

EXPLORING THE FEASIBILITY OF CRIMINALISING MATERNAL SUBSTANCE ABUSE IN SOUTH AFRICA

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SUMMARY

With alcohol abuse by pregnant women being a significant problem in South Africa, particularly in the rural areas of the Western Cape province, the country carries one of the world's heaviest burdens of foetal alcohol syndrome (FAS). FAS is regarded as the most severe of the foetal alcohol spectrum disorders. A child affected by FAS may suffer various developmental delays, including behavioural problems, poor language and fine motor skills, overall poor academic performance, mental retardation, and an increased tendency towards aggression and violence. Despite the alarming extent of the problem, maternal substance abuse is not currently a criminal offence in South Africa. This article explores the feasibility of criminalising maternal substance abuse, either by way of an amendment to the Children's Act 38 of 2005 or by introducing a new statutory offence. As South African children are already afforded protection against abuse and neglect in terms of the Children's Act, the prosecution of mothers who abuse substances while pregnant and then give birth to children suffering FAS-related harm could potentially also occur within this ambit. This would require an extension to the definitions of abuse and neglect in the Children's Act and would have no effect on the legal status of a foetus in South Africa. Yet one would face certain challenges associated with the principle of legality: in terms of the *ius strictum* requirement, for instance, courts are expected to apply a strict rather than a broad interpretation to the definition of a crime. Therefore, if it is not provided for clearly enough in the definition of abuse and neglect, courts may be hesitant to include maternal substance abuse in their understanding of these crimes. Moreover, a strict interpretation of the meaning of "child" in the Children's Act would exclude a foetus. In addition, a foetus does not possess legal subjectivity under South African law, which means that it generally does not have any legal rights, nor can it be the victim of any crime. Alternatively, the legislature could opt for introducing a new statutory offence to address maternal substance abuse separately. In this regard, criminalising maternal substance abuse as a materially-defined crime would be the best route to follow. This would restrict prosecution to instances where maternal substance abuse does in fact result in FAS-like effects in the child upon birth. In determining the feasibility of criminalising maternal substance abuse in South Africa, the article also takes a comparative look at United States law in this regard, particularly the position in Alabama and South Carolina. Developments in these states do seem to bode well for a decision to criminalise maternal substance abuse

in South Africa as well. As shown in *Hicks v State of Alabama* 2014 153 So.3d 53 and *Whitner v State* 328 S.C. 1, 492 S.E.2d 777 (1997), maternal substance abusers in the United States may be prosecuted for either a specific statutory offence or general child neglect. However, while the courts in those cases imposed imprisonment, South Africa's already overcrowded prisons coupled with the predominantly socio-economic causes of maternal substance abuse in the local context would warrant alternative sentencing options. These include referral to a rehabilitation centre or diversion. In addition, the United States courts seem to have accepted the view that foetuses should be afforded the same protection as children. As this would stir up a hornet's nest in terms of the abortion debate and the legal status of a foetus in South Africa, following the American example in this respect is not recommended. However, this challenge can be overcome by criminalising maternal substance abuse as suggested above, by providing for prosecution only where the affected child is born alive and presents with FAS-like symptoms.

1 INTRODUCTION

Foetal alcohol spectrum disorders refer to the varied clinical effects an expectant mother's prenatal drug and alcohol use can have on her child.¹ Substance abuse during pregnancy is known to cause developmental delays in children, including behavioural problems, poor language and fine motor skills, and overall poor academic performance.² Other effects include mental retardation and an increased tendency towards aggression and violence.³

The most severe condition on the spectrum is foetal alcohol syndrome (FAS), which has a lasting impact on a child's health and well-being.⁴ Colloquially known as maternal substance abuse, FAS is officially defined as prenatal exposure to alcohol, which causes a wide range of developmental disabilities in a foetus.⁵

From a global perspective, South Africa is among the countries most afflicted by FAS.⁶ In recent times, the most heavily affected regions have been those classified as rural,⁷ notably rural areas in the Western Cape province.⁸ A 2013 study found that at least 20 per cent of women in the

¹ Gardner "Should Drinking During Pregnancy Be Criminalised to Prevent Foetal Alcohol Spectrum Disorder?" 2016 9(1) *South African Journal of Bioethics and Law* 26 26; Olivier, Urban, Chersich, Temmerman and Viljoen "Burden of Fetal Alcohol Syndrome in a Rural West Coast Area of South Africa" 2013 103(6) *South African Medical Journal* 402 402.

² Lester and Lagasse "Children of Addicted Women" 2010 29(2) *Journal of Addictive Diseases* 259 260.

³ Gardner 2016 *South African Journal of Bioethics and Law* 26; Olivier *et al* 2013 *South African Medical Journal* 402–403; Du Toit, Smith and Odendaal "The Role of Prenatal Alcohol Exposure in Abruption Placentae" 2010 100(12) *South African Medical Journal* 832 832.

⁴ Olivier *et al* 2013 *South African Medical Journal* 402–403.

⁵ Williams and Smith "Fetal Alcohol Spectrum Disorders" 2015 136(5) *American Academy of Pediatrics* 358 358.

⁶ Olivier *et al* 2013 *South African Medical Journal* 402; Gardner 2016 *South African Journal of Bioethics and Law* 26.

⁷ Olivier *et al* 2013 *South African Medical Journal* 402; Prinsloo and Ovens "An Exploration of the Scope and Impact of Prenatal Substance Abuse in Mitchell's Plain, Western Cape" 2015 16(2) *Child Abuse Research: A South African Journal* 148 148.

⁸ Olivier *et al* 2013 *South African Medical Journal* 402; Gardner 2016 *South African Journal of Bioethics and Law* 26–27.

Western Cape drank heavily during pregnancy,⁹ while research published in 2017 estimated the rate of FAS among rural Grade 1 learners in the province at between 9,4 and 12,9 per cent.¹⁰

Despite the prevalence of alcohol abuse during pregnancy and the severity of its consequences, maternal substance abuse is not currently a criminal offence in South Africa. Therefore, this article explores the feasibility of criminalising maternal substance abuse, either in terms of existing South African legislation,¹¹ or by way of a newly created statutory offence. In determining the feasibility of introducing laws to govern maternal substance abuse in the country, the present legal position in South Africa is compared with United States federal and state law on maternal substance abuse, particularly the position in Alabama and South Carolina.

As a backdrop to this investigation, an overview of legal instruments, laws and case law regarding children's rights and the legal position of the foetus in South Africa is first provided.

2 INSTRUMENTS AND LAWS GOVERNING THE RIGHTS OF SOUTH AFRICA'S CHILDREN

2.1 United Nations Convention on the Rights of the Child

The evolution of children's rights in South Africa over the years has mainly been spurred by international obligations, not least the United Nations Convention on the Rights of the Child (UNCRC).¹² The UNCRC specifically states that all States Parties must provide for the rights of children in terms of both basic and family needs.¹³ With South Africa having ratified it in 1995, the UNCRC became one of the first legally binding conventions affording human rights to the country's children.¹⁴

In the Preamble, the UNCRC clearly states its purpose to protect children's rights:

"Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*'. "¹⁵

Article 3 obligates States Parties to consider the best interests of the child in all actions concerning children and to take all appropriate legislative and administrative measures necessary to ensure children's protection and care.

⁹ Olivier *et al* 2013 *South African Medical Journal* 402–405.

