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## Articles

### CRACK BABIES AND THE CONSTITUTION: RUMINATIONS ABOUT ADDICTED PREGNANT WOMEN AFTER *FERGUSON V.* *CITY OF CHARLESTON*

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#### I. INTRODUCTION

WHAT should society do in response to a pregnant woman who uses crack?<sup>1</sup> The dangers to the fetus in such cases vary from no addic-

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1. The current response to this problem is to criminally prosecute pregnant women for using crack. This ignores the effects of other illegal drugs and alcohol on the fetus, even though they can be just as damaging to the fetus and have long-reaching effects on children. See LAURA E. GOMEZ, *MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE* 137 nn.8-9 (1997). Although popular pregnancy books discuss the effect of prescription drugs, alcohol, tobacco and the work place environment on the fetus, our legal system has focused on the use of crack cocaine. See *id.* at 12-13 (stating that "among hard drugs currently popular in the United States, cocaine has generated more popular, political, and media concern than other illicit drugs"). The use of other illegal drugs by pregnant women, including heroin, which is considered more dangerous than crack, does not receive the same attention from the media and the legal system. See *id.* at 13 (noting that "while heroin is widely recognized to be a more dangerous drug than cocaine, its use and abuse does not generate the same elite or popular concern"). Furthermore, since legislation and prosecutorial action focus on pregnant women addicts, there is little attention paid to the use of drugs by men and the possible implication this may have on the fetus. Studies are not conducted in this area, and therefore, we cannot determine if the focus of legislation and prosecution needs to be shifted. See Mary Becker, *Reproductive Hazards After Johnson Controls*, 31 *HOUS. L. REV.* 43, 52 (1994) (noting that be-

tion, to mild dependency, to severe neurological damage and convulsions or even death.<sup>2</sup> Most people's initial reaction is revulsion—how can a woman expose her unborn child to such serious risks? This often triggers retributive notions of justice, which call for imprisonment and punishment of the woman.<sup>3</sup> On the other hand, pro-choice advocates see such coercive tactics as undermining the right to privacy.<sup>4</sup>

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cause few studies have been done on potential male reproductive hazards, exact risk of exposure from toxic agents to both male and female is unknown, and therefore, causation of fetal injury is difficult to prove).

2. The results of medical studies examining the use of crack and other drugs by a pregnant woman on the unborn fetus are conflicting. Some doctors report that the use of illegal drugs by pregnant women can cause severe damage to the fetus causing the child to be born with various neurological and physical defects, such as cerebral hemorrhaging, prenatal strokes, birth defects, neonatal growth retardation and fine motor disorders. See Enid Logan, *The Wrong Race, Committing Crime, Doing Drugs, and Maladjusted for Motherhood: The Nation's Fury Over "Crack Babies"*, SOC. JUST., Summer 1999, at 115 (stating that race, gender and class oppression influence drug use, thereby affecting phenomenon of "crack baby"). Early studies also indicated negative long-term effects on the child. Researchers believed that crack babies grew up to be abnormal. They also found evidence that something was missing from their brains, stating that, "in crack-babies, the part of their brains that 'makes us human beings, capable of discussion or reflection' has been 'wiped out.'" *Id.* at 117 (quoting Katharine Greider, *Crackpot Ideas*, MOTHER JONES, July/Aug. 1995, at 52, 53). On the other hand, more recent studies and programs demonstrate that any developmental delays suffered by children at birth can be overcome within several years and that "crack babies" can be normal children and adults. See Lawrence M. Berger & Jane Waldfogel, *Prenatal Cocaine Exposure: Long-Run Effects and Policy Implications*, 74 SOC. SERV. REV. 28, 30-31 (2000) (noting that outcomes associated with prenatal exposure can be overcome through competent caregiving in appropriate environment); Wendy Chavkin, *Cocaine and Pregnancy: Time to Look at the Evidence*, 285 JAMA 1626 (2001) (noting that "the data are not persuasive that in utero exposure to cocaine has major adverse developmental consequences . . ."); Meredith Cosden et al., *Effects of Prenatal Drug Exposure on Birth Outcomes and Early Child Development*, 27 J. DRUG ISSUES 525 (1997) (stating that many infants exposed in utero have normal birth outcomes).

3. See GOMEZ, *supra* note 1, at 27-40.

4. See *id.* at 38-39. Pro-choice advocates, however, are also concerned with the effect of drugs on the unborn fetus and do offer other suggestions as to how society might deal with the problem. In California, pro-choice advocates sponsored legislation supporting educational services and drug treatment programs as a means of reducing the number of children born addicted to drugs. For example, California state representative, Jackie Speier, a pro-choice advocate, sponsored four bills regarding drug exposure to the fetus, but none were of a punitive nature. See *id.* at 38 (noting that Jackie Speier associated her pro-choice position with issue of prenatal drug exposure).

Several states have tried to charge such women with either distribution of drugs to a minor,<sup>5</sup> criminal child abuse<sup>6</sup> or homicide<sup>7</sup> based on the use of illegal drugs before birth. Most courts have rejected such an approach, mainly on statutory grounds, reasoning that the word “child” or “minor” means one that is born.<sup>8</sup> The courts are also swayed by policy considerations, finding that criminal prosecution is not an effective means of dealing with pregnant women’s drug abuse problems.<sup>9</sup> South Carolina

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5. See, e.g., *Johnson v. State*, 602 So. 2d 1288, 1295 (Fla. 1992) (finding that law prohibiting distribution of illegal drugs to minor was not applicable to mother who used illegal drugs during pregnancy).

6. See, e.g., *Whitner v. State*, 492 S.E.2d 777, 785-86 (S.C. 1997) (confirming conviction of woman for criminal child abuse based on her drug use during pregnancy). But see, e.g., *Reyes v. Superior Court*, 141 Cal. Rptr. 912, 914-15 (Cal. Ct. App. 1977) (finding that child abuse endangerment statute did not apply to harm inflicted onto fetus).

7. See, e.g., David Firestone, *Woman Is Convicted of Killing Her Fetus by Smoking Cocaine*, N.Y. TIMES, May 18, 2001, at A12 (reporting that twenty-four year old woman was sentenced to twelve years in prison for killing her unborn fetus by smoking crack cocaine); Bob Herbert, *Stillborn Justice*, N.Y. TIMES, May 24, 2001, at A29 (same). A South Carolina woman was charged and convicted of the homicide of her still born infant by her use of crack cocaine during pregnancy. See *infra* notes 229-32 and accompanying text.

8. See *Johnson*, 602 So. 2d at 1291-92 (noting that child abuse statute only applies to abuse after child is born). In *Johnson*, the court found that a woman could not be charged with delivering drugs to a minor when it was based on the mother’s drug use during pregnancy, as the legislature did not intend to include a fetus in the definition of a child. Furthermore, appellate courts have overturned criminal convictions because the mother’s actions occurred during pregnancy, and the courts did not consider a fetus a child. See *Reyes*, 141 Cal. Rptr. at 914-15 (holding that child abuse statute does not reach abuse directed at unborn children); *State v. Gethers*, 585 So. 2d 1140, 1142-43 (Fla. Dist. Ct. App. 1991) (same); *State v. Luster*, 419 S.E.2d 32, 34-35 (Ga. Ct. App. 1992) (finding that statute penalizing delivering and distribution of cocaine does not apply to delivery from mother to unborn child); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991) (rejecting argument that legislature intended pregnant woman’s cocaine use to fall within type of conduct prosecuted under delivery-of-cocaine statute); *State v. Gray*, 584 N.E.2d 710, 711-12 (Ohio 1992) (deciding that state may not prosecute parent for child endangerment on basis of substance abuse that occurred before child’s birth); see also GOMEZ, *supra* note 1, at 149 n.15 (noting that several courts have thrown out convictions based on prenatal drug exposure). But see *Whitner*, 492 S.E.2d at 777 (holding that word “child” in statute includes viable fetus).

9. See *Johnson*, 602 So. 2d at 1295-96 (stating that “prosecuting women for using drugs and ‘delivering’ them to their newborns appears to be the least effective response to this crisis”). “Criminal penalties may exacerbate the harm done to fetal health by deterring pregnant substance abusers from obtaining help or care from either the health or public welfare professions . . . . Such prosecution is counterproductive to the public interest . . . .” *Id.* at 1296. Some prosecutors have begun to realize that social service agencies and public health organizations may be better equipped to handle this problem. A prosecutor from San Diego, California believes criminalization could lead “these women to hide out—they wouldn’t seek treatment because they would be incriminating themselves.” GOMEZ, *supra* note 1, at 86. The same prosecutor also noted that social service and health agencies had begun to develop successful treatment strategies:

You can go down to our county rehab center and they’re—for lack of a better word—*celebrating* addicted mothers who come in to get treatment

is the notable exception to this judicial trend. In *Whitner v. State*,<sup>10</sup> the South Carolina Supreme Court held that a viable fetus is a child within the meaning of the child abuse and endangerment law. The court affirmed an eight-year prison term of a woman who smoked crack during the third trimester, causing the baby to be born with cocaine metabolites in its system. The court rejected the defendant's due process privacy claim and "her right to carry her pregnancy to term."<sup>11</sup> The court noted that the legislature had the right to "impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus . . . ."<sup>12</sup>

South Carolina authorities, however, wanted more. They sought to coerce crack addicted pregnant women into treatment by threatening and actually imposing imprisonment if they did not enter and stay in a drug abuse treatment program.<sup>13</sup> The charges brought against the women va-

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and get off the narcotic. And they actually have these photographic displays of mothers and their children who they were carrying while they were using substances, and now they're holding their child and saying, "I'm clean, I'm not using." But it's that kind of a social approach to help the person.

*Id.*

10. 492 S.E.2d 777 (S.C. 1997).

11. *Whitner*, 492 S.E.2d at 785 (holding that "plain meaning of 'child' as used in this [child abuse] statute includes a viable fetus"). The defendant cited multiple cases to support her argument that prosecuting her "burden[ed] her right of privacy, or, more specifically, her right to carry her pregnancy to term," including *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *Id.* The *Whitner* court, however, focused on the *LaFleur* case. See *id.* at 785-86 (citing *LaFleur* rational to support holding that statute did not burden defendant's "right to carry her pregnancy to term or any other privacy act"). In *LaFleur*, teachers were required to take maternity leave beginning at the fourth or fifth month of pregnancy until the child was three months old. See *LaFleur*, 414 U.S. at 634-35 (stating facts of case). The state, in *LaFleur*, argued that its interest was the continuity of pupil's education, but the Court found that the policy was not a rationale means to meet the state's objective. See *Whitner*, 492 S.E.2d at 785 (discussing facts of *LaFleur*). The *Whitner* court emphasized the state's interest in "protecting the life and health of the viable fetus," citing *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in support of this proposition. *Id.* at 785-86. Furthermore, the *Whitner* court stated that, unlike the circumstances of *LaFleur*, *Whitner's* fundamental rights were not implicated by the prosecution. See *id.* at 786 (stating that "we do not think any fundamental right of *Whitner's* . . . is implicated under the present scenario"). The *Whitner* court pointed out that no person, including *Whitner*, has a right to use illegal drugs. See *id.* (noting that "[u]se of crack cocaine is illegal, period").

