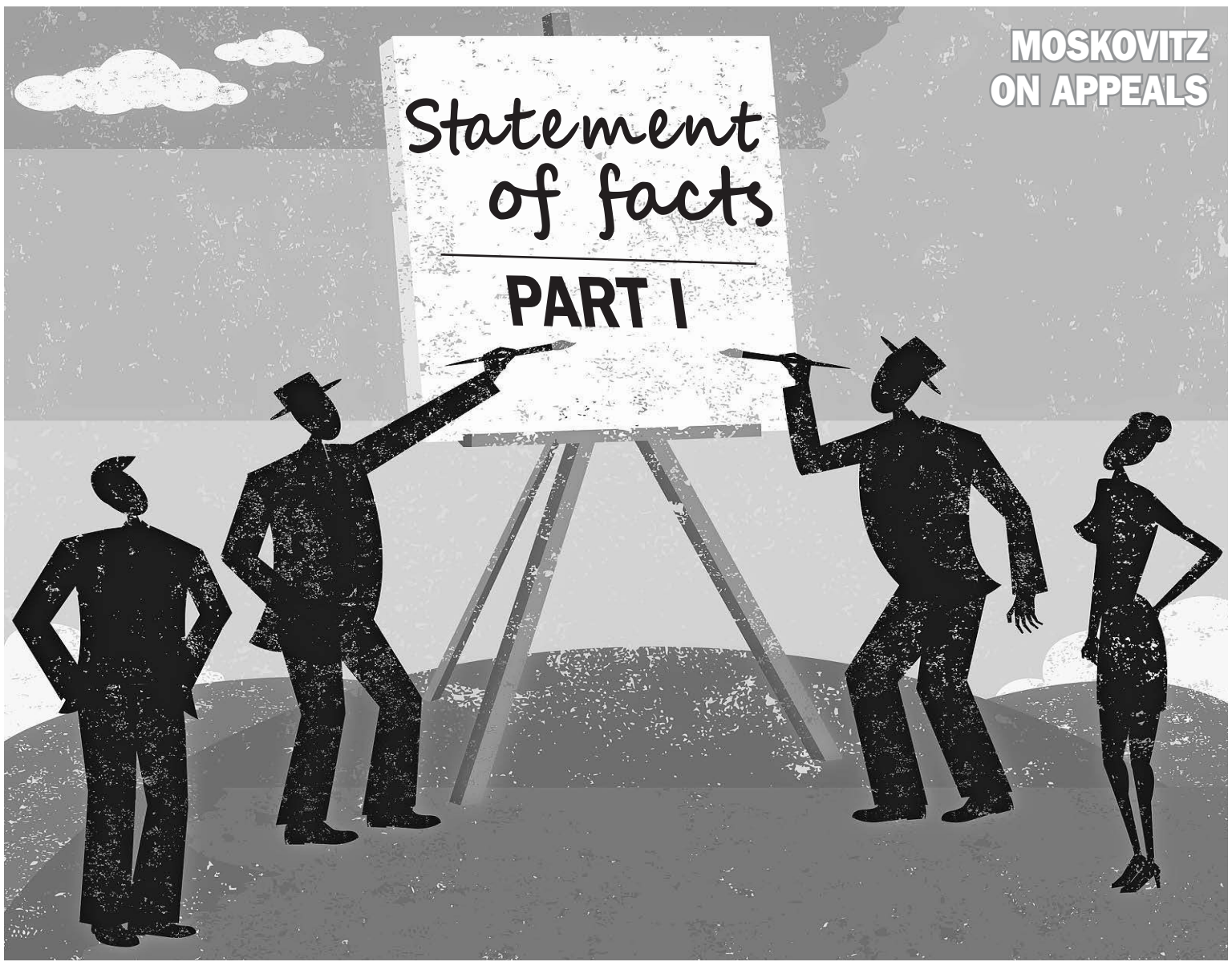

By Myron Moskovitz

An appellate brief (and most trial briefs) should include both procedural facts and substantive facts, each in a separate section.

The *procedural* facts are usually stated first, in a section headed "statement of the case" or "procedural facts." This should include all the facts about the procedural history of the case that will help the appellate court decide the issues you raise in this appeal.

Begin with a short description of the *complaint*, and end with the *notice of appeal*. In between, describe each procedural event that is relevant to the issues on appeal. After every sentence, cite the pages (and lines) of the record that support that sentence.

Summarize the allegations of the "operative" complaint — the version that was the basis for the judgment or order you are appealing. If the original complaint was amended a couple of times before the third amended complaint led to the summary judgment you are appealing, summarize only the third one, not the first two. The third is the one that counts in the appeal.

