

RECENT DEVELOPMENTS

REFINING THE *REVLON* DOCTRINE'S APPLICABILITY TO CHANGES OF CONTROL: *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1993).

In late 1993, Paramount Communications was the object of a takeover contest that has significantly affected the development of Delaware corporate law. In response to hostile overtures from QVC Network, Paramount implemented defensive measures of unprecedented magnitude. In *Paramount Communications v. QVC Network*,¹ QVC challenged the legality of Paramount's defensive measures. The Supreme Court of Delaware, applying the analysis of *Revlon v. MacAndrews*,² affirmed a lower court's ruling that invalidated most of Paramount's defensive mechanisms. Although the Delaware Supreme Court had understandable reasons for pronouncing that its decision established no generally applicable legal principles, *QVC Network* nonetheless significantly contributes to the development of Delaware corporate law in three ways. First, this holding marks the Delaware judiciary's explicit rejection of the argument that only the imminent break-up of a corporate entity will trigger heightened fiduciary duties under *Revlon*. In rejecting this argument the Court consequently ruled that there exist certain circumstances under which a change of control will trigger *Revlon* duties. This ruling gives rise to the holding's second contribution to Delaware corporate law: a refinement of the Delaware judiciary's understanding of what circumstances legally constitute a change of control. With these principles established, the Court's holding makes a third and continuing contribution: progress toward understanding exactly what circumstances involving an effective change of control trigger duties under *Revlon*. These three contributions constitute an important legal precedent that will significantly affect both the development of Delaware corporate law and the future decisions of corporate boards contemplating strategic combinations.

In 1983 Paramount Communications embarked upon a new strategic restructuring plan.³ The long-term goal of this plan was

1. 637 A.2d 34 (Del. 1993).

2. 506 A.2d 173 (Del. 1985) (holding that once a corporation's board of directors resigns itself to an effective sale of the corporate entity, the board is fiducially bound to treat all bidders equally and obtain the highest price for the shareholders).

3. See *QVC Network, Inc. v. Paramount Communications, Inc.*, 635 A.2d 1245, 1248 (Del. Ch. 1993), *aff'd*, 637 A.2d 34 (Del. 1993).

the strategic expansion of Paramount into a leading force in the rapidly evolving communications and entertainment industry.⁴ Consistent with this ambition, Paramount in 1989 initiated a tender offer for control of Time, Inc.⁵ Although this takeover attempt was ultimately unsuccessful, Paramount's management continued its expansionary strategy through mergers and acquisitions.⁶ In 1993 Paramount's financial advisors brought to its attention the possibility of a strategic combination with Viacom, Inc.⁷ Despite the breakdown of early negotiations, Paramount and Viacom pursued negotiations in earnest through September of 1993.⁸

On September 12, 1993, Paramount's board of directors unanimously approved a merger plan known as the "Original Merger Agreement." This agreement provided for Paramount's merger with and into Viacom.⁹ The agreement further provided that Paramount's board would amend its company's "poison pill" rights agreement¹⁰ to exempt the execution of the proposed merger with Viacom.¹¹ Finally, to frustrate potential competing bids, the agreement implemented several mechanisms designed to inhibit such competition. These mechanisms included a No-Shop Provision, a Termination Fee Provision and a Stock Option Agreement.

The No-Shop Provision prohibited the Paramount board from discussing, negotiating or endorsing any competing transaction unless two conditions were satisfied.¹² The first condition re-

4. *See id.*

5. *See* Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1990).

6. *See QVC Network*, 635 A.2d at 1248. Between 1989 and 1993 Paramount's management evaluated several possible strategic combinations with other media companies.

7. *See id.* Paramount had considered the possibility of strategic combination with Viacom as early as 1990. Recent exploration of such a transaction began on April 20, 1993.

8. *See id.* at 1248-49.

9. *See id.* at 1250. Under the terms of the Original Merger Agreement each share of Paramount common stock would be converted into a basket of Viacom Class A voting stock, Class B non-voting stock and \$9.10 in cash, valued at \$69.14 per share. The Original Merger Agreement contained no "collar" provision or other protection against a decline in the market price of Viacom's stock.

10. A poison pill is a defensive tactic used by a company that is a target of an unwanted takeover attempt. Poison pills generally make the company's shares or financial condition less attractive to an unwanted potential acquirer. Under a rights agreement, a commonly used poison pill, the target issues to shareholders rights that are redeemable for a substantial premium in the event of a takeover. The redemption of the rights disburses much of the corporate treasury to the shareholders, depleting the value of the corporate entity that the hostile suitor would acquire.

11. *See QVC Network*, 635 A.2d at 1251.

12. *See QVC Network*, 637 A.2d at 39.

quired that a third party make “an unsolicited written, bona fide proposal [that] is not subject to any material contingencies relating to financing.”¹³ The second condition required that Paramount’s board determine (with the advice of counsel) that the board’s fiduciary obligations required negotiations with the third party.

The Termination Fee Provision obligated Paramount to pay Viacom a \$100 million termination fee should one of the following three contingencies occur: first, Paramount’s termination of the Original Merger Agreement in favor of a competing transaction; secondly, the failure of Paramount’s stockholders to approve the Viacom merger; or thirdly, the Paramount board’s recommendation of a competing transaction.¹⁴

The Stock Option Agreement granted to Viacom an option to purchase approximately 19.9 percent of Paramount’s outstanding common stock at a price of \$69.14 per share, should any of the triggering contingencies for the Termination Fee Provision occur.¹⁵ In addition to these customary stock option terms, the Stock Option Agreement contained two unusual provisions. First, a “note feature” permitted Viacom to pay for the shares with a senior subordinated note instead of cash.¹⁶ Secondly, a “put feature” empowered Viacom to require Paramount to pay Viacom an amount in cash equal to the difference between the purchase price and the market price of Paramount’s shares.¹⁷

On September 12th Paramount and Viacom publicly announced the execution of the Original Merger Agreement.¹⁸ Officers of the two companies carefully stressed that Paramount was for sale only to Viacom and that other bids were unwelcome.¹⁹ Viacom’s Chief Executive Officer, Sumner Redstone, suspected that QVC was contemplating a competing bid. He personally tel-

13. *Id.*

14. *See id.*

15. *See id.* The Stock Option Agreement granted to Viacom an option to purchase exactly 23,699,000 shares of Paramount’s common stock, should a triggering contingency occur.

16. *See id.* This note feature enabled Viacom to execute its stock option without having to raise the \$1.6 billion purchase price.

17. *See id.* The put feature’s use of a variable (the price of Paramount’s stock) to compute the buyout amount resulted in there being no limit to the maximum dollar value of Viacom’s stock option.

18. *See id.*

19. *See id.*

ephoned QVC's Chief Executive Officer, Barry Diller, to discourage Diller from making such a bid for Paramount.²⁰

These admonitions did not deter QVC. On September 20, QVC proposed an acquisition of Paramount at a total package price of \$80 per share.²¹ At a Paramount board meeting on September 27, Paramount CEO Martin Davis explained that Paramount would proceed with the Viacom merger despite the fact that the market value (per share) of QVC's proposal was \$18.35 higher than the market value (per share) of the Viacom deal.²² In response, QVC on October 27 commenced a tender offer for Paramount's shares. Under the terms of the tender offer QVC would pay \$80 in cash for fifty-one percent of Paramount's outstanding shares, and would acquire the remaining shares in a second-step merger.²³

Viacom then raised its own bid for Paramount. On October 24, Viacom and Paramount entered into an Amended Merger Agreement. This agreement provided that Viacom would launch a tender offer for fifty-one percent of Paramount's stock at \$80 per share, to be followed by a second-step merger.²⁴ Under this agreement the defensive measures designed to inhibit competing bids remained in force.²⁵ On November 6, Viacom unilaterally raised its tender offer price to \$85 per share of Paramount stock.²⁶

On November 12 QVC escalated the bidding and increased its tender offer price to \$90 per share of Paramount stock.²⁷ The total value of QVC's proposed tender offer and second-step

20. *See id.*

21. *See id.* QVC proposed a merger in which each share of Paramount stock would be exchanged for a package consisting of 0.893 shares of QVC common stock and \$30 in cash.

22. *See id.* at 39-40. As of Friday, September 24, the QVC proposal had a market value of \$83.80 per share, as compared to the Viacom deal's market value of \$65.45.

23. *See id.* at 40. In the second-step merger QVC would convert each share of Paramount stock into 11.42857 shares of QVC common stock. The value of this conversion was \$80.71 per share of Paramount stock.

24. *See id.* at 40-41.

25. *See id.* at 40. The Amended Merger Agreement granted to Paramount the right not to exempt Viacom from its "poison pill" Rights Agreement in the event the Paramount Board determined that such an amendment would violate its fiduciary duties. Paramount was also granted the right to terminate the Amended Merger Agreement if Paramount withdrew its recommendation of the Viacom transaction or recommended a competing transaction. The No-Shop Provision, the Termination Fee Provision and the Stock Option Agreement nonetheless remained in force.

26. *See id.* at 41. Viacom also offered a comparable increase in the value of the securities offered as the consideration for the second-step merger.

27. *See id.*

merger was at this point \$1.3 billion greater than the value of the Viacom agreement.²⁸ Nonetheless, on November 15, Paramount's board determined that QVC's new offer was not in the best interests of Paramount's stockholders. Paramount's board based this conclusion on management's qualitative judgement that the Viacom transaction would provide greater benefit to Paramount's shareholders in the long run.²⁹ Paramount's board also accepted management's description of QVC's bid as excessively conditional, yet made no effort to obtain the additional information needed to test the accuracy of that characterization.³⁰

On November 16, QVC petitioned the Delaware Court of Chancery to enjoin the Viacom tender offer and invalidate Paramount's antitakeover mechanisms. QVC contended that Paramount's directors had violated their fiduciary duties. QVC argued that the proposed Viacom merger's effective transfer of control from the Paramount shareholders to Viacom's majority shareholder, Sumner Redstone, subjected Paramount to the "level playing field" duties³¹ articulated in *Revlon v. MacAndrews*.³² QVC further argued that Paramount's directors were not adequately informed in their decision making,³³ and that Paramount's defensive measures were disproportionate.³⁴ Paramount responded by asserting that the proposed merger with Viacom represented the fulfillment of a long-term business strategy. Paramount provided various reasons why the proposed merger with Viacom would provide Paramount's shareholders with greater

28. See *QVC Network*, 635 A.2d at 1256. The total value of QVC's proposed transaction was approximately \$10.8 billion, compared to the \$9.5 billion value of the QVC agreement.

29. See *id.* at 1257-58. At the November 15 board meeting Paramount's financial advisors (Lazard Freres & Company) applied a weighted average multiple analysis to value the QVC and Viacom offers at \$80.01 and \$74.29, respectively. Their presentation emphasized that such an analysis does not encompass the long-term synergistic or cost-saving effects of a particular merger. The financial advisors did not attempt a quantitative analysis of such effects.

30. See *id.* Management's presentation to the Paramount board at the November 15 meeting emphasized conditions of the QVC offer omitted disclosure of similar conditions in the Viacom offer. The Paramount board consequently concluded that QVC's offer was not a "bona fide" proposal and therefore surmised that the No-Shop Provision prohibited the acquisition of additional information from QVC.

31. See *id.* at 1261.

32. 506 A.2d 173 (Del. 1985).

33. QVC argued that Paramount's directors had failed to observe their fiduciary duties to exercise due care and make an adequately informed decision according to the guidelines established in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

34. QVC contended that Paramount's defensive mechanisms were unreasonable and disproportionate under the enhanced level of scrutiny mandated by *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

long-term value than QVC's proposed transaction.³⁵ Relying on the precedent of *Paramount Communications v. Time*,³⁶ Paramount argued that the business judgement rule should apply to this pursuit of a long-term corporate strategy.

The chancery court granted QVC's request for injunctive relief. It ruled that the change of control in the Viacom transaction indeed triggered duties under *Revlon*.³⁷ Although the chancery court declined to address whether all changes of control trigger *Revlon* duties,³⁸ the court held that Paramount's shareholders were entitled to choose for themselves whether to accept the higher immediate premium that the QVC transaction afforded.³⁹ The court emphasized that the QVC transaction would transfer absolute control of the merged entity to one individual, Viacom's Sumner Redstone, who would have the power to alter the long-term corporate strategy that the QVC transaction was designed to promote. Because the QVC transaction included no structural protections of the current Paramount shareholders' continuity, the court concluded that the shareholders were entitled to the fiduciary protection that underlie *Revlon* duties.