¹⁰ Van Schalkwyk and Marais "Educators' Relational Experiences with Learners Identified With Fetal Alcohol Spectrum Disorder" 2017 37(3) *South African Journal of Education* 1 1.

¹¹ For e.g., Children's Act 38 of 2005.

¹² OHCHR *Convention on the Rights of the Child* E/CN.4/RES/1990/74 (1990). Adopted: 20/11/1989; EIF: 02/09/1990; Abrahams and Matthews *Promoting Children's Rights in South Africa: A Handbook for Members of Parliament* (2011) 24.

¹³ Preamble to the UNCRC.

¹⁴ Dugard *International Law: A South African Perspective* 4ed (2011) 335.

¹⁵ Preamble to UNCRC (own italics).

In the South African setting, this is implemented by way of the Constitution of the Republic of South Africa, 1996 (Constitution),¹⁶ as well as the Children's Act.¹⁷

Also of particular relevance to this contribution are articles 6 and 19 of the UNCRC. The former requires States Parties to "recognize that every child has the inherent right to life" and "ensure to the maximum extent possible the survival *and development of the child*".¹⁸ The latter deals with child abuse and neglect, providing as follows:

"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of *physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*"¹⁹

2.2 African Charter on the Rights and Welfare of the Child

Out of concern for Africa's children, most of whose situation "remains critical" owing to the continent's unique circumstances (including socio-economic, cultural, traditional and developmental issues),²⁰ the African Union (AU) adopted the African Charter on the Rights and Welfare of the Child (African Charter) a year after the adoption of the UNCRC. South Africa ratified it in 2000.²¹

Among other provisions, article 4 of the African Charter provides that the best interests of the child must always be taken into account when dealing with any matters that relate to the child. This sentiment has been included both in South Africa's Constitution²² and the Children's Act.²³ Article 5 of the African Charter goes on to state that governments have a duty to ensure children's survival and development to the fullest extent possible. This, in turn, correlates with the right to life and the State's duty to aid and protect children entrenched in the Children's Act.²⁴

2.3 The Constitution of the Republic of South Africa

Constitutional provisions of particular importance to this article are sections 28 and 39.

¹⁶ S 28 of the Constitution.

¹⁷ 38 of 2005.

¹⁸ Own italics.

¹⁹ Art 19(1) of the UNCRC (own italics).

²⁰ Preamble to the AU *African Charter on the Rights and Welfare of the Child* (1990) CAB/LEG/24.9/49. Adopted: 01/07/1990; EIF: 29/11/1999.

²¹ African Commission on Human and Peoples' Rights "OAU/AU Treaties, Conventions, Protocols & Charters" (2019) <https://au.int/en/treaties> (accessed 2021-05-05).

²² S 28(2) of the Constitution.

²³ S 7 of the Children's Act.

²⁴ S 2 of the Children's Act.

In addition to the key provision that a child's best interests must be of paramount importance in all matters that affect the child's life,²⁵ section 28 also specifically states that every child has the right "to be protected from maltreatment, neglect, abuse, or degradation".²⁶ This clearly finds relevance in a study of the harmful effects of maternal substance abuse on a child, and therefore also an investigation into the feasibility of criminalising maternal substance abuse in South Africa.

Section 39, in turn, deals with the importance and recognition of foreign law,²⁷ providing that when interpreting any section of the Bill of Rights, a court may consider foreign and international law in coming to a decision.²⁸ In seeking statutory solutions to maternal substance abuse in South Africa, therefore, trends in foreign law could provide important guidance, provided that any new laws promote the spirit, purport and objects of the Bill of Rights.²⁹

2.4 The Children's Act

The Children's Act³⁰ essentially gives effect to the rights entrenched in section 28 of the Constitution.³¹ It describes numerous rights and responsibilities regarding the care and protection of children,³² and specifically provides for the regulation and protection of children in the context of all forms of abuse.³³

Importantly, while the Constitution offers a broad framework in section 28, the Children's Act expands on the rights provided for in that section. As such, it protects against maltreatment and abuse of children³⁴ and regulates the family environment³⁵ and care of children.³⁶ It is an all-encompassing Act with the potential to protect children from exposure to drugs or alcohol in the womb too.³⁷

Judging by the definitions offered in the Children's Act, abuse and neglect do not pertain to the physical aspect alone, but extend also to the emotional and psychological aspects.³⁸ Child abuse is defined as "any form of harm or ill-treatment deliberately inflicted on a child", including physical abuse, sexual abuse, bullying, child labour abuse, and any actions or behaviour that can cause emotional and psychological harm to the child.³⁹ Neglect is seen

²⁵ S 28(2) of the Constitution.

²⁶ S 28(1)(d) of the Constitution.

²⁷ S 39(1)(b) and (c) of the Constitution.

²⁸ S 39(1) of the Constitution.

²⁹ S 39(2) of the Constitution.

³⁰ 38 of 2005.

³¹ Preamble to the Children's Act 38 of 2005.

³² Ss 18–22 of the Children's Act.

³³ Ss 1 and 7(l)(ii) of the Children's Act.

³⁴ S 7(l)(ii) of the Children's Act.

³⁵ S 7(k) of the Children's Act.

³⁶ S 11 of the Children's Act.

³⁷ The challenging question as to whether a foetus can also enjoy protection in terms of the Children's Act is discussed with reference to civil case law under heading 3 below.

³⁸ S 1 of the Children's Act.

³⁹ *Ibid.*

as the failure to exercise “parental responsibilities to provide for the child’s basic physical, intellectual, emotional or social needs”.⁴⁰ While the Children’s Act does not itself define maltreatment, the World Health Organization (WHO) understands it to mean all forms of physical or emotional ill-treatment, sexual abuse, neglect or commercial exploitation.⁴¹

Other key provisions of the Children’s Act for purposes of this article are in sections 18 to 22, which deal with parents’ responsibilities and rights towards their children. Above all, a parent has a duty to care for their child,⁴² which is defined as safeguarding the child’s well-being, and protecting the child from physical, emotional and psychological abuse, maltreatment and neglect.⁴³ These parental responsibilities are relevant when considering maternal substance abuse. As mentioned earlier, FAS can cause developmental delays that hamper a child emotionally, physically and psychologically.⁴⁴ These are all factors included in the definition of abuse in the Children’s Act,⁴⁵ which could potentially be extended to include children exposed to such abuse in the womb.⁴⁶ It is arguable that a mother’s knowledge (or otherwise) of the adverse effects of alcohol consumption during pregnancy could be considered in determining whether alcohol-related harm to a foetus would constitute deliberate abuse of the child once the child is born alive. In this regard, Watt and colleagues⁴⁷ found that more than half of the women in their study had indeed been warned by medical staff and nurses not to use alcohol during pregnancy.

Finally, section 305 of the Children’s Act proceeds not only to lay down a criminal norm,⁴⁸ but also provides a criminal sanction⁴⁹ for child neglect and abuse. According to section 305(6), anyone who is found guilty of abuse or neglect faces a fine or imprisonment of either 10 years (first offenders) or 20 years (repeat offenders).

3 THE LEGAL POSITION OF THE FOETUS: DEVELOPMENTS IN THE LAW OF DELICT

South Africa has had no criminal cases involving maternal substance abuse. However, a number of civil cases have dealt with the challenges that maternal substance abuse creates, including its potential to afford an unborn foetus legal subjectivity. As the following paragraphs will show, both *Pinchin*

⁴⁰ *Ibid.*

⁴¹ Ward, Artz, Burton and Phyfer “Child Maltreatment in South Africa” (2018) <https://www.saferspaces.org.za/understand/entry/child-maltreatment-in-south-africa> (accessed 2021-07-01).

