an automobile must yield to pedestrians in crosswalks only when the pedestrian "is approaching so closely from the opposite half of the roadway as to be in danger," and

WHEREAS, the Assembly respectfully submits that the standard of care imposed on drivers by 13 AAC 02.155(a) is inadequate because it allows dangerous traffic situations to develop and fosters the attitude that drivers need only react to such situations, and

WHEREAS, traffic regulations should promote safety through standards of care designed to encourage vigilant and affirmative efforts to prevent danger, and

WHEREAS, by virtue of the uniform traffic standards imposed by AS 28.01.010, the City and Borough of Juneau may not independently address the need for reform of crosswalk safety standards;

NOW, THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA:

1. That the Alaska Legislature is urged to take such action as may be necessary to improve traffic safety by requiring that drivers yield to pedestrians as soon as the pedestrians enter any part of the crosswalk on an undivided roadway or that part of the crosswalk located on the driver's side of a divided roadway.

2. That the city clerk is directed to provide copies of this resolution to Juneau's Legislative Delegation, the Alaska Department of Public Safety, and other local governments in Alaska through the Alaska Municipal League.

3. Effective Date. This resolution shall be effective immediately upon adoption.

Adopted this 22nd day of January, 1990.

Bruce M. Keller
Mayor

Attest:

Patty A. Pelley
Clerk

SB 414

Senator Johne Binkley

Senate Finance Committee
P.O. Box V • Juneau, Alaska 99811 • (907) 465-4985

Finance Committee
Co-Chairman

MEMORANDUM March 8, 1990

TO: Senator Jan Faiks, Chairman
Senate Judiciary Committee

FROM: Senator Johne Binkley

RE: SB 414 - Relating to commitment to treatment programs for pregnant women who are alcoholics

---

This is to request a hearing in your committee of SB 414 at the earliest possible time. SB 414 is one of a package of bills which target the problems of Fetal Alcohol Syndrome. It would provide for petition for commitment to a treatment center of an alcoholic pregnant person whose continued use of alcohol will likely harm the fetus. It is, by far, the bill which is receiving the most public interest, and I would appreciate your consideration of a teleconferenced statewide public hearing.

I have included with this request a copy of research recently completed by Legislative Research Agency which explores both sides of the policy and legal questions surrounding non-voluntary commitment of pregnant persons. There is no obvious right or wrong as we consider the rights of the mother and the rights of the child under our laws, but the consequences for the child of continued alcoholic drinking during the critical months of his or her development are staggering. A child born with Fetal Alcohol Syndrome has been damaged for life, with enormous medical problems, irreversable educational consequences, and social and daily living skills far below other children and adults. There are women in Alaska who have produced three, four, even as many as seven Fetal Alcohol Syndrome Child. In these instances it is time for society to intervene.

Alaska's alcohol commitment statutes are difficult under any circumstances, and would not be used to commit women who are casual or social drinkers. The commitment statutes provide a civil remedy, they would not put pregnant women in jail. SB 414 would provide an important tool where all other means of intervention had failed.

Also included with this memo is a copy of research which shows the costs to society of every FAS child born in Alaska. Estimating 29 FAS children born each year, we are

looking at an encumbered societal cost of nearly $40 million. If we add Fetal Alcohol Effect children that cost skyrockets to $104 million.

The problem is enormous. The arguments for and against involuntary commitment are persuasive, each in their own way. My sense, from the correspondence we've received in the office, is that the public would appreciate the opportunity to voice their concerns.

Thank you for your consideration of this request.

Bill would reduce birth of FAS babies

OPINION

by Sen. Johne Binkley
for the Tundra Times

JUNEAU — We can take an important step to reduce the number of Fetal Alcohol Syndrome babies born in Alaska if my bill providing for involuntary commitment of pregnant alcoholic women passes the Legislature. But one thing we *won't* be doing is putting drinking moms in jail.

It's understandable that people unfamiliar with this legislation might think the police will be prowling the bars, looking for pregnant women to haul off to jail if this bill passes. That's not true.

And even if an alcoholic woman did find herself in court under this law, she wouldn't be sent to jail. The judge would be able to order her to check into a residential alcohol treatment program.

Here's exactly what the bill — Senate Bill 414 — would do as it is currently written:

If a pregnant woman is showing signs of serious alcoholism, the bill allows the court to be petitioned to determine whether she needs professional help to avoid harming the baby she is carrying. And, while there is plenty of evidence to show that even a couple of drinks a day during pregnancy can cause some damage to the baby's health, this bill is aimed only at the hard core alcoholic, not the casual drinker.

The only peopole who could make a complaint in court against the woman would be her spouse, guardian, relative, a doctor or the administrator of a treatment facility. Because the bill also requires a doctor to file a certificate supporting the court petition, we've tried to protect against a situation where an angry husband or relative files an unjustified complaint.

The doctor must have examined the woman sometime within the two days prior to the petition being submitted to the court, or must have at least given her the opportunity to reject a physical examination.

If, after reviewing the evidence and the physician's certificate, the court decides that only intervention can prevent damage to the baby, the judge can then order the woman committed to a private or public facility for treatment of alcoholism.

The commitment period would be 30 days, with provisions for extension until the baby is born if the court is convinced during a second hearing that there is a need for continuing treatment.

As the treatment goes on, the patient would be provided reasonable opportunities to see the doctor of her choice.

And even if an alcoholic woman did find herself in court under this law, she wouldn't be sent to jail. The judge would be able to order her to check into a residential alcohol treatment program.

And, at any point during the treatment period, if the woman either is determined to be no longer alcoholic or she is no longer pregnant, she would be released.

Most mothers obviously want to take good care of their babies from the moment they find out they're pregnant, and they don't need or deserve anybody from the state telling them how to do it. But alcohol and drug addiction can override that natural protective instinct, and helping those mothers addicted to alcohol protect their babies is the aim of this bill.

Some would say we have no right to intervene in a pregnant woman's life. I'd point out that we already have laws on the books making it illegal to provide alcohol or drugs to children from the moment they are born. Shouldn't we provide that same protection — if only in the most serious cases of alcohol abuse by the mother — in the months before the child is born?

Others might argue that by the time a woman is obviously pregnant and her alcohol abuse is documented well enough to go to court, the fetus has already been damaged. That some damage already would have occurred probably is true, but medical research has documented the fact that the brain is developing through the whole term of the pregnancy.

So even if the mother didn't stop drinking until the latter stages of her pregnancy, the child would still have a chance of having fewer defects than if the alcohol abuse were allowed to continue right up until birth.

Finally, some opponents of this bill would argue that it would discourage women from seeking medical care during pregnancy, out of fear that the doctor might file a complaint to get her committed to an alcohol program. But again, this bill is aimed only at the most serious abusers, and we've found that many pregnant women who are seriously alcoholics don't get proper medical care during their pregnancy anyway.

Fetal Alcohol Syndrome saddles a child with lifelong defects that are directly attributable to the mother's behavior. And since most these mothers have no financial resources, they create expensive financial problems we end up paying for. It costs an average of $1140,000 just to get a newborn FAS child through the period of intensive care it requires at birth and $1.4 *million* to care for it over a lifetime.

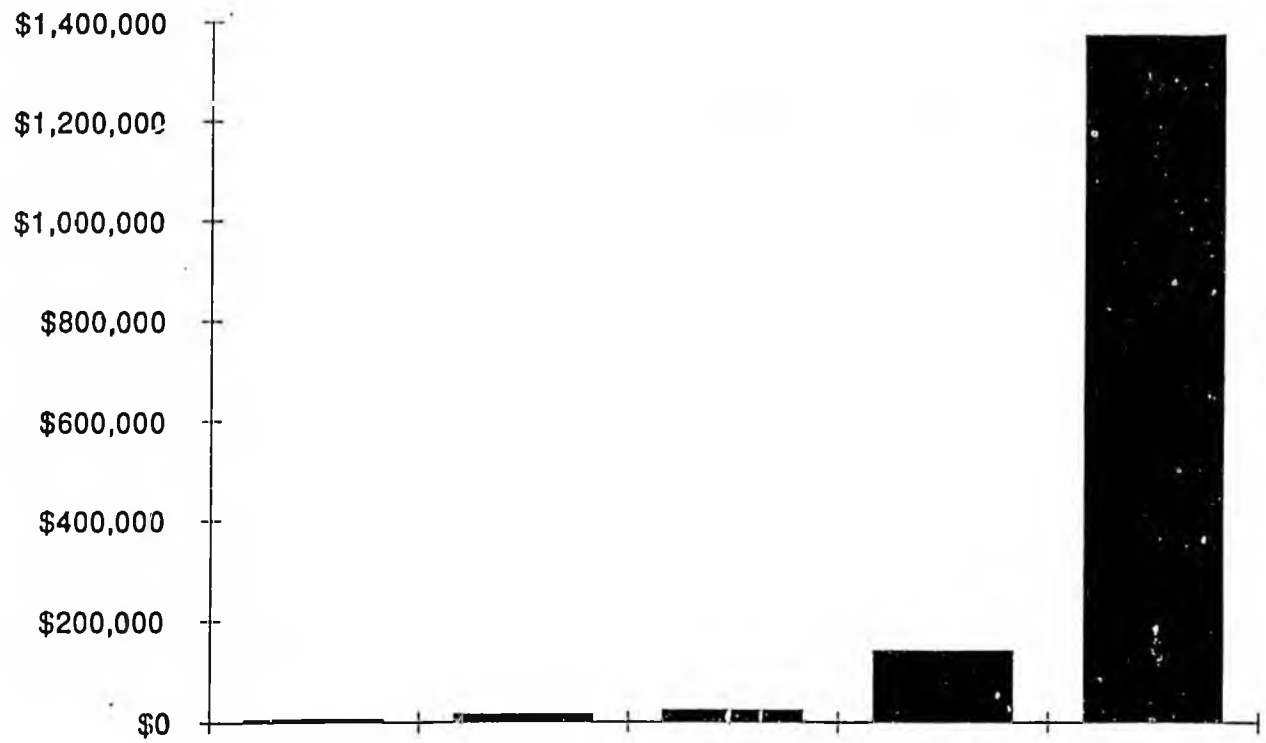
When I filed this bill, I thought a lot about a woman in Southcentral Alaska who has had seven FAS babies. All of those children are in foster families now, and the last we heard, this woman is pregnant again.