The court then held that proper fulfillment of Paramount's *Revlon* duties entailed a demonstration that the Paramount board's decision regarding long-term value was adequately informed.⁴⁰ After finding that Paramount's board violated its heightened duty to obtain reliable information,⁴¹ the court invalidated the board's exemption of Viacom from Paramount's "poison pill" rights plan.⁴² The court also disallowed the Stock Option Agreement, but ruled that the Termination Fee Provision

35. See *QVC Network*, 635 A.2d at 1263. Paramount advanced the following reasons as to why the Viacom transaction would provide greater long-term value: first, that Viacom would bring only one line of business to a merger; secondly, that the merged entity would consist mostly of Paramount assets that would not generate sufficient earnings to sustain the acquisition price; thirdly, that the high value of the "second-step" portion of the QVC transaction was due to market perception of QVC's prospects of acquiring Paramount; and fourthly, that the QVC offer was highly conditional.

36. 571 A.2d 1140 (Del. 1990) (holding that Time's approval of a merger transaction with Warner Communications did not implicate *Revlon* duties because the merger furthered a long-term business strategy designed to preserve Time's unique "corporate culture").

37. See *QVC Network*, 635 A.2d at 1265.

38. See *id.* Observing that it remains an open question whether "a change in control will in all circumstances trigger duties under *Revlon*" the court declared that "it is unnecessary and inappropriate to resolve that question on a doctrinal level."

39. See *id.* at 1266.

40. See *id.* at 1267-68 citing *Barkan v. Amsted Indus.*, 567 A.2d 1279, 1287 (Del. 1989).

41. See *QVC Network*, 635 A.2d at 1268-70.

42. See *id.* at 1270.

constituted reasonable compensation for Viacom's efforts in pursuing an unconsummated transaction.⁴³

The Supreme Court of Delaware, in an opinion by Chief Justice Veasey, unanimously upheld the decision of the chancery court.⁴⁴ The court began its analysis with an examination of the fundamental fiduciary duties that govern directors in situations involving a change of control.⁴⁵ The Court concluded that the proposed Viacom transaction constituted an effective change of control that mandated enhanced fiduciary protection of the stockholders' interests.⁴⁶ Such fiduciary protection required the company's directors to exercise special diligence⁴⁷ in acquiring the information⁴⁸ necessary to maximize the value reasonably available for the stockholders.⁴⁹

The Court applied this doctrine and rejected Paramount's crucial contention that *Time* rather than *Revlon* governed the case.⁵⁰ Through a close reading of the text of *Revlon* and its progeny⁵¹ the Court concluded that a change of corporate control may implicate *Revlon* duties. The Court distinguished *Time* from *Revlon* by pointing out the *Time* court's finding that no change of control was involved in the original merger between Time and Warner.⁵² The Court explicitly rejected Paramount's crucial contention that only the imminent break-up of a corporate entity will trigger *Revlon* duties.⁵³ The Court upheld the Chancellor's

43. See *id.* at 1270-72.

44. *Paramont Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1993). Chief Justice Veasey delivered an opinion in which Justices Moore and Holland joined.

45. See *id.* at 41-45.

46. See *id.* at 43. The court emphasized that Paramount's fluid aggregation of unaffiliated stockholders would transfer control of Paramount to one individual (Viacom's Sumner Redstone) who would have power to alter the long-term vision that the Viacom transaction purportedly would further. Consequently Paramount's directors had a fiduciary duty to obtain either a control premium or structural protections of the stockholders' interests.

47. See *Citron v Fairchild Camera and Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989).

48. See *Barkan v Amsted Indus., Inc.*, 567 A.2d 1279, 1287 (Del. 1986).

49. See *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1288 (Del. 1989). The court's concept of "value" does not limit a board of directors to consider only the amount of cash involved. *Id.* at 1282 n.29. A board may take into account non-cash value and other practical considerations provided that the board has evaluated all material information reasonably available. *QVC Network*, 637 A.2d at 44-45.

50. See *QVC Network*, 637 A.2d at 46-48.

51. See *id.* The Court examined the following cases: *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1297 (Del. 1989); *Paramont Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1988); *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985); *Revlon v. MacAndrews*, 506 A.2d 173 (Del. 1985); and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

52. See *Time*, 571 A.2d at 1149.

53. See *QVC Network*, 637 A.2d at 45-48.

findings that the Paramount directors had breached their fiduciary duties.

At several points in its opinion the Delaware Supreme Court declared that its decision laid down no generally applicable rule.⁵⁴ There are several reasons underlying the court's characterization of its decision as one limited to the facts of the case then before it. The first reason involves the Court's reluctance to antagonize corporate boards through the announcement of sweeping limitations on the judiciary's deference to business judgment.⁵⁵ This reluctance furthers the Delaware legislature's established policy of fostering a legal climate conducive to corporate enterprise.⁵⁶ The second reason relates directly to the credibility of the Delaware judiciary.⁵⁷ A generally applicable retreat from the Delaware Supreme Court's recent ruling in *Time* would have severely undermined the Delaware judiciary's reputation as the common law's most reliable arbiter of corporate law principles.

These considerations render understandable the Court's pronouncement that its decision established no generally applicable rule. Yet, despite such rhetoric, the Court's decision makes several significant contributions to the development of Delaware corporate law. Although the Court deliberately left unanswered the question whether a change of control will in all circumstances trigger *Revlon* duties, the Court explicitly ruled that *Time* does not apply to certain situations involving an effective change of corporate control. Following *QVC Network*, an assertion of the existence of a strategic alliance will not exempt corporate boards from duties under *Revlon* when the transaction in question involves an effective change of control from a fluid aggregation of public stockholders to an individual dominating shareholder.

The Court's holding in *QVC Network* makes three significant contributions to Delaware's law of corporate governance. First, the holding explicitly rejects the argument that *Time* narrowed

54. See, e.g., *id.* at 43 n.13 ("We express no opinion on any scenario except the actual facts before the Court, and our precise holding herein"); *id.* at 51 ("It is the nature of the judicial process that we decide only the case before us—a case which, on its facts, is clearly controlled by established Delaware law.").

55. See Martin Dickson, *Barbarians Waiting at the Gate: the Importance of the Paramount Case*, FINANCIAL TIMES, Dec. 9, 1993, at 25.

56. See 1963 DEL. LAWS 724 ("The General Assembly of the State of Delaware declares it to be the public policy of the State to maintain a favorable business climate and to encourage corporations to make Delaware their domicile.").

57. See Dickson, *supra* note 55, at 25.

the universe of *Revlon*-triggering events to include only the imminent break-up of a corporate entity. As a consequence of this rejection, the Court ruled that certain circumstances involving a legal change of control will trigger duties under *Revlon*. The Court's ruling on this point necessitated the holding's second significant contribution: a refinement of the Delaware judiciary's understanding of the circumstances that constitute a legal change of control. Finally, the Court's holding takes an important step towards a complete understanding of exactly what circumstances involving an effective change of control will trigger duties under *Revlon*. *QVC Network's* important role in this continuing inquiry marks the holding's third significant contribution to the development of Delaware corporate law.

The first significant feature of the Court's holding was its rejection of the contention that only the imminent break-up of a corporate entity triggers duties under *Revlon*. Prior to *QVC Network* many observers had posited that the Court's decision in *Time* had limited the universe of *Revlon*-triggering circumstances to include only the inevitable dissolution of a corporate entity.⁵⁸ At the foundation of this contention stood the theory that the Delaware Supreme Court intended *Revlon* to apply only to transactions involving the inevitable break-up of a company.⁵⁹ According to this hypothesis, the Delaware Chancery Court misinterpreted the *Revlon* decision by ruling in subsequent cases⁶⁰ that changes of control had triggered *Revlon* duties.⁶¹ In keeping with this theory,

58. See Portia Policastro, Note, *When Delaware Corporate Managers Turn Auctioneers: Triggering the Revlon Duty After the Paramount Decision*, 16 DEL. J. CORP. L. 187, 15 (1991) ("Paramount holds that, aside from the isolated case where a corporate board actually initiates a bidding process to sell the corporation, the *Revlon* duty will trigger only when a board of directors either initiates a transaction or responds to an offer in such a way as to cause a break up or dissolution of its corporation."); See also Daniel S. Cahill and Stephen P. Wink, Note, *Time and Time Again the Board is Paramount: The Evolution of the Unocal Standard and the Revlon Trigger Through Paramount v. Time*, 66 NOTRE DAME L. REV. 159, 196 (1990) ("Defenders of the corporate bastion can breathe a sigh of relief. Scary *Revlon*-land has been confined to a remote region of the takeover landscape. . . . The only situations this court mentions as relevant to *Revlon* are "bust-up" transactions and auctions of a company.").

59. See Policastro, *supra* note 58, at 5-7 ("[I]n *Revlon*, it was the inevitable break-up of the company that led to the board's duty to maximize *Revlon's* current share value, not the fact that either Pantry Pride or Forstmann would purchase *Revlon*.").

60. See, e.g., *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279 (Del. 1989); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1988).

61. See Policastro, *supra* note 58, at 5-6 ("[P]erhaps because of the difficulty in determining when the 'break-up' of a company becomes 'inevitable,' the language of *Revlon* has not been interpreted to apply solely to break up transactions. Instead, Delaware courts construing *Revlon* have chosen to focus their inquiry on whether or not a company is for 'sale'.")

Paramount contended that the Original Merger Agreement did not trigger *Revlon* duties, because it involved no inevitable break-up.

The Delaware Supreme Court correctly rejected this contention for two reasons. The first reason is that the plain text of the relevant precedents does not support the contention that an inevitable break-up is necessary. *Revlon* disjunctively states that it is a violation of fiduciary duties for directors to favor one contending faction "when bidders make relatively similar offers or the dissolution of the company becomes inevitable."⁶² There thus exist circumstances other than an inevitable break-up that trigger duties under *Revlon*. The text of *Time* further clarifies this point. Although the Court in *Time* narrowly characterized *Revlon's* bidding possibility as "when a corporation initiates an active bidding process seeking to sell itself," the Court expressly considered the bidding and break-up possibilities "without excluding other possibilities."⁶³ The relevant precedents thus clearly allow for the implication of *Revlon* duties in cases not involving the inevitable break-up of a corporate entity.

Secondly, there exist sound policy reasons for the application of *Revlon* duties to at least some situations involving a change of corporate control. Such transactions constitute a fundamental reorganization of a corporation's dominating ownership. This warrants a heightening of both the fiduciary protection of shareholders and the standard of scrutiny under which courts examine such transactions.

Having established that some circumstances involving an effective change of control will implicate duties under *Revlon*, the court refined its understanding of what constitutes a change of control as a matter of law. This refinement of the legal definition of a change of control is *QVC Network's* second significant contribution to the development of Delaware corporate law. Analogizing to the facts of *Time*, Paramount contended that the proposed transaction with Viacom did not constitute a legal change of control. According to Paramount, the most important characteristic of the agreement with Viacom was not the effective transfer of

62. *Revlon*, 506 A.2d at 184 (emphasis added). One can easily characterize the dispute between Paramount and QVC as two bidders (Viacom and QVC) making relatively similar offers for Paramount.

63. *Time*, 571 A.2d at 1150.

control but rather the consummation of a long-term strategic alliance that was in the best interests of the stockholders.

The Court correctly rejected this contention.⁶⁴ Paramount had phrased its argument in terms of the best long-term interests of Paramount's diffuse stockholders. Yet the proposed transaction would have denied the stockholders the power to effectuate policies that they believe to be in their best interests. Prior to the proposed transaction, Paramount's stockholders could have pooled their voting power to effectuate policies (through the election of directors) that the shareholders deemed to be in their best interests. The proposed transaction would have removed this power from the shareholders and placed it in the exclusive hands of Viacom's Sumner Redstone. Redstone's power over the merged entity's corporate policy would have been so broad that Redstone could have singlehandedly altered the strategic vision that the merger agreement purported to further. Viewed in this light the proposed transaction with Viacom clearly warranted the heightened fiduciary protection required in transactions involving less complicated changes of control. The Court thus correctly concluded that an effective transfer of corporate power from diffuse public stockholders to one dominating stockholder constitutes a legal change of control, regardless of any assertion of the existence of a strategic alliance.

This scenario represents one set of circumstances under which a takeover transaction constitutes a change of control triggering *Revlon* duties. The Court's conclusion left open the general question of exactly what circumstances constitute a change of control for the purpose of triggering *Revlon* duties. Nonetheless *QVC Network* took an important step toward a more thorough understanding of the universe of *Revlon*-triggering events. The case's contribution to this continuing inquiry constitutes a third important contribution to the development of Delaware corporate law.

