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# Is a Relational Approach Required to Close the Door on Criminal Liability for Maternal Prenatal Conduct?

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## Abstract

*Calls for women who drink heavily during pregnancy to face criminal liability for the subsequent harm to their future children are driven by notions of the 'bad mother' and the view that such behaviour represents a serious moral wrong, worthy of criminal penalties. If we are to avoid the erosion of women's autonomy and extensive scrutiny of women's lives such maternal criminal liability would precipitate, a new approach is needed in the criminal law. Until now, questions regarding criminal liability for conduct at the prenatal stage have focussed on the status of the victim at the relevant time; taking little account of whether the harm was caused by the pregnant woman or a third party. This has resulted in the woman who drinks heavily during pregnancy being presented as equally blameworthy as the man who stabs his pregnant partner. I argue that a relational approach; accurately reflecting the different nature of the relationship between a pregnant woman and her foetus, to that of a third party and a foetus, is vital for the law to capture the moral blameworthiness of conduct which unintentionally causes harm to future children. Only when the law is able to do this can arguments in favour of maternal criminal liability based on notions of the 'bad mother' be addressed and the door firmly closed on criminal liability for maternal prenatal conduct.*

## 1. Introduction

Women have not yet faced criminal liability in the UK for their prenatal conduct such as heavy drinking or drug taking during pregnancy which results in harm to their future children.[1] However, the criminal law has not expressly excluded pregnant women from liability for such harm in the way

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1 I use the terms 'prenatal conduct' and 'harm to a future child' to refer to harm due to events which occur prenatally. This includes prenatal events that cause harm to the foetus that is subsequently born alive and prenatal events which cause harm to the child *after* she is born alive. Where I refer to only one of these two types of prenatal events I make that distinction clear.

that the civil law has[2] and although such criminal liability seems unlikely at present, it remains a possibility.[3] Powerful arguments have been made by others as to why maternal criminal liability for prenatal conduct should be resisted on the ground that it would be ineffective at preventing harm and highly problematic for the lives of women, leading to calls for an exclusion of maternal liability in the criminal as well as the civil law.[4] However, those calls have so far gone unheeded and the door has not been firmly closed on maternal criminal liability.

In this paper I seek to establish three things: that maternal criminal liability for unintentional prenatal harm remains a possibility, that a relational approach could close the door on such liability, and that it would be appropriate for the criminal law to adopt such an approach.

Women who drink alcohol during pregnancy are commonly viewed as having committed a serious moral wrong, driving the argument that such behaviour should be criminalised.[5] This argument cannot be addressed until the criminal law captures the particular moral nature of how a pregnant woman might cause harm to her future child. Under the current law a woman who drinks heavily during pregnancy leading to the death of her child following its birth could be guilty of manslaughter in the same way as a man who stabs his pregnant partner unintentionally causing the death of the child after it is born.[6] The woman who drinks heavily during pregnancy is ingesting alcohol into her own body which is far from unusual in our society whereas someone who stabs a pregnant woman is acting in a violent manner towards another person which would attract criminal liability even where no harm occurred to a future child. To treat these individuals as equally blameworthy for the harm caused to the child after its birth fails to take account of the different reasons and interests pregnant women

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2 With the exception of harm due to negligent driving, the Congenital Disabilities (Civil Liability) Act 1976 (CDCLA) is intended to exclude maternal civil liability for prenatal conduct. See ss 1(1) and 2 CDCLA.

3 For a discussion of how the offence of concealment has been used to punish women for their conduct during pregnancy beyond the scope of the offence see E Milne, 'Concealment of Birth: Time to Repeal a 200-Year-Old "Convenient Stop-Gap"?' (2019) 27 Feminist Legal Studies 139.

4 E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford and Portland Oregon: Hart Publishing, 2001); M Brazier, 'Liberty, Responsibility, Maternity' (1999) 52 Current Legal Problems 359; E Cave & C Stanton, 'Maternal Responsibility to the Child Not yet Born' in A Farrell, A Mullock, C Stanton & S Devaney (eds), *Pioneering Healthcare Law* (London: Routledge, 2015) 306; S Fovargue & J Miola, 'Policing Pregnancy: Implications of the Attorney General's Reference (No. 3 of 1994)' (1998) 6(3) Medical Law Review 265.

5 E Armstrong & E Abel, 'Fetal Alcohol Syndrome: The Origins of a Moral Panic' (2000) 35(13) Alcohol and Alcoholism 276; K Bell, D McNaughton & A Salmon, 'Medicine, Morality and Mothering: Public Health Discourses on Foetal Alcohol Exposure, Smoking Around Children and Childhood Overnutrition' (2009) 19(2) Critical Public Health 155; D Wilkinson, L Skene, L De crespigny & J Savulescu, 'Protecting Future Children from In-Utero Harm'(2016) 30 Bioethics 425; E Milne, 'Putting the Fetus First – Legal Regulation, Motherhood, and Pregnancy' (2020) 27(1) Michigan Journal of Gender and Law 149.

6 *Attorney-General's Reference (No 3 of 1994)* [1997] All ER 936, [1998] AC 245.

might have for acting towards their own bodies compared to third parties acting towards another individual. The right to make choices about one's own body is an important factor in assessing whether behaviour is morally problematic and is an important legal principle.[7] It is therefore unsatisfactory for the law not to take account of the unique way in which this right is engaged in the unintentionally harmful conduct of pregnant women.

I argue that the solution lies in adopting what Seymour refers to as a 'relational approach' to cases of this kind, taking into account how the relationship between a pregnant woman and her foetus differs to that of a third party and a foetus, as well as the characteristics of the foetus.[8] This would capture the different moral nature of the harmful actions and thus the argument that women whose behaviour during pregnancy unintentionally harms their future children should face criminal liability because they have committed a serious moral wrong in the same way as a third party who causes such harm by attacking a pregnant woman, can be shown to be inaccurate. This has the potential to finally close the door to maternal criminal liability for unintentionally harmful prenatal conduct.

In order to answer the question of whether the criminal law should adopt a relational approach to prenatal conduct I must first explain the approach the law currently takes before going on to establish how this leaves the door open to maternal criminal liability.

## 2. The current law

The civil and criminal law in England and Wales currently take different approaches to liability for harmful prenatal conduct. While a child who is born disabled as a result of events which occur while it is in utero or even prior to its conception can bring a civil claim against other individuals responsible for those events,[9] the child cannot bring such a claim against his own mother except in relation to negligent driving.[10] Under the criminal law individuals – potentially including the woman pregnant with the future child[11] –

7 For a detailed discussion of this see R Scott, *Rights, Duties and the Body* (Oxford and Portland Oregon: Hart Publishing, 2002).