If we had had this law on the books, we might have been able to save not only her first FAS baby from some degree of damage, but the other six as well. Being committed to a treatment program might have brought an end to her alcohol abuse for good, and those other six babies could have been born healthy.

I don't claim to have written the perfect bill in this or any other case, but it will be debated and people surely will offer changes as it makes it way through the Legislature's committee process. An important part of that process is public input, and if you've got ideas on this subject, I encourage you to contact us.

Right now there are about 30 FAS babies being born every year in Alaska. This bill won't save them all, but it would at least give us the hope of saving some of them.

Costs of Treatment as Compared with Costs of FAS



$6,000	$15,000	$24,000	$140,805	$1,373,836
one woman in residential care 30 days	one woman in residential care 120 days	one woman in residential care 210 days	one FAS infant 65 days	one FAS patient 65 years
$200/day intensive treatment	$200/day for 30 days for intensive trmt and $100/day for 90 days continuing treatment	$200/day for 30 days for intensive trmt and $100/day for two 90 day commitments of treatment	average hospital stay for intensive care	lifetime costs

Alaska State Legislature

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February 2, 1990

MEMORANDUM

TO: Representative Eileen MacLean

FROM: Maureen Weeks MW
Legislative Analyst

RE: Nonvoluntary Treatment for Pregnant Women Who Habitually Use Alcohol; School Curricula
Research Request 90.137

You asked this agency what legal or policy issues are raised by two proposals: (1) to mandate treatment for women who habitually use alcohol during and after pregnancy; and (2) to implement a school curriculum on Fetal Alcohol Syndrome. This memorandum addresses these questions at some length. The summary below provides an overview of the major points of discussion. A table of contents can be found on page 4. The bibliography and list of personal communications are at the end.

SUMMARY

Number and Cost of Drug and Alcohol-Affected Newborns

A state study shows that in six months of 1989, in Anchorage and Fairbanks alone, physicians reported 111 newborns whose mothers had used alcohol during pregnancy or used drugs a few days or hours before delivery. At this rate, physicians in these two cities *this year alone* will report 222 children damaged by drugs or alcohol. At least two Anchorage cocaine babies are HIV positive.

Experts say this is only a fraction of babies exposed to drugs or alcohol during pregnancy. Many of these infants are not reported to the state. There are several reasons for this. First, toxicology tests on Alaska newborns are not routine. Second, some Alaska physicians are reluctant to report. Third, blood tests at birth do not show the larger number of babies whose mothers used drugs or alcohol at any other time earlier in their pregnancy.

Even before severely affected babies leave the hospital, the costs of care are enormous. The bill for a 16-month-old FAS baby boy who lives in the intensive

care unit at Providence Hospital is $1.4 million, so far. One study says the lifetime cost of Fetal Alcohol Syndrome babies born in one year is $39.8 million.

Legal Questions

Policy makers considering mandated treatment for pregnant women who abuse drugs or alcohol must juggle two basic rights: the pregnant woman's right to control her own body and the child's right to be born healthy. In most cases, the rights are compatible because most pregnant women want to provide the fetus with a safe place to grow. But some cannot or will not. Often, these women are addicted. When they abuse drugs or alcohol, does society -- a judge, a lawmaker, a physician, a relative -- have an obligation or a right to protect the fetus from harm? Ethicists and philosophers debate this question vainly, while lawyers write persuasive articles on both sides. Meanwhile, judges and legislators are left to seek a reasonable answer.

Policy Questions

Most state statutes do not address the problem of babies damaged by drugs and alcohol. Alaska, for example, does not require drug or alcohol tests for newborns. It does not require physicians to report newborns who test positive. Alaska child abuse and neglect laws do not include the fetus. No law tells Alaska physicians to test pregnant women if they believe she might be using drugs or alcohol. And officials say that if all substance-abusing pregnant women were identified and ordered into treatment, there would not be enough beds for them.

Some states are attempting to find a solution that respects the pregnant woman's privacy and protects the fetus. Minnesota has taken the lead with a two-month-old law that requires physicians to test and report substance-abusing pregnant women. When they get a report, state officials are required to offer the woman treatment and prenatal care. If she refuses or fails the treatment, the state must put the woman in nonvoluntary treatment. A state official says the law has already been used in several Minnesota counties.

If a baby is born drugged in Oklahoma, state officials may take custody of the baby and require the mother (and the father) to complete treatment before they return the baby to the home. Some states require physicians to test newborns if they suspect the infant has been affected by drugs or alcohol and then require physicians to report positive test results. Some states allow authorities to take custody of children who are born with drugs in their blood. One means to do so is to redefine certain parts of child abuse or neglect statutes to include the fetus.

Policy Options

Some Alaska experts recommend requiring pregnant women to get treatment if they will not do it on their own. When an Alaska woman has committed a jailable offense, a judge may opt to use the threat of jail to convince the woman to enter a treatment program. State officials want to require physicians to report addicted newborns, but some physicians object on the grounds that the state should first make its position clear by passing a law to include the fetus in child abuse or neglect statutes. The National Conference of State Legislatures recommends identifying children born with drug or alcohol problems so they can be placed in the proper protective, health or rehabilitative channels. Dr. Ira Chasnoff, a nationally recognized expert on substance-abusing pregnant women, recommends treatment and parenting education. Finally, some say it is wrong to force women into treatment unless all-out efforts have been made to educate the public about the damage drugs and alcohol can do to the fetus. These advocates say policy makers should first make available effective treatment for pregnant women and change the conditions which breed abuse of drugs and alcohol.

Implementing a Fetal Alcohol Syndrome Curriculum

The question of legal and policy issues concerning implementing a curriculum to teach about Fetal Alcohol Syndrome in the schools is treated very briefly. In general, state experts on law and education see no difficulty in encouraging local school districts to teach this subject. Education officials, however, are traditionally hesitant to mandate curricula. For the first time in its history, the State Board of Education on January 30 passed a resolution to support mandating comprehensive health education in the school curriculum, including a segment on Fetal Alcohol Syndrome.

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BACKGROUND

Incidence of Babies Born with Alcohol and Drugs in their System

State officials say that in one six-month period, Anchorage physicians reported 65 newborns testing positive for cocaine and one positive for another drug. In the same six month period, Anchorage physicians identified and reported 33 babies or toddlers with symptoms of Fetal Alcohol Syndrome or Fetal Alcohol Effects. Two Anchorage cocaine babies are HIV positive but the number may be higher because it can take up to a year and a half after birth for a baby to test positive (Staciokas). In the six month period, Fairbanks physicians reported eight newborns positive for cocaine, two for marijuana and one for amphetamines. One baby was identified as affected by alcohol (Caskey, pers. com.). At this rate, physicians in Anchorage and Fairbanks could be expected to report 222 drug or alcohol damaged children a year.

Experts say this is only a fraction of infants who ingested drugs or alcohol before they were born.[1] The majority are not reported for several reasons:

- State law does not require toxicology tests on newborns who show signs of distress caused by drugs or alcohol;

- Once an infant is tested, state law does not require physicians to report positive tests and the state claims many do not. A state report says, "Many in the medical community are reluctant to report such births to DFYS (Division of Family and Youth Services)," adding that, "[I]t is not common to report (alcohol) births even when they are recognized" (Staciokas, p. 1); and

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[1] Alaska Department of Health and Social Service officials say the department is preparing to test all Alaska newborns for cocaine in a six-month "blind" study (Livey, pers. com.).

- Positive toxicology tests at birth cover only infants whose mothers used cocaine or other drugs within days or hours of delivery.[2] In addition, Fetal Alcohol Syndrome is sometimes difficult to identify at birth. Thus, tests and observations at birth do not include the larger number of infants whose mothers used drugs or alcohol at any other time during their pregnancy. Studies show that moderate doses of alcohol, as early as the first months of pregnancy, can impair a child intellectually, while even one hit of cocaine can do permanent damage to a fetus.

No one has counted the total number of babies born with Fetal Alcohol Syndrome (FAS) or Fetal Alcohol Effects (FAE) in Alaska. One survey shows that between 1981 and 1988 the incidence of FAS among Alaska Natives was 4.2 per 1,000 births -- twice the national average (Berner, p. 2 and Hild, pers. com.). No similar data exists for non-Native births. In the absence of a definitive count, a study by the Alaska Senate Advisory Council estimates that at least 29 Alaska babies are born annually with FAS (Research Request No. 89-100015, p. 1). Alaska experts believe about ten times more babies are born annually with FAE than with FAS (Hild, pers. com.).