Since the decision in *QVC Network* the Delaware judiciary has continued its inquiry into what circumstances involving an effective change of control trigger duties under *Revlon*. In the recent case of *Arnold v. Society for Savings Bancorp*⁶⁵ the chancery court recognized *QVC Network* as an important precedent in this continuing inquiry. *Arnold* involved the merger of a Bank of Boston

64. See *QVC Network*, 637 A.2d at 47.

65. *Robert H. Arnold v. Society for Savings Bancorp, Inc.*, Civ. A. No. 12883, 1993 WL 526781 (Del. Ch. Dec. 17, 1993).

subsidiary into Bancorp, a publicly owned Delaware corporation. The merger resulted in Bank of Boston's ownership of one hundred percent of the merged entity's stock.⁶⁶ Robert Arnold, a minor shareholder in Bancorp, filed suit to enjoin the merger. He argued that the proposed merger triggered duties under *Revlon*, and maintained that Bancorp's board breached its *Revlon* duties by rejecting other merger bids.⁶⁷

The chancery court rejected Arnold's *Revlon* claims.⁶⁸ Vice Chancellor Chandler ruled that *Revlon* duties did not apply to Bancorp's directors because the merger in question did not constitute a legal change of control. Unlike Paramount's proposed merger with Viacom, in which one individual would exert exclusive control of the merged entity, the Bancorp transaction placed ownership of the merged entity in a corporation owned by a fluid aggregate of public shareholders. Noting this contrast, Vice Chancellor Chandler cited *QVC Network* to emphasize that unlike the proposed Viacom transaction, the Bancorp merger did not threaten the continuity of the shareholders in the merged entity and therefore it did not constitute a change of control for the purpose of triggering duties under *Revlon*.⁶⁹

Arnold demonstrates the important position that *QVC Network* holds in the Delaware judiciary's evolving understanding of what circumstances as a matter of law constitute a change of control for the purpose of triggering *Revlon* duties. In *QVC Network*, the Delaware Supreme Court ruled that an effective transfer of control to a controlling stockholder constitutes a legal change of control that triggers duties under *Revlon* (despite any assertion of a strategic alliance). In *Arnold*, the chancery court answered a question that the decision in *QVC Network* had opened. When there is an effective transfer of control to a fluid aggregate of unaffiliated public stockholders, *Arnold* held, there is no legal change of control and *Revlon* duties do not apply.⁷⁰

Despite the Delaware Supreme Court's statement that its decision in *QVC Network* established no generally applicable rule, *QVC Network* will continue to affect both the development of Delaware corporate law and the practice of business in corporate America. *Arnold* suggests that the Delaware judiciary regards *QVC Network*

66. *See id.*

67. *See id.* at *8.

68. *See id.* at *9.

69. *See id.* at *11.

70. *See id.* at *10-11.

as having significant precedential value for cases involving strategic combinations that effect transfers of corporate control. The business community, meanwhile, will look to *QVC Network's* refinements of the applicability of *Revlon* duties when considering the implementation of corporate strategies that involve mergers and acquisitions.

Thomas A. Gentile

GESTATIONAL SURROGACY AND THE MEANING OF "MOTHER": *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

Advances in reproductive technology are forcing courts to consider increasingly complex social and ethical dilemmas. The very definition of family faces scrutiny, and our understanding of what it means to be a parent comes into question. In *In re Baby M.*,¹ the New Jersey Supreme Court faced the difficult question of where parental rights lie when a married couple contracts with another woman to bear a child. In that case, the child was conceived by artificial insemination, and it was genetically related to both the husband and the surrogate mother, with the understanding that the married couple would raise the child as their own. The Court denied the parental rights claimed by William Stern and his wife under the surrogacy contract by declaring surrogacy contracts void and against the public interest.² It recognized Mr. Stern and Mary Beth Whitehead, the surrogate mother, as the natural parents, based on their biological relationship to the baby, and granted custody to Mr. Stern and liberal visitation rights to Ms. Whitehead.³

Now reproductive technology has taken another leap forward, and courts are again facing new dilemmas. Gestational surrogacy, in which the gestating mother receives an embryo formed *in vitro* from the gametes of the intended parents, differs from surrogate motherhood in that the gestator is not genetically related to the baby she carries. In *Johnson v. Calvert*,⁴ the California Supreme Court for the first time considered the question of parental rights in a case of gestational surrogacy. While in *Baby M.* the

1. 537 A.2d 1227 (N.J. 1988).

2. *Id.* at 1240.

3. *Id.* at 1258, 1261.

4. 851 P.2d 776 (Cal. 1993).

rights of a biological father were questioned by the biological mother, in *Johnson*, the California Supreme Court was asked to resolve the issue of maternity. Which woman was the child's mother under California law: the genetic mother or the gestational mother? The Court first analyzed maternal rights under California's Uniform Parentage Act⁵ and was unable to answer the question.⁶ Under the Act, the Court found that genetic relation and gestation are equally valid claims to motherhood.⁷ Falling back on the intent of the parties, the Court elected to enforce the surrogacy contract and declared the genetic and intended mother the legal mother of the child.⁸

The California Supreme Court reached the right conclusion for the wrong reasons. In electing to apply the Act, which offered "a mechanism to resolve [the] dispute, albeit one not specifically tooled for it. . .",⁹ the Court isolated itself from a determination of motherhood based on genetic consanguinity and was forced to go beyond biological relationships in its search for a legal definition of motherhood. Because the Court concluded that both gestation and genetic relationships were sufficient proofs of maternity, it was forced to turn to the intent of the parties to determine parental rights. This application of contract principles to family relations was both inappropriate and unnecessary. Had the Court declined to apply California's Uniform Parentage Act to this situation (the Act, after all, was clearly not intended to solve this sort of dilemma), the Court could have held that maternity, like paternity, requires a genetic relationship between parent and child. A genetic definition of motherhood is best suited for surrogacy cases: It avoids the application of contract principles to family relations; it rests motherhood on the single contribution that no other woman can supply for the child; it relies on the most important connection between a mother and child as the determining factor of motherhood; it is the definition of maternity that is least susceptible to discriminatory results or baby-selling; it advances the best interests of the child; and it best conforms with current social understanding of parenthood.

Johnson's facts are typical of surrogate gestation cases. Mark and Crispina Calvert desperately wanted a child genetically re-

5. CAL. FAM. CODE, § 7600-50 (West 1994).

6. *Johnson*, 851 P.2d at 779-81.

7. *Id.* at 781.

8. *Id.* at 782.

9. *Id.* at 779.

lated to them. Because of a partial hysterectomy, Crispina was unable to carry a baby, but her ovaries were still capable of supplying eggs.¹⁰ On January 15, 1990, Mark and Crispina entered into a surrogate gestation contract with Anna Johnson.¹¹ The contract provided that an embryo created *in vitro* from Mark and Crispina's gametes would be implanted in Anna.¹² The contract further required Anna to relinquish "all parental rights" to the resulting child.¹³ In consideration for her services, the Calverts were to pay Anna \$10,000 in installments and to insure her life with a \$200,000 policy.¹⁴ The implantation took place on January 19, 1990.¹⁵ During the pregnancy, conflicts arose, culminating in a letter to Mark and Crispina from Anna in which she demanded early payment and threatened to keep the child after its birth.¹⁶ Mark and Crispina filed a suit seeking a declaratory judgment that they were the legal parents of the unborn child, and Anna responded in kind.¹⁷

The Superior Court in Orange County consolidated the actions,¹⁸ and the parties stipulated that Mark and Crispina were the genetic parents of the child.¹⁹ The superior court held that "Mark and Crispina were the child's 'genetic, biological and natural' father and mother, that Anna had no 'parental' rights to the child, and that the surrogacy contract was legal and enforceable against Anna's claims."²⁰ The Court of Appeal for the Fourth District affirmed, applying the Uniform Parentage Act to support the trial court's decision,²¹ and the California Supreme Court granted review.²²

The Supreme Court affirmed the lower court's decisions.²³ Justice Edward A. Panelli, writing for the majority, began by stating that even though "[p]assage of the [Uniform Parentage Act] clearly was not motivated by the need to resolve surrogacy dis-

10. *Id.* at 778.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Johnson v. Calvert*, No. X63-31-90 (Cal. Super. Ct. Nov. 21, 1990).

19. *Johnson*, 851 P.2d at 778.

20. *Id.*

21. *Anna J. v. Mark C. et. al.*, 12 Cal. App. 4th 977, 985 (1991).

22. *Anna J. v. Mark C.*, 822 P.2d 1317 (Cal. 1992).

23. *Johnson*, 851 P.2d at 787.

putes, which were virtually unknown in 1975," the Court felt constrained to apply a statute that "facially applies" because "[n]ot uncommonly, courts must construe statutes in factual settings not contemplated by the enacting legislature."²⁴ Under the Act, which was intended to remove the stigma of illegitimacy, maternity is established either by proof that a woman gave birth to the child in question or by the methods employed to establish paternity, which include the use of genetic markers.²⁵ Thus, under the Act, both Anna and Crispina had equally valid claims to maternal rights. Justice Panelli could see "no clear legislative preference" between the two methods for establishing maternity and therefore concluded that "enquiring into the parties' intentions as manifested in the surrogacy agreement" was necessary.²⁶

Turning to the parties' intentions, Justice Panelli found that but for the Calverts' actions in seeking to have a child, the baby would not exist.²⁷ The intent of the parties was procreation, not egg donation. Justice Panelli stated that "the intended parents are the first cause, or the prime movers, of the procreative relationship,"²⁸ and that "the interests of children . . . are unlikely to run contrary to those of adults who choose to bring them into being."²⁹ Justice Panelli, therefore, held that "she who intended to procreate the child . . . is the natural mother under California law."³⁰

In reaching this holding, Justice Panelli determined that the gestational surrogacy contract was not inconsistent with public policy. Although Anna had suggested that surrogacy contracts amount to a sale of parental rights, exploit or dehumanize women, and commodify children, Justice Panelli viewed the monetary payments not as a sale of parental rights or of children, but as compensation for services.³¹ Gestational surrogacy, furthermore, was no more likely to exploit impoverished women than other forms of undesirable employment.³² Enforcement of the

24. *Id.* at 779.

25. *Id.* at 780.

26. *Id.* at 782.

27. *Id.*

28. *Id.*, quoting John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology As the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415 (1991).

29. *Id.* at 783, quoting Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 397.

30. *Id.* at 782.

31. *Id.* at 784.

32. *Id.*

contract did not violate constitutional rights because any such rights were dependent "on a prior determination that [Anna] is indeed the child's mother,"³³ the very issue under consideration. In spite of these conclusions, Justice Panelli recognized that "the proper forum for resolution of [the legality of surrogacy contracts] is the Legislature."³⁴ He nevertheless felt that the Court was required to rule on the case in light of the ambiguities in the Uniform Parentage Act.³⁵

Justice Armand Arabian concurred in part. Justice Arabian joined the part of the Court's opinion that held that Crispina Calvert was the natural mother of the child, but declined to join the portion of the opinion that declared gestational surrogacy contracts consistent with public policy.³⁶ From Justice Arabian's perspective, "[t]he multiplicity of considerations at issue in a surrogacy situation plainly transcend traditional principles of contract law" and are "more suitably addressed in the legislative forum."³⁷

Only Justice Joyce L. Kennard dissented. She believed that the intent of the parties should not be determinative because both the genetic mother and the gestational mother have substantial claims to legal maternal rights.³⁸ Justice Kennard advocated the adoption of a statute similar to the proposed Uniform Status of Children of Assisted Conception Act.³⁹ Under this proposal the gestational mother would be the legal mother of the child unless the parties had complied with elaborate procedures, including psychiatric evaluations of all parties, medical examinations of the women, and judicial examination of the proposed arrangements prior to conception.⁴⁰ Absent such legislation, Justice Kennard would treat the competing claims of maternity as equal and would resolve the case based on the best interests of the child.⁴¹

Justice Kennard saw the policy questions at issue as pitting reproductive freedoms against practices that could threaten the well-being of women and children. Like the other Justices, Justice

33. *Id.* at 786.

34. *Id.* at 784.

35. *See id.* at 785.

36. *Id.* at 787-88 (Arabian, J., concurring).

37. *Id.* at 788 (Arabian, J., concurring).

38. *Id.* (Kennard, J., dissenting).

39. UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 122 (1992 Supp.).

40. *Johnson*, 851 P.2d at 794 (Kennard, J., dissenting).