⁴² S 18(2)(a) of the Children’s Act.

⁴³ S 1 of the Children’s Act.

⁴⁴ Forray “Substance Use During Pregnancy” 2016 5 *F1000Research* 1 2–3.

⁴⁵ S 1 of the Children’s Act.

⁴⁶ As suggested under heading 3 below.

⁴⁷ Watt, Eaton, Dennis, Choi, Kalichman, Skinner and Sikkema “Alcohol Use During Pregnancy in a South African Community: Reconciling Knowledge, Norms, and Personal Experience” 2016 20(1) *Maternal and Child Health Journal* 48 48.

⁴⁸ S 305(1) of the Children’s Act.

⁴⁹ S 305(6) and (7) of the Children’s Act.

*v Santam Insurance (Pinchin)*⁵⁰ and *Road Accident Fund v Mtati (Mtati)*⁵¹ extended the application of the *nasciturus* fiction⁵² (normally applied only in matters of succession) to the law of delict and created the possibility of holding someone liable if a causal connection can be established between injuries suffered in the womb and harm suffered after birth. As such, both matters are relevant to the question of liability in maternal substance abuse.

3 1 *Pinchin v Santam Insurance*

Regarded as a leading case in determining the right to claim for harm done to a foetus, *Pinchin* paved the way for a delictual claim for prenatal injuries sustained by a foetus. The matter dealt with an expectant mother who, having been involved in a car accident during her pregnancy, gave birth to a child with cerebral palsy.⁵³ The court had to decide whether the child was entitled to a claim against the negligent driver owing to harm sustained as a foetus.⁵⁴ The matter was the first of its kind to be dealt with in terms of the law of delict, such questions having previously been regulated by the law of succession.⁵⁵

Key in deciding *Pinchin* were the issue of when life of the unborn child starts,⁵⁶ and the connection between criminal and civil liability for harming a foetus.⁵⁷ Even though the matter was approached under the law of delict, the court relied on authority that found no distinction between a foetus sustaining injuries before birth that result in its death after birth, and a child who is injured directly after birth and subsequently dies.⁵⁸ This led the court to find that where a child is harmed in the womb and is born alive, but subsequently dies owing to harm sustained in the womb, this would constitute murder.⁵⁹

This causal connection between harm done to a foetus in the womb and the injuries sustained by the foetus pre-birth and by the child after live birth⁶⁰ is particularly important for purposes of this study. After all, the FAS-afflicted child suffers harm while still a foetus in the womb. This causal connection could ultimately not be proved in *Pinchin*,⁶¹ in large part due to the state of medical knowledge at the time. However, following the court's reasoning, one can argue that if it can be proved that there is a causal connection between a mother engaging in substance abuse during pregnancy, and her child's physical and psychological challenges upon live birth, this may constitute a criminal act.

⁵⁰ 1963 (2) SA 254 (W).

⁵¹ 2005 (6) SA 215 (SCA).

⁵² This common-law principle states that a child that was born alive and conceived prior to a testator's death is considered to have obtained rights from the moment it was conceived.

⁵³ *Pinchin supra* 269.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Pinchin supra* 270–271.

⁵⁷ *Pinchin supra* 272.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Pinchin supra* 275.

⁶¹ *Ibid.*

Perhaps even more significant in *Pinchin*, viewed from a maternal substance abuse angle, was the finding that it would be nearly inconceivable for the intentional administration of a drug that causes defects in a foetus not to raise any action.⁶²

3 2 *Road Accident Fund v Mtati*

The question in *Mtati* was whether a child who had sustained brain injuries as a foetus during a collision was entitled to a claim against the Road Accident Fund (RAF).⁶³ The court found that the driver owed a duty of care towards the child, although still a foetus in her mother's womb at the time of the car crash.⁶⁴

Most of the Appeal Court's examination supported the views in *Pinchin*.⁶⁵ The court stated that it would be inappropriate not to extend the *nasciturus* fiction to delictual matters in scenarios where the foetus is harmed while in the womb and is then born alive with injuries sustained because of such prenatal harm.⁶⁶ This view was based on the causal connection between injuries suffered in the womb and the damage suffered after birth⁶⁷ – a connection that was indeed successfully proved in *Mtati*, unlike in *Pinchin*.

Interestingly, the court in *Mtati* held that scenarios of a child claiming damages from their mother would be impracticable in South Africa.⁶⁸ The issue at stake in this article, however, is not whether a child afflicted by FAS should be able to claim damages from their mother, but rather whether the mother should be held criminally liable for her conduct during her pregnancy.

4 CRIMINALISING MATERNAL SUBSTANCE ABUSE

4 1 Elements of criminal liability

To prove criminal liability, six requirements need to be satisfied, namely legality, conduct (which includes causation in consequence crimes), compliance with the definition of the crime, unlawfulness, criminal capacity and culpability.⁶⁹ The State has to prove each element beyond a reasonable doubt to secure a successful prosecution. Following a brief reminder of the content of the six elements below, each is discussed with specific reference to maternal substance abuse and the two available options for its possible criminalisation.

⁶² *Pinchin supra* 274.

⁶³ *Mtati supra* 218.

⁶⁴ *Mtati supra* 227.

⁶⁵ As explained above; *Mtati supra* 219.

⁶⁶ *Mtati supra* 219.

⁶⁷ *Mtati supra* 219; *Pinchin supra* 272–275.

⁶⁸ *Mtati supra* 228.

⁶⁹ Snyman *Criminal Law 7ed* (2020) 28; Burchell *Principles of Criminal Law 5ed* (2016) 51.

4 1 1 *Legality*

Snyman defines legality as follows:⁷⁰

- “1. An accused may not be found guilty of a crime, unless the type of conduct with which he is charged:
 - a) has been recognised by the law as a crime (*ius acceptum* rule);
 - b) in clear terms (*ius certum* rule);
 - c) before the conduct took place (*ius praevium* rule);
 - d) without the court having to stretch the meaning of the words and concepts in the definition to bring the particular conduct of the accused within the compass of the definition (*ius strictum* rule); and
2. After the conviction an accused may not be sentenced unless the punishment also complies with the four principles set out immediately above under 1a) to d) (*nulla poena sine lege* principle or *nulla poena* principle).”

If any of these requirements is not complied with, it will undermine the principle of legality.

4 1 2 *Conduct*

In criminal law, conduct is subdivided into acts and omissions,⁷¹ thus implicating both persons who actively committed a criminal act and those who did nothing when the law expected them to act.⁷² In the latter regard, there are a number of instances where there is a legal duty to act positively. These include duties that stem from a protective relationship towards another person,⁷³ such as that of a parent towards their child.⁷⁴

4 1 3 *Causation*

Crimes are divided into formally defined and materially defined crimes. The former refers to conduct that is prohibited regardless of the result (such as perjury and the possession of drugs), while the latter refers to so-called “result crimes”, which cause a specific prohibited outcome (such as murder or culpable homicide, which cause death).⁷⁵ Causation is only an element in materially defined crimes.⁷⁶

4 1 4 *Unlawfulness*

This requirement means that the conduct must have contravened a law without justification for the act.⁷⁷ A number of objective factors must be taken

⁷⁰ Snyman *Criminal Law* 31.