8 J Seymour, *Childbirth and the Law* (Oxford: Oxford University Press, 2000) 159-164.

9 Such a claim is derivative from a breach of a duty of care owed to the affected parent s 1(3) CDCLA.

10 ss 1(1) and (2) CDCLA. This is a policy decision due to the requirement for all drivers to have insurance, meaning that it would be the woman's insurer meeting any judgment in respect of her negligent driving, rather than the woman herself.

11 See Fovargue & Miola; Cave & Stanton; Brazier, 'Liberty, Responsibility, Maternity'; E Cave, *The Mother of All Crimes: Human Rights, Criminalization and the Child Born Alive* (Aldershot: Ashgate, 2004) 61-62.

can commit an offence if their actions which occur when the victim is in utero cause harm to the child after she is born alive.[12]

### 2.1. Civil law

The civil law in this area is dominated by the Congenital Disabilities (Civil Liability) Act 1976 (CDCLA) brought into law following the thalidomide tragedy.[13] The CDCLA stipulates that a child born disabled as a result of an occurrence before or during its birth can bring a civil claim against the person whose wrongful act caused that disability.[14] However, the child's mother is expressly excluded from such liability except in relation to negligent driving.[15] Maternal liability is excluded in this way because of the extent of the liability women would otherwise face and the potential for such liability to be used against women in matrimonial disputes.[16] As Jackson argues, there are three further reasons why this exclusion is required in civil law.[17] First, without such exclusion there would be practical implications on women's freedom to make choices about their bodies rendering them second class citizens in terms of autonomy and bodily integrity and subjecting them to continual surveillance.[18] For example, a pregnant woman would not be free to refuse a medical procedure such as a caesarean section without the prospect of being held liable for the consequences of that decision for her future child. Second, there would be practical difficulties in determining the standard of the 'reasonable person' used to determine standards of behaviour in the tort of negligence in relation to women's conduct during pregnancy.[19] Given the all-encompassing nature of pregnancy for nine months (as well as the potential for preconception care to impact on the health of a future child) and the extensive list of factors which can impact on the welfare of a future child, applying such a standard to pregnancy would permit judicial scrutiny of every aspect of women's lives. Third, judicial reasoning is primarily based on analogy and precedent which cannot easily be applied in the unique biological relationship of pregnancy.[20] In law, a foetus is not a legal person and so the pregnant women and foetus are not analogous to two individuals. However, the foetus is also 'not nothing' and what

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12 *Attorney-General's Reference (No 3 of 1994)*.
13 See H Teff and C. Munro, *Thalidomide: The Legal Aftermath* (Chichester: Saxon House, 1976).
14 S 1(1) CDCLA
15 S 1(2) CDCLA
16 Law Commission, *Report on Injuries to Unborn Children* Law Comm No 60 (London: HMSO, 1974) 24-25.
17 Jackson, 142-147.
18 ibid 143.
19 ibid 143-144.
20 ibid 144.

is thought to be in its interests can be considered, meaning that the pregnant woman and foetus are considered not one but not two.[21] This makes analogy to other relationships between individuals problematic.[22] For all of these reasons a relational approach differentiating maternal liability from third party liability is adopted by the civil law.

### 2.2. Criminal law

In contrast to the civil law described above, the criminal law on prenatal conduct does not clearly differentiate between harm caused by the pregnant woman carrying the foetus and harm caused by third parties. Instead, the focus of the criminal law is on the status of the victim and so the criminal law can be seen to take a definitional approach, leaving the door open to maternal criminal liability for unintentional prenatal harm. This definitional approach can be seen in the following criminal offences.

Section 1 of the Infant Life (Preservation) Act 1929 (ILPA) makes it a criminal offence punishable by life imprisonment, to intentionally destroy the life of a child capable of being born alive before it has an existence independent of its mother.[23] Overlooking the troubling language of this provision and indeed the problematic title of the legislation,[24] it is notable that this section is only concerned with the *destruction* of the foetus capable of being born alive; it is not relevant to prenatal conduct which causes harm short of destruction to a future child (i.e. one that is later born alive). Further, no distinction is drawn between a pregnant woman who destroys the foetus she is carrying and a third party who destroys a foetus being carried by someone else.[25] This offence reflects the definitional approach of the criminal law; focussing on the status of the foetus rather than who has caused the harm and how. This definitional approach is illustrated by the family law case of *C v S*[26] in which the father of a foetus sought a court order preventing his ex-partner from terminating her pregnancy on the grounds that a termination at the stage of 18–21 weeks would be an offence under section 1 ILPA, in that it would be destroying a foetus capable of being

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21 *Attorney-General's Reference (No 3 of 1994)* 687.

22 Jackson, 146.

23 Unless it is done only to preserve the life of the mother (s 1 ILPA) or the termination is in accordance with the provisions of the Abortion Act 1967 (s 5(1) Abortion Act 1967, as amended by the Human Fertilisation and Embryology Act 1990).

24 It is troubling and inaccurate to refer to a foetus of any stage gestation as a child or an infant.

25 Although the pregnant woman is a potential perpetrator of this offence, there appears to have been only one expectant mother convicted under this 90-year-old law. Maisha Mohamed was convicted despite no evidence as to what happened to the foetus. See Anonymous, 'Baby destruction woman sentenced', *BBC News* 24 May 2007 < http://news.bbc.co.uk/1/hi/england/manchester/6687893.stm> accessed 19 August 2020.

26 [1987] 1 All ER 1230.

born alive. The father sought to bring the claim in his own name but also to join the future child as a party to the action. However, the Court of Appeal followed the reasoning in *Paton v Trustees of the British Pregnancy Advisory Service*[27] and held that a foetus could not be a party to an action, and that a foetus born at 18-21 weeks that might show some discernible signs of life but would never be capable of breathing either naturally or with artificial assistance, could not be considered a 'child capable of being born alive' within the meaning of section 1 ILPA and so rejected the father's claim.[28] It can be seen that in focussing solely on the status of the 'victim', the foetus capable of being born alive, this offence reflects a definitional approach to harmful prenatal actions, rather than a relational approach which would distinguish between the actions of the pregnant woman and those of third parties.

In section 58 Offences Against the Person Act 1861 (OAPA) the actions of a pregnant woman and a third party who intentionally destroy a foetus of any gestation are described separately but both constitute the same offence:

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.[29]

Under this provision, a pregnant woman who intentionally attempts (whether successfully or not) to abort her pregnancy or a third party who intentionally attempts to abort a woman's pregnancy can be guilty of a criminal offence and sentenced to life imprisonment.[30] It is this legislation (together with section1 ILPA and section 59 OAPA) that makes abortion a crime in England and Wales unless one of the exceptions set out in the Abortion Act 1967 apply.[31] The language used in section 58 OAPA hints at the distinction a relational ap-

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27 [1978] 2 All ER 987.