41. *Id.* at 799 (Kennard, J., dissenting).

Kennard suggested that the legislature is best suited to resolve the conflict.⁴² She argued that the majority's use of the parties' intent as a means of resolving the case improperly applied tort, property, and contract concepts to a question of family law.⁴³

Viewing the opinions as a group, their only commonality is their agreement that the desirability of surrogacy contracts is generally a policy question best left to the legislature. Until more legislatures make policy decisions in this area, however, Courts must provide some degree of guidance. In the United States, one out of every six couples is infertile.⁴⁴ As new reproductive technologies become increasingly popular, procedures that separate the biological aspects of motherhood will increasingly question the meaning of "mother."⁴⁵ Society must ask what types of connections are of greatest importance in the face of competing claims of motherhood.

Although the *Johnson* Court reached the correct conclusion, the majority unnecessarily entered the legislature's policy realm by implicitly approving surrogacy arrangements. The Court could have resolved the question of maternal rights apart from the contract if it had held that the Uniform Parentage Act did not address the question of surrogacy, and instead had reached its conclusion by defining the 'natural mother' as the genetic mother.⁴⁶ In any judicial resolution of surrogacy cases that does not attempt to pass judgment on surrogacy as a reproductive practice, the definition of "mother" must be the central issue. That definition will provide order and will give parties prospective notice of governing principles for their individual situations,⁴⁷ without forcing courts to wade into legislative policymaking.

42. *Id.* at 801 (Kennard, J., dissenting).

43. *See id.* at 795-96 (Kennard, J., dissenting).

44. *See* Suzanne F. Seavello, *Are You My Mother? A Judge's Decision in In Vitro Fertilization Surrogacy*, 3 HASTINGS WOMEN'S L.J. 211, 211 (1992) (arguing that *in vitro* fertilization surrogacy results in both a genetic and a birth mother).

45. *See* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 673 (1993) (examining the parental rights of parties to surrogate mother arrangements).

46. Under the majority's interpretation of the Uniform Parentage Act, each of the competing claims for maternity was equally valid, and the Court turned to intent. But, as one commentator pointed out when considering the appellate Court's application of the same statute, "it is . . . entirely illegitimate to presume anything about the legislative definition of 'natural mother' in this case from a reading of the statute at hand." *Id.* at 689.

47. John Lawrence Hill, *What Does It Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 360-01 (1991).

An effective definition must take into account the fundamental differences between gestational surrogacy and surrogate motherhood. As one commentator noted,

[G]estational surrogacy and surrogate mother arrangements require different legislative and dispute resolution approaches [because] "different biological relationships [are] at stake in the two forms of surrogacy. [S]urrogate mother arrangements raise issues not present in gestational surrogacy because the surrogate mother is in all respects the mother of the child. . . ."⁴⁸

A genetic determination of maternal rights is especially suited for distinguishing between gestational surrogacy and surrogate motherhood because genetics is at the heart of the difference: The surrogate mother contributes a gamete, the gestational surrogate mother does not.

Courts should make genetics the primary determinant of maternal rights.⁴⁹ Such a determinant would provide the stability of a clear definition, while also balancing the considerations that are necessary when comparing surrogate motherhood with surrogate gestation. Furthermore, the genetic determinant: (1) separates contract principles from the allocation of family relationships, (2) recognizes the unique contribution of a genetic mother, (3) defers to the most important connection between mothers and children, (4) avoids the possible discriminatory results or oppressive application found in intent-based determination, (5) promotes the best interest of the child, and (6) conforms with current social understandings of parenthood.

The *Johnson* Court's reliance on contract principles is problematic. "It seems to obliterate the long-standing difference in Western culture between relationships based in status and relationships based in contract, because it seems to merge the family with the world of business and commerce, to define family

48. Alice Hofheimer, Note, *Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy*, 19 N.Y.U. REV. L. & SOC. CHANGE 571, 578-80 (1992) (examining maternal rights in the context of surrogate mother and gestational surrogacy arrangements).

49. In the article cited by the *Johnson* majority, see *supra* note 47, Professor Hill argues that genetics are not a sufficient basis for a claim of parental rights. He gives as an example the case of forcible rape. The man in such an instance cannot assert paternal rights over a child resulting from the act. This is not because he is not the legal father of the child, but because he has forfeited the right to assert his parental status by his actions.

Genetic relationship should be viewed as the background rule for the determination of parental status. In exceptional circumstances this test should not apply. Rape is one such case, and true gamete donation to a sperm or egg bank would be another.

relations as negotiable ties between otherwise unconnected, autonomous individuals."⁵⁰ Surrogacy contracts may be equated with baby-selling. A determination of maternal rights based in genetic relationship avoids this pitfall. If the genetic mother is the legal mother, surrogate gestation cannot involve baby-selling.⁵¹ The mother cannot buy what is already hers. By comparison, in surrogate mother cases, the surrogate mother would be recognized as the mother of the child. Absent legislative action, adoption would be necessary for the intended mother to become the legal mother of the child. Such legislative action recognizes the position of the surrogate and protects her rights as a mother. In the case of a dispute, custody principles would be used to determine placement and corresponding rights, as was the case in *Baby M*.

The genetic determination of maternal rights also recognizes the unique contribution the genetic mother makes to her child's life. Crispina Calvert's contribution to her baby was one that only she could make. Had another woman filled her role, a different child would exist. Anna Johnson's role, though critical, was fungible by comparison. Any biologically capable woman could have gestated the baby. "Unlike the gestational connection, the genetic relationship endures and shapes the individual's development and experience from conception to death."⁵² Although the emotional attachment a gestator feels for the baby should not be understated, initial parental rights are never determined based on intensity of feeling. Should a couple, due to circumstances beyond their control, leave a newborn with another woman for an extended period of time and return at the first possible opportunity to claim their child, the law would recognize their parental rights. The caretaker's strong feelings of love for the child would be irrelevant legally.

The genetic determination of maternal rights recognizes the genetic relationship as the most basic, important connection a child has with a parent.

The blood bond between parent and child has achieved both historical and mythological significance in every culture. This connection is a manifestation of both the act of creating the child and the ongoing similarity between parent and child. . . .

50. Dolgin, *supra* note 45, at 692.

51. See, e.g., Hill, *supra* note 47, at 356; Hofheimer, *supra* note 48, at 580.

52. Hofheimer, *supra* note 48, at 595.

The importance of biological similarity is augmented by scientific developments over the past fifty years which strongly suggest that even variables such as psychological dispositions and personal proclivities in such intimate matters as spousal preference and occupational choice may be determined, at least in part, genetically. In sum, it is only natural that our sublime and complex feelings regarding this issue reflect precisely the sentiment that law should preserve as a family unit that which nature has rendered genetically similar.⁵³

The biological link between parent and child cannot be altered. It defines who the child is at a most basic level. A surrogate gestator cannot create such a bond between herself and a child. Rather, her role may be more accurately analogized to that of the wet nurse. "A wet nurse's relationship with the child could continue for well over a year and involve psychological bonding. . . ."⁵⁴ Although the wet nurse gave sustenance from her own body, she does not gain legal rights comparable to those of natural parents.⁵⁵

Genetic determination of parental rights serves as a non-discriminatory means of assigning legal status. The *Johnson* Court's reliance on contract principles suggests that maternal status is negotiable. Furthermore, a definition of "mother" based on gestation "reinforces archaic sex roles and stereotypes by giving greater recognition and responsibility to the child-bearer."⁵⁶ Only the genetic test for maternal rights protects maternal status from both discrimination and commercialization.

Opponents of surrogacy as a reproductive practice suggest that surrogacy services demean women. Professor Hill responds to this allegation by questioning "how . . . the situation of a woman from a lower-middle income family who enters a surrogate arrangement [is] distinguished from the situation of this same woman who instead takes a job cleaning bathrooms in a bus station"⁵⁷ Some women may view surrogate gestation as preferable to janitorial employment. Respect for their individual autonomy demands that they be allowed this choice. On the other hand, true surrogate motherhood is certainly distinguishable because the child in that case is in every sense the child of the surrogate

53. Hill, *supra* note 47, at 389-90.

54. Hofheimer, *supra* note 48, at 591-92.

55. *Id.*

56. *Id.* at 601. Hofheimer further suggests that equal protection principles prohibit states from treating maternity differently from paternity. *Id.* at 596.

57. Hill, *supra* note 47, at 411.

mother. A failure to recognize the mother's relationship with the child in surrogate motherhood does detract from the importance of motherhood. Again, the genetic test for parenthood recognizes the distinction.

Recognition of the importance of genetics in parent-child relationships furthers the best interests of the child. With gamete donors, contractually intended parents, and a gestational mother, a child could have as many as five "parents."⁵⁸ When added to the possible combinations of step-parents that divorce and remarriage could bring into a child's life, the instability of child-adult relationships could be overwhelming. "There is a 'strong fear' among child welfare experts that children from surrogacy arrangements may experience problems similar to those that some adopted children have: confusion about their identities and genetic backgrounds, learning difficulties, and behavioral and psychological problems."⁵⁹ If surrogacy cases involve extended litigation, "the child may grow up with uncertainty regarding the identity of her parents."⁶⁰ In the *Johnson* case, the child was two and one-half years old before the final resolution of the dispute.⁶¹ The genetic test for maternity "promote[s] continuity and security for the children over time,"⁶² and provides a rapid and clear solution to legal conflicts. In linking conception with parental responsibility, the genetic test rule also "serves the interests of children and society by promoting responsible procreative behavior."⁶³

Justice Kennard's suggestion that custody should turn on a judicial case-by-case determination of the best interests of the child⁶⁴ is unacceptable. Such judicial determination of the "best mother" in each case constitutes a judicial invasion of the private lives of the parties that is not merited when the genetic mother has given no evidence of unsuitability. Child protection laws should be sufficient to protect children of unqualified parents. Furthermore, the case-by-case method unduly burdens courts and likely leaves the child's familial status in doubt for years, with severe psychological consequences for the child.

58. *Id.* at 355.

59. Seavello, *supra* note 44, at 219-20.

60. Hill, *supra* note 47, at 417.

61. See *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

62. Hofheimer, *supra* note 48, at 602.

63. *Id.*

64. *Johnson*, 851 P.2d at 799-800 (Kennard, J., dissenting).

Finally, any legal definition of "natural mother" must conform to the basic social understanding of motherhood. "To stipulate a meaning . . . which is fundamentally distinct from the traditional way in which the term is used is to open the door to a changed, and perhaps diminished, social significance for parenthood as an institution."⁶⁵ Today, "a fundamentally biological conception of parenthood is ingrained deeply in the ethos of our culture. It continues to influence our most profound intuitions concerning the nature of parenthood and paternal rights."⁶⁶ The legal understanding of parenthood—with the exception of adoption—should be based on the most important and deepest biological connection parents share with their children: genetics.

The judicial determination of the legal meaning of "mother" does not resolve the policy disputes that revolve around surrogacy. A genetic test for motherhood would allow surrogate gestation to continue, without a need to approve of surrogacy contracts. This definition would not even prevent all surrogate motherhood arrangements. The parties would simply resort to adoption by the intended mother after the birth, if the child's natural mother remained willing. Until state legislatures resolve the policy issues associated with gestational surrogacy, the genetic test for motherhood is the best solution courts can adopt. While leaving to legislatures the difficult policy issue of whether surrogacy contracts' are valid, a genetic definition of motherhood resists commercialization of family relations, recognizes the unique contribution of the genetic mother, relies on the genetic bond (the most important connection between the mother and the child), avoids non-discriminatory or oppressive applications, protects the best interests of the child, and conforms with current social understandings of parenthood.

Jeffrey M. Place

65. Hill, *supra* note 47, at 361.

66. *Id.* at 419.

THE *GRAHAM* DOCTRINE AS A WEAPON AGAINST SUBSTANTIVE DUE PROCESS: *Albright v. Oliver*, 114 S. Ct. 807 (1994).

In grappling with the doctrine of substantive due process, the Supreme Court has itself noted that "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."¹ *Albright v. Oliver*² might be an unremarkable avoidance of that uncharted area were it not for two interesting aspects. First, the divided vote indicates a vigorous disagreement within the Court on the proper way to analyze substantive due process claims, even among some of the more conservative members of the Court. Second, *Graham v. Connor*³ as interpreted by the plurality may emerge as a powerful tool in disposing of future substantive due process claims.