Effects of Alcohol on the Fetus

When a pregnant woman drinks alcohol, her fetus, which also ingests the alcohol, may be damaged. If the damage is severe, it can include mental retardation and physical abnormalities such as cleft palate, curvature of the spine and heart and kidney defects. Less severe effects include hyperactivity, learning disabilities and short attention span.

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[2] Cocaine takes 48 hours to clear the pregnant woman's system but up to five days to clear the fetal system (Hild, pers. com.).

It is unclear how much alcohol can cause this damage. Fetal Alcohol Syndrome children always have chronically alcoholic mothers. But recent research by Ann Streissguth, a member of the team which originally identified Fetal Alcohol Syndrome, indicates that pregnant women who are "social drinkers" also risk harming their babies. Research published in 1989 shows that a woman who consumes more than one-and-a-half ounces of alcohol a day (approximately three drinks) has a three times greater chance of producing a child with a subnormal IQ (Streissguth et al, 1989, p. 7). An earlier study found that children of mothers who were "moderate drinkers" (averaging one drink a day during mid-pregnancy) had significantly shorter attention spans and more periods of inattention than children of infrequent or nondrinkers (S. Landesman-Dwyer et al, 1988, p. 187-193). Finally, in two other studies, researchers at the National Institute of Health and at the University of Washington found that one drink a day may substantially increase the risk of producing a low birthweight child (Mills, et al, 1984; Little, 1977). Dr. Streissguth and her associates caution that "safe" drinking levels for pregnant women have not been established.

The symptoms of alcohol damage to a fetus are divided into two sets. The more severe set is Fetal Alcohol Syndrome, a leading cause of mental retardation in the U.S. FAS children are characterized by premature birth, low birthweight, a characteristic facial appearance, central nervous system problems and malfunction of major organs such as their heart and kidneys. At birth, they may appear tremulous, jittery and irritable and they may have difficulty sucking and show abnormal sleep patterns.[4] Less severe, but more prevalent, is Fetal Alcohol Effects (FAE), which can also affect the intellect and cause hyperactivity as well as speech and hearing problems. Symptoms may not be

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[4] These are similar to the effects on newborns of prenatal exposure of cocaine: tremors, irritability, poor feeding, abnormal sleep patterns, prematurity and low birthweight (MacGregor, et al, p. 690; Doberczak et al, p. 356). Boston University School of Medicine pediatricians report the effects of marijuana on newborns include low birthweight, an abnormal startle reflex, tremors and an inability to shut out stimuli (Brody, p. 1).

- Among the policy questions: Would pregnant women abort or go "underground" to avoid mandated treatment? Is appropriate alcohol treatment available? Who is to report alcohol use and who is to mandate that the woman be treated?

The conflict between a woman's right to drink alcohol and the fetus's right to be free from damaging substances is a recent one. United States researchers did not identify alcohol as a hazard to the fetus until 1973 when Seattle physicians reported in the medical journal *Lancet* that children of chronically alcoholic mothers were abnormally small, had facial deformities, suffered from heart defects and were slower to develop (Jones et al, 1973).[5]

In the last 20 years, medical research has turned up a growing number of other hazards to a developing fetus, including environmental toxins, prescription drugs, illegal drugs and even nicotine. Research demonstrates that these may cause permanent handicaps and dangerously premature birth.

Although the perceived danger of prenatal exposure to drugs and alcohol is recent, two studies show that the effects of this exposure may be extensive.

- A 1989 study in Pinellas County, Florida found that, among women making their first visit for prenatal care, more than one in six tested positive for alcohol, marijuana, cocaine and/or opiates. The women were patients in public health clinics and the offices of private physicians. Dr. Ira Chasnoff, director of the National Association of Perinatal Addiction Research and Education (NAPARE),

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[5] Child abuse is another example of a recently perceived phenomenon. Although child abuse was identified in the late 19th Century, it wasn't until 1962 that Dr. C. Henry Kempe published an article in the Journal of the American Medical Association identifying the battered child syndrome (Kempe, et al, JAMA, Vol. 181, p. 17, 1962). Since that time, all states have written laws prohibiting child abuse and neglect.

evident until a child reaches school age. Both FAS and FAE may be difficult to identify at birth.

Data indicate that the drinking habits of fathers can also affect the fetus. A University of Michigan study shows that babies born to fathers who drank regularly during the month before conception were an average of 137 grams (4.83 ounces) lighter than those who were born to fathers who were occasional drinkers. Regular drinkers were defined as men who consumed about two standard-sized mixed drinks a day or had at least one binge before conception (Little and Sing, p. 1). Experiments with animals at Boston University School of Medicine show that alcohol consumption by male mice before mating can adversely and permanently affect the normal development of their offspring (Friedler, p. 129).

MANDATING TREATMENT FOR WOMEN WHO HABITUALLY USE ALCOHOL DURING PREGNANCY

Introduction

Most pregnant women make conscientious efforts to give the fetus a safe, healthy place to prepare for birth. Some do not or cannot. Among these are women whose consumption of alcohol threatens to injure the fetus.

Policy makers confronting the issue of alcoholic pregnant women find themselves juggling three notions fundamental to the structure of our political and social system: the right to life, the right to privacy and the expectation that society protects those who cannot protect themselves. This raises important legal and policy questions which are described, but not answered, in this memorandum.

- Among the legal issues: Does the child have the right to a healthy start in life? Does the mother have the right to be free of intrusion into her private life? Can a pregnant woman be compelled to live according to the dictates of a physician, a judge or society?

says the county's demographics may qualify the study as a microcosm of prenatal substance abuse in other U.S. communities (Sherman 1989, p. 28).[6]

- A 1988 survey of 36 hospitals nationwide showed that in one of every nine births, babies were born with an illegal drug in their system or their mothers admitted some type of illegal drug use during pregnancy, most commonly cocaine. The study did not include alcohol (P. Shaw, pers. com.).

Meanwhile, physicians have developed the technology to save damaged or premature infants who a generation ago would have died. In the 1950s, only two percent of babies born in the sixth to seventh month of pregnancy survived delivery and almost all were physically handicapped. In the 1970s, only one in five survived. Today, 40 to 50 percent survive and of these about one-third suffer major physical handicaps such as blindness, deafness, cerebral palsy and mental retardation (Orentlicher, p. 23).

Rapidly evolving medical technology and increased exposure to toxic substances create a conundrum for public policy makers, physicians and state officials. Does society have a responsibility to protect a fetus, which by its nature, is incapable of protecting itself? Is it ever possible to protect the fetus without riding roughshod over the pregnant woman's constitutional right to privacy, to control her own person and to freedom from all restraint or interference of others? The legal and policy issues raised by these questions are briefly discussed below.

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[6] Dr. Chasnoff will be in Anchorage May 3 and 4 to speak on cocaine and poly-drug use during pregnancy. His visit is sponsored by the Municipality of Anchorage, the Child Advocacy Network, Providence Hospital, the Indian Health Service and the Governor's Office.

Legal Issues

The rights of the fetus and the pregnant woman are brought into conflict by their unique relationship. Numerous courts have enunciated the child's right to begin life "unhampered and unimpaired by damage negligently caused to body or mind."[7] They have also upheld the right to privacy, the right to control one's own person, "the right of complete immunity: to be let alone."[8] The opposing rights are described below.

A: The Child's Right to a Healthy Start in Life

A New Jersey Supreme Court in 1960 was the first to write that a child has a right to a healthy start in life.[9] In a case involving a child born with deformed feet and legs after an automobile accident while he was in the uterus, the court wrote:[10]

> "There is no question that conception sets in motion biological processes which if undisturbed will produce what every one will concede to be a person in being. If in the meanwhile those processes can be disrupted resulting in harm to the child when born, it is immaterial whether before birth the child is considered a

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[7] *Sylvia v. Gobeille*, 220 A.2d, 222, Rhode Island, 1966.

[8] *Union Pacific Railway v. Botsford*, 141 U.S. Law. Ed. 734, 1891.

[9] Some commentators say this language does not establish a literal right to be born healthy. "To claim that *Smith* stands for the proposition that everyone owes a duty to a fetus to ensure that it is born 'with a sound mind and body' is to stretch the holding beyond recognition," according to Laurence J. Nelson, a California lawyer and ethicist.

[10] *Smith v. Brennan*, 157 A.2d 497, New Jersey, 1960.

> person in being. And regardless of analogies to other areas of the law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body."

Other courts have quoted from this decision.[11] One court, however, recognized no such right in a case involving wrongful life, saying the matter is a "mystery more properly to be left to the philosophers and the theologians".[12]

Those who argue for the right to a healthy start in life say that recent research demonstrates an increasing number of ways the acts or omissions of a pregnant woman can harm her potential child. For example, smoking may cause a baby to be born underweight and at risk for severe handicaps; prescribed medicines may cause physical anomalies; and exposure to certain hazards at work -- such as anesthetic gases, and the chemicals used to manufacture rubber, plastics, paints, cellophane, pesticides, nylons, gasoline, adhesives and bullets -- may damage a fetus.

Once parents are aware of pregnancy, these advocates say, they should be held to a "reasonably prudent expecting parents standard" to provide and care for the child. Parents have a duty to act reasonably toward their children, these proponents say, and a parent's right to autonomy should be limited when it conflicts with the child's right to be protected so it can be born whole (Simon, p. 90). To those who argue that protecting the fetus interferes with the woman's control over her own body and actions, they respond that people addicted to drugs or alcohol do not have control over their use of these substances.