28 *C v S*, 151-152.

29 S 58 OAPA 1861.

30 For example, a woman was convicted of an offence under s 58 OAPA after she took a drug, misoprostol, in order to bring about an abortion towards the end of her pregnancy in *R v Catt* [2013] EWCA Crim 1187.

31 In summary, abortion is not an offence if the pregnancy is no more than 24 weeks of gestation and two medical practitioners certify that the continuance of the pregnancy poses a greater risk to the woman's physical or mental health than a termination, or after 24 weeks, two medical practitioners certify that the abortion is necessary to prevent a risk to the life of the pregnant woman or grave permanent harm to the woman's health, or there is a substantial risk that the child would be seriously handicapped if born. S 1(1) Abortion Act 1967

proach seeks to draw in that it talks about a pregnant woman administering a noxious substance *to herself* while a third party administers the noxious substance to the pregnant woman. However, this distinction has little significance in section 58 OAPA as the pregnant woman faces the same liability as a third party.

There are strong arguments against imposing criminal liability on a pregnant woman acting to abort her own pregnancy that are beyond the scope of this paper.[32] However, while this remains a criminal act it less problematic for the pregnant woman who intentionally brings about her own abortion and a third party who intentionally brings it about on her behalf to be guilty of the same offence than in the case of unintentional prenatal harm. Provided that the third party is bringing about the abortion at the woman's request it is the woman's right to bodily integrity that is engaged regardless of whether she is the defendant or the third party. However, when we are dealing with unintentional prenatal harm, because of the bodily relationship of pregnancy, the interests of a pregnant woman are engaged in a way that they are not when the harm is caused by a third party. It is this that necessitates a relational approach in the criminal law.

Having now established that the criminal law takes a definitional approach to intentional prenatal harm, in the next section I will show that a similar approach is taken to unintentional harm, leaving the door open to maternal criminal liability for conduct such as heavy drinking during pregnancy.

### 2.3. The Potential for Maternal Criminal Liability for Unintentional Harm

It is a well-established principle in English law that a foetus cannot be considered a legal person until it has a separate existence to its mother.[33] Therefore, actions that are not intended to destroy the foetus which cause harm short of destruction to individuals in their foetal stage cannot attract criminal liability.[34] However, events which happen during an individual's foetal

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32 For a detailed discussion of the arguments against criminal liability for abortion see S Sheldon & K Wellings (eds), *Decriminalising Abortion in the UK: What would it mean?* (Bristol: Policy Press, 2020) <https://www.oapen.org/search?identifier=1007882> accessed 6 April 2020.

33 *Paton v BPAS* [1978] 2 All ER 987 in which it was held that a foetus cannot be considered a legal person until it has a separate existence to its mother; *Re F (In Utero)* [1988] Fam 122 in which it was held that the court had no jurisdiction to make an unborn child a ward of court in order to protect it from harm as a result of its pregnant mother's drug abuse; and *Re MB (an adult: medical treatment)* [1997] 8 Med LR 217 which stated that as a foetus cannot be a legal person, a pregnant woman has the same right to refuse medical treatment as any other competent adult.

34 However, actions intended to cause the destruction of the foetus which fail to destroy the foetus but instead cause harm, or even no harm at all, could be subject to criminal liability under s 58 OAPA, discussed above.

stage can attract criminal liability if they result in harm occurring to that individual *following birth* as the victim is then a legal person.[35] As explained below, the principle of legal personhood has dominated the law on unintentionally harmful prenatal conduct leading to the courts adopting a purely definitional approach leaving maternal criminal liability a possibility.

In the criminal law the leading case on prenatal conduct is *Attorney-General's Reference (No 3 of 1994)*[36] in which the defendant was found guilty of the 'dangerous act manslaughter' of a child after he stabbed his pregnant girlfriend in the abdomen causing her to deliver her baby prematurely. Although the foetus was not directly injured by the stabbing the baby was born alive but subsequently died 121 days later as a complication of its prematurity.[37] The defendant had committed an unlawful act which any sober and reasonable person would recognise as creating a risk of harm to some other person in stabbing the pregnant woman. It was not necessary to establish that the risk of harm to the ultimate victim (the future child) was obvious; only that the risk to someone, in this case the pregnant woman, was obvious.[38] It is clear that the status of the victim was central to the decision in this case. If the victim had died *in utero* a charge of manslaughter could not have been made out. It was the fact that the baby had been born alive and therefore the death had been of a legal person that enabled the charge to succeed.

It could be argued that this definitional approach, focussing on the status of the victim, is appropriate given that the case was not addressing the actions of a pregnant woman; the defendant in the case was not in the unique biological relationship of pregnancy with the victim. Therefore, his actions were towards another separate being; he had stabbed his pregnant girlfriend. However, this definitional approach means that there is nothing in the judgment precluding a pregnant woman facing criminal liability for her actions during pregnancy which cause the death or other harm to her own child following its birth.[39] As Cave and Stanton have pointed out, the ruling in *Attorney-General's Ref (No 3 of 1994)* and the subsequent case of *CP v Criminal Injuries Compensation Authority*[40] discussed below leave open the possibility that a pregnant woman could be prosecuted for gross negligence manslaughter if she takes heroin during pregnancy and her child is born alive but later dies of Sudden Infant Death Syndrome (SIDS) as a result of her heroin use.[41] In this scenario although

35 *Attorney-General's Reference (No 3 of 1994)*.
36 ibid.
37 *ibid* 250-251.
38 *ibid* 246.
39 M Brazier & E Cave, *Medicine Patients and the Law* ((6th edn, Manchester: Manchester University Press, 2016) 346.
40 [2014] EWCA Civ 1554.
41 E Cave & C Stanton, 290.

the heroin would be taken while the 'victim' is in its foetal stage the subsequent death would be of a child that had been born alive bringing it within the reasoning in *Attorney-General's Ref (No 3 of 1994)*.