Albright involved petitioner Kevin Albright's civil rights action, under 42 U.S.C. § 1983,⁴ alleging that police officer Roger Oliver had, under color of state authority, violated his right under the Due Process Clause of the Fourteenth Amendment to be free from prosecution except upon probable cause.⁵ The case came before the Supreme Court on writ of certiorari from the U.S. Court of Appeals for the Seventh Circuit,⁶ which affirmed the trial court's dismissal of the complaint. Consequently, for the purpose of the appeal, the Court accepted as true the allegations of the complaint.

Albright's allegations do not paint a pretty picture of the Macomb, Illinois police department. Detective Roger Oliver agreed to provide protection to Veda Moore, a cocaine addict who had come to him in fear of a man to whom she owed money for a previous drug purchase.⁷ In exchange for this protection, Moore was to act as an informant, seeking out cocaine dealers and

1. *Collins v. Harker Heights*, 112 S. Ct. 1061, 1068 (1992).

2. 114 S. Ct. 807 (1994).

3. 490 U.S. 386 (1989).

4. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

5. *Albright*, 114 S. Ct. at 810-11 (1994) (Rehnquist, C.J., plurality opinion).

6. *Albright v. Oliver*, 972 F.2d 343 (7th Cir. 1992) (affirming the district court's grant of a motion to dismiss the complaint pursuant to FED. R. Civ. P. 12(b)(6)), *aff'd*, 114 S. Ct. 807 (1994).

7. *Albright*, 114 S. Ct. at 823 n.3 (Stevens & Blackmun, JJ., dissenting).

purchasing drugs from them with money Oliver supplied.⁸ She was paid a small sum for each dealer she identified, but was singularly unsuccessful as an informant; of the fifty people she identified as dealers, none were successfully prosecuted for any crime.⁹ The Court of Appeals, noting that Moore was using her informant's reward money to buy cocaine for her own use, commented that Oliver should have suspected Moore was keeping the drugs she bought with his money and giving him random names from a phone book.¹⁰

During the course of her work as an informant, Moore presented Oliver with a package of powder and reported that she had bought it from John Albright, Jr.¹¹ When laboratory tests revealed it was baking soda, Oliver obtained a grand jury indictment against John Albright, Jr., for selling a "look-alike" substance, a crime in Illinois.¹² He conducted no further investigation to verify Moore's allegation.¹³ When Oliver went to arrest his suspect, however, he found a respectable retired pharmacist in his sixties.¹⁴ After deciding he had the wrong person, but learning that the pharmacist had a son with the same first name, Oliver scratched John Albright, Jr.'s, name from the warrant and inserted that of John David Albright.¹⁵

Unfortunately for Oliver, it soon became obvious that John David Albright could not possibly have sold the baking soda to Moore either.¹⁶ Upon determining this Albright's inculpability, Oliver called Moore to ask if she could have purchased the baking soda from a different son of John Albright, Jr. In response to a leading question, she agreed that petitioner Kevin Albright could have been the person from whom she had bought the substance.¹⁷ Oliver then attested to a criminal information, securing a warrant for his arrest.¹⁸

Upon learning of the arrest warrant, Kevin Albright surrendered to Oliver but maintained his innocence.¹⁹ He was released

8. *Id.*

9. *Id.* at 823.

10. *Albright*, 972 F.2d at 345.

11. *Albright*, 114 S. Ct. at 810 n.1 (Rehnquist, C.J., plurality opinion).

12. *Id.* at 823 n.4 (Stevens & Blackmun, JJ., dissenting).

13. *Id.* at 823 n.5.

14. *Id.* at 810 n.1 (Rehnquist, C.J., plurality opinion).

15. *Id.* at 823 n.4 (Stevens & Blackmun, JJ., dissenting).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 810 (Rehnquist, C.J., plurality opinion).

after posting bond and agreeing not to leave the state without the court's permission.²⁰ At the preliminary hearing Oliver testified that Albright had sold a look-alike substance to Moore,²¹ leading the court to hold Albright over for trial.²² Later, however, the charge was dismissed on grounds that it did not state an offense under state law.²³

Albright subsequently filed suit under 42 U.S.C. § 1983, alleging that Oliver had deprived him of substantive due process under the Fourteenth Amendment—specifically, his “liberty interest” to be free from criminal prosecution except upon probable cause.²⁴ The district court dismissed for failure to state a claim under § 1983.²⁵ Judge Posner, writing for the Seventh Circuit Court of Appeals, affirmed the dismissal,²⁶ holding that prosecution without probable cause is a constitutional tort actionable under § 1983 only if accompanied by incarceration, loss of employment, or some other palpable consequence.²⁷ Judge Posner analogized to the Supreme Court's decision in *Paul v. Davis*, which held that reputation alone does not implicate any property or liberty interest sufficient to sustain a civil rights action, and that something more than simple defamation by a state official must be involved to establish a § 1983 claim.²⁸

The Supreme Court affirmed on different grounds.²⁹ The Chief Justice wasted no time in dispensing with the question presented for certiorari, noting in his first paragraph, “Petitioner asks us to recognize a substantive right under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause. We decline to do so.”³⁰ Chief Justice Rehnquist based his decision on an examination of

20. *Id.*

21. *Id.*

22. *Id.*

23. The Court of Appeals could not discover the reasons for this odd dismissal. *Albright*, 975 F.2d at 344.

24. *Albright* 114 S. Ct. at 810 (Rehnquist, C.J., plurality opinion).

25. *Albright*, 975 F.2d at 344.

26. *Id.* at 348.

27. The Court of Appeals noted that the extent to which a claim of malicious prosecution is actionable under § 1983 is one “on which there is an embarrassing diversity of judicial opinion.” *Id.* at 345.

28. 424 U.S. 693, 711-12 (1976).

29. Chief Justice Rehnquist, with whom Justices O'Connor, Scalia, and Ginsburg joined, wrote the plurality opinion. Justices Scalia and Ginsburg also filed concurring opinions. Justice Kennedy, with whom Justice Thomas joined, and Justice Souter filed opinions concurring in the judgment. Justice Stevens, with whom Justice Blackmun joined, filed a dissenting opinion.

30. *Albright*, 114 S. Ct. at 810 (Rehnquist, C.J., plurality opinion).

two issues: judicial restraint in expanding the scope of substantive due process under the Fourteenth Amendment, and the proper constitutional source for Albright's claim.

In making his argument for judicial restraint, Chief Justice Rehnquist noted that "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."³¹ Albright's case, he explained, did not fall within the realm of cases to which substantive due process claims have traditionally been limited: marriage, family, reproduction, and bodily integrity.³²

Having distinguished Albright's case from other substantive due process cases, Chief Justice Rehnquist identified a different constitutional source for Albright's claim. He concluded that because the Fourth Amendment addresses pretrial deprivations of liberty, and because the Court has recognized that Amendment's relevance to the liberty deprivations incident to criminal prosecutions, Albright should have brought his claim under the Fourth Amendment.³³ Following the holding of *Graham v. Connor*,³⁴ Chief Justice Rehnquist explained that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."³⁵ The Chief Justice expressed no view on the strength of Albright's possible Fourth Amendment claim because the question was not presented to the Court.

Justice Scalia's concurrence made two points.³⁶ First, he noted that Albright's only liberty deprivation was his pretrial arrest, which further indicated that his was essentially a Fourth Amendment claim.³⁷ Second, Justice Scalia reiterated his long-standing objection to the very concept of substantive due process.

31. *Id.* quoting *Collins v. Harker Heights*, 112 S. Ct. 1061, 1068 (1992).

32. *Albright*, 114 S. Ct. at 812 (Rehnquist, C.J., plurality opinion).

33. *Id.* at 811 (citing *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (holding that the Fourth Amendment requires a finding of probable cause prior to any extended pretrial deprivation of liberty after arrest)).

34. 490 U.S. 386 (1989) (holding that a claim of excessive force on the part of police officers during arrest, investigatory stop, or other seizure of a person must be analyzed under Fourth Amendment standard).

35. *Albright*, 114 S. Ct. at 813 (Rehnquist, C.J., plurality opinion) (internal quotation marks omitted).

36. *Id.* at 814 (Scalia, J., concurring).

37. *Id.*

Although admitting that the Court's current jurisprudence does not go as far as he would in rejecting substantive due process, he pointed to *Graham* as a prohibition on imposing "additional requirements upon such of the states' criminal processes as are already addressed (and left without such requirements) by the Bill of Rights."³⁸

Justice Ginsburg's concurring opinion addressed two issues that were not, strictly speaking, essential to the question presented for certiorari.³⁹ She hypothesized that Albright may have pursued a substantive due process claim because he feared his Fourth Amendment claim would be barred by the statute of limitations or that his release on bond would not satisfy the Fourth Amendment seizure requirement.⁴⁰ Analyzing both of these hypotheses in detail, Justice Ginsburg concluded that Albright's possible Fourth Amendment claim "was neither substantively deficient nor inevitably time-barred."⁴¹ However, because Albright did not present this question to the Court, she declined to assert the claim for him, on grounds of judicial self-restraint.⁴² She joined Chief Justice Rehnquist in his analysis of *Graham*, concluding that the police misconduct alleged by Albright was properly analyzed under the Fourth Amendment.⁴³

Justice Kennedy, joined by Justice Thomas, concurred only in the judgment.⁴⁴ Justice Kennedy believed that Albright's claim was not a Fourth Amendment claim of unreasonable seizure, as analyzed by the Chief Justice, but one of "the malicious initiation of a baseless criminal prosecution against him."⁴⁵ Although Justice Kennedy found no explicit Bill of Rights standard for the initiation of prosecution, or for a judicial hearing to determine probable cause prior to arrest, he nevertheless conceded that a rule that does not contravene a specific protection of the Bill of Rights could still violate due process if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁴⁶ In Justice Kennedy's opinion, Albright's claim did not meet this standard. Even in the

38. *Id.*

39. *Id.* at 815 (Ginsburg, J., concurring).

40. *Id.*

41. *Id.* at 816.

42. *Id.* at 816-17.

43. *Id.* at 814.

44. *Id.* at 817 (Kennedy & Thomas, JJ., concurring in judgment).

45. *Id.*

46. *Id.* quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977).

absence of a standard for initiating a criminal prosecution, however, Justice Kennedy opined that there may still be a due process violation in malicious prosecution, similar to the common-law offense.

Regardless of whether a violation occurred, though, Justice Kennedy believed that the holding of *Parratt v. Taylor*⁴⁷ compelled the court to affirm the Seventh Circuit. *Parratt* held that a state actor's random and unauthorized deprivation is not subject to challenge under § 1983, if the state provides an adequate post-deprivation remedy.⁴⁸ Justice Kennedy concluded that Albright's claim is one of those "questions of property, contract, and tort law [that under *Parratt*] are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer."⁴⁹

Justice Souter also concurred only in the judgment.⁵⁰ In prior cases, he explained, such as *United States v. James Daniel Good Real Property*⁵¹ and *Soldal v. Cook County*,⁵² the Court had

rejected the proposition that the Constitution's application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure), on a theory that one specific constitutional provision can pre-empt a broad field as against another more general one.⁵³

He argued that Chief Justice Rehnquist's expansive reading of *Graham* could not be reconciled with these cases. The cases can be made consistent, however, if *Graham* is taken to mean that separate analysis under the Due Process Clause and the Fourth Amendment is redundant only when the Fourth Amendment provision in question already fully defines the process due under the Fourteenth Amendment.⁵⁴

Furthermore, Justice Souter recognized the need for judicial self-restraint in the area of substantive due process.⁵⁵ He argued

47. 451 U.S. 527 (1981).

48. *Id.* at 544.

49. *Albright*, 114 S. Ct. at 818 (Kennedy & Thomas, JJ., concurring in judgment).

50. *Id.* at 819 (Souter, J., concurring in judgment).

51. 114 S. Ct. 492 (1993) (rejecting view that the applicability of one constitutional amendment preempts the guarantees of another).

52. 113 S. Ct. 538 (1992) (holding that where multiple violations are alleged, the Court will examine each constitutional provision in turn).

53. *Albright*, 114 S. Ct. at 820 (Souter, J., concurring in judgment).

54. *Id.* at 820 n.2.