State the name of each party to the appeal and the position (appellant, respondent, etc.) he or she occupies. From then on, it's usually best to refer to each party *by name* rather than by position. That makes it easier on the reader, who might forget which party is "appellant" and which is "respondent," or which is "plaintiff" and which is "defendant." It also tends to humanize the case, which helps a bit when your client is a human rather than a corporation.

Which Procedural Facts to Include

Lawyers tend to clutter up this part of the brief with procedural facts that are irrelevant to the issues on appeal. There is no need (and no requirement) that you tell the appellate court everything that happened in the trial court. Stick to what matters *in this appeal*.

Suppose you are appealing after a jury verdict against your client in a negligence case, and your only claim is that some rulings on evidentiary issues were erroneous. State when the original complaint was filed, what the operative complaint alleged, what the answer alleged, when the case went to trial and the verdict. There is usually no need to discuss rulings on demurrers, discovery motions and the like.

Here's something I often see in briefs I review: "The hearing on the motion was originally set for May 1, but the trial court continued the hearing until May 2." Who cares? If it has nothing to do with the appeal, leave it out.

You might, however, include procedural facts that — while not directly relevant to the appeal — tend to make your client look a little better, your opponent look a little worse, or the trial court somewhat biased or incompetent. If demurrers to your opponent's complaints were sustained four times before he got it right, say so, as it just might make the appellate judge a bit skeptical when he reads your opponent's brief.

Ditch the Dates

Lawyers love dates. They include the date of every motion, every ruling, and every time the trial judge burped. And, apparently fearing jail time if they are a day off, they usually add "on or about."

Why? Probably because everyone else does it, or from unthinking habit. But all this does is annoy, bore, and confuse the reader, who thinks "Why did the lawyer include this date? Do I need to remember it?"

Drop the excessive dates. All they do is clutter up your brief with distracting fluff.

There are only three dates I include in every appellant's opening brief: (1) the date the complaint was filed, (2) the date of the order or judgment you are appealing from, and (3) the date the notice of appeal was filed. Number one lets the justice know how old the case is, and numbers two and three lets her know that she has jurisdiction to hear the appeal.

Beyond those three dates, I include a date only if I have a good reason to include it. For example, if one of my arguments will be that a motion for new trial was filed after a statutory deadline, I include the date it was filed (along with the statutory deadline).

How to Persuade in Your Statement of Procedural Facts

I try to persuade in every part of my brief. That does not mean that I explicitly *argue* in places one is not supposed to argue - such as the Statement of Facts. So how can you persuade if you don't argue? By including persuasive facts.

Sometimes simply *juxtaposing* two facts demonstrates the injustice of what the trial court did. For example, "Plaintiff's counsel supported his motion to continue the trial with his uncontested sworn declaration stating that his 3-year-old daughter has just fallen off a roof and suffered a severe brain injury that required emergency surgery. Nevertheless, without explanation, the court denied the motion." No argument, just facts - but who needs argument with facts like these?

Sometimes I'll include a *short quote* from an argument trial counsel made in a memo of points and authorities or at an oral argument on a motion, where the quote supports an argument I plan to make in the argument section of my brief. I do this only if the quote is both short and persuasive. This helps me show the "justice" argument very early to the appellate judge — without explicit arguing — and in a voice somewhat different from mine. And it shows that the trial court had a chance to deal with this argument, so I'm not just Monday-morning quarterbacking.

In the next few columns, I'll discuss how to present the *substantive* facts.

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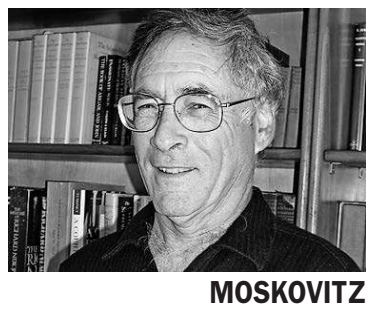


MOSKOVITZ

How American law can make mothers legal targets

By Linda C. Fentiman

In her new book "Blaming Mothers," law professor Linda Fentiman explores how mothers became legal targets. She explains the psychological processes we use to confront tragic events, and the unconscious race, class and gender biases that affect our perceptions and influence the decisions of prosecutors, judges and jurors. For instance, she writes about a Utah woman who was charged with murder when she declined to have a Caesarian section and then delivered a stillborn child. In the following excerpt, she discusses how pregnant women are stripped of their right to make end-of-life decisions.