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[11] See, for example, *Grodin v. Grodin*, 301 N.W.2d 870, Michigan, 1981; *Womack v. Buchhorn*, 187 N.W.2d 222, Michigan, 1971; and *In Re Ruiz*, 500 N.E.2d 935, Ohio, 1986.

[12] *Becker V. Schwartz*, 386 N.E.2d 807, New York, 1978.

Noting that the right not to be wrongfully harmed by others is "perhaps a person's most basic right," Harvard fellow Deborah Mathieu writes that there may be times when a pregnant women's liberty justifiably may be limited to prevent harm to her future child, whether or not the woman is the cause of the harm. She warns that many factors (extent of harm, risk of harm, and chance and cost of avoiding it) must be considered before intervention is justified (Mathieu, p. 31). Dr. Mathieu notes several examples in which the U.S. Supreme Court has allowed intrusions: drawing blood for a blood alcohol test, compulsory smallpox vaccination and compulsory sterilization in which the court held that the principle of compulsory vaccination "is broad enough to cover cutting the Fallopian tubes."[13] Therefore, she argues, the strong presumption in favor of the pregnant woman's bodily integrity must sometimes be overridden by the child's right not to be harmed (p. 45).

Some argue for restricting an addicted pregnant woman's use of drugs or alcohol. Advocates of this position say that using alcohol is a privilege, not a right, and they note that using illicit drugs is a crime. They say that distributing illegal drugs and alcohol to a fetus is a more serious crime than simply using illegal drugs oneself (M. Shaw, p. 104). They note that were a woman to give alcohol or drugs to a child the day after its birth, rather than the day before, she would risk criminal sanctions (Balisy, p. 1223). An Alaska case illustrates this argument. A Fairbanks woman in 1989 was sentenced to six months in jail after her two-week-old baby drank formula with cocaine in it and died. The mother was 7-1/2 months pregnant when she was sentenced and had used cocaine during both pregnancies. She had a third child who tested positive for the drug. Besides the jail time, she was ordered to spend six months to 1-1/2 years in a drug treatment program (Associated Press, August 28, 1989).

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[13] Drawing blood: *Schmerber v. California*, 16 U.S. Law. Ed. 2d 908, 1966 and *Breithaupt v. Abram*, 353 U.S. Law. Ed. 448, 1957. Compulsory sterilization: *Buck v. Bell*, 274 U.S. Law. Ed. 1000, 1927. Compulsory smallpox vaccination, *Jacobson v. Massachusetts*, 197 U.S. Law. Ed. 643, 1905.

These advocates say that officials may justifiably restrict a pregnant woman's use of alcohol, tobacco and licit and illicit drugs to keep her from passing drugs through her body to the fetus. Patricia King of the Georgetown University Law Center wrote in 1979 that it would "certainly be justifiable" to compel an addicted pregnant woman to undergo treatment (King, p. 1684). John Robertson of the University of Texas Law School says that once a woman decides to have a child -- that is, she does not have an abortion -- she has a "duty" to assure that the fetus is born as healthy as possible. "She no longer has the right to produce a dead or unhealthy baby" (Robertson, p. 352 and 360). Professor Robertson says a "mere ban" on certain activities during pregnancy, such as alcohol or drugs for the sake of the fetus, is no more intrusive on a woman's autonomy than regulating other activities, such as adding fluoride to the water or requiring vaccination (Robertson, p. 359-60).

B: <u>The Mother's Right to Privacy</u>

Those who weigh the competing constitutional rights and see the balance tip in favor of the woman, argue that vesting a fetus with rights creates an unacceptable intrusion into women's bodies and their personal lives. They say state interference pits woman against fetus, eroding bonding and encouraging women to avoid prenatal care (Note, p. 1012).

These advocates turn to the right of privacy, citing Justice Brandeis' often-quoted dissent that the "right to be left alone" is "the most comprehensive of rights and the right most valued by civilized man."[14] To this they add the

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[14] In his dissent in *Olmstead v. United States*, Justice Brandeis wrote: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature... They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things... They conferred, as against the Government, the right to be left alone -- the most comprehensive of rights and the right most valued by civilized men" (277 U.S. Law. Ed. 944, [1928]).

importance of control over one's own person, citing another Supreme Court opinion, "No right is held more sacred, or is more carefully guarded... than the right of every individual to the possession and control of his own person."[15]

In addition, these advocates note, the pregnant woman has the right to be free of sex discrimination: no man, they argue, would be forced to protect his sperm from alcohol damage that might harm a future child (Sherman 1989, p. 28). Pregnant women, they say, are singled out for intervention because of their unique status. They cite several examples in which the U.S. Supreme Court refused to force criminal suspects to submit to certain medical procedures. In one instance, the court held the state could not compel a suspect to have his stomach pumped for morphine capsules, saying such a process is "conduct which shocks the conscience."[16] In another, the court held that surgically removing a bullet from a robbery suspect's chest against his will for use as evidence against him is an "unreasonable" intrusion."[17] And in a third, the court allowed the state to take a blood test only if it could demonstrate that it was necessary to perform the test immediately or else the evidence would be lost.[18] This court added:

> "The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."

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[15] Union Pacific Railway v. Botsford, 141 U.S. Law. Ed. 734, 1891.

[16] *Rochin v. California*, 96 U.S. Law. Ed. 183, 1952.

[17] *Winston v. Lee*, 84 U.S. Law. Ed. 2d, 662, 1985.

[18] *Schmerber v. California*, 16 Law. Ed. 2d, 908, 1966.

F ·lly, a federal circuit court has held that mental patients committed against their will have the right to refuse treatment. The court cited the words of an Oklahoma state court, "[L]iberty includes the freedom to decide about one's own health. This principle need not give way to medical judgment."[19] Because of these basic rights, these advocates say, no pregnant woman who refuses treatment for the good of her fetus should be forced to submit to it.

Dawn Johnsen, writing in the *Yale Law Journal*, warns that granting rights to fetuses which conflict with a woman's autonomy reinforces the tradition of disadvantaging women on the basis of their sex. By subjecting women's decisions and actions during pregnancy to judicial review, the state questions women's abilities. At the same time, it seizes their rights to make decisions essential to their very personhood. This rationale is similar to that used in the past to exclude women from the paid labor force, Ms. Johnsen says. She warns that fetal rights could be used to restrict women's autonomy in ways far surpassing any regulation on the actions of competent adult men (Johnsen, p. 624-5).

Moreover, advocates of this view say, health care is a finite commodity, medical knowledge holds many lacunae and no law gives anyone -- including a fetus -- the right to be healthy (Nelson, p. 736; Mathieu, p. 27). These commentators note that virtually everything the pregnant woman does has some effect on the fetus. A woman could be held liable for fetal injuries from household accidents caused by her own negligence, they say. They list other behaviors for which she could be brought to account: using prescription, non-prescription or illegal drugs; eating improperly; smoking; exposing herself to infectious diseases such as syphilis or herpes; exposing herself to workplace hazards such as those found in dry cleaning establishments and service stations; and engaging in too much exercise (Johnsen, p. 606-7). A professor of law at the American University writes in a *Washington Post* editorial (Nov. 25, 1987):

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[19] *Rennie v. Klein*, 653 F.2d 836, 3d Cir., 1981.

> "What are we prepared to order next in the name of fetal health? Shall we arrest all pregnant women who smoke cigarettes? Drink liquor? Drink coffee? Shall we order hospital confinement, as has already been done at least twice, when a woman has been given medical advice and chooses not to follow it? Shall we shackle her to her hospital bed? Shall we compel a woman to submit to surgery to correct fetal defects? Shall the police hold her down while she is injected with anesthesia?"

A New York City judge, who denied a hospital's request to order a caesarean section on a 35-year-old indigent women who had borne ten children, says she also finds problems with restricting pregnant women. "It's absolutely clear that cigarettes and liquor are harmful to babies, that bad nutrition brings brain damage," Judge Margaret Taylor told a reporter. "So, do you prevent a woman from doing these things the minute she gets pregnant?" (Lewin, p. 1).

Commenting on forced medical treatment of pregnant women, bio-ethicist Lawrence J. Nelson of the University of California warns that infringing on a woman's rights by requiring certain behavior could lead to "unsavory" precedents for further invasion of a woman's privacy. This invasion could include court action against women who smoke cigarettes as well as court orders forcing women to undergo prenatal diagnostic procedures or fetal surgery, Dr. Nelson says. Paraphrasing John Stuart Mill, Dr. Nelson says it is far better to avoid compelling pregnant women to live as seems good to a particular physician, judge or even to the rest of us than to force them to sacrifice their wills and their bodies on the alter of someone else's notion of the good. He concedes that this may result in the birth of children who will suffer death or an avoidable injury or disease. "The price to fetuses and to society of honoring maternal refusals of treatment may seem high, but contrary policy would rob us of much more and leave us far poorer as human beings" (Nelson et al, p. 763).

The same view is held by George Annas, associate professor of law and medicine at Boston University (Annas, p. 45):

> "...[S]ome fetuses that might be salvaged may die or be born defective. This will be tragic, but it is likely to be rare. It is the price society pays for protecting the rights of all competent adults... The choice between fetal health and maternal liberty is laced with moral and ethical dilemmas."