12. *Whitner*, 492 S.E.2d at 786.

13. See *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1284-85 (2001) (discussing statute South Carolina enacted to deal with issue of pregnant women using cocaine). Medical personnel at a publicly funded hospital in Charleston were concerned about the increase of drug use by pregnant women. A nurse in the hospital heard about a program by the Greenville police department to arrest and charge drug abusing pregnant women with child abuse. The hospital's counsel contacted Charleston's city attorney to offer the hospital's assistance in instituting a similar program. See *id.* at 1284 (explaining facts of case).

ried from simple possession to child endangerment, depending on the stage of pregnancy.<sup>14</sup> In *Ferguson v. City of Charleston*,<sup>15</sup> a six-to-three decision,<sup>16</sup> the United States Supreme Court invalidated a policy in which a state hospital transmitted positive drug test results of pregnant women to the police for criminal prosecution if the women did not enroll in or remain in a substance abuse treatment program.<sup>17</sup> The urine test, which is a search within the meaning of the Fourth Amendment,<sup>18</sup> was performed if a woman met one or more of nine criteria.<sup>19</sup> These criteria, however, did not establish a legally sufficient basis for a search under the Constitution.<sup>20</sup> Thus, the drug screen was taken without a warrant, probable cause or reasonable suspicion, and because of the procedural posture of the case, the Court also assumed that there was no consent.<sup>21</sup>

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14. During pregnancy, if a woman tested positive at twenty-seven weeks or less, the charge is "simple possession." *Id.* at 1285. Beyond twenty-seven weeks, the charge is "possession and distribution to a person under the age of 18—in this case, the fetus." *Id.* Finally, if the woman tested positive for drugs at delivery, the charge is "unlawful neglect of a child." *Id.*

15. 121 S. Ct. 1281 (2001).

16. Justice Stevens wrote the opinion, in which Justices O'Connor, Souter, Ginsburg and Breyer joined. *See Ferguson*, 121 S. Ct. at 1284. Justice Kennedy concurred in the judgment. *See id.* at 1293. Justice Scalia dissented, joined in part by Chief Justice Rehnquist and Justice Thomas. *See id.* at 1296.

17. *See id.* at 1285-93 (holding that South Carolina's statute dealing with prenatal cocaine violates women's Fourth Amendment rights). The women entered a treatment program and were to abstain from using drugs. Although the policy stated that the police would be notified only if the woman did not stay in the program or tested positive a second time, in reality, when the program was first instituted, women were being arrested after the first positive drug test. *See id.* (stating facts of case).

18. Urine tests are searches within the meaning of the Fourth Amendment, even though such tests do not involve an intrusion into one's body. The reasoning is that urine tests "can reveal a host of private medical facts about [an individual and can] involve visual or aural monitoring of the act of urination, [which by] itself implicates privacy interests." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989).

19. The criteria the medical personnel used at the hospital were as follows:

1. No prenatal care
2. Late prenatal care after 24 weeks gestation
3. Incomplete prenatal care
4. Abruptio placentae
5. Intrauterine fetal death
6. Preterm labor "of no obvious cause"
7. IUGR [intrauterine growth retardation] "of no obvious cause"
8. Previously known drug or alcohol abuse
9. Unexplained congenital anomalies.

*Ferguson*, 121 S. Ct. at 1285 n.4.

20. *See generally Illinois v. Gates*, 462 U.S. 213 (1983) (adopting "totality of the circumstances" test to determine if probable cause exists for issuance of search warrant).

21. *See Ferguson*, 121 S. Ct. at 1287-88 (explaining that there was no probable cause or "even the basis for a reasonable suspicion" of cocaine use). Certiorari was granted to determine "whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." *Id.* at 1284. The United States District Court for the District of South Carolina determined that the taking of the urine and the subsequent drug screen were unreasonable searches. *See id.* at 1286 (finding that searches

Concerns relating to the health of the mother and fetus raised the likelihood that the policy would fit neatly into the “special needs” exception to the Fourth Amendment warrant and probable cause requirements, as indeed the Fourth Circuit found.<sup>22</sup> Under prior case law, if a program had a governmental purpose independent of general law enforcement, the case would fall into the special needs category, prompting the use of a test balancing the independent governmental objective against the individual’s privacy right.<sup>23</sup> Almost invariably, the result of the balancing tilted in favor of the state,<sup>24</sup> leading many commentators to argue that the special needs exception could theoretically swallow the Fourth Amendment because behind every law enforcement need are some other non-criminal safety or health concerns.<sup>25</sup>

In a surprising constriction of the special needs line of cases, the *Ferguson* majority noted the “pervasive involvement” of the police and lack of special medical treatment for drug abusing pregnant women and their fetuses once they were identified.<sup>26</sup> The Court interpreted the earlier special needs decisions to make a critical distinction between the state’s

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were unreasonable because they were not conducted by medical university for medical purposes). Regarding consent, however, the district court determined it was a factual issue for the jury. *See id.* (asserting that jury should find for petitioners unless they found consent). The jury found consent, and the petitioners appealed. *See id.* (noting that petitioners appealed on theory that there was insufficient evidence to support jury’s finding). On appeal, the United States Court of Appeals for the Fourth Circuit did not reach the issue of consent, finding that the “special needs” doctrine applied. *See Ferguson v. City of Charleston*, 186 F.3d 469, 476 (1999) (stating that “we affirm on the basis that the searches were reasonable as special needs searches”). The United States Supreme Court granted certiorari to review whether the Fourth Circuit’s determination, regarding the special needs doctrine, was correct. *See Ferguson*, 121 S. Ct. at 1287 (stating that “[w]e granted certiorari to review the appellate court’s holding on the ‘special needs’ issue”). They remanded the consent issue. *See id.*

22. *See Ferguson*, 186 F.3d at 476 (applying special needs doctrine to South Carolina statute).

23. *See generally* *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (defining and applying special needs exception to Fourth Amendment warrant and probable cause requirements); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1995) (discussing situations where search warrant is not required because compelling government interest exists); *Skinner*, 489 U.S. at 602 (1989) (same); *see also infra* notes 43-48 and accompanying text.

24. *But see Chandler v. Miller*, 520 U.S. 305, 322-23 (1997) (invalidating state law requiring drug testing of individuals running for political office). Of course, if the primary purpose is viewed as having a general criminal purpose, the special needs doctrine cannot apply, and, therefore, the usual Fourth Amendment requirement of probable cause is necessary. *See Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (holding that city checkpoints, which have primary purpose of detecting illegal drugs, were unconstitutional).

25. *See, e.g., Andrea Lewis, Drug Testing: Can Privacy Interests Be Protected Under The “Special Needs” Doctrine?*, 56 BROOK. L. REV. 1013, 1044 (1990) (proposing that special needs doctrine will make probable cause requirement irrelevant).

26. *See Ferguson*, 121 S. Ct. at 1290-91 (explaining that “different courses of medical treatment” were not available to mother or infant and that police “were extensively involved in the day-to-day administration of the policy”).

ultimate goal—in this case, to persuade pregnant women to enter a drug abuse program—from its immediate objective of generating evidence for criminal prosecution. After *Ferguson*, special needs were to be determined by the immediate, rather than the ultimate, goal.<sup>27</sup>

Since the taking of the urine sample was not forced—the women “freely and voluntarily provided the urine samples” to the hospital<sup>28</sup>—the dissent argued that obtaining and transmitting it to the police did not violate the Fourth Amendment,<sup>29</sup> and therefore, the special needs doctrine was inapposite.<sup>30</sup> Moreover, even assuming that the special needs cases were implicated, Justice Scalia, dissenting, maintained that the case at bar fell squarely within them.<sup>31</sup> He further claimed that the majority’s decision cast doubt on the validity of various reporting statutes, including those requiring medical personnel or other persons to advise the police of

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27. *See id.* at 1293-94 (Kennedy, J., concurring) (noting that immediate result of search will now be the special need required to justify searches). Justice Kennedy noted that in the previous special needs cases, the Court considered the ultimate goal of the policy—“detering drug use by our Nation’s school children,”—rather than the immediate goal—“gathering evidence of drug use by student athletes.” *Id.* at 1293. Although *Ferguson* indicates a change in the Court’s view of special needs, Justice Kennedy concurred in the judgment. *See id.* at 1293-96 (expressing concern with majority’s decision to focus on immediate purpose of search as opposed to ultimate goal).

28. *Id.* at 1296 (Scalia, J., dissenting). Justice Scalia argued that the Court had previously found that it was not unconstitutional for the police to use information obtained lawfully for other purposes by non-police personnel. *See id.* at 1297 (citing *Hoffa v. United States*, 385 U.S. 293, 302 (1996)). “[T]he Fourth Amendment [does not protect] a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.” *Id.* (citing *Hoffa*, 385 U.S. at 302). Therefore, Justice Scalia argued that because the urine was not taken forcibly, turning over the test results to the police was valid. *See id.* at 1298 (finding that police did not engage in unconstitutional search because urine samples were given consensually). He also argued that, even if there was coercion (which he did not believe there was), it would be immaterial because the state was not involved in any coercive activities. *See id.* at 1299 (noting that government did not coerce patients into providing urine samples, and if coercion did exist, it was based on need for medical treatment during pregnancy).

29. *See id.* (stating “that there is no basis for saying that obtaining of the urine sample was unconstitutional”). On this issue, Justice Scalia dissented by himself. *See id.* at 1296, 1299-1302. Chief Justice Rehnquist and Justice Thomas joined him only in the second part of his dissent regarding the special needs analysis. *See id.* Justice Scalia argued that the majority incorrectly concluded that reporting tests to the police was a search, and that instead, the search was merely the “taking of the urine sample.” *Id.* at 1296.

30. *See id.* at 1299 (noting that special needs doctrine is irrelevant because taking of urine sample and passing it on to police was constitutional and doctrine only applies to “searches and seizures that are otherwise unlawful”).

31. *See id.* (explaining that special needs doctrine validates transmitting urine sample to police).



possible criminal behavior.<sup>32</sup> The majority, however, found that such reporting requirements were “simply not in issue.”<sup>33</sup>

The *Ferguson* decision is, in its own way, narrow. It does not prohibit medical personnel from reporting substance abuse by pregnant women to the police in all situations. The majority opinion relied heavily on the facts and circumstances of the case.<sup>34</sup> A modified version of the Charleston, South Carolina program, even one that could ultimately lead to imprisonment for crack addicted pregnant women, would probably pass constitutional muster.<sup>35</sup> Whether coercing pregnant women into treatment by using the jail stick is good policy is another matter. There are other responses to the problem of crack babies that in all likelihood remain unaffected by *Ferguson* and that might work better to protect children.