55. Justice Souter wrote that judicial self-restraint is required by pragmatic concerns that the Court would be "subjecting government actors to two (potentially inconsistent)

that because none of the injuries Albright complained of could be attributed solely to his prosecution, as opposed to the ensuing detainment, Albright had not "shown a substantial deprivation of liberty from the mere initiation of prosecution."⁵⁶ Absent this substantial deprivation, Justice Souter concluded, Albright's case did not warrant expansion of substantive due process to cover the initiation of prosecution.⁵⁷ Justice Souter declined to address the question whether such expansion would be warranted under a different fact pattern, where a substantial harm did accrue after charges were filed, but before arrest.⁵⁸

Justices Stevens and Blackmun took issue with the judgment itself.⁵⁹ Justice Stevens first reviewed the facts as alleged by Albright and concluded there was clearly no probable cause for the criminal charges filed against him.⁶⁰ Then, Justice Stevens explicitly endorsed Albright's contention that the Due Process Clause of the Fourteenth Amendment requires probable cause for the initiation of prosecution. In support of that claim, he noted that *Hurtado v. California*⁶¹ at least indirectly established the constitutional importance of the probable cause standard.⁶²

Justice Stevens also asserted that a probable cause requirement would be analogous to other requirements that the Court has determined to be essential to due process, such as notice and an opportunity to be heard. He argued that the grand rhetoric of *In re Winship*,⁶³ which invoked the spirit of the Magna Carta, and referred to rules that "are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property,"⁶⁴ also supported a formalized probable cause requirement.⁶⁵

standards for the same conduct, and needlessly imposing on trial courts the inevitable burden of reconciling well-established jurisprudence under the Fourth and Eighth Amendments with the ill-defined contours of some novel due process right." *Id.* at 820.

56. *Id.* at 821.

57. *Id.* at 822.

58. *Id.*

59. *Id.* (Stevens & Blackmun, JJ., dissenting).

60. *Id.* at 823.

61. 110 U.S. 516 (1884) (holding that the substance of the Fifth Amendment was preserved when charges are brought via information [instead of via indictment from a grand jury] by California's requirement that a magistrate certify to the probable guilt of the defendant).

62. *Albright*, 114 S. Ct. at 822 (Stevens & Blackmun, JJ., dissenting)

63. 397 U.S. 358 (1970) (formalizing the requirement that criminal convictions be established by proof beyond a reasonable doubt).

64. *Id.* at 362 (quoting *Davis v. United States*, 160 U.S. 469, 488 (1881)).

65. *Albright*, 114 S. Ct. at 825 (Stevens & Blackmun, JJ., dissenting).

The Supreme Court's decision in *Albright* was correct, although Justice Souter's opinion is a better justification than that of Chief Justice Rehnquist, or Justice Kennedy. The Chief Justice's classification of *Albright* as a Fourth Amendment case does not directly address the petitioner's claim. As Justice Stevens rightly indicated, explicit constitutional provisions do govern the filing of charges, but they are to be found in the Fifth Amendment, not the Fourth.⁶⁶ Despite the Chief Justice's well-founded reluctance to entertain substantive due process claims, such claims should either be categorically restricted (the approach favored by Justice Scalia), or addressed on their merits (the approach taken by Justices Souter and Stevens).

Both Justice Stevens and Justice Souter identified the weakness of the plurality opinion: The Chief Justice's argument relied heavily on a reading of *Graham v. Connor* that is at odds with the doctrine expressed in *U.S. v. James Daniel Good Real Property*, where the Court asserted, "We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another."⁶⁷ As Justice Stevens correctly noted in his dissent, the position taken by the Chief Justice echoes Justice Black's famous dissent in *Adamson v. California*,⁶⁸ in which Justice Black argued that the Fourteenth Amendment not only incorporated the entire Bill of Rights, but also determined the outer limits of the due process guarantees.⁶⁹ That position has never been accepted by the Supreme Court in the half-century since *Adamson*.

Graham involved a complaint that police had used excessive force in making an investigatory stop of the plaintiff, thus violating "rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983."⁷⁰ The Supreme Court in that case rightly vacated the lower courts' decisions because they had applied a generic standard to measure excessive force, rather than the relevant Fourth Amendment reasonableness standard. Chief Justice Rehnquist's opinion in *Albright* paraphrased the relevant holding from *Graham* somewhat selectively, however: "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a

66. *Id.* at 828.

67. 114 S. Ct. 492, 499 (1993).

68. 332 U.S. 46 (1947).

69. *Id.* at 71-72.

70. *Graham v. Connor*, 490 U.S. 386, 390 (1989) (quoting Complaint p.10, App.5).

particular sort of government behavior, 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'⁷¹ The original quoted passage reads in its entirety, "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."⁷² As the complete quotation suggests, the issue in *Graham* was police brutality. *Graham* did not present the problem of a heretofore unknown constitutional claim, so its applicability to *Albright* is questionable.

Both Justice Souter and Justice Stevens gave *Graham* the more narrow reading suggested by the full text of the holding. In order to prevent *Graham* from degenerating into a form of Justice Black's incorporation theory, they took it to mean that substantive due process claims are redundant and improper when they concern liberties already fully protected by a constitutional provision. This reading, of course, leaves open the possibility that a substantive due process claim mirrored by an unincorporated amendment, or based solely on long-standing legal notions of tradition and justice, could possibly sustain constitutional scrutiny.

In contrast to Chief Justice Rehnquist's reasoning, Justice Souter's opinion concurring in the judgment has the virtue of dealing directly with the essence of *Albright*'s claim before the Court, namely that Oliver had infringed on *Albright*'s rights by instituting baseless charges against him. Justice Souter's narrow reading of *Graham* left him to engage in a balancing test, weighing the scope of the alleged deprivation against the heavy presumption opposing the expansion of substantive due process.

The objection put forth by Justice Stevens, that Justice Souter's opinion relied too heavily on *Collins v. Harker Heights*,⁷³ is ultimately not persuasive. Even though the fact patterns in *Collins* and *Albright* are starkly different (*Collins* was a case asking the Court to recognize a city's failure to provide a safe workplace as a constitutional violation—a claim the Court unanimously de-

71. *Albright*, 114 S. Ct. at 813 (Rehnquist, C.J., plurality opinion) quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989) (internal quotation marks omitted).

72. *Graham*, 490 U.S. at 395 (internal quotation marks omitted).

73. 112 S. Ct. 1061 (1992) (enunciating a doctrine of judicial restraint in dealing with claims to recognize new substantive due process rights).

scribed as “unprecedented”⁷⁴), the objection does not refute the point that in the interests of institutional legitimacy and judicial stability, the Court should be loath to recognize “new” constitutional rights.

Justice Souter’s use of Fourth Amendment precedents to demonstrate that the petitioner had a burden of showing substantial damages stemming from the filing of charges, above and beyond those related to his actual arrest, had the virtue of allowing Albright’s claim to be considered on its merits, while still maintaining a strong presumption against assertions of new substantive due process rights. Interestingly, Justice Stevens used these same cases to argue that this is not “uncharted territory” that the Court should avoid. The weakness of this counter-argument is that it treats the unreasonable seizure cases as hinging on prosecution without probable cause. This is another version of the equivocation between seizure and prosecution made by the Chief Justice, which Justice Stevens himself rejects. Justice Stevens’s argument inconsistently appeals to Fourth Amendment jurisprudence to support consideration of Albright’s claim while rejecting the plurality’s Fourth Amendment analysis which would dispose of the claim.

Justice Stevens’s last two arguments against Justice Souter’s opinion were similar, but insufficient. He argued that Justice Souter’s requirement of showing “substantial burden on liberty” should relate only to damages and not to the existence of a procedural due process right. He further argued that Justice Souter’s pragmatic concerns about subjecting government actors to possibly inconsistent standards are inappropriate; Congress considered those difficulties when it enacted § 1983, and it is not the Court’s place to reconsider them.⁷⁵

These arguments involve a common theme of pragmatism versus principle, Justice Stevens’s point being that the Court, as guardian of constitutional rights, must err on the side of principle. This pragmatism-principle dichotomy, however, is not an accurate description of the circumstances in *Albright*. Implicit in Justice Souter’s opinion is an understanding of the difference between the logic of discovery and the logic of justification. Balancing tests that might be inappropriate in disposing of recognized core constitutional rights may be acceptable means of assessing

74. *Id.* at 1069.

75. *Albright*, 114 S. Ct. at 833 (Stevens & Blackmun, JJ., dissenting).

the nature of newly proposed ones. Moreover, traditional and sound principles of judicial restraint require the Court to decide cases on the most narrow grounds possible, to avoid crossing the line between adjudication and policy-setting. Even if a constitutional standard for prosecution were to be announced, *Albright* would be an inappropriate vehicle for that decision. In any event, it is certainly within the province of the Court to consider the foreseeable consequences of its rulings and to give weight to those considerations.

While Justice Stevens failed to rebut Justice Souter's reasoning, his analysis of Justice Kennedy's reliance on *Parratt v. Taylor*⁷⁶ was more compelling. *Parratt* held that an inmate whose mail was negligently lost by prison officials did not suffer a violation under the Due Process Clause. Writing for the Court, then-Justice Rehnquist noted, "The deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure."⁷⁷ Justice Stevens contrasted that situation with *Albright*: "Petitioner was subjected to criminal charges by an affirmative, deliberate act of a state official. The filing of criminal charges is effectuated through established state procedures under which government agents, such as respondent Oliver, are authorized to act."⁷⁸ *Parratt* rightly declined to extend constitutional status to the negligent loss of property, but its precedential weight cannot dispose of *Albright*, where an entirely different due process violation was alleged.

Ultimately, the force of the Chief Justice's reasoning in *Albright* is as much in the application of *Graham* as in its interpretation. If the scenario in *Albright* repeats itself in the future, *Graham* may emerge as a powerful tool for use in avoiding the expansion of substantive due process. By construing *Albright*'s claim of a substantive due process right to be free from baseless prosecution as a Fourth Amendment search and seizure issue, Chief Justice Rehnquist shunts his claim down a dead end street. Under this reading of *Graham*, claims that assert a novel due process right need only be recast in terms of an incorporated amendment in order to dispose of them. This recasting could be done either by focusing on the relevant state actions, as the Chief Justice did in

76. 451 U.S. 527 (1981).

77. *Id.* at 543.

78. *Albright*, 114 S. Ct. at 833-34 (Stevens, J., dissenting).

Albright, or by focusing on the specific liberty deprivations incurred, as Justice Souter did.

If these approaches seem unsatisfactory, it is because they are not forthright about their goal. Therein lies the disturbing nature of *Albright*: The Court has fashioned a powerful tool that can be used to avoid considering substantive due process claims, but has done so at the expense of judicial credibility, in relying upon a strained reading of *Graham*. If substantive due process is to be limited, the best means short of disavowing it entirely may be to adopt Justice Scalia's explicit and categorical restriction of the doctrine, under which no new due process rights, which would impose further restrictions on the States' criminal processes, may be asserted. Although this approach does not easily mesh with all of the Court's due process jurisprudence, it has the virtue of being straightforward and final.

Until the Court takes such a stand, it will be forced to deal with the issue on a case-by-case basis. After *Albright*, however, the Court may rely on the Chief Justice's interpretation of *Graham* to restrict future substantive due process claims, notwithstanding the more accurate reading of *Graham* put forth by Justices Souter and Stevens.

James Lank

THE LACK OF A JUDICIAL POLICY ADDRESSING MATERNAL DRUG ABUSE CASES: *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993).

On September 30, 1993, the Kentucky Supreme Court, in *Commonwealth v. Welch*,¹ held that a woman who injected the narcotic oxycodone into her jugular vein during her eighth month of pregnancy, and subsequently gave birth to a baby exhibiting neonatal drug abstinence symptoms, was not guilty of second degree criminal abuse.² The decision marked the end of a case that had received enormous attention from the national media³ as well as

1. 864 S.W.2d 280 (Ky. 1993).

2. KY. REV. STAT. ANN. § 508.110 (Michie/Bobbs-Merrill 1991). Welch was also indicted under § 218A.990(7) (possession of a Schedule II narcotic) and § 218.990(15) (possession of drug paraphernalia).

3. *Appeals Court To Hear Case of Mother Accused of Abuse*, LEX. HERALD-LEADER, June 23, 1991, at C2 (reporting that ABC-TV's "Nightline" interviewed Welch regarding fetal abuse).

from organizations such as the American Civil Liberties Union,⁴ the National Organization for Women,⁵ and the American Medical Association.⁶ It also curtailed a widespread movement, started three years ago, to prosecute pregnant drug users under criminal statutes.⁷

In *Welch*, the Court chose to walk down a well-worn path with regard to this controversial issue,⁸ and away from the prospect of expanding the doctrinal stance it asserted in *Jones v. Commonwealth*.⁹ The *Jones* Court held that a drunk driver could be convicted of the second-degree manslaughter of an infant who was born alive but later died as a result of prenatal injuries suffered in an automobile collision. In *Welch*, however, the Court stated that *Jones* was not controlling because it applied only to those offenses that had previously been addressed by the common law.¹⁰ The Court also argued that if the criminal abuse statutes were construed to include prenatal injuries caused by the mother's conduct, they could be applied against the entire range of a pregnant woman's behavior. Such a result would transgress the limits of fair notice and of constitutional due process against statutory vagueness. Finally, the Court asserted that criminalization of maternal drug abuse violated the intent of the Kentucky General Assembly to treat the problem solely as one of public health.