BOOK EXCERPT

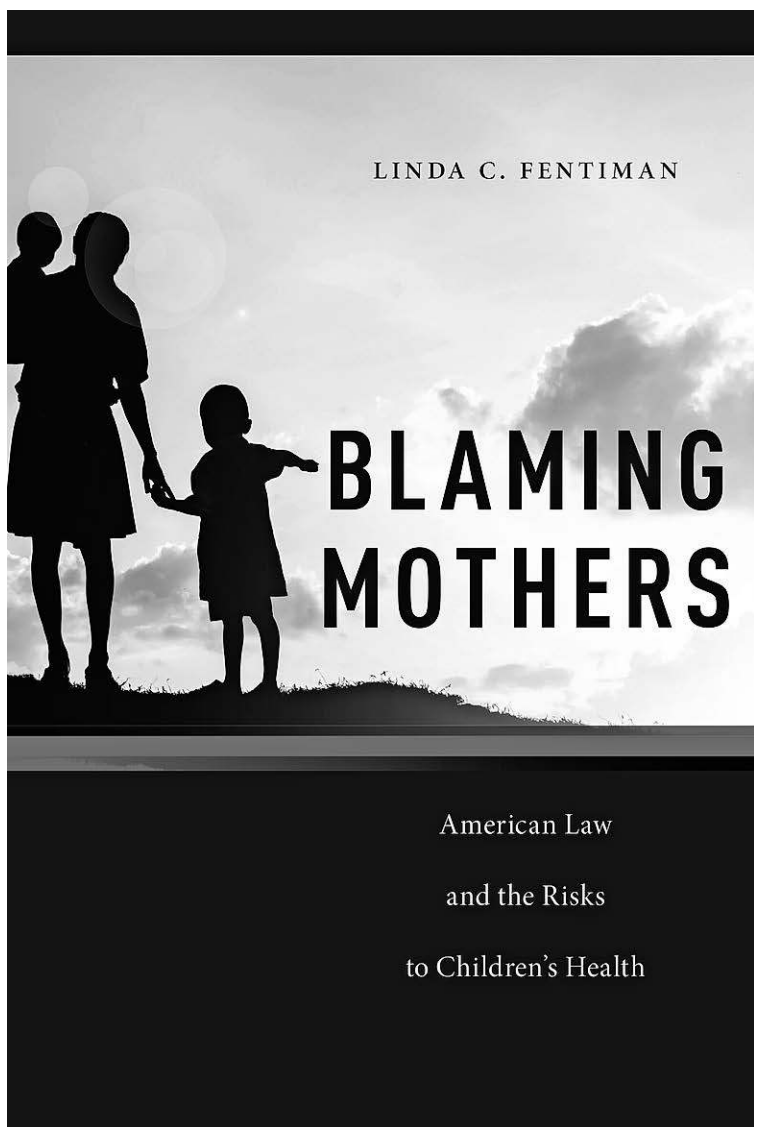
In the forty-four years since *Roe v. Wade* was decided its opponents have sought multiple legal end-runs around it. A primary strategy has been to enact laws that grant fetuses "personhood" rights. As a result, pregnant women have been charged with murder and other crimes for engaging in behavior that has allegedly harmed the fetus. When the case of Bei Bei Shuai, an Indiana woman who was charged with murder and attempted feticide in 2010, garnered national media attention, many Americans saw these laws in action for the first time. Yet, few of us realize how far this legislative activism has gone and how many forms it takes. In addition to the laws that ensnare women like Ms. Shuai, in many states it is also legal to nullify a pregnant woman's advance medical directive and, in essence, strip her of her fundamental right to make end-of-life decisions throughout her pregnancy, all in the name of fetal rights.

FENTIMAN

Every state authorizes and encourages competent adults to use "advance directives," "living wills," or "health care proxies," which enable them to express in writing their wishes for future medical care in the event that they become unable to voice those wishes themselves. These laws were a response to judicial decisions in the 1980s and '90s, when courts were asked to make end-of-life decisions for formerly competent adults who had not documented their wishes in writing. They stem from American law's emphasis on individual autonomy and self-determination, which is reflected in the doctrine of informed consent. Advance medical directives provide welcome and explicit guidance to family members and physicians about the kind of care that the person would choose if he or she were able to do so.