It could be argued that the door to maternal criminal liability is not left open in this way as such a scenario could not constitute the offence of gross negligence manslaughter because that requires the existence of a duty of care between the pregnant woman and her future child, something excluded in the civil law by the CDCLA. A duty of care in the criminal law appears unlikely given the exclusion of maternal liability expressed in the CDCLA and the opinion of Lord Dyson MR in the case of *CP v CICA* that the criminal law should reflect the civil law in these circumstances:

Since the relationship between a pregnant woman and her foetus is an area in which Parliament has made a (limited) intervention, I consider that the court should be slow to interpret general criminal legislation as applying to it.[42]

The law would be incoherent if a child were unable to claim compensation from her mother for breach of a duty of care owed during pregnancy, but the mother was criminally liable for causing the harm which gave rise to damage and a right to compensation (...).[43]

However, it appears that despite the exclusion of maternal liability under section 1(1) CDCLA a woman could still owe a civil duty of care to her future child in respect of heavy drinking during pregnancy in some circumstances. The CDCLA applies to a child 'born disabled' as a result of an occurrence before its birth bringing a claim in respect of those disabilities.[44] Further, section 1(2) states that:

An occurrence to which this section applies is one which –

*a*. affected either parent of the child in his or her ability to have a normal, healthy child; or

*b*. affected the mother during her pregnancy, or affected her or the child in the course of its birth, *so that the child is born with disabilities* which would not otherwise have been present. (emphasis added)

Therefore, the CDCLA is not applicable to harm which occurs *after* the child is born alive as a consequence of something that happened prior to its birth. For example, if a woman drinks heavily during pregnancy and her child is born with FASD, the CDCLA would exclude her child from bringing a claim against her in respect of the FASD itself, but if the woman's drinking caused the child to suffer seizures after its birth resulting in brain damage, this could be construed as falling outside of the CDCLA. The child would be bringing a claim

42 *CP v CICA* [65] (Lord Dyson).
43 ibid [66] (Lord Dyson).
44 S 1(1) CDCLA 1976.

in respect of disabilities it was not born with and which were due to an occurrence after its birth.

If such a duty of care is not excluded under the CDCLA it is possible that one could be found to exist by applying the normal criteria set out in *Caparo v Dickman*:[45] it is foreseeable that a pregnant woman's future child could be harmed by her heavy drinking given the current understanding of the impact of the prenatal environment on the health of future children; there is likely to be sufficient proximity between a pregnant woman (who is aware she is pregnant) and her future child as there is a clear relationship distinguishing this from a duty owed to the world at large; and although there are strong public policy reasons why a duty in negligence should not exist (discussed above), these could be threatened by arguments that it would be fair, just and reasonable for a duty of care to exist because of the seriousness of the moral wrong that has been committed.

Therefore, returning to Cave and Stanton's example above, a woman who takes heroin during pregnancy, whose child is born alive but later dies from SIDS associated with her drug taking during pregnancy, could be said to owe a duty of care sufficient for the offence of gross negligence manslaughter as a civil duty of care in relation to post-birth harm caused by pre-birth events is not prohibited by the CDCLA and could be found applying the principles in *Caparo v Dickman*. Therefore, criminal maternal liability for prenatal conduct remains a possibility.

Even assuming that the CDCLA does exclude a duty of care in civil law, despite the comments of Lord Dyson MR, a lack of a duty of care in civil law does not necessarily preclude the existence of a duty of care in criminal law. The purposes of the two branches of law are distinct and therefore where it might be considered inappropriate for a duty of care to exist in one, it could be entirely appropriate in the other.[46] The purpose of a duty of care in civil law is to distribute loss in a manner necessary for the functioning of society, whereas a duty of care in criminal law is centred on protecting individuals from harm caused in a blameworthy manner.[47] Indeed, in order to protect individuals it might be more necessary for the criminal law to act where the civil law does not.[48] Consequently, not all of the arguments against a duty of care in civil law apply equally against a duty of care in criminal law and so it should not be assumed that the civil law exclusion is sufficient to rule out a duty of care in criminal law.

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45 [1990] 2 AC 605.

46 It was acknowledged in *CP v CICA* that the public interests in play in tort and the criminal law are different. *CP v CICA* [47] (Lord Treacy).

47 See M Jefferson, *Criminal Law* (11th edn, Harlow: Pearson Education, 2013) 463 and *Wacker* [2003] QB 1207 (CA).

48 M Allen, *Criminal Law* (13th edn, Oxford: Oxford University Press, 2015) 368.

The possibility of criminal maternal liability for harmful prenatal conduct is further increased by the language used in *Attorney-General's Ref (No 3 of 1994)*. As Fovargue and Miola have argued, in finding that a third party could be liable in manslaughter in these circumstances, and further holding that the pregnant woman and foetus are 'two distinct organisms living symbiotically, not a single organism with two aspects',[49] the House of Lords took a step towards personalising the foetus despite rejecting the possibility that the foetus could be a separate legal personality.[50] This step towards personalisation is based on the assumption that while the State has a duty to protect the rights of women, it also has an interest, or perhaps even a duty, to protect foetuses not only from harm by third parties, which would reflect their value to their parents, but also from harm *by their parents*, because they have their own intrinsic value. Further, the pregnant woman was objectified as the 'maternal environment of the foetus'[51] in Lord Mustil's comments:

The unlawful and dangerous act of B *changed the maternal environment of the foetus* in such a way that when born the child died when she would otherwise have lived.'[52] (emphasis added)

This reflects a separation of mother and foetus to an extent that it treats pregnant women in the same way as other potential defendants. Further, the conception of the pregnant woman as 'maternal environment' raises the possibility that such liability may be extended beyond intentionally harmful actions to the woman's failure to maintain that environment to the standard acceptable to the law.[53]

In addition, the harm that the woman could be liable for is not limited to the *death* of the child born alive. One of the five rules Lord Mustill considers to have been established is that:

Violence towards a foetus which results in *harm* suffered after the baby has been born alive can give rise to criminal responsibility even if the harm would not have been criminal (apart from statute) if it had been suffered in utero.[54] (emphasis added)

Therefore, a woman could be criminally liable for disabilities suffered by her child as a result of her conduct during pregnancy provided that the harm occurred to the child after it was born alive.[55]

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49 *Attorney-General's Reference (No 3 of 1994)* 255 (Lord Mustill).
50 Fovargue & Miola, 287-290.
51 *Attorney-General's Reference (No 3 of 1994)* 264 (Lord Mustill).
52 ibid.
53 K Savell, 'The Mother of the Legal Person' in S James & S Palmer (eds) *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Oxford and Portland Oregon: Hart Publishing, 2002) 46.
54 *Attorney-General's Reference (No 3 of 1994)* 254 (Lord Mustill).
55 Brazier, 'Liberty, Responsibility, Maternity' 382.

The above discussion shows that the definitional approach taken in *Attorney-General's Ref(No 3 of 1994)*, which fails to distinguish between the harmful conduct of a third party and a pregnant woman, together with the step it took towards the personalisation of the foetus means that maternal criminal liability for unintentional prenatal harm remains a possibility. This approach is problematic as it does not permit the law to take account of the unique way in which a pregnant woman might harm her future child and the interests she may have in acting in that way. As I will explain in the next section, the door to maternal criminal liability was more recently left ajar by the definitional approach taken in the case of *CP v CICA* which considered the specific question of whether the actions of a pregnant woman which unintentionally harm her future child could constitute a crime.