C: Viability of the Fetus

The U.S. Supreme Court in *Roe v. Wade* found the state's compelling interest in the fetus's potential life begins with viability -- that is, when the fetus can survive outside the mother's body.[20] The court held (410 U.S. 113):

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications."[21]

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[20] When is a fetus viable? In 1973, when the Supreme Court wrote the *Roe* decision, it noted that viability was usually at the seventh month of pregnancy (28 weeks). Today, the earliest point at which a fetus can survive is 23-24 weeks, according to David Orentlicher, ethics and health policy counsel for the American Medical Association (Orentlicher, p. 23). If viability is defined as the age at which the fetus has any prospect of survival outside the womb, the age would be 23-24 weeks. If viability is defined as the point at which half of fetuses will survive, the age is 26 weeks, Orentlicher says.

[21] The fact that a child can survive outside the womb is no assurance that he or she will have a healthy life. Children born too soon have significantly increased risks of permanent injuries such as mental retardation, blindness, deafness and cerebral palsy.

Dr. Mathieu of Harvard hinges the burden of a woman's duty to the fetus on the concept of viability. She believes a woman's obligations to the fetus have two distinct levels:

- At the first level, the woman assumes an obligation to the future child by becoming pregnant. Since there is normally a high probability that a child will come into being, she owes this future person a duty of due care similar to the duty of due care she owes to any stranger: to refrain from causing harm, and, to some extent, to try to prevent or remove harm.

- The second level comes once she decides against abortion. Here, the pregnant woman assumes a higher level of obligation, placing herself in a special relationship with her future child that carries certain inherent obligations similar to those of any parent toward his or her child. Just as a parent's obligations to her child are stronger and more demanding than her obligations to other persons, so a pregnant woman's obligations at this stage to her future child may be stronger and more demanding than her obligations to others, Dr. Mathieu says.

Because of this, she says, "[T]here is good prima facie argument that the state may impose certain restrictions on a pregnant woman's behavior throughout her pregnancy. During the first few months of pregnancy, the restrictions would be relatively nonintrusive, but might increase in severity during the last few months."

At the higher level of duty -- after she forgoes abortion -- the woman may have to accept significant limitations on her freedom of action in order not to harm her child, Dr. Mathieu says. She adds that policy makers considering intervention should ask two questions: To what extent will the future child be

harmed by the mother's actions? And to what extent will the pregnant woman be harmed if her decision is overruled and her body is invaded? She concludes that intervention is justified in the case of pregnant women who are addicted to alcohol because alcohol can cause serious, permanent harm to a child (Mathieu, p. 51).

The director of the medical ethics program at the University of Wisconsin asks similar questions but comes to a different conclusion. Speaking at a conference on Prenatal Abuse of Licit and Illicit Drugs sponsored by the New York Academy of Sciences, Norman Fost said four conditions must exist before a mother is morally obliged to accept treatment:

- First, there must be high risk of serious permanent harm to the baby;

- Second, there must be low risk of serious permanent harm to the mother;

- Third, the recommended treatment must provide a clear benefit to the fetus; and

- Fourth, in order to remain consistent with the *Roe* decision, the fetus must be viable.

If all these conditions are met, a mother might legitimately be compelled to abstain from harmful behaviors, Dr. Fost says. But, he concludes, because the damage may already be done by the time the fetus is viable, there is no "clear benefit to the fetus" and society has no ethical stand from which to force a pregnant woman to abstain (Henig, p. 8).

One commentator says the decision to treat hangs on a "delicate balancing." John Myers writes in the *Duquesne Law Review* (p. 53):

> "When reliable scientific evidence clearly establishes that maternal conduct carries with it a very high probability of fetal death or serious disability, intervention may be appropriate... [A]s courts decide such cases, they will focus primarily on the likelihood and severity of fetal harm and the degree of invasion of protected maternal interests required to effectuate intervention."

Although he did not say it, Professor Myers could have added that legislators, too, will perform a similar "delicate balancing" when deciding whether to require treatment of substance-abusing pregnant women.

Professor Myers says that as the degree of state intervention becomes more intrusive on the woman's rights, the state must demonstrate an increasingly strong justification for interfering. He points out that it would be inconsistent to compel a woman to give birth (he means, making abortion illegal after viability) without protecting the soon-to-be-born child from injury which could follow it throughout life. There is no logical or legal reason to deny the state's interest in a newborn infant, he says. Similarly, there is no reason to deny the state's interest in a viable fetus which is completely unable to assert its own rights.

Finally, Professor Myers gives intervention a thumbs-up or thumbs-down judgment in three examples, one based on an actual case and two on hypothetical examples:

> Example 1. An alcoholic woman is 26 weeks pregnant (the fetus is approaching viability) and has given birth to one FAS child. Her physician fears that her drinking will damage her fetus. The physician cannot accurately predict the likelihood that this particular fetus will be damaged by alcohol, Mr. Myers says. This makes the probability and degree of fetal harm speculative. In addition, state intervention would be "highly invasive" (e.g., a constant watch, regular reporting or civil

commitment). Because of these factors, the state should not intervene, the professor says.

Example 2. A fetus has a growing hydrocephalic condition. Surgeons could stop the worsening condition with surgery that penetrates the woman's abdomen and the fetus's skull. The parents object to the medical intervention on religious grounds. Professor Myers says worsening harm is certain and this intervention would be justified.

Example 3. Because of placement of the placenta, physicians are "99 to 100 percent" certain an unborn child will die if delivered vaginally. Because of the certainty, Professor Myers says intervention is justified. (In this actual case, the court ordered the surgery but the mother did not return to the hospital, the placenta shifted and a healthy child was delivered vaginally. The case was *Jefferson v. Griffin Spalding County Hospital Authority*, 274 N.E.2d 457, Georgia, 1981.)

The American College of Obstetricians and Gynecologists in 1987 issued a policy statement that physicians were "almost never" justified in going to court to compel medical procedures for pregnant women. The statement read, "Obstetricians should refrain from performing procedures unwanted by the pregnant woman... The use of judicial authority to implement treatment regimens in order to protect the fetus violates the pregnant woman's autonomy." The statement was written by Dr. Kenneth J. Ryan of Brigham and Women's Hospital in Boston (Lewin, p. 1).

D: Child Protection Programs and Civil and Criminal Law

Generally, the law about fetal rights will develop in child protection programs, tort law and the criminal law. In most states, policy makers and the courts are silent on the subject of the rights and status of the fetus; this assumes that the rights of the pregnant woman have precedence over the rights of the fetus.

The examples given here are the exception and are provided for those contemplating how to deal with substance abuse during pregnancy.

Child Protection

In most cases, pregnant women cannot be tested involuntarily for use of drugs or alcohol. But newborns exhibiting distress can be tested and some states require physicians to do so and report positive results. Some localities consider the presence of an illegal drug in an infant's blood evidence of child abuse and allow emergency custody of the child. An example is Nassau County, New York, which takes emergency custody for up to eight months of newborns testing positive for illegal drugs. Los Angeles County allows social workers to remove from the mother's care newborns who show positive drug tests. The County Chief Probation Officer, Barry J. Nidorf, says the county would rather rely on residential treatment than on emergency custody but "there is just a dearth of treatment programs" (Sherman 1988, p. 24).

Civil Law

In the civil law, the attitude toward the fetus has changed since Justice Oliver Wendell Holmes ruled that a fetus is part of its mother and cannot sue for prenatal injuries.[22] Sixty years after Justice Holmes wrote his decision, a United States District Court found that a child can recover for prenatal injuries if the fetus was viable when the injuries occurred. One by one, other courts agreed, until today this view is as well established as was the contrary rule in 1884, according to Roland F. Chase, who summarized prenatal injury in an *American Law Review* article (Chase, p. 1227).

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[22] *Dietrich v. Northampton*, 138 Mass 14, 1884.

Criminal Law

With increased use of alcohol and drugs among women, criminal law is feeling its way to the new area of fetal injury caused by acts of the pregnant woman. In most jurisdictions, mothers who abuse drugs or alcohol are not charged with a crime. The *National Law Journal* reports, however, that in 1989 at least ten women in five states (California, Florida, Illinois, Massachusetts and South Carolina) faced criminal prosecutions because they used cocaine, heroin or alcohol while pregnant. Only one was convicted. She was Jennifer Johnson of Florida, convicted of delivering cocaine to a minor through the umbilical cord and sentenced to one year in a rehabilitation program as well as 14 years probation during which she must report any pregnancies to authorities and receive approval for her prenatal care program. The case is being appealed (*State v. Johnson*, 89-890CFA, Cir. Ct. Seminole County.)

One celebrated case involves a pregnant woman jailed during her pregnancy. She was Brenda Vaughan, who tested positive for cocaine in a presentencing hearing after she was convicted of forging checks. Washington, D.C. Superior Court Judge Peter Wolf sentenced Ms. Vaughan to jail until her due date, saying at the sentencing hearing, "You've got a cocaine problem, and I'm not going to have this baby born addicted" (Moss, p. 20). Wolf later said he sentenced Ms. Vaughan to jail because there were no treatment programs available. He also said many of his colleagues told him they had similarly sentenced or incarcerated pregnant drug abusers (Jost, p. 88; Sherman 1988, p. 25).

A northern California district attorney, Michael Ramsey, says he is seeking jail terms for women who give birth but refuse medical care for substance abuse. He says the approach works. He says he has filed only one case, and that case was dropped when the woman agreed to treatment. Meanwhile, the number of newborns

testing positive for drugs in his county has fallen from up to ten a month to almost none, he says.[23]

E: Court Decisions Regarding the Fetus

Like judges across the nation, Alaska judges faced with pregnant women using illegal drugs have been in a quandary. On the one hand, they are urged by prison officials not to imprison expectant mothers because of concern that jail personnel cannot care for them properly. On the other hand, a judge may order prison (if the crime is a jailable offense) because the woman is a danger to others, and because nurse practitioners at the jail can give the woman better care than she might get out of jail. Other judges may use the court's "persuasive powers" to talk reluctant substance-abusing pregnant women into voluntarily entering local treatment centers.