⁷¹ Snyman *Criminal Law* 43; Burchell *Principles of Criminal Law* 77.

⁷² Snyman *Criminal Law* 49; Burchell *Principles of Criminal Law* 78.

⁷³ Snyman *Criminal Law* 51.

⁷⁴ Snyman *Criminal Law* 51; *S v B* 1994 (2) SACR 237 (E).

⁷⁵ Snyman *Criminal Law* 66; Burchell *Principles of Criminal Law* 95.

⁷⁶ *Ibid.*

⁷⁷ Snyman *Criminal Law* 80; Burchell *Principles of Criminal Law* 114.

into account when determining unlawfulness, including the values of society as a whole.⁷⁸

Various justifications may be legally raised in criminal matters, including private defence,⁷⁹ necessity,⁸⁰ consent,⁸¹ official capacity,⁸² presumed consent,⁸³ obedience to orders,⁸⁴ and the defence of impossibility.⁸⁵ Each justification has its own requirements to succeed. Moreover, the list of grounds of justification is not a closed one,⁸⁶ and more grounds can arise in accordance with society's needs.

4 1 5 Criminal capacity

Criminal capacity refers to the presence of certain mental abilities at the time the specified crime is committed,⁸⁷ being the ability not only to appreciate the wrongfulness of the conduct, but also to act in accordance with such appreciation of wrongfulness.

4 1 6 Culpability

Pertaining to a person's blameworthiness in committing a crime,⁸⁸ culpability can be subdivided into whether the conduct was intentional or negligent.⁸⁹

The test for intention is subjective,⁹⁰ requiring the courts to determine an accused's state of mind at the time they committed the offence. Intention, in turn, can be further broken down into direct intention (*dolus directus*),⁹¹ indirect intention (*dolus indirectus*)⁹² and foreseeing the possibility of the result (*dolus eventualis*).⁹³ *Dolus eventualis* refers to a person who does not have the prohibited result as their main aim, but who, in pursuing their main aim, subjectively foresees and accepts that an unlawful act may be committed.⁹⁴

⁷⁸ Snyman *Criminal Law* 81; Burchell *Principles of Criminal Law* 114.

⁷⁹ Snyman *Criminal Law* 85; Burchell *Principles of Criminal Law* 121.

⁸⁰ Snyman *Criminal Law* 95; Burchell *Principles of Criminal Law* 143.

⁸¹ Snyman *Criminal Law* 102; Burchell *Principles of Criminal Law* 208.

⁸² Snyman *Criminal Law* 107; Burchell *Principles of Criminal Law* 143.

⁸³ Snyman *Criminal Law* 106; Burchell *Principles of Criminal Law* 222.

⁸⁴ Snyman *Criminal Law* 112; Burchell *Principles of Criminal Law* 190.

⁸⁵ Snyman *Criminal Law* 116; Burchell *Principles of Criminal Law* 187.

⁸⁶ Snyman *Criminal Law* 81.

⁸⁷ Snyman *Criminal Law* 137; Burchell *Principles of Criminal Law* 251.

⁸⁸ Snyman *Criminal Law* 127; Burchell *Principles of Criminal Law* 341.

⁸⁹ Snyman *Criminal Law* 129; Burchell *Principles of Criminal Law* 341.

⁹⁰ Snyman *Criminal Law* 133; Burchell *Principles of Criminal Law* 344.

⁹¹ Where a person directs their will to committing a prohibited act, knowing that what they are doing is unlawful, and continue to act so as to achieve the prohibited goal. See Snyman *Criminal Law* 160.

⁹² Where a person commits a prohibited act out of necessity to obtain their goal. See Snyman *Criminal Law* 160.

⁹³ Snyman *Criminal Law* 161; Burchell *Principles of Criminal Law* 349.

⁹⁴ Snyman *Criminal Law* 161; Burchell *Principles of Criminal Law* 351.

The test for negligence, on the other hand, is mainly objective.⁹⁵ The accused's conduct is compared to that of the hypothetical "reasonable person";⁹⁶ it will be found to have been negligent if:

"The reasonable person in the same circumstances would have foreseen the possibility

- a) That the particular circumstances might exist;
- b) That his conduct might bring about a particular result;
- c) The reasonable person would have taken steps to guard against such a possibility; and
- d) The conduct of the person whose negligence has to be determined differed from the conduct expected of the reasonable person."⁹⁷

It is plain to see that negligence is much easier for the State to prove than any form of intention.

4 2 Criminalising maternal substance abuse in terms of the Children's Act

4 2 1 Legality

If maternal substance abuse is to be criminalised, the principle of legality dictates that the law must recognise it as a crime.⁹⁸ The Children's Act already clearly defines abuse and neglect, and provides a sanction for those who commit these acts against children.⁹⁹ It has been suggested that the meaning of "abuse" or "neglect" under the Children's Act¹⁰⁰ could potentially be extended to include the harmful effects of maternal substance abuse.

In terms of the *ius strictum* requirement of the principle of legality, courts are expected to interpret the words and concepts in the definition of a crime in a strict rather than a broad sense.¹⁰¹ Therefore, if not provided for clearly in the definition of "abuse" and "neglect",¹⁰² a court may be prevented from extending these crimes to include maternal substance abuse.¹⁰³ Moreover, a strict interpretation of the meaning of "child" in terms of the Children's Act would exclude a foetus.¹⁰⁴ Ultimately also, a foetus does not possess legal

⁹⁵ Snyman *Criminal Law* 183; Burchell *Principles of Criminal Law* 416.

⁹⁶ Snyman *Criminal Law* 187; Burchell *Principles of Criminal Law* 419.

⁹⁷ Snyman *Criminal Law* 183; Burchell *Principles of Criminal Law* 419.

⁹⁸ Snyman *Criminal Law* 31; Burchell *Principles of Criminal Law* 35.

⁹⁹ S 305(3), (6) and (7) of the Children's Act.

¹⁰⁰ See s 1 of the Children's Act.

¹⁰¹ Burchell *Principles of Criminal Law* 40.

¹⁰² Snyman *Criminal Law* 36–39; Burchell *Principles of Criminal Law* 35.

¹⁰³ This was also evident in *Masiya v Director of Public Prosecutions*, Pretoria 2007 (5) SA 30 (CC) par 57, where the Constitutional Court stated that the accused could not be convicted of rape because, at the time of commission of crime, his conduct did not constitute rape, but only indecent assault. The ruling was based on the legal principle that crime cannot be created retrospectively.

¹⁰⁴ S 1 of the Children's Act.

subjectivity, which means that it generally does not have any legal rights, nor can it be the victim of any crime.¹⁰⁵

4 2 2 Conduct

As mentioned, criminalising maternal substance abuse in terms of the Children's Act could occur by including it as a form of abuse or neglect.¹⁰⁶ The element of conduct dictates that, to be convicted, a woman accused of maternal substance abuse will have to meet the definitional requirements of one of these crimes against her child.

Currently, the full definition of "abuse" in the Children's Act reads as follows:¹⁰⁷

"abuse" in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes—

- (a) assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;
- (c) bullying by another child;
- (d) a labour practice that exploits a child; or
- (e) *exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.*"

The Children's Act¹⁰⁸ defines "neglect" as:

"a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs."