### 2.4. CP v CICA

In *CP v CICA* the Court of Appeal was asked to consider whether heavy alcohol consumption during pregnancy resulting in a child born with Foetal Alcohol Spectrum Disorder (FASD) could amount to a crime of violence under section 23 OAPA 1861 and therefore form the basis of a claim for compensation from the Criminal Injuries Compensation Authority (CICA).[56] Compensation had been previously granted under CICA for similar injuries before the scheme was reformed in November 2012 to exclude children damaged by alcohol in the womb.[57] The action brought on behalf of CP was governed by the 2008 CICA scheme and had the potential to cast doubt on the legitimacy of this exclusion by seeking a ruling that heavy drinking during pregnancy could be considered a crime of violence and thus worthy of compensation under the scheme.

The offence states that:

Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by *any other person* any poison or other destructive or noxious thing, so as thereby to endanger the life of *such person*, or so as thereby to inflict upon *such person* any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding ten years.'[58] (emphasis added)

The Court of Appeal unanimously ruled that the harm had occurred while CP was a foetus and a foetus could not be 'any other person' for the purposes

56 The biological mother in this case did not face criminal investigation or charges. *CP v CICA* [11] (Lord Treacy).
57 ibid [1] (Lord Treacy).
58 S 23 OAPA 1861.

of section 23 OAPA. Therefore, CP was not entitled to compensation on the basis of this offence.[59]

This definitional approach is clearly illustrated in the remarks of Lord Dyson MR who stated that:

If s 23 [OAPA] had expressly included a foetus as well as "any other person", EQ [CP's mother] would have committed the *actus reus* of the offence during pregnancy.[60]

Thus, the case hinged on the definition of the required victim.

It could be argued that as a foetus lacks legal personhood and cannot be the victim of a section 23 offence, nor any other offence drafted to protect legal persons, maternal criminal liability for unintentionally harmful prenatal acts is only possible if new legislation was passed to make a foetus a specific victim of such an offence. However, the reasoning in *CP v CICA* does not alter the potential for maternal liability on the basis of the invocation of the born-alive rule in *Attorney-General's Ref (No 3 of 1994)* where the victim is the child following its birth as explained above.

Further, it is not only liability for gross negligence manslaughter that remains a possibility for women in relation to their conduct during pregnancy, but liability for harm short of death such as under section 20 OAPA. This statutory provision makes it an offence to maliciously (ie intentionally, or recklessly) wound or inflict grievous bodily harm upon any other person.[61] Following the ruling in *CP*, harm done at the foetal stage would not be sufficient for this offence for the same reason it was not sufficient for a section 23 offence; the foetus cannot be 'any other person'. However, a section 20 offence could be committed if the heavy alcohol consumption during pregnancy causes harm *after* the child is born alive such as seizures[62] which result in brain damage. It could be argued that in that scenario the brain damage is connected to the harm suffered at the foetal stage and so is not harm to the child born alive but merely the child born alive suffering the effects of the harm done to it at its foetal

59 It is worth noting that if the Court of Appeal had ruled that heavy drinking during pregnancy is capable of being a crime of violence for the purposes of the CICA scheme, it would not automatically follow that pregnant women could face criminal liability for such actions; it would be for the courts to consider whether this amounted to a criminal act if and when such as case was brought by the Crown Prosecution Service (CPS) and this would have to also pass the initial hurdle of being considered to be in the public interest. Crown Prosecution Service, 'The Code for Crown Prosecutors' 2018 < https://www.cps.gov.uk/publication/code-crown-prosecutors> accessed 20 August 2020, para 4.9.

60 *CP v CICA* [64] (Lord Dyson MR).

61 S.20 OAPA.

62 F Nicita et al, 'Seizures in Fetal Alcohol Spectrum Disorders: Evaluation of Clinical, Electroencephalographic, and Neuroradiologic Features in a Pediatric Case Series' (2014) 55(6) Epiliepsia e60-e66.

stage.[63] However, this is not the view taken by the House of Lords in *Attorney-General's Ref (No 3 of 1994)*. In that case the death of the child born alive was held to be harm *to the child* caused by the attack on the child's mother during pregnancy rather than merely an effect of the prenatal harm. If prenatal events which cause the death of a child later born alive can be considered to be sufficient for manslaughter, there is no reason why brain damage due to a seizure could not be sufficient for section 20 OAPA on the same basis.

A further argument as to why maternal criminal liability is unlikely following the case of *CP v CICA* is that in that case the Court of Appeal expressed an intention for the criminal law to reflect the approach of the civil law and to 'be slow to interpret general criminal legislation as applying to [the relationship between a pregnant woman and her foetus].'[64] However, this reluctance to impose criminal liability on women for their conduct during pregnancy is not the exclusion that commentators such as Fovargue and Miola have called for.[65] *CP v CICA* was decided on the basis of the status of the victim at the time the harm occurred leaving the born-alive rule from *Attorney-General's Ref (No 3 of 1994)* in operation and reinforcing the definitional approach of the criminal law. Conceptual reasons as to why the civil law exclusion should be followed were not given. There was no explanation of why the relationship between the potential victim and the potential defendant should mean that criminal liability would be inappropriate in these circumstances. Therefore, while the Court of Appeal has expressed an intention for the criminal law to follow the relational approach of the civil law, without a robust conceptual basis it is not certain that this intention will be followed in all circumstances that come before the courts. Further, while this is a decision of the Court of Appeal the ruling in *Attorney-General's Ref (No 3 of 1994)* which did not adopt a relational approach to prenatal conduct came from the House of Lords and so takes precedence indicating that a purely definitional approach to harmful prenatal conduct is likely to prevail at least where the harm occurs after the child is born alive. Therefore, the intention expressed by the Court of Appeal to follow the civil law is not sufficient to close the door firmly on maternal criminal liability.

If a woman was found guilty of an offence such as gross negligence manslaughter, or inflicting grievous bodily harm under section 20 OAPA, in relation to her conduct during pregnancy which caused harm to her child after he was born alive, it is unlikely that this would be the end of the matter. Those who believe that a woman who drinks heavily during pregnancy has committed a serious moral wrong in the same way as the man who stabs his pregnant partner

63 CP's disabilities were held to be the effects of the harm done to her *in utero* rather than harm occurring following her birth, as the harm had already occurred, but in the case of seizures, new, post-birth harm would be occurring. *CP v CICA* [42] (Lord Treacy).

64 ibid [65] (Lord Dyson MR).