Nationwide, judges forced by circumstance into this frustrating arena have made hurried decisions in rushed hearings that began after a women went into labor. They have upheld laws they did not like after emergency hearings in hospital rooms or hurried conference telephone calls. A 1987 study published in the *New England Journal of Medicine* (May 7, 1987) shows 21 cases since 1981 in which hospitals had sought court orders to override the wishes of a pregnant woman. In all but three, judges granted the orders.

This section is limited to examples of rulings involving (1) pregnant women brought to the attention of the court for fear their actions or inactions might harm an unborn fetus and (2) infants born with drugs or alcohol in their systems. Among the cases:

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[23] Sources of information about these cases include: Gest, p. 50; Sherman, p. 28; Moss, p. 20; and Grace, p. F10.

Judicial Intervention Before the Child is Born

Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, New Jersey, 1964.

Despite evidence that she could hemorrhage so severely that she and her unborn child would die, Willimina Anderson refused blood transfusions in her 32nd week of pregnancy because they were against her religion. A trial court held that it could not intervene. The state supreme court heard the case immediately and ordered the blood transfusions, should they become necessary. The court wrote, "We are satisfied that the unborn child is entitled to the law's protection" (201 A.2d 537).

The Matter of Dittrick, Michigan, 1977.

Six weeks <u>before</u> a child was to be born, a Michigan probate court ordered social workers to take temporary custody of the fetus. The order was based on testimony that the parents had lost custody of an earlier child following allegations of continuing physical and sexual abuse and faced pending criminal charges. The court of appeals ruled that Michigan law gave courts no jurisdiction over an unborn child (MSA Sec. 27.3178(598.2). The legislature might want to consider appropriate amendments to the probate code, the court said, adding, "Indeed, the background of the present case has convinced us that such amendments would be desirable" (263 N.W.2d 37).

Case No. 79-JN63, Denver Juvenile Court, Colorado, 1979.

In this case, physicians decided on a caesarean section when the fetal heartbeat slowed during labor. The mother resisted, the hospital went to court and at a bedside hearing, hospital lawyers argued the state had a compelling interest to protect the unborn. They asked the judge to

declare the fetus a "dependent and neglected child." The judge granted the order and the mother told her lawyer afterward that she was grateful for the surgery. The judge, Jon Lawritson, now a lawyer in private practice, later told the *American Bar Association Journal*, "I didn't like being placed in the position I was placed in" (Jost, p. 86).

Matter of Steven S., Los Angeles County, 1980.

When a pregnant woman was certified to receive intensive psychiatric treatment for up to two weeks, the Los Angeles County went to juvenile court for an order to detain her during the final weeks of her pregnancy. The juvenile court found that the unborn fetus was a minor and detained the fetus (and the woman). It ordered the mother's release when the child was born. The order was overturned on appeal six weeks later, after the detention and pregnancy were both over. The appeals court found the unborn child was not a person under California law (126 Cal. App. 3d 29).

Jefferson v. Griffin Spalding County Hospital, Georgia, 1981.

Jessie Mae Jefferson, 39 weeks pregnant, objected to a physician-prescribed caesarean section on religious grounds. The county hospital went to court, saying the placenta had moved down near the cervix and there was a "99 to 100 percent certainty" that the unborn child would die if delivered vaginally. In an emergency hearing the same day, the superior court authorized the surgery if Ms. Jefferson came to the hospital for care. The court wrote, "The Court finds that the intrusion involved...is outweighed by the duty of the State to protect a living unborn human being from meeting his or her death before being given the opportunity to live." One day later, the state supreme court upheld the decision. The woman did not return to the hospital, the placenta shifted and a healthy baby was delivered (274 S.E.2d 457).

Taft v. Taft, Massachusetts, 1983.

Lawrence Taft went to court to force his pregnant wife to have a surgical procedure to suture her cervix and avoid miscarriage. Susan Taft refused on religious grounds and a probate judge ordered her to submit to the procedure. The appeals court found the wife could not be ordered to have surgery. The court ruled that the wife's constitutional rights were established on the record, while any interest the state might have in requiring a competent adult woman to submit to the surgery was not established (446 N.E.2d 395).

In re Jamaica Hospital, New York, 1985.

In this case, the court appointed a physician as the guardian of the unborn child. It ordered the physician to do all that was necessary to save the life of an 18-week-old fetus, including administering blood transfusions over the mother's objection (491 N.Y.S.2d 898).

Crouse Irving Memorial Hospital, Inc. v. Paddock, New York, 1985.

Here, the court ordered a pregnant woman to receive blood transfusions to protect the welfare of her fetus which was being delivered prematurely.

In re Madyun, Washington, D.C., 1987.

Ayesha Madyun, a 19-year-old woman, had been in labor two days when she arrived at the hospital; 18 hours later, her labor had not progressed and physicians decided on a caesarean section to avoid a fatal infection to the baby. When Ms. Madyun refused, the hospital won a court order authorizing surgery. Superior Court Judge Richard Levie wrote, "It is one thing for an adult to gamble with nature regarding his or her own life;

it is quite another when the gamble involves the life or death of an unborn infant" (Lewin, p. 1; 114 *Daily Washington Law Reporter* 2233).

In re A.C., Washington, D.C., 1987.

Angela Carder, a pregnant woman who had suffered from leukemia since she was 13, married when she had been in remission for three years. In her 25th week of pregnancy, she was diagnosed as terminally ill. Physicians disagreed about whether she would want surgery were she lucid. One believed she would not want to deliver a child that might have to suffer the pain of handicap; another believed she would have accepted a caesarean section. The trial court ordered surgery and afterwards, in a period of lucidity, Ms. Carder stated she would agree to the surgery although she might not survive it. But when another physician went to her for verification, the dying woman mouthed the words, "I don't want it done." While Ms. Carder lingered between life and death, the case was appealed and the appeals court allowed the surgery. In a later opinion filed five months after the mother and child died, the appeals court said the state's interest in protecting innocent third parties may override the individual's right to bodily integrity. It suggested that "a sort of quasi-official body" should balance the many factors, with the judiciary playing "an appropriate and limited reviewing role, rather than the primary adjudicator in a highly charged and short time frame" (533 A.2d 611).

The Case of Brenda Vaughan, Washington D.C., 1988.

Brenda Vaughan, a first-offender convicted of check forgery, tested positive for cocaine in a pre-sentencing drug test. The judge ordered her to jail until after she had given birth. "She's apparently an additive personality and I'll be darned if I'm going to have a baby born that way," he said (Jost, p. 88).

Judicial Intervention After the Child is Born

Reyes v. Superior Court of California, California, 1977.

A pregnant woman addicted to heroin was warned by health care workers that if she continued using the drug, her child was in danger. She ignored the advice and twin boys were born addicted and suffering from withdrawal. The mother was charged with two counts of felony child endangering. The California appeals court found that California statute did not cover the mother's conduct before the children were born and dismissed the case (75 Cal. App. 3d 214).

The Matter of Male R., New York, 1979.

A family court judge found that a child born with mild drug withdrawal symptoms to a mother who used barbiturates, cocaine and alcohol was a neglected child. The mother had refused to enroll and remain in treatment programs (422 N.Y.S.2d 819).

The Matter of Baby X, Michigan, 1980.

When a newborn baby showed symptoms of heroin withdrawal, a probate court judge appointed a guardian ad litem for the baby and found enough evidence of neglect to take temporary custody. The decision was affirmed by the circuit court, which found that withdrawal symptoms caused by prenatal maternal drug addiction may qualify the child as neglected. The court repeated language by earlier courts that a child has a "legal right to begin life with a sound mind and body" and said the way a mother treats a child before it is born is an indication of how she will treat it afterwards (293 N.W.2d 736).

The Matter of Danielle Smith, New York, 1985.

A New York family court held that an unborn child is a person and that a child born to an alcoholic mother was a neglected child. The mother, who consumed ten drinks a day three or four days a week, had not complied with earlier orders to get treatment. The infant, born prematurely, was small, jittery, irritable and had facial anomalies; physicians noted a "small possibility that the child might have fetal alcohol syndrome." Based on the medical reports, the court held there was sufficient proof to establish imminent danger of physical impairment to the unborn child (492 N.Y.S.2d 335).

In re Ruiz, Ohio, 1986.

The court of common pleas determined that Nora Ruiz, a mother who used heroin intravenously within two weeks of the birth of her child, exposed the child to substantial risk before its birth and abused the child. The child was born early and small for his gestational age; he was irritable, jittery, trembly and had trouble taking food; his urine test was positive for cocaine and heroin. Agreeing with earlier courts that the child has a "right to begin life with a sound mind and body", the Ohio court held that a viable fetus is a child under the state's child abuse statute (R.C. Sec. 2151.031). Relying on *Roe v. Wade*, the court said the state has an interest from the point of viability in the child's care, protection and physical and mental development (500 N.E.2d 939).

F: Legal Issues in Alaska

Child Protection

In Alaska, child protection services begin when the child is born. Use of drugs or alcohol during pregnancy is not considered child abuse. Once the child is

born, state law does not require physicians to report a newborn with drugs or alcohol in its system.