In this Article, I discuss a range of legal options available to the state to deal with this important problem.<sup>36</sup> These choices include—on a spec-

32. See *id.* at 1297-98, 1300-01 (stating that South Carolina statute is indistinguishable from other reporting statutes that require medical professionals and others to report criminal behavior). Justice Scalia took the position that “established law . . . says that information obtained through violation of a relationship of trust is obtained consensually, and is hence not a search.” *Id.* at 1298. He went on to say that the majority’s position leaves undetermined the issue of when evidence obtained by trusted sources can be used by the police, and therefore, requires that such future determinations be made on a case-by-case basis. See *id.* (arguing that majority’s holding “leaves law enforcement officials entirely in the dark as to when they can use incriminating evidence obtained from ‘trusted’ sources”).

33. *Id.* at 1290. The majority is clear that no one is questioning the right and the responsibility of medical personnel to report child abuse. Such statutes have not been challenged by the *Ferguson* case. See *id.* (providing that majority’s holding does not affect child abuse statutes that require medical professionals to report information that they came across “in the course of ordinary medical procedures aimed at helping the patient herself”). Justice Kennedy, in his concurring opinion, agreed with the majority and stated that the decision did “not call into question the validity of mandatory reporting laws such as child abuse laws . . . , even if arrest and prosecution is the likely result.” *Id.* at 1295 (Kennedy, J., concurring).

34. See *infra* notes 55-63 and accompanying text.

35. According to the majority, the case does “not address . . . doctors independently compl[ying] with reporting requirements.” *Ferguson*, 121 S. Ct. at 1292. Justice Kennedy stated “South Carolina can impose punishment upon an expectant mother who has so little regard for her own unborn that she risks causing him or her lifelong damage and suffering.” *Id.* at 1295 (Kennedy, J., concurring). Because Justice Scalia believed that there was no search within the meaning of the Fourth Amendment and would have upheld the right of Charleston’s officials to institute and carry out such a program, he would likely uphold any similar type program. See *id.* at 1302 (Scalia, J., dissenting) (finding that “there was no uncontroverted search in this case”). Chief Justice Rehnquist and Justice Thomas concurred with Justice Scalia’s opinion that even if it were a search and there was no consent, then the special needs doctrine applied and the program was constitutional. See *id.* at 1299 (explaining that if “properly applied,” the special needs doctrine would “validate” the South Carolina statute).

36. In addition to these legal options, society could offer other solutions to this problem. If the government (state and federal) were willing to put more resources into fighting the problem of crack addicted pregnant women, additional

trum from the most to the least intrusive on individual liberty—criminal incarceration, civil commitment, termination of parental rights and temporary removal of the child after birth, along with any other children the woman may have. I do not necessarily agree with all these alternatives or the means of implementing them. In particular, I find the use of criminal and civil incarceration not only an unnecessary infringement on women's personal liberty, but also as working at irrational cross-purposes with the objective of protecting the fetus.<sup>37</sup> Nor can one ignore the reality that such laws fall disproportionately on poor minority women.<sup>38</sup>

In addition, although I favor temporary removal and permanent termination as a better means of dealing with the crack addicted pregnant woman, I do not view these avenues as perfect solutions. There are drawbacks to using them, particularly if done in a knee jerk fashion without looking to the facts and circumstances of each case. That is, not every crack addicted pregnant woman should lose her children, either temporarily or permanently. Furthermore, the solutions, if any, greatly depend on the state's willingness to provide sufficient resources to help addicted pregnant women.<sup>39</sup>

## II. CRIMINAL INCARCERATION AND CIVIL COMMITMENT ALTERNATIVES AFTER *FERGUSON*

Although pregnant women can be charged with possession, use or distribution of illegal drugs, district attorneys vary in the ways they use the criminal law to inflict punishment on the pregnant woman because her behavior may cause harm to the fetus. A noted expert, Professor Laura Gomez, identified four categories of prosecutorial responses to the problem of pregnant addicts, ranging from very punitive to inaction.<sup>40</sup> Examples of cases in the "very punitive" category include the homicide

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educational efforts and treatment programs could be offered. These types of comprehensive specially designed programs have had more success than incarceration, but are more costly. See *infra* notes 226-29 and accompanying text.

37. See *infra* notes 101-17 and accompanying text.

38. See *infra* notes 138-63 and accompanying text; see also *Ferguson v. City of Charleston*, 186 F.3d 469, 473 (4th Cir. 1999) (claiming that Charleston policy to drug test pregnant women had racially disparate impact in violation of Title VI regulations, which prohibits discrimination in federally assisted programs).

39. The unwillingness of government to put resources into solving this problem is a major hurdle that needs to be overcome. In California, the legislature passed almost thirty bills between 1983 and 1996 regarding addicted pregnant women. None of these bills was punitive in nature, but a large number of the bills were vetoed by the governor because of the high price tags attached to the legislation. See GOMEZ, *supra* note 1, at 41 (noting that California's Governor vetoed almost fifteen percent of legislative bills concerning pregnant women's drug use from 1983 to 1996); see also *infra* notes 226-28 and accompanying text.

40. See GOMEZ, *supra* note 1, at 78 (listing four prosecutorial responses to problem of pregnant drug users). Professor Gomez divides the prosecutorial responses to the problem of pregnant addicts into four categories: "(1) very punitive—prosecution with the intent to punish; (2) moderately punitive ('hard' diversion)—prosecution under existing statutes to coerce women into treatment;

prosecution of a South Carolina woman for the death of her fetus due to her smoking crack cocaine,<sup>41</sup> and the trial of a Florida woman for the delivery of a controlled substance to her child at birth.<sup>42</sup> The emphasis in this class is on punishment and incarceration of the woman for her harm to the fetus.

Professor Gomez considered the Charleston, South Carolina program at issue in *Ferguson* as only “moderately punitive,” because the *intent* is not to punish, but rather merely to coerce women to enter drug treatment programs by threatening prosecution.<sup>43</sup> She argued that this approach focuses on treatment, rather than punishment and incarceration. But, of course, if the treatment is rejected, the end result will be the same as cases in the “very punitive” category—imprisonment because of danger to the fetus.

Although the Court found this specific program unconstitutional, there may be ways to design similar programs that permit incarceration for refusal of treatment that would be constitutionally sound. In other words, *Ferguson* does not remove all possibility of criminal prosecution and incarceration of pregnant addicted women to protect their fetuses.<sup>44</sup> While

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(3) least punitive (‘soft’ diversion)—threatening prosecution to encourage women to enroll in treatment; and (4) inaction.” *Id.*

41. See Firestone, *supra* note 7, at A12 (stating that South Carolina sentenced woman to twelve years in prison for killing her unborn fetus by ingesting crack cocaine); Herbert, *supra* note 7, at A29 (same). Professor Gomez does not mention this case in her book as it was decided after the book was written. It is, however, an obvious example of the “very punitive” category.

42. See GOMEZ, *supra* note 1, at 78-79 (providing Florida prosecution of woman for delivery of controlled substance to her son and daughter as example of “very punitive” response to problem of drug use by pregnant women). Although both of the Florida woman’s children were born healthy, they tested positive for drugs at birth. See *id.* at 78 (explaining that son and daughter “were born healthy, but each tested positive at birth for the cocaine metabolite”).

43. See *id.* at 79-81 (noting that South Carolina statute encouraged drug treatment for pregnant women by threatening prosecution). The “least punitive” model differs from the “moderately punitive” model because pregnant addicted women who are arrested for non-violent offenses are able to avoid prosecution by attending a drug treatment program. See *id.* at 81 (discussing “least punitive” programs, which allow women to “avoid prosecution by participating in a coordinated prenatal care/drug treatment”). The difference between these two models is that the moderately punitive model is viewed as coercive, while the least punitive model is viewed as diversionary. See *id.* at 82 (stating that moderately punitive programs coerce women into drug treatment while least punitive models divert women from the criminal justice system into treatment programs). Under the “very punitive” model, the woman is prosecuted, and if this results in a conviction, the woman will be incarcerated. Where prosecutors follow the fourth model, “inaction,” they do nothing, leaving the solution of this problem to the child protective agencies. See *id.* (noting that “prosecutors may choose not to single out these [prenatal drug use] cases in any way”).

44. Justice Stevens notes that hospital personnel may have the duty to report “evidence of criminal conduct that they inadvertently acquire in the course of routine treatment.” *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1292 (2001). Justice Kennedy argues that states can prosecute crack addicted pregnant women for the harm they do to their fetus. See *id.* at 1295 (Kennedy, J., concurring) (stating

*Ferguson* clearly limits the powers of the state in this context, it leaves more than sufficient penal options in dealing with the problem. Furthermore, *Ferguson* does not speak at all to the use of civil commitment as an alternative method. *A fortiori*, if criminal prosecution remains an available option after *Ferguson*, then surely civil commitment does as well. I will discuss these two alternatives in the proceeding two sections.

#### A. *Criminal Prosecution*

Prior to *Ferguson*, the Court rendered four urine drug testing decisions that could have applied to the case at bar. In each case, the Court found that because the testing invaded a reasonable expectation of privacy,<sup>45</sup> it was a search within the meaning of the Fourth Amendment.<sup>46</sup> In these cases, the government asserted that there were special needs independent of ordinary law enforcement objectives that justified departure from Fourth Amendment requirements. The Court then determined if, in fact, special needs were involved. If the answer was yes, the Court engaged in a constitutional balancing designed to determine if a warrant or individualized suspicion was necessary. In *Skinner v. Railway Labor Executives' Ass'n*,<sup>47</sup> against a backdrop of frequent drug use by railway employees, the Court approved mandatory drug testing of those who either were involved in major accidents or who violated safety rules. The special need asserted was to protect the safety and lives of railroad passengers. In *National Treasury Employees Union v. Von Raab*,<sup>48</sup> the Court upheld warrantless, suspicionless testing of United States Custom Service employees who were being promoted to positions allowing them to carry weapons or to execute drug interdiction efforts. This was also permissible because of the need to protect "the integrity of our Nation's borders or the life of the citizenry."<sup>49</sup> *Vernonia School District v. Acton*<sup>50</sup> validated warrantless random drug testing of public school students involved in intramural sports because of the school's "custodial and tutelary responsibility for children,"<sup>51</sup> and because

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that "South Carolina can impose punishment upon an expectant mother who has so little regard for her own unborn that she risks causing his or her lifelong damage and suffering" by ingesting cocaine during her pregnancy). Justice Scalia believes that the decision of whether the police can act in this type of situation should be left to "the democratic process—which would produce a decision by the citizens of Charleston, through their elected representatives." *Id.* at 1296 (Scalia, J., dissenting).