However, more than half of the states have enacted laws that invalidate advance directives if the woman is pregnant, once again privileging fetal health over women's health and autonomy. In twelve states a woman's advance directive is unenforceable throughout her pregnancy, simply because of that biological status. Texas is one of these states; its advance directive law provides that life-sustaining treatment may not be withdrawn or withheld from a pregnant patient. In fourteen additional states the woman may have her treatment wishes overridden if it is probable that her pregnancy will progress to a live birth, and four more states suspend the implementation of an advance directive if the fetus is currently viable or likely to become viable. Another fourteen states' statutes are silent on the impact of pregnancy. In these states a pregnant woman's family cannot determine the enforceability of an advance directives without time- consuming and emotionally exhausting litigation. Only five states' laws provide that the choices made by a woman in her advance directive will always be honored and explicitly offer her the opportunity to express her wishes about treatment while pregnant.

The legality of statutes prohibiting the enforcement of pregnant women's advance directives has rarely been litigated. In January 2014, a Texas man, Erick Muñoz, challenged the application of the Texas advance directive law to his wife, Marlise Muñoz, who had collapsed from a stroke when she was fourteen weeks' pregnant with the couple's second child. Mrs. Muñoz's collapse was not discovered for an hour or more; during that time she stopped breathing. After she was brought to the county hospital, doctors were unable to restore her to consciousness. Doctors determined that she was brain-dead and they were concerned that her fetus had also suffered irreversible damage to the brain and other organs, because of the length of time the fetus was deprived of oxygen. However, the hospital decided not to "pronounce" Mrs. Muñoz dead because of its concerns about the pregnancy exclusion in the Texas advance directive law. The hospital interpreted the Texas law's mandate that life-sustaining treatment may not be withdrawn or withheld from a pregnant patient as requiring the hospital to maintain Mrs. Muñoz on life support even though she was brain-dead. Mrs. Muñoz had been a paramedic, along with her husband; both her husband and her parents asserted that she would not have wanted to be maintained on a ventilator if there was no chance that she could be restored to consciousness. Only after the case gained national attention and Mr. Muñoz sued the hospital did a Texas trial judge order that Mrs. Muñoz be removed from the ventilator, because she was in fact dead. The judge declined to rule on the Texas law's legality or constitutionality, declaring only that the law was inapplicable because Mrs. Muñoz was dead and the law applied only to living patients.



The judge's opinion itself became a hot-button issue in the Texas primary election race that occurred shortly thereafter. Every Republican candidate for lieutenant governor criticized the decision, seeking, as one reporter declared, to "burnish[ ] their pro-life credentials." The comments of state senator Dan Patrick, who was later elected lieutenant governor, were typical. He declared, "Life is so precious and there's nothing more precious than the life of a baby in the womb." Indeed, the basic tenet of abortion foes appears to be that the fetus' interest in potential life should always prevail over a woman's right to health and to make autonomous medical decisions.

Thirty years earlier, another dead woman's body was mechanically sustained in order to promote fetal life. In 1986, a pregnant Georgia woman, Donna Piazzi, was declared brain-dead after an apparent suicide attempt, but the hospital refused to accede to her husband's request to remove her from life support, after her paramour (and apparent biological father of the fetus) objected. The hospital petitioned a court to continue treatment and the court agreed, determining that even if Mrs. Piazzi had executed an advance directive, it would not be enforceable under Georgia law. The court ordered Mrs. Piazzi to remain on life support until she could gestate and deliver a living child. When the fetus' condition deteriorated at about twenty-five weeks of pregnancy it was delivered by caesarean section; it lived for less than forty-eight hours. Thereafter Mrs. Piazzi was removed from life support and allowed to die.

Yet when women have asked judges to invalidate state laws making their advance directives inoperative during pregnancy they have been unsuccessful. In two cases, brought in North Dakota and Washington, the courts rejected lawsuits challenging these state laws. In both cases the courts found that because the women were currently healthy, mentally competent, and not pregnant there was no actual "case and controversy." Laws that authorize a "pregnancy exclusion" to women's advance medical directives are objectionable because they impose other people's views about the risks that pregnant women should be willing to accept in order to avoid any risk of fetal harm, totally disempowering women who seek to control their medical treatment. These laws enshrine a paternalistic view of women, directly overruling any other choice the woman has made. In essence, laws invalidating the advance medical directives of pregnant women assert that any reasonable woman would choose to receive medical treatment, no matter how invasive, painful, or futile, in order to give her fetus a chance at life. They are eerily reminiscent of the tragedy of Angela Carder, the young Washington D.C. woman at the center of *In re A.C.*, who had survived cancer only to have it return mid-pregnancy, and the many other women who have been compelled to undergo a caesarean section rather than choose the method of delivery that reflects their medical preferences and personal values.

*Excerpted with permission from "Blaming Mothers: American Law and the Risks to Children's Health," by Linda C. Fentiman (NYU Press 2017).***man** *is a professor at Pace University School of Law.*