When a physician report is made, however, child protection workers assess the home situation and, if the baby appears to be in danger, go to court to remove the baby from the mother's care, according to Martha Holmberg, social services field administrator. How long the child lives away from its mother depends on the individual situation, Ms. Holmberg says.

Alaska physicians do not generally report alcohol in a baby's system, according to Ms. Holmberg. They are more likely to report a child born with cocaine, she says. Similarly, the department is less likely to intervene if the substance used is alcohol, Ms. Holmberg says. She contends that an alcoholic mother is less dangerous to the child than a mother addicted to cocaine. She also contends that a baby affected by alcohol is less difficult to care for -- and less at risk for further abuse -- than a baby affected by cocaine. The cocaine baby is at "double risk," she says.

Civil and Criminal Law

The extent and nature of fetal rights in civil law and of the fetus as a protected entity in criminal law remain largely unexplored. There has been little or no civil litigation on fetal rights versus parental rights in Alaska. As for criminal law, the Criminal Division of the state Department of Law interprets Alaska statutes to give no protection to an unborn fetus at any stage unless there is injury to the mother (Otto, pers. com.).

G: Summary

The child's right to a healthy start in life collides with its mother's right to be left alone. Frequently, the repercussions come when the pregnant woman

uses drugs and alcohol which others believe will harm her fetus. The situation is pervasive: in a survey, 15 percent of pregnant Florida women tested positive for drugs or alcohol at their first prenatal visit. The dilemma is intensified because physicians are winning difficult medical victories to save younger and younger infants -- some of them already permanently damaged by the acts of their own mothers. Against this backdrop, policy makers search for workable answers to philosophical, ethical and legal questions about the fetus.

Policy Issues

The U.S. Supreme Court articulated in *Roe v. Wade* the state's "important and legitimate interest in protecting the potentiality of human life" (410 U.S. 162). One obvious interest is financial. A child damaged by prenatal substance abuse is likely to require expensive state services. There are other good reasons, apart from the value of human life itself, to attempt to protect the physical and mental health of a fetus. Among them is the loss of a contributing member of society.

Some commentators find it inconsistent that a state makes no move to protect an unborn child from the drugs or alcohol taken by a pregnant woman, but is willing to seek custody minutes after that same child is born already damaged for life by harmful substances (Parness and Pritchard, p. 294). The difficulty is that whatever the state does to protect the fetus, it must necessarily do to the mother.

A: <u>Cost of Fetal Alcohol Syndrome</u>

A report by the Senate Advisory Council estimates that the lifetime cost of one FAS birth in Alaska is $1.4 million. The lifetime cost the FAS babies born each year in Alaska is $39.8 million. These cost estimates are selected medical and

social costs only. They do not include costs of welfare, the justice system, mild physical problems, learning disabilities or the loss of a useful member of society, nor do they include the education and social service costs of victims of FAE (Research Request 89-100015, p. 1).

Providence Hospital officials report costs of $1.4 million for a 16-month old child born with FAS who has been abandoned to the hospital by his mother. He is his mother's third FAS baby. Weighing today what other babies weigh when they are born, the little boy reaches out to touch other babies in the intensive care ward. He cries, but his wails are rendered soundless by a tracheotomy tube dangling from his throat 24 hours a day. A hospital official describes the situation as "awful." Janet Oates, of the hospital's administrative council, says visiting Soviet physicians seem "moved and astonished" that hospital staff take the time to care for this baby.

A 1990 report by the Department of Health and Social Services Division of Family and Youth Services estimates actual cost to the state over 18 months for one addicted infant at $5,600. Costs for one substance-abusing parent are $12,000 over 18 months. These are costs for services not eligible for Medicaid reimbursement. They do not include costs of welfare, the justice system, mild physical problems, emergency medical problems, learning disabilities or loss of a useful member of society.

For children, costs include clothing ("in our experience, children of substance-abusing parents seldom, if ever, have adequate clothing or infant supplies," the memorandum says.) They also include costs of foster care and day care while the parents take treatment. This care also guarantees the child is seen by competent adults alert to the possibility of abuse or neglect, the report says. For adults, costs include urine tests, transportation (most clients do not have transportation, the report says), court evaluations, drug and alcohol treatment and other therapy and parent training.

B: Is Treatment Available for the Pregnant Woman?

Currently, no Alaska residential treatment beds are specifically reserved for pregnant substance abusers. This will change when a federally funded residential treatment center for 15-20 substance-abusing pregnant women opens this year in Anchorage. Requests for proposal for the $520,412 center have been distributed, according to Vicki Hild of the Alaska Native Health Board. The center will be limited to Native pregnant women and their children unless the state provides funds for pregnant women of other races. The state Department of Health and Social Services has reserved $200,000 in the FY 91 governor's budget for residential treatment for pregnant women. The money will be distributed through grants, according to Matt Felix of the State Office of Drug and Alcohol Abuse.

Ms. Hild says that, faced with publicity about pregnant substance abusers, some Alaska co-educational treatment facilities have recently begun accepting pregnant women, but none have programs designed specifically for these women. Ms. Hild and others believe that women are more likely to succeed in drug and alcohol treatment if they are in a woman-only program. Ms. Hild says the confrontational technique effective for males does not work for women, especially for Native women. She adds that men have played negative roles in the lives of many female substance abusers, making it difficult for women to progress in co-educational therapy programs.

Dr. Wendy Chavkin, associate professor at Columbia University School of Public Health and Department of Obstetrics, says that, nationally, treatment is not available for motivated pregnant women. She surveyed 78 drug treatment program in New York City to learn that 54 percent excluded pregnant women, 67 percent excluded pregnant women on Medicaid and 87 percent excluded pregnant women on Medicaid who are addicted to crack. Health advocates say Dr. Chavkin's survey, the first survey of drug treatment available to pregnant women, is limited in scope but accurately portrays what is happening around the country. Janet

Chandler of Northwestern Memorial Hospital's Perinatal Center for Chemical Dependence in Chicago, says addiction treatment programs discriminate against pregnant women. "Most centers worry about the liability, so as soon as they discover a woman is pregnant, they refuse her or throw her out of the program" (Brody, p. 1).

C: Current Alaska Law

No Alaska law mandates treatment for addicted pregnant women. One statute, AS 47.37.190(a), allows the involuntary commitment of alcoholics. It is restricted to people who are considered alcoholic.[24] The statute allows commitment by a superior court judge if the person is likely to inflict physical harm on others or is incapacitated by alcohol.

In practice, alcoholic Alaskans are rarely committed for treatment under this statute, according to Assistant Attorney General Elizabeth Shaw. In Juneau, for example, only two attempts have been made in the ten years Ms. Shaw has represented the state Department of Health and Social Services. Both attempts failed. Ms. Shaw says she is not aware of attempts in other jurisdictions. She cites two reasons why the statute is infrequently used and even less frequently successful:

- The first is lack of resources. Ms. Shaw says the 500 treatment beds in Alaska are not adequate for the number of alcoholics of any sex or age. In 1989, women filled 29 percent of treatment slots statewide (Mundell, pers. com.). Statistics do not show how many of these women were pregnant.

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[24] Alcoholic is defined in AS. 47.37.270 as "a person who habitually lacks self-control in using alcoholic beverages, or uses alcoholic beverages to the extent that the person's health is substantially impaired or endangered, or the person's social or economic function is substantially disrupted."

- The second problem is time, according to Ms. Shaw. Once the involuntary commitment case is on the court docket, the state or municipality must obtain confidential documents, protected by strict federal confidentiality laws. Moreover, most defendants exercise their right to a jury trial, which can cause further delay. Shaw says that by the time the case gets to trial, the defendant can sober up enough to convince a jury that he or she will voluntarily obtain treatment.

D: Practical Pros and Cons of Mandating Treatment

Experts believe that most substance-abusing pregnant women want to stop using drugs and alcohol. They want their babies to be healthy and are more open to help during pregnancy than they will be at any other time in their lives. In the first of two comprehensive articles on substance-abusing pregnant women, the *National Law Journal* says experts agree that legal disputes could be avoided if society would focus its resources on positive methods of encouraging maternal health (Sherman 1988, p. 25). They recommend spending money to help pregnant women overcome their addiction. This is money well spent, they say, because the alternative is to spend even more on medical care, education and foster care for damaged children.

However, the proposal to require treatment for pregnant women who use alcohol poses some practical problems in addition to questions about the woman's right to privacy and the child's right to a healthy start in life. Among them:

- How much? How much alcohol does the woman have to use before treatment becomes mandatory? Are other licit and illicit drugs included? What about nicotine, caffeine, poor nutrition, exercise, sexual intercourse or hazards encountered at work?

Who reports? Alaska's involuntary commitment statute, AS. 47.37.190, allows relatives, a certifying physician or a treatment facility administrator to make a petition to commit. If physicians are required to report, how does that affect patient-client confidentiality? Does it affect the physician's liability? Would women avoid prenatal care to avoid detection? Would the requirement erode the physician's practice?

Does the woman have access to treatment? Residential treatment facilities are in urban areas. It would be difficult for a pregnant woman to leave her rural home for months of treatment in a far-away facility. The problem would be compounded if she had children. (Ms. Hild of the Alaska Native Health Board says the federally funded 15-20 bed residential treatment center for pregnant women set to open this year in Anchorage will reserve beds for children.)

Would the woman go "underground" or seek an abortion? The threat of mandatory treatment might make some women stop drinking. But others might attempt to obtain an abortion to avoid the ordeal. Or, they might go "underground" for fear of being reported for drinking.