45. See *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (discussing reasonable expectations of privacy standard).

46. See *Ferguson*, 121 S. Ct. at 1287 (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989)).

47. 489 U.S. 602 (1989).

48. 489 U.S. 656 (1989).

49. *Von Raab*, 489 U.S. at 679. Justice Scalia, however, dissented because "neither frequency of use nor connection to harm is demonstrated or even likely." *Id.* at 681 (Scalia, J., dissenting).

50. 515 U.S. 646 (1995).

51. *Vernonia Sch. Dist.*, 515 U.S. at 656.

of the need to protect young athletes from injuries and to provide positive role models for the entire student body which “was in a state of rebellion.”<sup>52</sup> In *Chandler v. Miller*,<sup>53</sup> however, a state law requiring drug testing of those running for high political office was invalidated because the majority found that there was no evidence that state office holders had drug problems, and therefore, the Court regarded the state’s interest as “symbolic” rather than “special.”<sup>54</sup> Furthermore, the Court reasoned that the state’s interest was not substantial enough to outweigh the individual’s privacy interest.

The majority in *Ferguson* distinguished these cases on the ground that the special needs the state asserted as justification in such cases were “divorced from the State’s general interest in law enforcement.”<sup>55</sup> In *Ferguson*, on the other hand, the police were involved in the program from its inception and on a day-to-day basis. The drug tests were used specifically to obtain incriminating evidence of criminal wrongdoing so that if a patient refused treatment, she could be successfully prosecuted and incarcerated.<sup>56</sup> To achieve that end, police officials themselves determined the

52. *Id.* at 663.

53. 520 U.S. 305 (1997).

54. *Chandler*, 520 U.S. at 318, 322; *see also Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting) (arguing that testing was illegal because it was performed merely for symbolic reasons). Justice Scalia, however, joined the majority opinion in *Chandler*. *See Chandler*, 520 U.S. at 307 (indicating that Justice Scalia joined majority opinion).

55. *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1289 (2001). The Court emphasized other ways in which the prior cases differed from *Ferguson*. For example, the Court noted that because it was clear in the prior cases how the test results would be used, “protections against the dissemination of the results to third parties” existed. *Id.* at 1288. The Court reasoned that in the prior cases, the results were used in less invasive ways—i.e., to prevent promotion or participation in sports—and therefore implicated lower expectations of privacy. *See id.* (noting that “the invasion of privacy in this case is far more substantial” than that seen in prior cases). Furthermore, the Court stated “the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.” *Id.* at 1293 (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000)).

56. The *Ferguson* Court was most troubled by the fact that medical personnel had the “specific purpose of incriminating . . . patients,” without assuring that the patients were informed of their constitutional rights. *Ferguson*, 121 S. Ct. at 1292. The Court cited, as an analogous proposition to the situation in *Ferguson*, *Miranda v. Arizona*, 384 U.S. 436 (1966), which was a Fifth Amendment case that required warnings during custodial interrogations as a condition of admissibility of any statement by the suspect. Such a scenario, however, was not presented by *Ferguson*. *See id.* at 1297 (Scalia, J., dissenting) (stating that *Miranda* is not analogous to facts of *Ferguson*). The *Miranda* reference was also puzzling in light of *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) and *United States v. Watson*, 423 U.S. 411 (1976), cases in which the Court ruled that suspects, even when in custody, do not have to be advised of their Fourth Amendment rights in order to give a valid waiver. Thus, although *Miranda* requires a *knowing* Fifth Amendment waiver, Fourth Amendment waivers only have to be *voluntary*. In addition, as Justice Scalia noted, the misplaced trust doctrine permits statements to be used in evidence even if they were given to a private person or a public official under the mistaken belief that

procedures to use in performing the drug screening, advised personnel how to assure a proper chain of custody for the urine samples, had access to the women's files, attended meetings of the substance abuse team and received reports of the women's progress while they were in treatment. The Court found this quite different from situations in which physicians "in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under rules of law or ethics is subject to reporting requirements, which no one has challenged here."<sup>57</sup>

The Court also distinguished *Griffin v. Wisconsin*<sup>58</sup> and *New York v. Burger*,<sup>59</sup> other special needs cases, albeit not involving urine testing. *Griffin* allowed probation officers to search a probationer's home without a warrant or probable cause, reasoning that such requirements would interfere with the state's operation of a probation system.<sup>60</sup> The *Ferguson* Court concluded that *Griffin* was not controlling because, unlike women receiving medical treatment, probationers have lesser expectations of privacy, and because the *Griffin* Court had reserved decision on whether *routine use* of such evidence for criminal prosecution would be valid.<sup>61</sup> Similarly, in *Burger*, the Court upheld a program that permitted police officers to carry out warrantless administrative inspections of companies involved in dismantling cars because owners in such highly regulated businesses had little expectation of privacy.<sup>62</sup> Furthermore, "the discovery of evidence of other [penal law] violations [was deemed to be] merely incidental to the purposes of the administrative search."<sup>63</sup>

Justice Kennedy concurred only in the *Ferguson* judgment, arguing that the majority's distinction between the "ultimate goal and immediate purpose" of the policy was not supported by precedent.<sup>64</sup> In his view, *all* of the special needs cases depended on the policy's ultimate goal. In every such case, he argued, the immediate purpose of the search was to collect evidence. He noted, "[A]lthough procuring evidence is the immediate

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the information would be kept secret. *See id.* (stating "that using lawfully (but deceptively) obtained materials for purposes other than those represented, and giving that material or information derived from it to the police, is unconstitutional"). In one case, the Court held that a confession obtained by a government agent posing as an inmate was admissible even without *Miranda* warnings. *See Illinois v. Perkins*, 496 U.S. 292, 294 (1990) (holding that "*Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement").

57. *Ferguson*, 121 S. Ct. at 1290.

58. 483 U.S. 868 (1987).

59. 482 U.S. 691 (1987).

60. *See Griffin*, 483 U.S. at 878 (stating that "the probation regime would . . . be unduly disrupted by a requirement of probable cause").

61. *See Ferguson*, 121 S. Ct. at 1289 n.15 (distinguishing *Griffin* from facts presented by *Ferguson*).

62. *See id.* at 1291 n.21 (noting that *Burger* involved expectation of privacy that was "particularly attenuated").

63. *Id.*

64. *Id.* at 1293 (Kennedy, J., concurring).

result of a successful search, until today that procurement has not been identified as the special need which justifies the search.”<sup>65</sup> By contrast, he found the South Carolina program unconstitutional because the test results were specifically intended for criminal prosecution. The hospital became, in effect, an arm of the police.<sup>66</sup>

Justice Kennedy affirmed the power of the state to “impose punishment” on expectant mothers who use drugs.<sup>67</sup> He made it clear that the ruling did not affect the validity of child abuse reporting statutes even though the result of such reporting is likely to be criminal prosecution.<sup>68</sup> Justice Kennedy opined that medical personnel could establish criteria for identifying drug-abusing women and provide counseling to them and medical treatment to protect the fetus. The police could then “adopt legitimate procedures” to obtain such evidence and use it to prosecute if necessary.<sup>69</sup> Justice Scalia in dissent argued, however, that there was no basis for distinguishing *Ferguson* from cases in which medical personnel give the police incriminating evidence discovered during treatment.<sup>70</sup>

The *Ferguson* Court left open two primary means of pursuing criminal prosecution. The first being notification of the police pursuant to reporting statutes, and the second being consent of pregnant addicted women to a urine analysis. Both possibilities are explored in the proceeding two subsections.

### 1. *Reporting Statutes*

As the *Ferguson* majority observed, every state has a statute requiring medical personnel to report child abuse.<sup>71</sup> Most states, however, interpret

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65. *Id.* at 1294 (Kennedy, J., concurring).

66. *See id.* (Kennedy, J., concurring) (finding program unconstitutional because “there was substantial law enforcement involvement in the policy from its inception”).

67. *Id.* at 1295 (Kennedy, J., concurring). Justice Kennedy, nonetheless, noted it would be appropriate for the state to provide treatment to addicted pregnant women. *See id.* (noting that such rehabilitation and training is proper within state’s powers and obligations).

68. *See id.* (Kennedy, J., concurring) (noting that such reporting will likely result in arrest and prosecution of mother).

69. *Id.* (Kennedy, J., concurring).

70. *See id.* at 1300 (Scalia, J., dissenting) (questioning whether “addition of a law-enforcement-related program to a legitimate medical purpose destroys applicability of the ‘special needs’ doctrine”) (emphasis in original).

71. *See id.* at 1290 (noting that such statutes are consistent with ethical reporting requirements). Many states also require school personnel, social workers and law enforcement officials to report child abuse. *See, e.g.*, ARK. CODE ANN. § 12-12-507(b) (Michie 1999) (listing as mandatory reporters medical personnel, teachers, school officials, school counselors, social workers, family service workers, day care center workers or any other child or foster care workers, mental health professionals, peace officers, law enforcement officials, prosecuting attorneys or judges). In some states, mandatory reporters include ordinary citizens witnessing abuse. *See, e.g.*, FLA. STAT. ANN. § 39.201(1) (West 2000) (stating all persons are mandatory reporters if they know or have reasonable basis to suspect child abuse).

their general civil child abuse laws to include only a child already born.<sup>72</sup> Simply amending the reporting and civil child abuse statutes to include viable fetuses could obviate this problem.<sup>73</sup> This would make a pregnant woman's conduct a basis both for reporting and coercing the woman into treatment by the threat of removal of the child and possible termination of parental rights.<sup>74</sup> Moreover, given the language in *Planned Parenthood v. Casey*<sup>75</sup> that provides that the state has a legitimate interest in protecting the life of the fetus from the onset of pregnancy,<sup>76</sup> a respectable argument

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72. See *In re Valerie D.*, 613 A.2d 748, 770 (Conn. 1992) (finding statutes that allow termination of parental rights cannot be based on mother's prenatal conduct); *In re J.B.C.*, 18 P.3d 342, 345 (Okla. 2001) (stating that child cannot be declared dependent based on evidence of mother's conduct prior to birth of child because fetus is not child within meaning of Oklahoma Children's Code). There appear to be no reported cases interpreting mandatory reporting laws as including only children already born. If a state court has interpreted a jurisdiction's general child abuse statutes as applying to only live born children, however, presumably the same would follow for mandatory reporting laws.

73. For example, Alabama's reporting statute does not currently include a fetus. Alabama's statute reads as follows:

(a) All hospitals, clinics, sanitariums, doctors, physicians, surgeons, . . . or any other person called upon to render aid or medical assistance to any child, when the child is known or suspected to be a victim of child abuse or neglect, shall be required to report, or cause a report to be made of the same, orally, . . . immediately, followed by a written report, to a duly constituted authority.