65 Fovargue & Miola, 292-293.

are unlikely to be satisfied by maternal criminal liability only when some additional harm associated with the alcohol consumption occurs after birth.[66] Arguments will continue to be made for the law to reformed to hold women legally responsible for harm caused to their future children at the foetal stage. After all, there appears to be little to distinguish the conduct of a pregnant woman which results in harm to her child after he is born alive from the same conduct which causes harm to a foetus that is later born alive. Therefore, the potential for maternal criminal liability for prenatal conduct remains under the born alive rule and could lead to prenatal conduct that causes harm at the foetal stage.

Having now established that the door remains ajar to criminal maternal liability for prenatal conduct I will now consider how the intuitive moral judgment of the conduct of pregnant women has the potential to push that door wide open and how a relational approach, which reflects who has caused the harm and how, could address this.

## 3. The moral judgment of the conduct of pregnant women

If we accept that parents are under a moral duty to do what they can to protect their children from unreasonable and avoidable harm then it seems to follow that women who intend to bring a foetus to birth have a moral duty to protect their child from harm even if this harm is due to events before its birth. The fact that the child is a foetus rather than a legal person at the time the harmful events occur is irrelevant as the duty is owed to the future child not the foetus.[67] Indeed, as Brazier has argued, a pregnant woman can be seen to be under a particularly strong moral duty not to injure her future child due to the future child's total dependency on the pregnant woman.[68] The argument is that this total dependency, coupled with the woman's intention to bring this future child to birth, mean that the pregnant woman should at least take that future child's interests into account when making decisions. Her conduct during pregnancy will affect the welfare of an individual; that cannot be disregarded on the grounds that that individual is not yet born.[69]

Strong arguments have been made by Brazier and other commentators that it would be inappropriate for this moral duty to be translated into a legal one

66 A man who stabs his pregnant partner causing harm to the foetus, rather than to the child after it is born alive, would still face criminal liability for the infliction of grievous bodily harm on the woman.

67 B Steinbock, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses*, 2nd ed. (2nd edn, New York: Oxford University Press, 1992) Chapter 4.

68 Brazier, 'Liberty, Responsibility, Maternity'367.

69 ibid 369.

on the basis that it would be ineffective in preventing harm to future children and it would be an unjustified trespass on women's autonomy.[70] Unfortunately, these arguments have not been sufficient to prevent cases such as *CP v CICA* being pursued in the courts. I argue that it is the interpretation of this moral duty that lies behind cases such as *CP v CICA* and has the potential to push the door to criminal maternal liability for prenatal conduct wide open.[71] The influence of the moral view of pregnancy can be seen in cases such as *Attorney-General's Ref (No.3 of 1994)* itself. As Fovargue and Miola argued:

> The decision in [*Attorney-General's Ref (No.3 of 1994)*] suggests that the courts are willing to interpret the law in such a way as to provide a morally 'correct' outcome. In crossing the gap between moral and legal culpability where a foetus is concerned, the courts have opened up a range of possibilities which have the potential to extend even further than at present.[72]

The courts' desire to interpret the law to achieve a morally 'correct' outcome could therefore lead to the perceived moral duty associated with pregnancy being translated into criminal maternal liability for harmful prenatal conduct at least in circumstances where the harm occurs after the child is born alive.[73] Indeed, as Milne argues, the assumption that a 'good mother' will always act to prioritise the needs of her future child in front of her own (what Milne refers to as the 'foetus-first' mentality) already influences the courts' interpretation of offences such as Concealing the Birth of a Child[74] to punish women for their behaviour during pregnancy.[75] The moral judgment of pregnant women will continue to push on the door to maternal criminal liability while the law is unable to address the argument that a woman whose conduct during pregnancy unintentionally causes harm to her future child has committed a serious moral wrong in the same way as a man who stabs his pregnant partner. Therefore, if we are to avoid the trespass on women's autonomy that criminal liability for behaviour during pregnancy would represent, an approach is needed that distinguishes between a woman whose conduct during pregnancy unintentionally causes harm to her future child and a third party who unintentionally causes such harm. Having established that the door to maternal criminal liability for unintentional prenatal harm remains open, and the potential for the moral judgment of the conduct of pregnant women to push it wide open, in the next section I will explain why

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70 ibid, Jackson; Fovargue and Miola; Cave and Stanton.

71 Something which Fovargue and Miola argue lies behind many of the court ordered caesarean section cases, Fovargue & Miola, 280-281.

72 Fovargue & Miola, 280-281.

73 Brazier argues strongly that this would be inappropriate, Brazier, 'Liberty, Responsibility, Maternity'.

74 S 60 OAPA.

75 E Milne, 'Putting the Fetus First'.

it would be appropriate for the criminal law to adopt a relational approach to finally close that door.

## 4. Why a relational approach is appropriate

The significance of a relational approach, distinguishing between a pregnant woman and a third party who unintentionally cause harm to a future child, lies in its ability to account for the interests that a woman might have in conduct directed towards her own body which would not be engaged in the case of a third party. Although this distinction is missing in the definitional approach taken by the courts in *Attorney-General's Ref (No 3 of 1994)* and *CP v CICA*, I argue that it can be seen in the statutory offences under sections 23 and 58 OAPA.

Starting with the offence considered in *CP v CICA* of administering a poison or noxious substance under section 23 OAPA, we can compare a third party who administers a noxious substance to a foetus *in utero* with a woman who indirectly administers the noxious substance to the foetus by consuming the substance herself. Both of these scenarios are likely to involve indirect administration as the third party would have to administer the substance through the woman's body. Indirect administration has been held to be included in the meaning of 'administered' in English law.[76] However, in the pregnant woman's case the 'administration' is not only indirect but is through the defendant's own body. The defendant administers the alcohol *to herself* and as a consequence it is administered to the foetus: her actions are towards her own body. Even in circumstances where alcohol consumed during the latter stages of pregnancy passes to the baby after it is born alive while the umbilical cord is still intact,[77] the pregnant woman should not be considered to have simply administered the alcohol to another person (her baby) but rather to herself.

If a woman drank heavily with the intent of procuring a miscarriage, this would be an offence under section 58 OAPA as she would have administered to herself a noxious substance for the purpose of procuring her own miscarriage. Despite it being noted in *CP v CICA* that the 'focus of section 58 is on the administration of drugs or the use of instruments on the woman rather than the child',[78] the Court of Appeal was of the opinion that the only thing that distin-

76 The meaning of 'administered' was defined in the case of *Gillard* (1988) 87 Cr App R 189 which considered it to mean 'takes, postulates some, ingestion' by the victim. Bringing a noxious thing into contact with the body, directly or indirectly, was enough, therefore, spraying with CS gas was included.

77 This has been the basis for criminalising drug taking in pregnancy in some American States. See for example *Johnson v State 578* So.2d 419 Ct App FL 5th Dist (1991).