One can safely argue that maternal substance abuse constitutes abuse or neglect insofar as it affects a child's physical, mental and psychological development *once born*.¹⁰⁹ However, it is debatable whether the definitions of abuse and neglect are broad enough to include either exposing or subjecting a *foetus* to behaviour that may harm the child once born, or failure to exercise parental responsibilities to provide for a child's basic needs *while still a foetus*. If so, conduct comprising maternal substance abuse will indeed comply with the definitions of abuse or neglect in terms of the Children's Act.¹¹⁰

4 2 3 Causation

The above definition of neglect and specifically subsection (e) of the definition of abuse in the Children's Act are both materially defined crimes that require a causal connection between the abusive/negligent conduct and

¹⁰⁵ *Christian Lawyers Association of SA v Minister of Health* 1998 (11) BCLR 1434 (T) 1436; *S v Mshumpa* 2008 (1) SACR 126 (E) 61–62, where the court made it clear that the killing of an unborn foetus did not constitute murder.

¹⁰⁶ Ss 1 and 7(l) of the Children's Act.

¹⁰⁷ S 1 of the Children's Act (own italics).

¹⁰⁸ S 1 of the Children's Act.

¹⁰⁹ Williams and Smith 2015 *American Academy of Pediatrics* 358.

¹¹⁰ S 1 of the Children's Act.

the emotional and psychological harm that follows. It follows, therefore, that should maternal substance abuse be included in the definition of abuse or neglect, this will trigger an investigation into the causal link between the act of consuming alcohol by an expectant mother and the subsequent psychological and emotional harm suffered by her child.

As discussed above,¹¹¹ the causal connection rule has undergone some development in civil law. Both *Pinchin*¹¹² and *Mtati*¹¹³ dealt with the causal link between harm done to a foetus in the womb and injuries sustained by the foetus pre-birth and by the child after live birth. In both instances, the court concluded that a claim for delictual damages would become possible where harm is inflicted on a foetus while in the womb, and where the child is then born alive suffering injuries as a result of such prenatal harm.¹¹⁴

Thus, if it is proved that a woman who consumed alcohol during her pregnancy gave birth to a child with FAS, the causal connection rule may be satisfied for purposes of prosecution in terms of the Children's Act.

4 2 4 *Unlawfulness*

To successfully prosecute a woman for maternal substance abuse (if it were to be criminalised as a form of abuse or neglect in terms of the Children's Act), there must be no justification for her conduct during her pregnancy. Like any other accused, a woman accused of maternal substance abuse would have certain grounds of justification at her disposal. For instance, a mother could potentially prove that she was forced to drink while held at gunpoint. In such a case, her conduct would have to comply with all the requirements of necessity to succeed.

4 2 5 *Criminal capacity*

In prosecuting maternal substance abuse as abuse or neglect under the Children's Act, the State would need to prove that the accused had the necessary criminal capacity at the time of consuming the alcohol. This would mean that, while she was drinking, she must have had the mental ability to appreciate the wrongfulness of her conduct, and to act in accordance with such appreciation of wrongfulness.¹¹⁵

4 2 6 *Culpability*

Based on the definition in the Children's Act,¹¹⁶ abuse is regarded as a deliberate act by the offender, who must have had a deliberate intention to harm or ill-treat the child. Therefore, for culpability to be present, the fault required is intention and not negligence.¹¹⁷ Should maternal substance

¹¹¹ See heading 3.

¹¹² *Supra* 275.

¹¹³ *Supra* 7–8.

¹¹⁴ *Pinchin supra* 275; *Mtati supra* 7–8.

¹¹⁵ Snyman *Criminal Law* 137; Burchell *Principles of Criminal Law* 251.

¹¹⁶ S 1 of the Children's Act.

¹¹⁷ Snyman *Criminal Law* 129; Burchell *Principles of Criminal Law* 341.

abuse be prosecuted as abuse in terms of the Children's Act, a mother would only be guilty of abuse if it is proved that she intended her alcohol consumption during pregnancy to result in her child being born alive with FAS. Consequently, an expectant mother who consumes alcohol without intending her baby to be born alive with FAS, or without at least foreseeing and accepting the harmful consequences of her actions (*dolus eventualis*), cannot be found guilty of abuse.

On the other hand, neglect is defined as the failure to exercise parental responsibilities to provide for a child's needs.¹¹⁸ In this instance, the fault required is negligence, which is determined based on the "reasonable person" test. This means that a conviction of neglect in the above scenario would be possible if the State can prove that a "reasonable mother" would not have consumed alcohol during pregnancy in the way that the woman accused of maternal substance abuse did.

4 3 Creating a new statutory crime for maternal substance abuse

If prosecution in terms of the Children's Act is not possible, the alternative way to criminalise maternal substance abuse would be to create a new statutory offence.

Again, the State would need to prove the presence of all six general elements of criminal liability to secure a conviction of such a newly defined crime.

4 3 1 Legality, conduct, unlawfulness and criminal capacity

In order to comply with the principle of legality, the legislature would have to clearly define the new crime in a statutory provision. Such new provision would need to contain both a criminal norm, stipulating the prohibited conduct, as well as a criminal sanction for contravention of the provision.

Regarding the conduct element, it would be best for the conduct to be criminalised in the form of a prohibition clause that unequivocally prohibits "the consumption of alcohol while pregnant".

In addition, the same rules regarding unlawfulness that apply to all other crimes would apply to the newly created statutory offence of maternal substance abuse. This implies that if a mother prosecuted for this crime manages to raise a successful ground of justification, it would render her conduct lawful.

Likewise, the State would need to prove that the mother had criminal capacity at the time of committing the offence of maternal substance abuse – in other words, that she was able to understand the wrongfulness of alcohol consumption while pregnant, and had the mental ability to act in accordance with such understanding.

¹¹⁸ S 1 of the Children's Act.

4 3 2 *Causation*

When considering the wording for a separate statutory crime of maternal substance abuse, the legislature would need to decide whether to create it as a formally or materially defined crime.

If a formally defined crime, the conduct of deliberate or negligent drinking during pregnancy would be sufficient for a conviction. However, should the legislature opt to create a materially defined crime, the State would bear the onus of proving that the child's physical or psychological harm was indeed caused by the mother's substance abuse during pregnancy. In this regard, the *Mtati* and *Pinchin* rulings, although dealing with the law of delict, have paved the way for this causal link to be proved.

4 3 3 *Culpability*

In terms of the fault or culpability element, the legislature would need to determine whether fault in the form of intention or negligence is required.

As mentioned above,¹¹⁹ the current offence of abuse in terms of the Children's Act requires fault in the form of intention ("deliberately inflicted"), while neglect requires negligence ("a failure"). Considering that negligence is far easier to prove, it may be wise to stipulate that a mother who *intentionally or negligently* consumes alcohol while pregnant would be guilty of the newly created crime of maternal substance abuse.

To test for negligence, the accused's actions will be compared to those of a "reasonable expectant mother". In this way, a woman who consumed alcohol during her pregnancy, thereby committing maternal substance abuse, will be found to have acted negligently in her act of consuming alcohol if it is clear that a reasonable woman would have acted differently or taken preventative steps.

4 3 4 *Potential phrasing*

Based on the above, a new, materially defined offence may be worded as follows:

"The deliberate or negligent consumption of alcohol, or any other, similarly harmful substance, by an expectant mother, knowing that she is pregnant and knowing the effect that the consumption may have on her unborn child, and which causes physical, psychological or emotional harm to her child once born, is a crime and is punishable with X, Y or Z."