(b) When an initial report is made to a law enforcement official, the official subsequently shall inform the Department of Human Resources of the report so that the department can carry out its responsibility to provide protective services when deemed appropriate to the respective child or children.

ALA. CODE § 26-14-3 (2000). The statute could be changed to read as follows, which would allow for the reporting of the mother's drug use while pregnant:

(a) All hospitals, clinics, sanitariums, doctors, physicians, surgeons, . . . or any other person called upon to render aid or medical assistance to any child, *fetus or pregnant woman*, when the child *or the fetus* is known or suspected to be a victim of child abuse or neglect, *which includes the use of illegal drugs by a pregnant woman*, shall be required to report, or cause a report to be made of the same, orally, . . . immediately, followed by a written report, to a duly constituted authority.

(b) When an initial report is made to a law enforcement official, the official subsequently shall inform the Department of Human Resources of the report so that the department can carry out its responsibility to provide protective services when deemed appropriate to the respective child, children *or fetus*. *Protection of the fetus can include providing a drug treatment program for the pregnant woman and parenting education for the prospective parents.*

74. Of course, there is no requirement that both statutes have to operate in tandem. Thus, a state could opt for including fetuses in the reporting statute, but not in the rest of the child abuse statutes.

75. 505 U.S. 833 (1992).

76. See *Planned Parenthood*, 505 U.S. at 869 (noting that state's interest coexists with protection of health of woman).



could be made that state reporting laws could also cover non-viable fetuses.<sup>77</sup>

One could also take the position that if a woman can abort her fetus prior to viability, why should she be punished because her drug use may cause damage or death to the fetus?<sup>78</sup> It is a greater power includes a lesser power analysis. That contention is usually deflected because the mother is already committing a criminal act by using crack, and by the crass view of some that abortion at least alleviates society of the cost of caring for the unwanted child, whereas crack babies cost society a lot of money. Nonetheless, abortion rights advocates see the current trend of imprisoning addicted pregnant women to force cessation of drug use as a way of undermining women's privacy right. They raise the slippery slope argument of first crack, then liquor, then smoking and then not eating nutritiously.<sup>79</sup> Whatever the merits of the privacy concerns, however, it is unlikely that the Court would invalidate statutes designed to protect fetuses that merely required medical personnel to report drug abuse by addicted pregnant women, even to the police.<sup>80</sup> As long as the primary purpose of the test is treatment rather than prosecution, *Ferguson* would appear inapplicable.<sup>81</sup>

77. For an example of ambiguity in state reporting laws regarding the requirement of a viable fetus, see *supra* note 73 and accompanying text. Policy considerations would dictate how inclusive the term fetus should be.

78. See Pat Swift, *Author Argues That Fetal Rights Are Fundamental Attack on Women*, BUFF. NEWS, Nov. 4, 2000, at D1. ("[W]ell-meaning efforts to protect a fetus from being harmed by a mother's drug or alcohol abuse have been twisted into laws that police and punish women and deny them essential control of their bodies").

79. See GOMEZ, *supra* note 1, at 38. Professor Gomez quotes a lobbyist for the March of Dimes as an example of this type of reasoning:

[T]hat we allowed society to start marginalizing women's behaviors into good behaviors/bad behaviors, that we'd go down a slippery slope . . . . You know, if you could do this to substance abusing women [jail them, punish them], then you could do it to women who don't comply with their diet for diabetes . . . . [Y]ou could start taking this out to some very scary places.

*Id.*

80. Charleston and the Medical University of South Carolina stopped their policy of reporting crack addicted pregnant women to the police after the lawsuit was filed in 1993. Doctors who find themselves treating cocaine addicted pregnant women now report them to "social service agencies, not police." Charles Lane, *Court Hears Drug-Test Arguments*, WASH. POST, Oct. 5, 2000, at A10.

81. The Court did not address the validity of any proposed reporting statutes. The Court only commented on existing child abuse reporting laws and the ethical and legal responsibility the medical profession has to report criminal acts. The *Ferguson* majority and Justice Kennedy stated that the *Ferguson* decision did not change existing statutes, which would remain constitutional. See *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1291, 1295 (2001) (Kennedy, J., concurring) (explaining that South Carolina can still impose punishment on mother who has no regard for her unborn child). Justice Scalia's argument to the contrary, whether conceptually accurate or not, is irrelevant, as the majority and Justice Kennedy stated explicitly that the reporting laws were not at issue in *Ferguson*. See *id.* at 1298

Bypassing the policy hurdle of whether forcing medical personnel to provide information to the police is efficacious in stopping the abusive behavior of addicted pregnant women and protecting children in the long term,<sup>82</sup> the question is whether information obtained as a result of such expanded mandatory reporting statutes can be used for criminal prosecution of the pregnant woman? With respect to current reporting statutes, the answers are varied. In some states, such evidence is inadmissible on the ground that the information was privileged and could only be used for purposes of civil proceedings to protect the child.<sup>83</sup> Furthermore, if the mandatory reporters who obtained the incriminating evidence from the wrongdoers work for the state, jurisdictions that recognize the privileged status of such communications hold that this information cannot be used in a criminal trial unless the abusers have been given the warnings mandated by *Miranda v. Arizona*.<sup>84</sup>

In other states, information obtained by mandatory reporting professionals is admissible in a criminal case. For example, a doctor who provided prenatal care to a crack addicted pregnant woman would be able to testify as to the woman's use of drugs. The doctor could also discuss the possible or actual harm to the fetus or child in the pregnant woman's criminal trial for child abuse.<sup>85</sup>

The third response of the states is, it depends. In some jurisdictions, there are statutes that govern who has access to the confidential information provided by mandatory reporters.<sup>86</sup> Courts decide that question, which in turn determines whether the confidential information could be used in a criminal trial. Therefore, for example, district attorneys in those

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(Scalia, J., dissenting) (noting that by not addressing reporting laws, officials are left without guidance).

82. Therapists and social workers have long complained about these reporting laws, arguing that their statutory obligation makes it difficult, if not impossible, to treat wrongdoers. This has surfaced mainly with respect to sex offenders, but is also applicable to drug abusers.

83. *Cf. Daymude v. State*, 540 N.E.2d 1263, 1265-66 (Ind. Ct. App. 1989) (holding that defendant's counselor, who was mandatory reporter, was not permitted to testify in criminal proceeding about defendant's sex abuse of child because purpose of the statute—protection of children—had been fulfilled).

84. 384 U.S. 436 (1966); *see Cates v. State*, 776 S.W.2d 170, 174 (Tex. Crim. App. 1989) (holding that statements made by defendant to Department of Human Resources' investigator are inadmissible if *Miranda* warnings are not given because investigator is responsible for investigating child abuse allegations).

85. *Cf. State v. Tucker*, 861 P.2d 37, 47 (Haw. 1993) (citing Hawaii Rule of Evidence 701) (concluding that doctor's and social worker's testimony regarding mother's lack of remorse when she found out her child died was permissible at the mother's trial for murder of her infant son). Similarly, an obstetrician or pediatrician may come to a rational conclusion that a mother's drug use has been harmful to the fetus. For example, the mother may not keep her prenatal appointments, may not be eating properly or the child may be born with visible indications of drug addiction, such as tremors.

86. *See, e.g., CAL. PENAL CODE* 11167.5 (West 2000) (listing agencies and persons that have access to child abuse reports).

states must petition the juvenile court that has jurisdiction over the matter for access to the reports. In resolving that question, the courts use a totality of the circumstances test in determining whether access and admissibility at the criminal trial should be granted.<sup>87</sup> Assuming the constitutionality of expanded mandatory reporting statutes which would include the fetus, the states may decide, as a matter of policy, whether to allow such information to be used in a criminal prosecution of the addicted pregnant woman. Thus, even after *Ferguson*, a state may still be able to impose criminal punishment on women who endanger their fetuses by using illegal drugs.

## 2. Consent

Aside from mandatory reporting statutes, there may be other ways to circumvent *Ferguson* even in a criminal law context. First, in a *Ferguson*-type program, if the women consented to the drug screen, as many of them would because they are either in denial, under the influence of drugs, unable fully to appreciate the consequences of their behavior or facing some other pressure—for example, the need for treatment—they would waive Fourth Amendment protection.<sup>88</sup> Furthermore, *Schneckloth v. Bustamonte*<sup>89</sup> and *Watson v. United States*<sup>90</sup> do not require that suspects, even those in custody, be told that they can refuse to consent in order for the waiver to be valid. The *Ferguson* Court's reference to *Miranda*, however, might presage the need for some kind of cautionary notice in this situation.<sup>91</sup>

If a woman refused to consent to a drug screen, that together with other particularized indicia of drug use, might be sufficient to establish probable cause or reasonable suspicion. In other contexts, the Court has indicated that while refusal to consent to a search is not "by itself" sufficient to establish probable cause,<sup>92</sup> such refusal coupled with other factors

87. See 66 Op. Att'y Gen. 106 (1983).

88. Justice Scalia concludes that the women did consent to the taking of the urine samples as it was not done forcibly—the women signed a consent for the urine testing—and there is no legal precedent requiring that the women know the test results would be turned over to the police. See *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1296-98 (2001) (Scalia, J., dissenting). Finally, Justice Scalia concludes that the women were not coerced to give the sample in order to receive medical treatment, but even if they were, it was not coercion applied by the government, and therefore, would be permissible. See *id.* at 1299 (Scalia, J., dissenting). The majority, on the other hand, only discussed the application of the special needs doctrine and did not reach the question of consent. Regarding consent, the majority remanded the case for a determination by the lower court. See *id.* at 1287.

89. 412 U.S. 218 (1973).

90. 423 U.S. 411 (1976).

91. For a further discussion, see *supra* note 56 and accompanying text.

92. See *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (holding that random consensual bus searches are constitutional).

might be.<sup>93</sup> Medical authorities could then transmit such information to the police. The information could in turn serve as a basis for securing a warrant to test the mother for drugs.<sup>94</sup>

Even without factoring in refusal to consent, it may be possible to design medical criteria that could establish a “fair probability”<sup>95</sup> that the woman used drugs. Although the South Carolina hospital did use criteria to identify drug abusing pregnant women,<sup>96</sup> many of the criteria were not specific and could result from factors other than drug use. For example, the first criterion was the lack of prenatal care.<sup>97</sup> That could well result from poverty, ignorance and fear. What is important under *Ferguson* is keeping police out of the initial loop and obtaining the drug screen for treatment rather than evidentiary purposes. In other words, criminal prosecution should be an afterthought on the part of the doctor, a last resort.<sup>98</sup>

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93. *Cf. Kolender v. Lawson*, 461 U.S. 352, 366 n.4 (1983) (Brennan, J., concurring) (“In some circumstances it is even conceivable that the mere fact that a suspect refuses to answer questions once detained, viewed in the context of the facts that gave rise to reasonable suspicion in the first place, would be enough to provide probable cause. A court confronted with such a claim, however, would have to evaluate it carefully to make certain that the person arrested was not being penalized for the exercise of his right to refuse to answer.”).