4. Scott Learn, *Drug Abuse While Pregnant Not Child Abuse, High Court Says*, LEX. HERALD-LEADER, Oct. 1, 1993, at A1.

5. *Fetal Abuse New Abortion-War Worry*, KY. POST, June 11, 1990, at 2K (reporting that opposing sides over the issue of abortion rights had joined to voice concern over Welch's conviction).

6. Todd Pack, *Fetal Abuse Debate Targets Greenup Case. Woman Awaits Appeal of Conviction For Using Drugs While Pregnant*, LEX. HERALD-LEADER, July 8, 1991, at B1.

7. Learn, *supra* note 4, quoting Isabelle Katz Pinzler, who helped defend Welch and who is the head of the A.C.L.U.'s Women's Rights Project in New York.

8. *Johnson v. State*, 602 So.2d 1288 (Fla. 1992) (holding that cocaine passing through umbilical cord after birth, but before cutting of cord, did not violate statute provision against adult delivery of controlled substance); *State v. Gethers*, 585 So.2d 1140 (Fla. Dist. Ct. App., 1991) (holding that child abuse statute did not extend protection over unborn fetus and therefore defendant could not be prosecuted for child abuse); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992) (holding that parent may not be prosecuted for child endangerment for substance abuse occurring before the birth of the child).

9. 830 S.W.2d 877 (Ky. 1992).

10. *Id.* at 880 ("It is a necessary caveat to this Opinion to specify certain limitations on its rationale. We have addressed only criminal homicide offenses which, while now codified in KRS Chapter 507, were heretofore addressed by the common law. We do not address new offenses, such as criminal child abuse, which were not common law offenses, and for which the common law provides no similar legal precedent.")

This holding was erroneous, both in terms of the reasoning used to justify the decision and the policy addressing maternal drug abuse. Rather than build upon the logic of *Jones*, the Court dismissed the entire issue of whether an infant who was injured by prenatal actions was protected by the aegis of Kentucky's abuse statutes. Its reasoning was strained, even dishonest at times. The Court's reliance upon the common law definition of "person" ignores the historical distinctions drawn between a person and a fetus for the purposes of crimes at common law. The Court's arguments distinguishing the cause of injury in the *Welch* case from the *Jones* scenario are little more than exercises in verbal gymnastics. Finally, its "slippery slope" and fair notice analyses are unconvincing and artificial.

The facts of the *Welch* case centered on the actions of Connie Welch, a thirty-three year old woman who was arrested on November 7, 1989 during the course of a police drug raid at the home of a suspected drug dealer.¹¹ The police found Welch to be under the influence of the narcotic oxycodone, having just injected the drug into her jugular vein, and in the possession of several syringes and other drug paraphernalia.¹² She had a fifteen year history of drug abuse.¹³ Her body was covered with trackmarks.¹⁴ Her veins were so deflated from constant puncturing that she often needed another person to inject her with the drug.¹⁵ Due to her advanced state of pregnancy, Welch was released and given a court date.¹⁶ Welch continued her drug abuse despite her arrest and her pregnancy.¹⁷

On December 1, 1989, Welch gave birth to a baby boy.¹⁸ Soon thereafter, the baby began to exhibit troubling symptoms, including abnormal crying, irritability, and fever.¹⁹ Additionally, he was tremulous, jittery, and had difficulty sleeping.²⁰ The mother's drug use had also caused his skin to be mottled.²¹ The baby was diagnosed as suffering from neonatal abstinence syndrome.

11. *Welch*, 864 S.W.2d at 280.

12. *Id.*

13. *Fetal Abuse*, *supra* note 5.

14. *Id.*

15. Charles Wolfe, *Case of Baby Addicted to Drugs Stretches Law, Mother's Attorney Says*, LEX. HERALD-LEADER, Sept. 12, 1991, at B2.

16. *Welch*, 864 S.W.2d at 280.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 285.

On May 23, 1990, Welch was convicted of violating Kentucky's criminal child abuse statute and sentenced to five years in prison.²² The court of appeals, however, vacated the conviction. Based on the Kentucky Supreme Court's decision in *Hollis v. Commonwealth*,²³ the court ruled that the abuse of a fetus was excluded from the purview of the criminal abuse statute. The Commonwealth's Attorney General petitioned the Kentucky Supreme Court to review the case.

In a 5-2 decision, the Kentucky Supreme Court affirmed the court of appeals' decision. Writing for the majority, Justice Charles M. Leibson began his analysis by addressing the precedent cases. In *Hollis*, the Court held that the defendant, who forced his hand up his pregnant wife's vagina with intent to kill the fetus, could not be charged with murder based on the unborn status of the fetus.²⁴ In *Jones*, however, the Court held that the defendant could be charged with second-degree manslaughter because the victim had been born alive, but died as a result of having suffered prenatal injuries.²⁵ In justifying these different results, Justice Leibson stated that the Kentucky General Assembly had neglected to define the word "person" when it codified the crime of homicide. Thus, the Court had to construe legislative intent by referring back to common law precedent.²⁶ No less renowned authorities than Edward Coke and William Blackstone asserted that it was the fact of birth that conveyed the status of "person" upon the victim: " 'To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder.' "²⁷ Justice Leibson concluded that the rationale behind *Hollis* and *Jones* looked not to "metaphysical or medical questions regarding when life begins," but rather applied the common law's "born-alive" rule to distinguish between feticide and infanticide.²⁸ He conceded that because Welch's baby was born alive, the *Jones* de-

22. Welch was also convicted and sentenced to two years for felony possession of a controlled substance and to twelve months for misdemeanor possession of drug paraphernalia. The felony sentences were to run consecutively; the misdemeanor sentence was run concurrently with the felony sentences. *Id.* at 280-81.

23. 652 S.W.2d 61 (Ky. 1983).

24. *Id.*

25. 830 S.W.2d 877 (Ky. 1992).

26. *Jones*, 830 S.W.2d at 878.

27. *Id.* at 879, quoting 4 WILLIAM BLACKSTONE, BLACKSTONE COMMENTARIES 198 (Sharpwood ed., 1860); also citing 3 EDWARD COKE, INSTITUTES 50 (1648).

28. *Welch*, 864 S.W.2d at 282.

cision “superficially” suggested that she “could be prosecuted for second-degree abuse based on her prenatal criminal activity.”²⁹ Leibson ultimately determined, however, that the “born-alive” definition of the word “person” could not be extended from criminal homicide to criminal abuse because criminal child abuse was formerly not a crime at common law. The *Jones* holding, concluded Leibson, applied only to criminal homicide offenses.³⁰ Thus, the Court had to look elsewhere to define “person” under the criminal abuse statute.

The majority opinion, however, declined to address the difficult issues associated with a definition of “person.” Rather, the court disposed of the case by asking whether the Kentucky General Assembly intended to consider prenatal injuries caused by a pregnant woman’s drug use as equivalent to those caused by assaults inflicted by a third person. Justice Leibson emphasized that the *Welch* scenario presented a different quality of abuse than *Hollis* or *Jones* because *Welch* involved “self-abuse,” which had the side-effect of transmitting drugs to the fetus. The drug use, therefore, was not a direct cause of postpartum injury. Rather, the withdrawal, not the absorption, of the drugs was the direct cause of the child’s injuries.³¹

Justice Leibson argued that the case could not come under the criminal abuse statute because the injuries resulted from the mother’s self-abuse. A contrary ruling, he concluded, raised the specter of an extraordinarily steep and slippery slope; any maternal activity that had an actual or potential negative impact upon the health of the unborn child—whether smoking, drinking, or simply failing to wear prescription lenses while driving—might expose the mother to prosecution. Justice Leibson rejected the Commonwealth’s argument that the statute covered only conduct that qualified as criminal, and that the attorney general’s office would have the discretion to decide when instances of conduct would be prosecuted. Such an approach, Leibson warned, was “so arbitrary” as to risk transgressing “reasonably identifiable limits.”³² The statute would be unconstitutional on grounds of vagueness and insufficient notice.

29. *Id.*

30. *See supra* note 10.

31. *Welch*, 864 S.W.2d at 282.

32. *Id.* at 283.

Finally, Justice Leibson concluded that criminalization of maternal drug abuse would ignore the specific intent of the General Assembly's Maternal Health Act.³³ This Act had been designed to provide a comprehensive approach to alcohol and drug abuse during pregnancy. Justice Leibson found a specific policy of non-punishment in the Act:

[E]ducation and treatment are essential strategies in preventing prenatal exposure to alcohol and other drugs. . . . [P]unitive actions taken against pregnant alcohol or substance abusers would create additional problems, including discouraging these individuals from seeking the essential prenatal care and substance abuse treatment necessary to deliver a healthy newborn. . . . [T]he General Assembly finds it is necessary to treat the problem of alcohol and drug use during pregnancy solely as a public health problem.³⁴

Although the Maternal Health Act was a civil law, Justice Leibson noted that the Assembly had considered criminal implications: It had amended Kentucky Revised Statutes § 218A.990 to provide additional criminal punishment only for dealers who supplied drugs to pregnant women. Justice Leibson, therefore, concluded that the General Assembly had intended to exclude maternal drug abuse from the scope of the criminal abuse statute.

In a brief dissent, Justice Donald C. Wintersheimer, joined by Justice Joseph E. Lambert, criticized the majority opinion for "rewrit[ing] a criminal statute."³⁵ Justice Wintersheimer argued that the Court's function in *Welch* was simply to insure that the statute punished instances where the acts of one person caused injury or abuse to another person. In response to the majority's refusal to transfer the common law definition of "person" to criminal abuse statutes, Justice Wintersheimer asserted that the term meant simply "human being."³⁶ He provided a short list of secondary references, ranging from standard dictionaries to Prosser's 4th Edition,³⁷ in support of his claim. He also argued that the majority's "slippery slope" argument was both false and an intrusion into the legislative prerogative.³⁸

The Court's decision was wrong. *Jones* had established a rationale for the Commonwealth's prosecution of *Welch* under the

33. 1992 Ky. ACTS ch. 422.

34. *Welch*, 864 S.W.2d at 284, quoting 1992 Ky. ACTS ch. 442.

35. *Id.* at 286.

36. *Id.* at 285.

37. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971).

38. *Welch*, 864 S.W.2d at 286.

criminal abuse statute. Rather than carry through with *Jones's* logic, the Court drew a distinction between protecting a child from abuse and from homicide. The Court, moreover, strained the facts of the case beyond credibility to avoid a finding of criminal abuse. Finally, the Court relied on a tenuous, illogical statutory vagueness argument. At best, the reasoning employed by the Court is weak and unconvincing; at worst, it is a dishonest and dissembling representation of history.

The majority's opinion presupposes that the common law intended for the definition of "person" to vary depending on the type of crime committed. Although different areas of law define "person" differently,³⁹ the common law has made no such distinction for victims of criminal offenses. Were it otherwise, the legal culpability of a defendant would depend upon whether the victim met the particular criteria of "personhood" for the crime in question.⁴⁰ The logical result of such a system would be the creation of a hierarchy of potential victims, a hierarchy that would offend rational sensibilities.⁴¹ The common law's only differentiation of personhood with regard to criminal acts focuses on whether the individual had been born alive.⁴² It was then, and only then, that an individual was considered to be capable of surviving independent of the mother.⁴³ Thus, under the common law "a conviction of homicide was not possible . . . unless the infant had been born alive."⁴⁴ This difference, however, is not applicable to the circumstances in *Welch* because the baby was

39. For instance, civil and property law considers a child *en ventre sa mere* to be a person from the very moment of conception. See, e.g., *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.C. Cir. 1946). See also 1 WILLIAM BLACKSTONE, BLACKSTONE COMMENTARIES 22 (Marshall D. Ewell ed. 1882). Additionally, tort law has recognized that an unborn person may have a cause of action. *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Verkennes v. Corneia*, 38 N.W.2d 838 (Minn. 1949) (allowing representative of deceased unborn child, who was viable and capable of separate and independent existence, to maintain a civil action on behalf of the child under state's wrongful-death statute). In at least one instance, a court has recognized that a person may be harmed before she was even conceived. See *Renslow v. Menonite Hospital*, 367 N.E.2d 1250 (Ill. 1977) (holding that child who suffered permanent disability to the brain, nervous system, and various organs as a result of the negligent transfusion of blood into her mother seven years before the child's conception has a cause of action for negligence).