Should the legislature choose to create a formally defined crime, this could read as follows:

"The deliberate or negligent consumption of alcohol or any other, similarly harmful substance by an expectant mother, knowing that she is pregnant and knowing the effect that the consumption may have on her unborn child, is a crime and is punishable with X, Y or Z."

¹¹⁹ See discussion under heading 4 2 6.

5 “PUNISHABLE WITH X, Y OR Z”: SENTENCING OPTIONS IN SOUTH AFRICA

Any inquiry into the feasibility of criminalising maternal substance abuse also needs to explore the available sentencing options should the conduct indeed be criminalised.

5.1 Sentences under the Criminal Procedure Act

The Criminal Procedure Act¹²⁰ allows for various sentences to be imposed, including imprisonment,¹²¹ a fine,¹²² committal “to any institution established by law”¹²³ and correctional supervision.¹²⁴

Imprisonment is considered non-optimal for perpetrators of maternal substance abuse, as the resultant separation could cause post-traumatic stress and anxiety disorders in children, even where the mother is considered a bad role model.¹²⁵ In addition, as many children are hesitant to have any contact with their mothers after imprisonment,¹²⁶ the family structure suffers irreparable harm, which goes against the aim of the Children’s Act to preserve and strengthen familial relationships.¹²⁷ It is also worth considering that many women who abuse alcohol during pregnancy face issues linked to their backgrounds, including mental illness, poverty or poor education.¹²⁸ Therefore, imprisoning these vulnerable members of our society would merely serve to punish them, without remedying their issues.

Imposing a fine would be equally inappropriate, as it offers the offender no rehabilitation or reintegration assistance.

A more workable alternative is committing these convicted mothers to an institution, established by law, which includes a treatment centre for alcohol and drug abuse.¹²⁹ The Prevention of and Treatment for Substance Abuse Act¹³⁰ regulates referrals to a treatment centre arising from a conviction in court, stipulating in section 36(1):

“A court convicting a person of any offence may in addition or in lieu of any sentence in respect of such offence order that such person be committed to a treatment centre if the court is satisfied that such person is a person

¹²⁰ 51 of 1977.

¹²¹ S 276(1)(b) of the Criminal Procedure Act.

¹²² S 276(1)(f) of the Criminal Procedure Act.

¹²³ S 276(1)(e) of the Criminal Procedure Act.

¹²⁴ S 276(1)(h) of the Criminal Procedure Act.

¹²⁵ Geldenhuys “When Mommy Goes to Prison” 2015 108(8) *Servamus* 24 24.

¹²⁶ Geldenhuys 2015 *Servamus* 26.

¹²⁷ S 2(a) of the Children’s Act.

¹²⁸ Jansen van Vuuren and Learmonth “Spirit(ed) Away: Preventing Foetal Alcohol Syndrome With Motivational Interviewing and Cognitive Behavioural Therapy” 2013 55(1) *South African Family Practice* 59 60–61.

¹²⁹ Ss 276(1)(e) and 296 of the Criminal Procedure Act.

¹³⁰ 70 of 2008.

contemplated in section 33(1)¹³¹ and such order, for the purposes of this Act, must be regarded as having been made in terms of section 35.”¹³²

The purpose of treatment centres is to rehabilitate and help reintegrate a substance abuser with society.¹³³ Therefore, it seems a feasible sentence for a woman convicted of maternal substance abuse,¹³⁴ affording her a chance to rehabilitate while maintaining ties with her children.

Another sensible option would be correctional supervision, where the offender is put under correctional officers’ control and the sentence is dependent on certain conditions.¹³⁵ This option would enable the offender to serve her sentence outside prison, undergo substance abuse treatment and receive further guidance on how to be a law-abiding citizen.

5.2 The diversion option

Diversion is the process of moving an accused *child* away from formal court procedures in a criminal matter¹³⁶ in order to find a constructive and more positive solution.¹³⁷ The Child Justice Act¹³⁸ defines a child as:¹³⁹

“any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2).”

Section 4(2), in turn, mandates the Director of Public Prosecutions to, among other options, consider for diversion those 18 years or older, but below 21. Therefore, this could serve as an alternative in dealing with women who abuse alcohol during pregnancy while under the age of 21.

The main purpose of a diversion order is to find a solution for child offenders without their receiving a criminal record. Other objectives include encouraging accountability for the harm caused, promoting reintegration with the family and community, preventing stigmatisation, reducing the chance of re-offending, and promoting a sense of dignity and self-worth in the offender.¹⁴⁰

¹³¹ Meaning “a person who is dependent on substances and – (a) is a danger to himself or herself or to the immediate environment or causes a major public health risk; (b) in any other manner does harm to his or her own welfare or the welfare of his or her family and others; or (c) commits a criminal act to sustain his or her dependence on substances”.

¹³² Which governs the committal of persons to treatment centres after an inquiry.

¹³³ S 2(d) of the Prevention of and Treatment for Substance Abuse Act.

¹³⁴ S 36(1) of the Prevention of and Treatment for Substance Abuse Act.

¹³⁵ Department of Correctional Services “Community Corrections” (2019) www.dcs.gov.za/?page_id=317 (accessed 2019-10-10).

¹³⁶ S 1 of the Child Justice Act 75 of 2008.

¹³⁷ Western Cape Government “What Is Diversion?” (2019) <https://www.westerncape.gov.za/general-publication/what-diversion> (accessed 2021-11-09).

¹³⁸ 75 of 2008.

¹³⁹ S 1 of the Child Justice Act.

¹⁴⁰ S 51 of the Child Justice Act.

Interestingly, a recent trend is also to provide diversion as an “alternative sentencing option” for adult offenders who commit minor offences.¹⁴¹ This is normally aimed at first-time offenders who admit guilt, with the purpose of reintegrating them into society as law-abiding citizens,¹⁴² and may be an option to consider should maternal substance abuse be criminalised in South Africa. Diversion of adult offenders who have committed minor offences is done with the consent of the Director of Public Prosecutions.¹⁴³

6 CURRENT LEGAL POSITION ON MATERNAL SUBSTANCE ABUSE IN THE UNITED STATES

While it is conceded that a comparative look at other Commonwealth legal systems would have been more appropriate than a comparison with the United States, no case of maternal substance abuse or its criminalisation has been documented in Commonwealth systems to date. The current trend in some American states, however, is to prosecute women who are proved to have harmed their children by consuming alcohol and/or taking drugs during pregnancy.¹⁴⁴ The paragraphs below offer a brief outline of the law in two of these states, as well as a ground-breaking federal statute.

6.1 Federal law: The Unborn Victims of Violence Act of 2004¹⁴⁵

The Unborn Victims of Violence Act, which took effect on 1 April 2004, treats crimes perpetrated against a woman and against her unborn child as separate offences.¹⁴⁶ The law came about in response to a public outcry after a man murdered his pregnant wife.¹⁴⁷ The accused was not convicted of any crime regarding the death of the foetus.¹⁴⁸

Both subsections 1841(a)(1) and 1841(2)(A) state that a person who causes bodily harm or death to a foetus will be guilty of an offence separate to any offence relating to harming the mother, which separate offence will be subject to the same punishment as would be apply to harm done to the mother.

¹⁴¹ Western Cape Government “Diversion Programmes for Adults in Conflict With the Law” (2019) <https://www.westerncape.gov.za/service/diversion-programmes-adults-conflict-law> (accessed 2021-12-14).