78 *CP v CICA* [47] (Lord Treacy).

guishes a section 58 offence from a section 23 offence is that the former requires an intention to bring about a miscarriage.[79] The *actus rei* of the two offences were viewed as the same. This ignores the fact that section 58 OAPA refers to 'administering to herself' while section 23 OAPA refers to 'administering to another'. This conflation of the *actus reus* of section 23 OAPA with that of section 58 OAPA misses the significance of Parliament, in enacting section 58 OAPA, only seeing fit to criminalise a pregnant woman's actions towards her own body where she intends to destroy the foetus.

The unique manner in which a pregnant woman may cause prenatal harm is reflected in the construction of the CDCLA. The fact that a pregnant woman's harmful prenatal acts are towards her own body means that maternal civil liability would be impossible under the CDCLA even if the express exclusion in section 1(1) CDCLA had not been included. Liability to a child under the CDCLA is dependent on a duty of care being owed to the parent whose reproductive health is affected.[80] For example, an employer who exposes workers to radiation which causes genetic mutations in his employee's gametes will only be liable to the child born disabled as a result if the employer owes a duty of care to the employee in respect of such exposure. A person cannot be liable in tort to herself and so a pregnant woman could not be liable to her future child for what was referred to in the parliamentary debate putting forward the legislation for its second reading as 'self-inflicted injury'.[81] Therefore, the CDCLA can be seen to reflect the indirect manner in which a pregnant woman may cause prenatal harm. Something that the potential for liability under the principle in *Attorney-General's Ref (No 3 of 1994)* and the definitional approach taken in *CP v CICA*, do not.

The above consideration of the *actus rei* of section 23 and section 58 OAPA demonstrates that the criminal law does recognise that a pregnant woman can cause harm to her future child by acting towards her own body and Parliament has only seen fit to expressly criminalise this when those actions are intended to destroy the foetus. However, the approach of the common law in *Attorney-General's Ref (No 3 of 1994)* and *CP v CICA* does not recognise the unique way in which a pregnant woman might unintentionally harm her future child. This is problematic because it fails to account for the interests that a woman might have in conduct directed towards her own body which would not be engaged in the case of a third party. In order to illustrate this I will now consider the

79 CP's mother could not be charged with a s 58 offence as she did not have the requisite intention to procure her own miscarriage.

80 S 1(3) CDCLA 1976.

81 Hansard Debate 06 (February 1976, volume 904) 1593 < https://api.parliament.uk/historic-hansard/commons/1976/feb/06/congenital-disabilities-civil-liability> accessed 25 August 2020. However, an exception to this was permitted in the case of negligent driving as noted above.

currently hypothetical scenario of ectogenesis in which a foetus develops outside of the woman's body. Ectogenesis is a useful thought experiment as it removes the physical relationship between a woman and her developing foetus so that the ways in which she can cause harm to that foetus are akin to those of a third party. By comparing this to a bodily pregnancy I will show why it would be appropriate for the criminal law to adopt a relational approach to unintentional prenatal harm.

### 4.1. Ectogenesis

Brazier has set out three considerations for determining the extent to which the law should interfere with a pregnant woman's conduct during pregnancy in the name of protecting the interests of her future child:

1. We cannot demand a woman 'subordinate her interests to the potential child's, where in the case of a child already born no such demand could be made';
2. A woman's obligation is to make judgements based on what is best for herself, her child and any other children; and
3. It must be proportionate and practical and able to be defined within agreed limits.[82]

In the case of ectogenesis, where a foetus gestates in an artificial womb outside of the woman's body,[83] Brazier's three considerations are clearly less likely to be problematic when considering criminal liability for harmful prenatal acts than when the foetus is within the woman's body. The woman's interests in health, privacy and liberty are not engaged in the same way. Imposing criminal liability on a woman who administered alcohol to an externally gestating foetus would be akin to the demand made in respect of a child already born.[84] The obligation on her in making decisions about the care of the externally gestating foetus is likely still to be to take the interests of her future child into account and weigh these against her own interests and those of her other dependants. However, whatever course of action is in the interests of her externally

82 Brazier, 'Liberty, Responsibility, Maternity', 375-376.

83 For the purposes of this thought experiment, I use the term 'ectogenesis' to refer to complete ectogenesis, where the foetus is not inside the woman's uterus at any time. I also make the assumption that the externally gestating foetus would not be considered a legal person as it has not been 'born alive' *(Paton v British Pregnancy Advisory Service Trustees* [1978] 2 All ER 987). See A Alghrani and M Brazier, 'What is it? Whose it? Re-positioning the Foetus in the Context of Research?' (2011) 70 Cambridge Law Journal 51 and E Romanis, 'Challenging the "Born Alive" Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood' (2020) 28 Medical Law Review 93.

84 It is an offence to give a child under 5 alcohol unless in an emergency or under medical supervision, Children and Young Persons Act 1933.

gestating future child, it is unlikely to represent a significant impact on her own interests in the same way as for a bodily pregnancy.

As others have discussed this is not the case in the current reality of pregnancy.[85] It is the fact that the foetus is developing inside the woman's body that necessitates a different approach by the law rather than the status of the foetus in isolation. The location of the foetus is not simply a matter of geography but a factor which engages the interests of the pregnant woman in a unique way. Further, the location of the foetus changes the nature of the prenatal conduct which might be harmful. For example, FASD could in theory be caused in ectogenesis by the expectant mother administering alcohol to the external foetus but in a bodily pregnancy it could be caused by the pregnant woman administering alcohol to herself. Similarly, avoiding causing such harm in the case of ectogenesis would require the woman not to administer alcohol to another being (even if not another person) something which other individuals are also required to do in instances where that could result in harm. For example, even administering alcohol to an animal can be a criminal offence under section 7 Animal Welfare Act 2006.

In the scenario of ectogenesis the actions of a woman who administers alcohol to the external foetus are akin to those of the third party in *Attorney-General's Ref (No 3 of 1994)* in that her actions are directed towards another being rather than herself.[86] If that caused harm either to the external foetus or to the resulting child later 'born' alive, there would be a strong argument in favour of criminal liability for that harm. After all, the woman would have administered a noxious substance to another being resulting in harm to that being.[87] This might mean that a definitional rather than a relational approach would be appropriate in the scenario of ectogenesis, however, this is not the case with a bodily pregnancy.

### 4.2. A relational approach to prenatal harm

We need to be clear about what behaviour would be criminalised in the case of unintentionally harmful prenatal conduct of pregnant women. Take the example of FASD linked to heavy drinking during pregnancy. Avoiding such harm in a bodily pregnancy would require the pregnant woman

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85 See note 4 above.