94. Is a warrant, however, even necessary? In *Schmerber v. California*, 384 U.S. 757 (1966), the warrant requirement was waived because of the need to act quickly to obtain evidence of intoxication, and the Court upheld the warrantless extraction of blood from a driver who objected to the test. The Court also stressed that the blood extraction was performed by a doctor at the direction of the police and constituted a reasonable test “performed in a reasonable manner.” *Id.* at 771. In *Veronia School District v. Acton*, 515 U.S. 646 (1995), a special needs case, the Court upheld mandatory random urine tests for student athletes, in part, because the taking of a urine sample was viewed as no more of an invasion of privacy than using a public restroom or giving urine samples during a physical exam. *See id.* at 657 (quoting *T.L.O. v. New Jersey*, 469 U.S. 325, 348 (1985)) (noting that “students within the school environment have a lesser expectation of privacy than members of population generally”).

95. *Illinois v. Gates*, 462 U.S. 213 (1983).

96. For a further discussion of the criteria used by the hospital, see *supra* note 19 and accompanying text.

97. For a further discussion of the criteria for medical personnel at the hospital, see *supra* note 19 and accompanying text.

98. Even assuming the evidence obtained by the doctors did violate the Fourth Amendment, would that necessarily require exclusion of the tainted information? The *Ferguson* Court did not reach the issue of the Fourth Amendment exclusionary rule. The case did not arise on appeal of the women’s convictions. The action was brought in federal court against the city, law enforcement officials and representatives of the hospital. *See Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1281 (2001) (noting appeal arises from policy hospital established with police, which was an alleged violation of women’s Fourth Amendment). The claim argued Fourth Amendment violations and a disparate racial impact under Title VI, which bars racial discrimination in federally assisted programs. *See id.*

While the Court has found that the Fourth Amendment applies to a variety of non-police officials, such as teachers, *T.L.O.*, 469 U.S. at 325, fire fighters, *Michigan v. Clifford*, 464 U.S. 287 (1984), and health inspectors, *Camara v. Municipal Court*, 387 U.S. 523 (1967), it has declined to make the exclusionary rule coterminous

### 3. *The Downside of Incarcerating Pregnant Drug Addicts*

In my view, these criminal prosecutions that steer clear of *Ferguson*, although probably constitutional, are neither efficacious nor humane. Giving birth in jail is one of the most shattering experiences for a woman.<sup>99</sup> She is manacled to the bed, without birthing partners, and the child is immediately removed.<sup>100</sup> She and the child, therefore, cannot bond properly, and this results in many children having what are called "attachment disorders,"<sup>101</sup> with serious implications for the child's future emotional development.<sup>102</sup> Additionally, many crack babies enter foster care, which does not always provide a stable nurturing environment.<sup>103</sup>

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with the substantive coverage of the Bill of Rights guarantee against unreasonable searches and seizures. Indeed, the Court has held that judicial clerks, *Arizona v. Evans*, 514 U.S. 1 (1995), legislators, *Illinois v. Krull*, 480 U.S. 340 (1987), and judges, *United States v. Leon*, 468 U.S. 897 (1984), are not covered by the exclusionary rule, on the theory that such officials would not be deterred by its use. Presumably, the same would be true for doctors and other medical personnel. The risk remains that if there is a Fourth Amendment violation, women may be able to sue for damages.

99. In 1993, a class action suit was brought by women prisoners against the District of Columbia correctional system. See *Women Prisoners v. District of Columbia*, 877 F. Supp. 634, 638-39 (D.D.C. 1994) (seeking injunctive relief from sexual harassment, violation of Title IX and for inadequate obstetrical and gynecological care). The women sued for injunctive relief to improve conditions in the D.C. correctional facilities. In addition to the women not receiving proper prenatal care, the case illustrates the problems women face when they are pregnant and in prison. One woman whose contractions were five minutes apart was shackled and sent to a prescheduled court hearing. See *id.* at 646. She was returned to the facility because she could not walk due to the labor pains and was offered aspirin and told to "prop her feet up and rub her stomach." *Id.* She delivered her baby shortly after in her cell, and then was shackled and sent to the hospital. See *id.* Handcuffs and shackles are not unusual for women in jail. "A physician's assistant stated that even when a woman is in labor 'their ankles and their hands are cuffed.'" *Id.*

100. Cf. *id.* at 646-47 (discussing shackling of inmates during labor and postpartum treatment of female inmates and their children).

101. Attachment disorders occur when an infant does not have the opportunity to bond with a nurturing caregiver who attends to the infant's needs. A constant caregiver gives an infant a secure base from which to explore his or her surroundings. Without appropriate attachment development, a child will have difficulty forming normal relationships and is likely to have impaired social development. See Samantha L. Wilson, *Attachment Disorders: Review and Current Status*, 135 J. PSYCHOL. 37, 37-49 (2001) (reviewing literature and studies available on attachment disorders).

102. See *id.* at 49 (noting potential perils of attachment disorders). Mothers are also impacted by the separation from their children. This can cause severe post-partum depression. In the D.C. correctional facilities, women were given minimal visiting time with their babies and were not given proper counseling to arrange for alternative care. See *Women Prisoners*, 877 F. Supp. at 647 (stating practices of D.C. Department of Corrections). Experts testified that mothers need to hold their children often, at least for every feeding time. See *id.*

103. Recent studies have indicated that "crack babies" who are brought up in nurturing environments, with consistent, caring caretakers, can catch up developmentally with children who are born drug-free. See Logan, *supra* note 2, at 121.

Furthermore, the use of jail for drug abusing expectant mothers beyond the first trimester may not necessarily help the fetus. The medical evidence indicates that drug abuse, similar to alcohol abuse, does the most damage in the first trimester,<sup>104</sup> and that many women who are drug abusers do not get prenatal care for many reasons, including not knowing they are pregnant.<sup>105</sup> This is not to say that damage or even death can not occur in the later stages of pregnancy or in the birthing process, for it can and does.<sup>106</sup> The odds are, however, that drug use in the first trimester is the most important in terms of protecting the child from developmental and neurological harm.

Criminal prosecution also does not provide lasting benefits for the mother. Unless she receives treatment in jail, which she has to be willing to accept, and many are not, she will be back on drugs as soon as she is released. While it is true that she cannot use drugs while in jail,<sup>107</sup> there will be nothing to prevent her from becoming pregnant again upon her release and renewing her drug use, this time with knowledge that going to a doctor for prenatal care is dangerous to her liberty.<sup>108</sup>

Moreover, the reality is that many states do not provide quality drug treatment programs for pregnant women, either in jail or on the

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Therefore, it becomes even more important for these children to avoid being caught up in the foster care shuffle.

104. See Gale A. Richardson & Nancy L. Day, *Studies of Prenatal Cocaine Exposure: Assessing the Influence of Extraneous Variables*, 29 J. DRUG ISSUES 225, 232 (1999) (noting tendency of births of underweight babies from mothers that used cocaine during first trimester). It is difficult to determine the actual effect of crack cocaine on the fetus as compared to the effects from other factors. Women, who are heavy users of cocaine during the first trimester, are also more likely to receive inadequate or no early prenatal care, abuse alcohol and other drugs and use tobacco. They are also less likely to provide proper stimulation to the infant when it is born. See *id.* at 222 (noting demographic prevalence of low-income mothers in such category).

105. See Robert E. Arendt et al., *Accuracy of Detecting Prenatal Drug Exposure*, 29 J. DRUG ISSUES 203 (1999) (noting results of advanced testing for prenatal cocaine use). Table One in the Arendt et al. article indicates that mothers who used cocaine were older, had delivered more children and had fewer prenatal visits. See *id.* at 208.

106. See Richardson & Day, *supra* note 104, at 233 (noting multiple complications that may lead to death caused by prenatal cocaine use).

107. Even this, however, is subject to doubt. Inmates may be able to get illegal contraband. If the woman is not placed in a drug treatment program immediately upon incarceration, the end result could be no different than if the addicted pregnant woman was left in the streets.

108. I will leave aside the possibility of forced sterilization. Compare *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding forced sterilization of third generation mentally retarded persons), with *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (invalidating, on equal protection grounds, sentencing guidelines authorizing sterilization for certain categories of criminals).

outside.<sup>109</sup> The rate of recidivism is extremely high for drug offenders,<sup>110</sup> as is witnessed by celebrities who, even when jailed, go back to drugs once they are released, risking their careers and freedom. Darryl Strawberry and Robert Downey, Jr. are such recent examples,<sup>111</sup> but there are many others. This occurs notwithstanding their access to the best treatment programs that money can buy.<sup>112</sup>

The jails and prisons are notorious for poor health care in general, particularly for women.<sup>113</sup> AIDS, breast and uterine cancer and complications of childbirth do not receive proper medical attention.<sup>114</sup> Whether we like it or not, drug addiction is a disease—a medical problem, that is difficult to treat and cure.<sup>115</sup> There is no reason to believe that the states, which provide the most minimal medical care for physical ailments in prison, will do any better with drug addiction.

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109. See Linda M. Whiteford & Judi Vitucci, *Pregnancy and Addiction: Translating Research Into Practice*, 44 SOC. SCI. & MED. 1371, 1372 (1997) (“[P]regnant women incarcerated for substance abuse are rarely provided treatment for their addiction.”); see also Nora S. Gustavsson & Anne E. MacEachron, *Criminalizing Women’s Behavior*, 27 J. DRUG ISSUES 637, 681 (1997) (“More than half of the drug treatment facilities in New York City refuse to admit pregnant drug users, and Massachusetts allocated only 15 residential treatment slots, statewide, to pregnant women.”).

110. See Kim Cobb, *Proposition Mandates Treatment, Not Prison: California to Vote on Drug-War Issue*, HOUS. CHRON., Oct. 2, 2000, at 1 (noting that sixty to eighty percent of all California inmates are destined to return to prison). “The General Accounting Office of Congress . . . reported that drug offenders who go to prison are four times as likely to return to prison in five years as people who receive treatment.” *Id.*

111. See *Nightly News* (NBC television broadcast, Aug. 5, 2001) (discussing problems celebrities have with drugs and alcohol abuse and their inability to remain drug-free after completing treatment program).

112. See *id.* (noting that staying sober at rehabilitation can be monumental challenge for celebrities). This is true for women performers too. Billie Holiday died poor and addicted to drugs in a treatment hospital. See Teddy Jamieson, *The Real Key Is Living the Blues*, HERALD (Glasgow, Scotland), Apr. 2, 2001, at 12 (discussing various women performers that have had drug problems, including Billie Holiday, Whitney Houston and Janis Joplin).