40. This argument assumes the victim is an already-born person.

41. Thus a person could hypothetically be the victim of an armed robbery but not murder.

42. COKE, *supra* note 27, at 50; BLACKSTONE, *supra* note 27, at 198.

43. *In re Ruiz*, 27 Ohio Misc. 2d 31, 32 (Ct. of Common Pleas 1986).

44. *Jackson v. Commonwealth*, 96 S.W.2d 1014 (Ky. 1936) (dismissing a murder indictment where the evidence was insufficient to establish that the child was born alive); *People v. Guthrie*, 293 N.E.2d 775, 778 (Mich. Ct. App. 1980).

born alive and had sustained injuries as a result of drug exposure while still in his mother's womb.

Defining an already-born individual as a "person," with respect to criminal homicide statutes but not criminal abuse statutes, is not logical. Such a rule would focus inordinate attention on the particular consequences, rather than on the criminality, of the action. Suppose, for example, that Welch had injected herself with oxycodone and that her unborn son suffered brain damage as a result. If her son was born alive, but died a day later as a result of his drug-induced injuries, then under *Jones* the Court conceded that Welch could be prosecuted for second-degree murder for wantonly causing the infant's death.⁴⁵ And yet, if the child managed to live, but with severe brain damage, Welch could not be prosecuted for abuse or any other offense. Such disparate results, based on different outcomes, make for poor policy and poor law. In both instances, Welch's actions would be the same, and would be considered equally reprehensible.

In addressing the question of the common law's definition of personhood, the Kentucky Supreme Court should have looked to the precedents of its sister courts. In *Commonwealth v. Cass*,⁴⁶ the Massachusetts Supreme Judicial Court addressed the extent to which a court should modify common law rules and definitions. The facts in *Cass* were similar to those in *Jones*, save only that the fetus was spontaneously aborted when the defendant's car struck an expectant mother. Even though the common law had traditionally not recognized fetuses as "persons," the Massachusetts Court determined that the legislature, by enacting the vehicular homicide statute, "contemplated that the term 'person' would be construed to include viable fetuses."⁴⁷ The Massachusetts Court thus explicitly expanded the meaning of common law terms to cover vehicular homicides. Anticipating those critics who would claim that the *Cass* decision impermissibly expanded the judiciary's role, Chief Justice Hennessey argued that a strict construction would result in the statute incorporating only the traditional rule, without the flexibility to modify it.⁴⁸ Such an unyielding approach would render the administration of criminal law in Massachusetts all but unworkable.⁴⁹

45. *Welch*, 864 S.W.2d at 282.

46. *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984).

47. *Id.* at 1325-26.

48. *Id.* at 1327.

49. *Id.*

Although preexisting common law meaning is a useful indicator of legislatures' intentions, to conclude that mere usage of the term "person" was intended to "crystallize the preexisting common law with regard to who may be the victim"⁵⁰ would be to fall into the trap that Chief Justice Hennessey forewarned against in the *Cass* decision. It would "make a shibboleth of a rule of construction."⁵¹ Strict construction of statutes denies a court the power to help the law to evolve in addressing novel problems. In the words of Oliver Wendell Holmes,

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁵²

Indeed, Kentucky's General Assembly realized the potential negative consequences of discouraging courts from modifying the meaning of common law terms in criminal statutes. The Kentucky Revised Statutes specifically allow for all provisions of the penal code to "be *liberally construed* according to the fair import of their terms" in order to promote justice and effect the objects of the law.⁵³ Given this express power of liberal construction, the Kentucky Supreme Court would have been well within its judicial authority in extending the common law definition of "person" to include criminal abuse.

In addition to its illogical distinction between protecting a child from abuse versus from homicide, the Court took great pains to characterize the *Welch* case as being merely an instance of a mother's "self-abuse," and argued that Welch's drug use was "not a direct cause of postpartum injury but an indirect cause."⁵⁴ The Court's attempt to distinguish between "prenatal injury from a pregnant woman's self-abuse . . . [and] injury inflicted by a third person"⁵⁵ stretches the text of the criminal abuse statute. Kentucky Revised Statutes § 508.110 states that a person is guilty of criminal abuse in the second degree when she "wantonly abuses another person . . . and thereby: (a) Causes serious physical injury; or (b) Places [the victim] in a situation that may cause . . .

50. *Id.*

51. *Id.*

52. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

53. KY. REV. STAT. ANN. § 500.030 (Michie/Bobbs-Merrill 1990) (emphasis added).

54. *Welch*, 864 S.W.2d at 283.

55. *Id.*

serious physical injury."⁵⁶ The statute makes no distinction as to the type of person who is proscribed from engaging in the abuse, nor does it exclude pregnant women as a class. By describing Welch's actions as "self-abuse," the Court seeks to hide the uncomfortable truth that *two* parties were affected by Welch's drug abuse. According to the attending physician's report, the baby had a fever, was very irritable, and cried a great deal.⁵⁷ Moreover, he was "tremulous [and] jittery,"⁵⁸ and had mottled skin because the nervous system's control over his blood vessels was disturbed.⁵⁹ These findings of fact demonstrate that this was more than "self-abuse." The mother's actions inexorably led to her child's condition.

The Court's claim, that "the withdrawal of drugs . . . rather than the absorption of these drugs . . . was the immediate cause of the baby's neonatal abstinence syndrome,"⁶⁰ strains credibility. If Welch were deliberately to place her newborn infant in a hermetically sealed room filled with poisonous gas, and the child were to develop an illness as a result of exposure to the poison, there is no doubt that the illness would be characterized as an injury and that Welch's conduct would have satisfied the criminal abuse statute's requirements.⁶¹ Effectively, this was the scenario in *Welch*: Welch's exposure of her unborn son to drugs resulted in his injury of narcotic addiction, an illness no less than that caused by exposure to poison.

Finally, logical extension of the Court's causation ruling leads to bizarre and undesirable results. If one were to accept the Court's reasoning that the withdrawal, not absorption, of drugs was "the immediate cause of the baby's neonatal abstinence syndrome,"⁶² then in order to prevent injury to such a newborn infant, an attending physician must administer regular doses of oxycodone. Failure to do so would cause the infliction of neonatal abstinence syndrome, which would then expose the physician to child abuse charges.

56. KY. REV. STAT. ANN. § 508.110 (Michie/Bobbs-Merrill 1990).

57. *Welch*, 864 S.W.2d at 285.

58. *Id.*

59. *Id.*

60. *Id.*

61. Consider an alternative example in which Welch fed her infant son formula mixed with illegal narcotics. According to the Kentucky Supreme Court, her son would only suffer harm when Welch stopped adding the narcotics.

62. *Welch*, 864 S.W.2d at 282-83.

Another significant underpinning of the Court's decision was the argument that criminalizing maternal substance abuse would create a "slippery slope whereby the law could be construed as covering the full range of a pregnant woman's behavior."⁶³ Justice Leibson believed this argument had grave implications: "What if a pregnant woman drives over the speed limit, or . . . doesn't wear the prescription lenses she knows she needs to see the dangers of the road?"⁶⁴ He rejected the Commonwealth's suggestion that the line be drawn at criminal conduct as being so arbitrary as to transgress reasonably identifiable limits. He felt that this distinction would "lack fair notice and violate constitutional due process limits against statutory vagueness."⁶⁵

Even if an unconstitutional lack of notice barred Welch's conviction, the Kentucky Court could have found a prospective decision of criminality. The Massachusetts Court specifically used this prospectivity to ensure fairness to the defendant: "[B]ecause our decision may not have been foreseeable, we do not apply it to this case or to other homicides occurring before the date of this decision."⁶⁶ A prospective rule would provide pregnant women in Kentucky fair notice and would be far more rational than a mechanical application of strict construction doctrine. "Simply because a liberal construction might work injustice in some cases is no proper reason for inflicting on the people the rule of strict construction in all cases."⁶⁷

Although some commentators believe that the vagueness concerns associated with the "slippery slope" argument is a disincentive for applying existing criminal abuse laws to maternal drug abuse cases,⁶⁸ careful examination of this argument reveals little more than a judicial bogeyman. In broadly asserting that a pregnant woman could be prosecuted because she smoked or drove a car without wearing prescription lenses, the Court forgot that in addition to injury to the child, the criminal abuse statute also

63. *Id.* at 283 (citing *Commonwealth v. Kemp*, No. 2707 C 1991, slip op. at 12 (Ct. of Common Pleas of Westmoreland County, Pa. Crim. Div. 1991)).

64. *Id.*

65. *Id.* See also Doretta Massardo McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory* 139 U. PENN. L. REV. 505, 515-516 (1990).

66. *Commonwealth v. Cass*, 467 N.E.2d 1324, 1325 (Mass. 1984).

67. *Livingston Hall, Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 759 (1935).

68. *Reyes v. California*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977); *State v. Gray*, No. L-89-239, 1990 WL 125695 (Ohio Ct. App. 1990), *aff'd* 584 N.E.2d 710 (Ohio 1991). See also, Note, *Maternal Rights and Fetal Wrongs*, 101 HARV. L. REV. 994, 1006 (1988).

requires a finding that the defendant's conduct was sufficiently "wanton" in nature.⁶⁹ By asking whether the conduct would be "wanton" if it were performed in the context of a parent and child, as opposed to a mother and fetus, the Court could have avoided the specter of vagueness. If it failed to meet the parent-child test, then clearly a pregnant woman who engaged in the same behavior should not be punished. Indeed, if the Court's reasoning were carried to its logical conclusion, a person who regularly injected a five-year old child with a Schedule II narcotic, or perhaps even pure heroin, should not be prosecuted. To do so might result in the "slippery slope" of including the full range of conduct that might result in harm to the child under the criminal abuse statute. People who smoked around children, or who drove a car with an infant passenger and failed to wear prescription lenses, would face the threat of prosecution for child abuse. Although such a conclusion is absurd, it logically follows from the Court's opinion.

The Court's reliance upon Kentucky's legislature is the only arguably compelling justification for its holding. In the Maternal Health Act, the Court found a legislative intent to not impose criminal sanctions on pregnant drug abusers. However, this policy conflicts with Kentucky's interests as well as those of its youngest citizens. Kentucky's Unified Juvenile Code states that "[c]hildren have . . . [the] fundamental rights to be free from physical . . . injury. . . ."⁷⁰ Although the Code does not *expressly* state that a fetus has a right to be born free from injury, many courts have recognized the legal right to begin life with "a sound mind and body."⁷¹ Moreover, Kentucky case law has long established that an unborn child may maintain a civil cause of action for prenatal harms.⁷² Acknowledging a legal right to begin life with a "sound mind and body" would be a logical extension of this doctrine.

The decision in *Welch* has already had a substantial chilling effect upon state prosecutors' efforts to prosecute pregnant substance abusers.⁷³ The most immediate consequences are suffered

69. KY. REV. STAT. ANN. § 508.110 (Michie/Bobbs-Merrill 1990).

70. KY. REV. STAT. ANN. § 620.010 (Michie/Bobbs-Merrill 1990).

71. In re Ruiz, 27 Ohio Misc. 2d 31 (Ct. of Common Pleas 1986); In the Matter Concerning Baby X, 293 N.W.2d 736 (Mich. App. Ct. 1980); Evans v. Olson, 550 P.2d 924, 927 (Okla. 1976); Womack v. Buchhorn, 187 N.W.2d 218 (Mich. 1971); Smith v. Brennan, 157 A.2d 497, 503 (N.J. 1960).

72. See *supra* note 39.

73. Learn, *supra* note 4.

by the children born to these women; they begin life with an enormously heavy handicap. Yet, ultimately, it is the Commonwealth of Kentucky that is most harmed, for it must bear the costs of caring for these infants. By refusing to warn pregnant drug abusers that Kentucky will not tolerate the wanton abuse of its unborn children, the Court did nothing to stem the numbers of children who will be born addicted. In addition, by blatantly distorting both the rules of criminal law and the facts behind this tragic case, the Court chose a policy that mocks the claim that Kentucky's penal code shall serve to "promote justice and effect the objects of the law."⁷⁴

K. Christopher Shen

74. KY. REV. STAT. ANN. § 500.030 (Michie/Bobbs-Merrill 1990).