¹⁴² Schüler Heerschop Pienaar “Diversion: The Role of Diversion in South African Law” (2019) <http://www.shplaw.co.za/index.php/blog/22-diversion-the-role-of-diversion-in-south-african-law> (accessed 2021-12-14).

¹⁴³ Schüler Heerschop Pienaar <http://www.shplaw.co.za/index.php/blog/22-diversion-the-role-of-diversion-in-south-african-law>.

¹⁴⁴ Boudreaux and Thompson “Maternal-Fetal Rights and Substance Abuse: Gestation Without Representation” 2015 43(2) *Journal of the American Academy of Psychiatry and the Law* 137 137–138.

¹⁴⁵ Pub.L. 108–212.

¹⁴⁶ Wilmering “Federalism, the Commerce Clause and the Constitutionality of the Unborn Victims of Violence Act of 2004” 2005 80(4) *Indiana Law Journal* 1189 1190.

¹⁴⁷ Boudreaux and Thompson 2015 *Journal of the American Academy of Psychiatry and the Law* 139.

¹⁴⁸ Similar to the South African matter of *S v Mshumpa* 2008 (1) SACR 126 (E) 126.

The important contribution of this statute is that it essentially provides for crimes against a foetus, an area of the law that has been hotly contested.¹⁴⁹ South Africa, in turn, does not recognise the unborn child as a separate being from its mother, as a foetus cannot be the bearer of the rights and duties afforded to natural persons.¹⁵⁰ Therefore, providing for crimes against unborn children in South African law would require the definition of a person to be extended to include an unborn child. Such a step would be inadvisable, as it would have disastrous consequences for abortion laws and women's rights.¹⁵¹ However, the United States statute does point to the possibility of criminally prosecuting South African mothers whose children are born alive (and thus enjoy legal subjectivity) and present with the adverse effects of maternal substance abuse.

The Unborn Victims of Violence Act has to date not been directly applied to instances of maternal substance abuse. However, as the following sections will show, the states that have incorporated the federal legislation into their own codes have extended the aims of the Unborn Victims of Violence Act to provide for the prosecution of expectant mothers who abuse alcohol.¹⁵²

6 2 State law: Alabama

6 2 1 Alabama's chemical endangerment law¹⁵³

Alabama's Code¹⁵⁴ includes the 2006 law entitled Chemical Endangerment of a Child, more commonly known as the chemical endangerment law.

In terms of this law, a child is defined as anyone below the age of 18.¹⁵⁵ On the issue of exposing a child to an environment where controlled substances are produced or distributed,¹⁵⁶ the law states:¹⁵⁷

- “(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:
1. Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260. A violation under this subdivision is a Class C felony.
 2. Violates subdivision (1) and a child suffers serious physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled

¹⁴⁹ Wilmering 2005 *Indiana Law Journal* 1201.

¹⁵⁰ Mankga “Nasciturus Fiction and the Principles of the Law of Delict Considered in the Light of a Recent Judgement” 2008 48(2) *Codicillus* 50 50.

¹⁵¹ *Christian Lawyers Association of SA v Minister of Health* 1998 (11) BCLR 1434 (T) 1439.

¹⁵² Boudreaux and Thompson 2015 *Journal of the American Academy of Psychiatry and the Law* 139.

¹⁵³ Chemical Endangerment of Exposing a Child to an Environment in Which Controlled Substances Are Produced or Distributed, Alabama Code S 26-15-3.2.

¹⁵⁴ Code of Alabama 1975.

¹⁵⁵ S 26(1) of the Alabama Code.

¹⁵⁶ *Ibid.*

¹⁵⁷ Ss 26(15)(1), (2) and (3) of the Alabama Code.

- substance, chemical substance, or drug paraphernalia. A violation under this subdivision is a Class B felony.
3. Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child. A violation under this subdivision is a Class A felony.
 - (b) The court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.
 - (c) It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance.”

Originally, the chemical endangerment law dealt with the endangerment of children once born. However, in recent times, Alabama has extended its application to include unborn children exposed to illicit substances while still in the womb, as is evident from the trend of criminalising maternal substance abuse in that state.¹⁵⁸ This is illustrated in the following discussion of *Hicks v State of Alabama (Hicks)*.¹⁵⁹

6 2 2 *Hicks v State of Alabama*

The *Hicks* matter involved a mother who was convicted in terms of Alabama’s chemical endangerment law of the chemical endangerment of her child while still a foetus. Having pleaded guilty, the mother was sentenced to three years’ imprisonment, which was suspended, and she ultimately spent a year on supervised probation.¹⁶⁰ In the year of her probation, she appealed to the Supreme Court of Alabama.¹⁶¹

Hicks was charged with the chemical endangerment of her child after she was found to have ingested cocaine during her pregnancy.¹⁶² Upon birth, her child had traces of cocaine in his system.¹⁶³ The issue in question was whether or not *Hicks*’s cocaine use during her pregnancy constituted the chemical endangerment of a *child*, as she maintained that the definition of a child did not extend to a foetus.¹⁶⁴

The case was brought on appeal on one aspect only, namely whether *Hicks*’s conduct constituted chemical endangerment.¹⁶⁵ In arguing on *Hicks*’s behalf, counsel made it clear that the legislature had not intended to extend the meaning of child to an unborn foetus, as this would constitute bad public policy.¹⁶⁶ Yet the court of appeal ultimately found that a viable foetus was

¹⁵⁸ Boudreaux and Thompson 2015 *Journal of the American Academy of Psychiatry and the Law* 139; Calhoun 2012 “The Criminalization of Bad Mothers” (29 April 2012) <https://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html> (accessed 2021-10-14).

¹⁵⁹ *Hicks v State of Alabama* 2014 153 So.3d 53.

¹⁶⁰ *Hicks supra* 56.

¹⁶¹ *Hicks supra* 55.

¹⁶² *Hicks supra* 56.

¹⁶³ *Ibid.*

¹⁶⁴ *Hicks supra* 55.

¹⁶⁵ *Hicks supra* 57.

¹⁶⁶ *Ibid.*

included in the definition of a child,¹⁶⁷ insisting that children are to be offered protection from their earliest stages, which included protecting a viable foetus from chemical endangerment.¹⁶⁸

While the notion of extending protection to a foetus is still foreign in South African law, the implications of Alabama's chemical endangerment law and the *Hicks* case point to an important shift in perspective, namely that exposing a foetus to substances in the womb can in fact be regarded as a crime¹⁶⁹ once the child is born alive.

6 3 State law: South Carolina

6 3 1 Applicable legislation

South Carolina provides for children's rights in terms of its Children's Code;¹⁷⁰ a child is defined there as a person below the age of 18.¹⁷¹ Child abuse or neglect is defined as follows:¹⁷²

"Child abuse or neglect' or 'harm' occurs when

- (a) the parent, guardian, or other person responsible for the child's welfare:
 - (i) *inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child,*¹⁷³ including injuries sustained as a result of excessive corporal punishment, but excluding corporal punishment or physical discipline which:
 - (A) is administered by a parent or person in loco parentis;
 - (B) is perpetrated for the sole purpose of restraining or correcting the child;
 - (C) is reasonable in manner and moderate in degree;
 - (D) has not brought about permanent or lasting damage to the child; and
 - (E) is not reckless or grossly negligent behaviour by the parents."

The Code further prohibits unlawful conduct towards a child, stating the following:¹⁷⁴

- (A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
 - (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;

¹⁶⁷ *Hicks supra* 59–60.