113. See *Women Prisoners v. District of Columbia*, 877 F. Supp 643 (D.D.C. 1994) (noting that female inmates experience higher rate of illness than general population). The policy of the Department of Corrections states that all new inmates “will be seen within 24 hours to determine the health status of the resident.” *Id.* This was not done for women prisoners. See *id.* at 643-44 (noting that female prisoners are not even given pelvic or breast exams during intake examination).

114. See *id.* at 643-48 (documenting improper healthcare for female inmates). There are many examples of poor health care given to women in prisons, including failure to provide regular breast and pelvic exams, regular prenatal care, pap smears and testing for sexually transmitted diseases. See *id.* The only test that was performed on a regular basis was for tuberculosis. These were likely done because tuberculosis posed a threat to prison personnel as well as other inmates. See *id.* at 644 n.11 (citing doctor’s testimony regarding reasons for frequency of tests).

115. See Allan I. Leshner, *Addiction Is a Brain Disease*, ISSUES SCI. & TECH., Apr. 1, 2001, at 75, 80 (stating that there is need to recognize addiction as brain disease in order to develop effective treatment programs).

There is also a problem of rationality with using evidence obtained from pregnant women to criminally prosecute them. If pregnant women know that their use of crack cocaine can, and indeed must, be reported to the police by medical personnel, there is a greater likelihood that they will not seek prenatal care at all,<sup>116</sup> thus increasing the danger of harm to both the mother and the fetus. As a matter of policy, therefore, we need to explore this relationship in greater depth before resorting to imprisonment for addicted pregnant women—an expensive and dehumanizing experience.<sup>117</sup>

### B. *Civil Commitment*

Would civil commitment statutes be a better solution? Certainly, as a matter of due process protection, it is an easier route for the state. In *In re Gault*,<sup>118</sup> the United States Supreme Court held that the civil label of convenience would not prevent the imposition of constitutional guarantees in juvenile court actions to determine if a child is delinquent.<sup>119</sup> The Court has, however, since strayed from that notion, and it has upheld the constitutionality of proceedings that are labeled civil and result in incarceration, even though not all criminal law safeguards were in place. For example, in *Allen v. Illinois*,<sup>120</sup> the Court permitted psychiatric testimony obtained from interviews with the defendant without *Miranda* warnings to be introduced at a civil proceeding conducted to declare a person sexually dangerous.<sup>121</sup> The majority stressed that the commitment proceedings were civil in nature and that the goal was treatment, not punishment.<sup>122</sup>

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116. See GOMEZ, *supra* note 1, at 146 n.25. Furthermore, studies indicate “coerced treatment is less successful than voluntary treatment.” *Id.*

117. If crack addicted pregnant women do not get prenatal medical care because they are afraid of self-incrimination and criminal prosecution, there is more likelihood that the fetus will be harmed. It is extremely difficult for anyone other than medical personnel providing prenatal care to detect potential harm to the fetus. This is different than the situation when parents fail to take their abused child for medical treatment. Other people will see the child and may recognize the abuse. The child may be in school or may be seen by neighbors or even people in stores. Any one of these individuals might report suspected child abuse and some are likely to be mandatory reporters. If a pregnant woman does not seek medical help, it is less likely that anyone else would recognize the possible abuse to the fetus, and no help will be provided for the woman or the fetus. Implicit in this conclusion is that people on drugs do not always manifest behavior indicating drug use.

118. 387 U.S. 1 (1967).

119. See *Gault*, 387 U.S. at 26-27 (noting that essentials of due process may provide more “therapeutic attitude” for juveniles).

120. 478 U.S. 364 (1986).

121. See *Allen*, 478 U.S. at 375 (noting that privilege against self-incrimination is not designed to enhance reliability of fact-finding); see also *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (upholding civil commitment for sexually violent offenders).

122. See *Allen*, 478 U.S. at 372-73 (describing state’s intentions and purposes regarding civil commitment).



Furthermore, the loss of liberty does not by itself trigger Sixth Amendment protection.<sup>123</sup> In *Middendorf v. Henry*,<sup>124</sup> the Court held that there was no right to appointed counsel either under the Sixth or the Fifth Amendments<sup>125</sup> at summary courts martial because they were not criminal prosecutions, even though the possible punishment was thirty days at hard labor.<sup>126</sup> Civil commitment also does not implicate *In re Winship*.<sup>127</sup> In *Addington v. Texas*,<sup>128</sup> involuntary commitment of mentally ill persons to state hospitals on less than reasonable doubt passed constitutional muster.<sup>129</sup>

Civil commitment, on its face, appears to be less intrusive than jail. Almost invariably, however, the care occurs in an institution with locks and bars. As the Chief Justice noted in *Allen*, the sexual offender rehabilitation involved there took place in a maximum security facility.<sup>130</sup>

The question is whether the state would provide higher quality programs for pregnant women who are civilly committed as opposed to those in jail.<sup>131</sup> The facilities and treatment that states provide for delinquent children, also under the guise of rehabilitation, are not comforting in this regard. The supposed beneficence of the state's exercise of its *parens pa-*

123. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

124. 425 U.S. 25 (1976).

125. The Fifth Amendment is the due process amendment that applies to the federal government. The Fourteenth Amendment only applies to the states.

126. See *Middendorf*, 425 U.S. at 46-48 (noting that individual facing martial trial was in more favorable position than probationer, who could face much longer incarceration).

127. 397 U.S. 358 (1970).

128. 441 U.S. 418 (1979).

129. See *Addington*, 441 U.S. at 428-30 (noting Texas' belief that various standards produce comparable results). The Court held that the clear and convincing standard of proof was necessary for the commitment of the mentally ill. See *id.* at 425-27 (considering both individuals' interest in not being involuntarily confined, and state's interest in being able to commit emotionally disturbed). The Court concluded that beyond a reasonable doubt standard was too difficult for the state to prove and still protect its citizens. See *id.* at 428-30 (explaining that this standard has been historically reserved only for criminal trials). The Court, however, pointed out that the state should not be permitted to interfere with an individual's liberty interest without a stronger showing than a preponderance of the evidence. See *id.* at 425-27.

130. See *Allen v. Illinois*, 478 U.S. 373 (1986) (noting that facility serves sexually dangerous persons and inmates who need psychiatric treatment). Chief Justice Rehnquist noted that neither the fact that it was a maximum-security prison nor that other prisoners were housed in the facility influenced the Court's analysis. See *id.* (recognizing the state's power to create such facilities to protect community). Neither of these factors meant that the state did not have the intent to treat sexually dangerous individuals rather than punish them.

131. For a further discussion, see *supra* notes 99-101 and accompanying text (noting that conditions for women in prison are extremely poor).

*triae* power over children<sup>132</sup> too often results in decrepit buildings,<sup>133</sup> corporal punishment<sup>134</sup> and lack of proper medical care.<sup>135</sup> Nor have the states done much better with respect to the mentally ill<sup>136</sup> or mentally retarded.<sup>137</sup>

Overall, I view criminal incarceration and civil commitment as six of one, half a dozen of another. To be sure, civil commitment does not result in a criminal record for the woman. In terms of freedom and quality medical care, however, the differences seem relatively slight.

### C. Equal Protection Concerns

Civil commitment proceedings, as well as criminal prosecutions against pregnant addicted women to protect their fetuses, would of course apply only to females. Under current law, that may not of itself create an equal protection problem. The reality, however, is that it will fall disproportionately on poor minority women.<sup>138</sup>

Where women are selected for different treatment because of pregnancy, the jurisprudence of the Supreme Court is complex. Although the Pregnancy Discrimination Amendment of 1978<sup>139</sup> makes pregnancy a protected class for purposes of Title VII,<sup>140</sup> which defines pregnancy-based discrimination as "sex discrimination," this is not true for equal protection claims. In 1974, the Supreme Court held in *Geduldig v. Aiello*<sup>141</sup> that California's denial of state disability benefits for work loss resulting from a

132. See *Schall v. Martin*, 467 U.S. 253, 263 (1984) (holding that the state has interest in protecting juveniles through its *parens patriae* power and in protecting community through its police power).

133. See *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1359-62 (D.R.I. 1972) (describing cold, dark, damp quarters that juveniles were kept in without toilet paper, blankets, etc.).

134. See *Nelson v. Heyne*, 491 F.2d 352, 356 (7th Cir. 1974) (finding that hitting juveniles with "fraternity paddle" was cruel and unusual punishment).

135. See *Morales v. Turman*, 383 F. Supp. 53, 72-83 (E.D. Tex. 1974) (noting inevitability of such repressive measures in large institutions), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 988 (1977).

136. See *O'Connor v. Donaldson*, 422 U.S. 563, 581 (1975) (Burger, C.J., dissenting) (holding that states must provide at least minimal treatment for non-dangerous, mentally ill patients committed to state mental health hospitals when plaintiff had been incarcerated for twenty-five years without any treatment).

137. See *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (holding that mentally retarded have right to reasonably safe conditions and minimal training to protect their interests).

138. Because the poor are least likely to be able to effectively challenge the quality of services and treatment, these programs will effectively be shielded from judicial supervision. Recent legislative changes prevent legal aid organizations from representing individuals in class action suits. This also will make it difficult for these laws to be challenged.

139. See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1994).

140. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(a)-2000e(c) (1994).

141. 417 U.S. 484 (1974).

normal pregnancy did not violate the Equal Protection Clause of the Fourteenth Amendment. Instead of treating the issue as a matter of classification on the grounds of gender, which would subject it to heightened scrutiny, the Court distinguished between two groups—one consisting of “pregnant women,” and the second, of “nonpregnant persons.”<sup>142</sup> As a result, the Court considered the case a “far cry” from sex-based discrimination, and therefore, held that “lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis . . . .”<sup>143</sup> This is merely rational relationship scrutiny, a standard that is usually very easy for the state to satisfy.<sup>144</sup>

*International Union, UAW v. Johnson Controls*<sup>145</sup> also was based on differences in reproductive roles between men and women, but it was a Title VII case, not a constitutional decision. The Court ruled that employers’ “fetal protection policies” were invalid because they banned all fertile women from workplace environments that were said to pose reproductive risks due to chemical or lead exposure. Writing for the majority, Justice Blackmun held that the plain language of the statute made it clear that such policies were facially discriminatory because they were based specifically

142. *Geduldig*, 417 U.S. at 496-97 n.20.

143. *Id.*

144. The one constitutional case in which the Supreme Court invalidated discrimination based on pregnancy was a due process claim, rather than an equal protection claim. In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Court found that the school district’s policy of forcing pregnant teachers out of the classroom at four months, based on an irrebuttable presumption of unfitness, violated the Due Process Clause. *See id.* at 644 (noting that this policy intends to keep incapacitated, pregnant teachers out of classrooms). The viability of the irrebuttable presumption line of cases is in doubt.