Will the physician recognize substance abuse? Some women are loath to tell their physician that they use drugs. New mothers told state social workers taking a preliminary survey that they used drugs during their pregnancies, adding, "I didn't tell my doctor, but I'll tell you" (VandeCastle, pers. com.).

Dr. Ira Chasnoff, who heads a national organization researching perinatal dependency and is director of the Perinatal Center for Chemical Dependence at Northwestern Memorial Hospital in Chicago, cautions that many physicians need training on how to conduct a thorough drug history on every patient, particularly every pregnant patient. Dr. Chasnoff told a

conference on Prenatal Abuse of Licit and Illicit Drugs in September 1988, "If an obstetrician asks about drugs at all, he'll say something like, 'You don't do drugs, do you?' There's a science to getting an honest answer about drug use, and that's not the way to do it" (Henig, p. 8). In recognition of this problem, the Boston University School of Medicine has designed a Fetal Alcohol Education Program to demonstrate how to take a drinking history (Weiner, Rosett and Mason, p. 34).

The National Institute on Alcohol Abuse and Alcoholism (NIAAA) complains that some physicians appear reluctant to inform their patients that the safest choice is to avoid drinking during pregnancy (Funkhouser and Denniston, p. 57.) In an article published in *Alcohol Health and Research World*, NIAAA staff say physicians do not advise women of the risks associated with drinking alcohol for several reasons. First, they fear that once confronted with her drinking problem, the woman may not return for treatment. Second, the physician may not be aware of community referral services. And third, some physicians are concerned that they could stigmatize the patient by suggesting she is alcoholic. Similarly, two professors of psychiatry at the Boston University School of Medicine and one at Harvard Medical School say physician intervention with women who abuse alcohol is "minimal." They say physicians feel they lack the time needed to deal with problem drinking and they feel the woman won't tell them the truth (Weiner, Rosett and Mason, p. 35).

Some physicians do not recognize the harm done by alcohol or cocaine. According to state officials, new mothers report that local physicians have told them (erroneously) that they can safely breast feed while using cocaine. Some physicians may not be aware of studies showing that a fetus can be damaged by moderate drinking. In addition, those who received their training before FAS was identified in 1973, may not be convinced that alcohol can harm the fetus. As recently as 12 years ago, a physician who identified himself as a Harvard Medical School graduate objected in

Treatment for Substance-Abusing Pregnant Women: Once it receives a report that a pregnant woman is using a controlled substance, the **Minnesota** welfare agency may offer the woman treatment for chemical dependency and prenatal care (Minn. Stat. 626.5561.2).

The agency may also seek emergency admission to a treatment facility under the civil commitment law. If the pregnant woman refuses or fails treatment, the agency is required to seek nonvoluntary admission. Allison Wolf, counsel for the Minnesota State Senate, says commitment is "short term -- up to 72 hours." After 72 hours the case is reviewed to determine whether the woman should stay in treatment. However, Joan Monahan, Social Service Program Advisor for the State of Minnesota, says counties have already used the two-month-old nonvoluntary admission law. She predicts it will be used frequently.

Beginning January 1, 1990, **Illinois** is developing a model program to care for and treat addicted pregnant women and addicted mothers. The program includes individual prenatal care under the supervision of a physician and temporary residential shelter for pregnant women and mothers and their children. The health department is to report on the program's progress at the end of each year (P.A. 86-877).

The **Connecticut** legislature in 1989 voted down a bill which would have required child protective workers to work with any pregnant woman whose behavior endangers the fetus (Wilson-Coker, pers. com.).

The Children's Act of the **Yukon Territory, Canada**, allows provincial officials to go to court if they believe that a fetus is subject to "serious risk" of FAS or "other congenital injury" because the pregnant woman is using addictive or intoxicating substances. The officials may ask for a court order requiring the woman to participate in "reasonable supervision or counselling" (Statutes of the Yukon Territory, Children's Act, Vol. 2, Section 134(1).)

After the Baby is Born

Required Testing of Newborns: In Minnesota, a physician must test a newborn infant if there is evidence that the child was exposed to a controlled substance (Minn. Stat. 626.5562.2). The same is true in Illinois, which passed legislation this year including under child abuse or neglect newborns with any trace of a controlled substance (HB304 and HB2262).

Required Reporting of Positive Toxicology Tests: Oklahoma requires physicians and other health care professionals to report any birth of "a child who appears to be a child born in a condition of dependence on a controlled dangerous substance." Knowing and willful failure to report is a misdemeanor (Oklahoma Statutes 21.846). In Minnesota, positive test results must be confirmed by another test and reported. Physicians are immune from liability arising from administration of the test (Minnesota Statutes 626.5562). Positive test results must also be reported under a new Illinois statute (HB304 and HB2262).

Emergency Custody of Newborns. At least four states have amended their statutes to allow authorities to investigate and possibly take custody of children who are born with drugs in their blood.

- In Oklahoma, newborns must be dependent on a controlled substance before the case can be investigated and the child removed from the home (Ok. Stat. 10.1101 and 1115.1; 21.846).

- If there is substantial proof that a new mother has been using a controlled substance or if a baby tests positive at birth, Florida physicians must report to the child abuse registry. Child protection investigators may remove the child from the home (415.503-504). Although state law lists only controlled substances,

health department policy includes alcohol, according to Shirley Smith of the department.

- Indiana law allows officials to investigate if there is evidence of FAS or evidence of physical or psychological injuries because the mother was addicted to drugs or alcohol; the child must also need care or rehabilitation (IC 31-6-4-3.1).

- California in 1989 set up a pilot program in four counties allowing officials to put newborns with drugs or alcohol in their blood into foster care with specially trained and recruited families (SB1173 amending Children, Ch. 1365). Statewide, no policies address reporting and placement of these newborns, according to Sharon Miller of the California Family and Children's Services Policy Bureau. Ruth Range of the California Disabilities Prevention Program says that if the state took automatic custody of drugged newborns, "there would be no place to put them."

  Connecticut, passed a bill in 1989 (SB1069) funding treatment for newborns of low-income, substance-abusing women. No Connecticut child goes into the program if the only reason for referral is a positive toxicology test, according to Pat Wilson-Coker, statewide director of Children's Protective Services. The mother must also ask the state to help treat her child.

Some localities also take custody of a baby born with drugs in its system. For example:

- In Nassau County, New York, the Department of Social Services allows emergency custody of up to eight months for any newborn who tests positive for an illegal drug. County officials say positive tests are evidence of drug abuse.

- In **Los Angeles County**, the Department of Children's Services requires physicians to report all positive toxicology tests on newborns (Miller, pers. com.). On average, 200 drug-exposed babies are born a month in Los Angeles County. About 120 of them have been placed in group nurseries at a cost of up to $2,500 a month per child. Others go to special foster homes (Greene, p. 34).

Parents Must Get Treatment: An Oklahoma law allows state officials to require treatment for a drug dependent mother of a newborn who tests positive and has been removed from the home. Under the plan, the mother must complete treatment before the child is returned to the home. The child's father, stepparent or other adult in the home who is drug dependent may also be required to complete a treatment program before the child can go home. Testing for parents may be required monthly for one year, after treatment is completed. Positive drug tests are reported to the district attorney (Ok. stat. 10.1101; 10.1115.1; 21.846).

Neglect: **New Jersey** defines child neglect to include the fetus (Sec. 30 4C-11). **Minnesota** includes prenatal exposure to a controlled substance in its definition of neglect. Neglect may be shown by withdrawal symptoms in the child, by a positive toxicology test and by developmental delays during the child's first year (121.883.2). **Oklahoma** defines as "deprived" a child born in a condition of dependence on a controlled dangerous substance, and whose parents fail to provide special care and treatment (10.1101). **Indiana** defines a child in need of services to include a child whose mother was addicted to alcohol or a controlled substance during pregnancy, and who needs care, treatment or rehabilitation (31-6-4-5). **Florida** defines as abused or neglected a child who is born physically dependent on a controlled substance, adding that no parents of such a newborn shall be subject to criminal investigation solely on the basis of the infant's drug dependency (415.503).

Study: Oregon legislators in 1989 passed a bill (SB448) requiring the Department of Human Resources to study the problem of substance- abusing pregnant and postpartum women and their infants. The study will focus on prevention, education and treatment. It will identify the size and nature of the problem and develop strategies for providing services.

Hotline: Illinois's Child Abuse and Neglect Hotline takes reports of newborn babies who are victims of substance abuse. Hotline employees also answer questions about Illinois law regarding newborns and controlled substances (Tel. No. 217/785-4010).

F: What Experts Suggest

Require Non-voluntary Treatment for Substance-Abusing Pregnant Women

Vicki Hild of the Alaska Native Health Board, and a recognized expert on substance-abusing pregnant women in Alaska, recommends involuntary commitment when the addicted pregnant woman is "out of control" and won't go to treatment on her own. She prefers involuntary treatment to jail.

But some officials wonder how to make women get mandatory treatment. New York City Judge Margaret Taylor asks, "If a woman says a month before her baby is due that she won't have a C-section, do you put her in jail or chain her to a hospital bed until it's time to deliver the baby?" (Lewin, p. 1).

Alaska judges may combine treatment with jail. Judge Rodger W. Pegues of Juneau considers prison the least worst place for a pregnant woman who is using drugs, who has committed a jailable offense and who refuses to enter in-patient treatment. The judge says that prison offers the woman medical care and better conditions than she might have at home, while at the same time denying her access to drugs or alcohol. He strongly recommends substance abuse treatment