¹⁶⁸ *Hicks supra* 66.

¹⁶⁹ Prinsloo and Ovens 2015 *Child Abuse Research: A South African Journal* 158.

¹⁷⁰ 2020 South Carolina Code of Laws Title 63 South Carolina Children's Code.

¹⁷¹ S 63-7-20(5) of the South Carolina Children's Code.

¹⁷² S 63-7-20(6) of the South Carolina Children's Code.

¹⁷³ Own italics.

¹⁷⁴ S 63-5-70 of the South Carolina Children's Code.

- (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
- (3) wilfully abandon the child.
- (B) A person who violates subsection (A) is guilty of a felony and for each offense, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.”

6 3 2 *Whitner v State of South Carolina*¹⁷⁵

In the *Whitner* case, a woman pleaded guilty of committing child neglect,¹⁷⁶ after she had used crack cocaine in the third trimester of her pregnancy.¹⁷⁷ Upon birth, her child tested positive for the drug and Whitner was convicted and sentenced to eight years’ imprisonment.¹⁷⁸

The main issue raised on appeal was whether, in determining child neglect, a child included a viable foetus.¹⁷⁹ The Supreme Court of South Carolina answered this question by examining the definition of a child in the Children’s Code, namely anyone “under the age of 18”.¹⁸⁰ This, the court held, provided sufficient scope to extend the meaning of a child to a viable foetus.¹⁸¹ The court further based this finding on the fact that South Carolina did in fact grant viable foetuses certain rights and privileges.¹⁸² These rights and privileges, and the scope of child neglect, included protecting viable foetuses from maternal substance abuse during pregnancy.¹⁸³

Whitner’s appeal was denied, and she was prosecuted for child neglect instead of a separate crime of maternal substance abuse.¹⁸⁴

7 CONCLUSION AND RECOMMENDATIONS

Dealing with the issue of maternal substance abuse going forward, South Africa has two options – either to maintain the status quo or follow the example of the American states above and criminalise maternal substance abuse.

Maintaining the status quo will merely result in a further increase in the already high rate of FAS in the country. Moreover, the decision in *Minister of Justice and Constitutional Development v Prince*¹⁸⁵ may exacerbate matters, as the legalised private use of marijuana during pregnancy has not yet been

¹⁷⁵ *Whitner v State* 328 S.C. 1, 492 S.E.2d 777 (1997).

¹⁷⁶ S 63-5-70 of the South Carolina Children’s Code.

¹⁷⁷ *Whitner supra* 778–779.

¹⁷⁸ *Whitner supra* 779.

¹⁷⁹ *Whitner supra* 780–781.

¹⁸⁰ *Whitner supra* 779.

¹⁸¹ *Whitner supra* 779–781.

¹⁸² *Whitner supra* 779.

¹⁸³ *Ibid.*

¹⁸⁴ *Whitner supra* 786.

¹⁸⁵ [2018] ZACC 30. The court found it unconstitutional for the State to criminalise the possession, use or cultivation of marijuana (or “cannabis”) by adults for personal consumption in private.

regulated.¹⁸⁶ In our view, this renders the criminalisation of maternal substance abuse in South Africa the most feasible option.

South African children are afforded protection against abuse and neglect in terms of the Children's Act.¹⁸⁷ Despite a current lack of local case law to support this, the prosecution of mothers who abuse substances while pregnant and then give birth to children suffering physical or psychological harm as a result of the abuse could potentially occur within the ambit of the Act's protection against abuse and neglect. Following this route, however, one would be up against certain challenges associated with the principle of legality.¹⁸⁸

Alternatively, the legislature could opt for a new statutory offence to address the issue of maternal substance abuse independently. In this regard, criminalising maternal substance abuse as a materially defined crime¹⁸⁹ would be the best route to follow so as to restrict prosecution to instances where maternal substance abuse does in fact result in FAS-like effects in a child upon birth.

Of course, once criminalised, the newly created statutory offence of maternal substance abuse would require a suitable sentence. Considering that substance abuse during pregnancy is often linked to the mother's circumstances, including mental illness, poverty or a lack of proper education,¹⁹⁰ a prison sentence does not seem appropriate. Exploring the alternative sentencing options provided for in South Africa, it is concluded that referral to a rehabilitation centre or diversion would be the most suitable sanction. Diversion offers the added benefit that the maternal substance abuser is afforded access to suitable treatment and education programmes and does not end up with a criminal record.

In conjunction with South Africa's current substance abuse laws, organisations such as the non-governmental organisation FASfacts, which was established in 2002, could prove extremely valuable in providing alternatives to imprisonment for women who commit maternal substance abuse. The organisation educates the public, with a specific focus on rural and farming communities, on what FAS is and the dangers of alcohol consumption while pregnant and breastfeeding.¹⁹¹ The FASfacts programme is threefold, comprising (a) training of community mentors to support pregnant women, and so prevent them from drinking while pregnant, (b) presenting day-long awareness sessions on domestic violence and substance abuse, and (c) providing counselling to community members at risk of or affected by substance abuse.¹⁹² The programme has helped lower

¹⁸⁶ *Minister of Justice and Constitutional Development v Prince supra* par 129.

¹⁸⁷ S 1 of the Children's Act.

¹⁸⁸ See discussion under heading 4 2 1.

¹⁸⁹ See discussion under heading 4 3 4.

¹⁹⁰ Jansen van Vuuren and Learmonth 2013 *South African Family Practice* 60–61.

¹⁹¹ Western Cape Government "Foetal Alcohol Syndrome Awareness Programme" (2019) <https://www.westerncape.gov.za/general-publication/foetal-alcohol-syndrome-awareness-programme> (accessed 2021-11-08).

¹⁹² Western Cape Government <https://www.westerncape.gov.za/general-publication/foetal-alcohol-syndrome-awareness-programme>.

FAS rates in the Western Cape by equipping rural communities most affected by FAS with the tools to battle this highly preventable problem.¹⁹³

Developments in American federal and state law bode well for a decision to criminalise maternal substance abuse in South Africa as well. As illustrated by the case law discussed in this article,¹⁹⁴ maternal substance abusers in the United States may be prosecuted for a specific statutory offence¹⁹⁵ or general child neglect.¹⁹⁶ However, while imprisonment was imposed in the sample cases from the United States, the overcrowded conditions in South Africa's prisons coupled with the largely socio-economic causes of maternal substance abuse in our local context justify the alternative sentencing options proposed above. In addition, the courts in the United States seem to have readily accepted the view that fetuses should be afforded the same protection as children. As this would stir up a hornet's nest in terms of the abortion debate and the legal status of a foetus in South Africa, following the American example in this respect is not recommended. However, this challenge can be overcome by criminalising maternal substance abuse as suggested above – that is, by providing for prosecution only where the affected child is born alive and presents with FAS-like symptoms.

Criminalising maternal substance abuse may cause expectant mothers to think twice before they use alcohol or other harmful substances during pregnancy. Although this proposed approach will undoubtedly have its critics and challenges, it remains a much better option than turning a blind eye to this growing problem.

¹⁹³ *Ibid.*

¹⁹⁴ See discussion under headings 6.2.2 and 6.3.2.

¹⁹⁵ *Hicks supra*. Also see *TW v Calhoun County Department of Human Resources* 206 (361) 2016.

¹⁹⁶ *Whitner supra*.