86 Although not towards a legal person. See note 33 above.

87 While this might not come under any existing offence, we might be justified in creating an offence or even amending s 23 OAPA to include an external foetus as a potential victim (although this would be in conflict with the title of the Act which refers to offences against the *person)*. This would then cover intentional *and reckless* harm by administration of a noxious substance to the external foetus. For example, if a woman administered a potentially harmful substance to her external foetus in the hope that it would make her baby taller, provided she was aware of the risk of harm to her future child, she would have committed an offence under the modified version of s 23 OAPA.

to avoid alcohol or at least restrict her consumption to a minimal amount for the whole nine months of pregnancy. Alcohol is an addictive substance and it would seem likely that those who drink heavily would be influenced by some level of addiction. This raises questions regarding the appropriateness of criminal liability in circumstances of addiction.[88]

Returning to Cave and Stanton's example of the woman who takes heroin during pregnancy causing the death of her child after it is born alive; in this scenario the pregnant woman could be guilty of manslaughter following the reasoning in *Attorney-General's Ref (No 3 of 1994)* as the death would be of a child who had been born alive. It would be irrelevant that the perpetrator was the pregnant woman; she would be considered as much to blame for the unintended death of the child as the man who stabbed his pregnant partner. This leaves no room for consideration of the argument that an individual who fails to resist a highly addictive substance such as heroin and administers it to herself bears a very different level of moral blame for the unintended consequences of her actions than a third party who attacks a pregnant woman.[89] The same argument applies to alcohol consumption.

Unfortunately, in *CP v CICA*, it was not contested that CP's mother had administered alcohol to the foetus[90] and so an opportunity was missed for the court to highlight that what it was being asked to consider a crime of violence was the failure to resist administering to herself a highly addictive substance for nine months or more. Had it done so, the argument could then have been made that this was not sufficiently blameworthy behaviour to be subject to criminal penalties. This is clearly illustrated in *CP v CICA* itself as CP's biological mother had shown what might be considered superhuman levels of self-control and determination in giving up illicit drugs and reducing her alcohol intake considerably for the sake of her future child, but still CP suffered from FASD.[91]

Although a full discussion of this issue is beyond the scope of this paper, the point remains that addiction plays a role in harmful maternal prenatal conduct in a way it does not for third parties. There is a debate regarding the impact of addiction on criminal liability[92] and the criminal law on prenatal conduct can only take account of and inform this debate, if it adopts a relational approach to prenatal conduct.

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88 For a discussion on this topic see AM Honoré, *Responsibility and Fault,* (Oxford: Bloomsbury, 2002) Chapter 6, 121-142 and J Tolmie, 'Alcoholism and Criminal Liability' (2001) 64 Modern Law Review 688.

89 Indeed, Emma Cave argues that seeking retribution from pregnant addicts for prenatal harm resulting from their addictions would be inappropriate as they have little choice or control over that behaviour. Cave 'Mother of All Crimes', 86-8.

90 *CP v CICA* [14] (Lord Treacy).

91 *CICA v First-tier Tribunal and CP (CIC)* [2013] UKUT 0638 (AAC) [3].

92 See Tolmie, 'Alcoholism and Criminal Liability'.

The wider need for a relational approach is illustrated by Wilkinson et al's argument that:

In the non-lethal gestational harm case, where a pregnant woman ingests a toxin that she is aware will harm her future child, she should be held accountable for that wrong.[93]

As Wilkinson et al appear to acknowledge, the blameworthiness of the pregnant woman might be influenced by addiction.[94] However, I would argue that referring to heavy drinking during pregnancy as simply 'a pregnant woman ingesting a toxin' is not sufficiently accurate to enable a proper consideration of blameworthiness to take place. This description does not reflect the fact that the unique relationship of pregnancy means that what would be criminalised is the failure to maintain a sufficient 'maternal environment' for nine months or more. If we acknowledge that adults have an interest in consuming substances which might be considered toxins such as alcohol or medicines, what we would be criminalising is the failure of pregnant women to subordinate their own interests to those of their future children. It is this oversimplification of the nature of the conduct that leads to the assumption that ingesting a toxin that she is aware will harm her future child will be a wrong. The fact that she might have other interests served by administering that toxin *to her own body* is lost in this description. For example, if she ingests a toxin as part of chemotherapy treatment.

As the criminal law is concerned with harm caused in a blameworthy manner it would be appropriate for it to adopt a relational approach to prenatal harm as this would enable it to capture the moral nature of the unintentionally harmful prenatal conduct. Once this has been achieved, the argument that pregnant women whose conduct unintentionally causes harm to their future children should face criminal penalties because they have caused harm to those future children in an equally morally blameworthy manner as the man who stabs his pregnant partner, can be shown to be inaccurate. This has the potential to finally close the door to maternal criminal liability for unintentionally harmful prenatal conduct.

## 5. Conclusion

The rulings in *Attorney-General's Ref (No 3 of 1994)* and *CP v CICA* leave open the possibility of women being held criminally liable for their conduct during pregnancy which unintentionally causes harm to their future

93 Wilkinson et al, 428.

94 Although, their argument appears to be that some factors that might lead to addiction (rather than the addiction itself) could warrant a more lenient approach, Wilkinson et al, 431.

children, at least where that harm occurs after the child has been born alive. The potential for this door to be pushed wide open is increased because the criminal law leaves no room for the argument to be made that a pregnant woman whose conduct unintentionally harms her future child is not worthy of the same level of moral blame for the unintended consequences of her actions as a third party who attacks a pregnant woman. While the criminal law views pregnant women in this way, arguments in favour of criminalising women for their behaviour during pregnancy based on misguided notions of 'bad mothering' cannot be fully addressed. It would be appropriate to adopt a relational approach to harmful prenatal conduct as this would enable the criminal law to take account of the different reasons and interests pregnant women might have for acting towards their own bodies compared to third parties acting towards another individual and the implications of this for the blameworthiness of their conduct. This approach is also desirable because it could lend valuable support to those who call for the door to maternal criminal liability to be firmly closed by addressing the arguments in favour of such liability based on misguided notions of what constitutes the 'good pregnant woman'. The question which follows on from this discussion is *how* should a relational approach to prenatal conduct be reflected in the criminal law? Although a detailed consideration of this question is beyond the scope of this paper, it seems that we will have to wait for a decision of the Supreme Court limiting the ruling in *Attorney-General's Ref (No 3 of 1994)* to cases involving third parties and distinguishing this from considerations of maternal conduct, if and when such an opportunity arises. This is necessary both to protect the interests of pregnant women and to enable the criminal law to accurately consider when harm has been caused in a blameworthy manner. Until then, in the absence of legislative reform, there is a risk that the particular moral condemnation directed at pregnant women could translate into criminal maternal liability for prenatal harm with the extreme intrusion into women's lives this would represent.