The problems associated with equal protection are further illustrated by a recent citizenship case. *See Nguyen v. INS*, 121 S. Ct. 2053, 2057-58 (2001) (relating to case where lawful United States resident, who was born out of wedlock in Vietnam, was to be deported based on decision of Board of Immigration Appeals). The Court validated a statute that outlined the procedure one must take to prove citizenship when one’s father is a citizen and one’s mother is an alien. *See id.* at 2059 (noting statute passes equal protection test, which requires an important governmental interest and that discriminatory means be substantially related to objective). The procedure for proving citizenship is different if one’s mother is the citizen and one’s father is the alien. *See id.* The majority reached this result by denying that gender-based discrimination was involved. *See id.* at 2056 (discussing congressional intent). Instead, it viewed the distinction as one between fathers, who met the requirements of the statute, and ones that did not. The dissent, coincidentally including both Justices O’Connor and Ginsburg, viewed the law as a “sex-based statute.” *See id.* at 2067 (O’Connor, J., dissenting) (explaining that sex-based statutes, even when reflecting typical characteristics of men and/or women, deny individual’s opportunities). Therefore, the dissent would have applied heightened scrutiny and struck it down for lack of an “exceedingly persuasive” justification. *See id.* (noting that equal protection demands proper application of heightened scrutiny to sex-based classification); *see also* *United States v. Virginia*, 518 U.S. 515, 531 (1996).

145. 499 U.S. 187 (1991).

on pregnancy.<sup>146</sup> Of course, this ruling also reflects the equation of pregnancy discrimination with sex discrimination in the statute.

Clearly, it is important to first determine whether criminal prosecution and civil commitment of pregnant addicted women to protect the fetus are sex-based. If the Court determines, as it indicated in previous cases, that such actions are not sex based, a successful equal protection challenge would be difficult.<sup>147</sup> As is apparent from *Washington v. Davis*,<sup>148</sup> proof of disparate impact alone would not be enough—intentional discrimination on the grounds of gender is required. If intentional sex-based treatment is found, the state must satisfy the intermediate standard of equal protection analysis by demonstrating an “exceedingly persuasive justification” for that action.<sup>149</sup> Although this standard of review is not strict scrutiny according to the Court, “the burden of justification is demanding, and it rests entirely on the State.”<sup>150</sup>

Although the government’s interest in protecting the unborn child is “important,” as is required by the intermediate level of review associated with sex discrimination, it might be difficult for these statutes to meet the second part of the test, which requires they be “substantially related to the achievement of those objectives.”<sup>151</sup> There is evidence that crack addicted pregnant women are less likely to seek medical help early in their pregnancy,<sup>152</sup> and therefore, neither criminal prosecution nor civil commitment is likely to help prevent damage to the fetus, as this is more likely to occur early on in the pregnancy.<sup>153</sup> Furthermore, studies indicate that if pregnant women know they can be prosecuted for drug use or child abuse, they do not seek medical treatment.<sup>154</sup> Thus, if these prosecutions

146. See *Int’l Union*, 499 U.S. at 199 (stating that Court’s conclusion is bolstered by Pregnancy Discrimination Act, which includes pregnancy as a basis of discrimination).

147. *But see* *Thurman v. Torrington*, 595 F. Supp. 1521, 1526 (D. Conn. 1984) (noting that gender classifications would be valid if substantially related to important governmental objective or purpose). *Thurman* is a much-cited lower court opinion, in which the plaintiff alleged that city police “consistently afforded lesser protection, . . . when the victim is (1) a woman abused or assaulted by a spouse or boyfriend, or (2) a child abused by a father or stepfather.” *Id.* at 1527. The court held a claim under the Equal Protection Clause was properly asserted. See *id.* (noting that equal protection is applied to legislative action and discriminatory governmental action in administration and enforcement of law).

148. 426 U.S. 229 (1976).

149. *Virginia*, 518 U.S. at 531 (1996).

150. *Id.* at 533 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

151. *Id.*

152. This is more likely due to the woman’s poverty and likelihood of homelessness than her lack of concern regarding the unborn child. See GOMEZ, *supra* note 1, at 17 (noting correlation between poverty and drug addiction).

153. For a further discussion, see *supra* note 104 and accompanying text.

154. For a further discussion, see *supra* note 116 and accompanying text. Most crack addicted pregnant women, however, are aware of the effect their drug use can have on their unborn child and would prefer to stop using drugs during

are considered gender based, the elevated means analysis might pose constitutional difficulties.

Even if the Court does not determine that such actions are gender based, there is a possibility, admittedly unlikely, that the actions could be considered race based. The *Davis* disparate impact problem is still an obstacle.<sup>155</sup> Intentional class based discrimination must be shown.<sup>156</sup> Where the impact is extremely disproportionate, however, that may be taken as evidence of purposeful racial bias.<sup>157</sup> For example, there is some evidence that doctors treat women of color differently when ordering invasive medical procedures. One study found that women were racial minorities in eighty-one percent of the cases in which doctors sought court ordered obstetrical interventions.<sup>158</sup>

To the extent that the prosecution of addicted pregnant women is based on the use of crack cocaine, one might argue that this too constitutes racial discrimination. Statistics indicate that approximately ninety-five percent of persons prosecuted for possession of crack in federal court are African American,<sup>159</sup> while the reverse is true for possession of powder cocaine.<sup>160</sup> Furthermore, the sentence for crack is much higher than it is for cocaine.<sup>161</sup> The lower courts have nonetheless refused to invalidate the disparate sentences.<sup>162</sup> It is problematic whether such statistics would

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their pregnancy. See *GOMEZ*, *supra* note 1, at 17 (“In one study of severely addicted women, 50 percent reported reducing their drug use while they were pregnant, and another 25 percent reported abstaining from use for the duration of their pregnancy.”).

155. See *Washington v. Davis*, 426 U.S. 239 (1976) (noting that primary purpose of Equal Protection Clause is prevention of race discrimination).

156. See *id.* at 241 (stating that once “prima facie” case of discrimination is demonstrated, burden shifts to state to “rebut presumption of unconstitutional action”) (citing *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

157. For example, in the venerable case, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court found that a facially neutral law that was enforced almost exclusively against Chinese laundries violated the Equal Protection Clause. Similarly, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court considered evidence of racially disparate impact to support an inference of discrimination, albeit in the context of voting rights.

158. See Deborah J. Krauss, Note, *Regulating Women’s Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decisions and Women of Color*, 26 HARV. C.R.-C.L. L. REV. 523, 531 (1991) (noting that minorities, African Americans, Asian Americans and Latinos, were treated differently when receiving medical care).

159. See *United States v. Clary*, 34 F.3d 709, 711 (8th Cir. 1994) (citing that “92.6 percent of those convicted of crack cocaine charges nationally were African American, as opposed to 4.7 who were white”).

160. See *id.* (noting disparate number of powder cocaine charges as compared to crack cocaine charges against African Americans).

161. See *id.* at 712 (providing for ten-year minimum sentence for those persons found possessing fifty grams or more of cocaine base [crack] and similar ten-year minimum sentence imposed for those possessing over 5,000 grams of powder cocaine) (citing 21 U.S.C.A. § 841(b)(1)(A)(iii)).

162. See *id.* (refusing to find that Congress was racially motivated in establishing sentencing guidelines).

be sufficient to show that “crack baby” prosecutions are racially discriminatory in violation of the Equal Protection Clause.<sup>163</sup> In sum, while use of both criminal prosecution and civil commitment as sanctions against pregnant, addicted women raises equal protection concerns, constitutional challenges on that basis are unlikely to meet with much success, at least in the absence of proof of intentional sex based discrimination.

### III. EVIDENCE OF DRUG ABUSE DURING PREGNANCY AS A BASIS FOR TEMPORARILY REMOVING A CHILD FROM PARENTAL CUSTODY AND FOR TERMINATION OF PARENTAL RIGHTS

As an alternative to criminal or civil incarceration of crack addicted pregnant women, the state may turn to civil dependency actions, also called child abuse and neglect proceedings, both as a spur to get the woman into treatment and as a means to protect the fetus and any other children the woman may have. Civil dependency actions can be both for temporary removal of a child<sup>164</sup> and for permanent termination of parental rights.<sup>165</sup> While temporary removal is less intrusive than termination, it is not without consequences for the mother and child. There are few published opinions regarding temporary removal,<sup>166</sup> but a discussion and analysis of the process involved will help clarify the issues.

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163. See *McCleskey v. Kemp*, 481 U.S. 279, 294 (1987) (rejecting African-American defendant’s argument that statistical study indicating that race was a factor in imposition of capital punishment in Georgia established equal protection violation because petitioner must prove purposeful discrimination in his particular case). Thus, statistical studies alone may be insufficient to show proof of discrimination.

It would be even more difficult to complain about the selection of poor women as targets of such statutes. See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (declining to recognize indigence as specially protected class).

164. See, e.g., *In re Jessica M.*, 586 A.2d 597, 605 (Conn. 1991) (finding that child could be temporarily removed from mother’s care, but there was not sufficient evidence to sustain termination of parental rights).

165. See, e.g., *In re Jamie R.*, 109 Cal. Rptr. 2d 123, 128 (Cal. Ct. App. 2001) (holding that termination is proper when state provided services to try and reunite family, children were adoptable and adoption was least detrimental alternative).

166. There are two reasons for the lack of appellate cases with regard to the temporary removal of a child from the parents’ custody. First, the majority of parents who find themselves involved with the dependency system are poor and cannot afford an appellate attorney or the transcript necessary for an appeal. The Court’s decision in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), which requires the state to provide transcripts for indigents appealing termination of parental rights, would not apply to temporary removal decisions. Second, the jurisdictional and dispositional hearings are not considered final hearings and may not be appealable. More often than not, the only hearing that can be appealed is the termination. The appropriateness of the removal, however, will also be considered by the appellate court at the termination appeal.

A. *Temporary Removal*

Currently all states have statutes that allow filing of an abuse and neglect petition relating to a child born to a drug abusing woman.<sup>167</sup> That is, the petition can be filed only *after* the child is born.<sup>168</sup> In some jurisdictions, the laws allow automatic removal of a child born with illegal drugs in his or her system.<sup>169</sup> Other states permit removal of the child born testing positive for drugs only if there are other indications that harm may come to the child, such as the parent's inability to provide proper care—food, housing or medical treatment.<sup>170</sup> In yet another group of states, even if the child is born “tox positive,” the courts have found removal improper because the child was only a fetus at the time of the mother's use of drugs, and such courts interpret their statutes as to require that the mother's abuse occur only *after* the child is born.<sup>171</sup> Since such statutes permit the filing of a petition to remove the child only *after* the child is born, they may not act as a strong incentive to a drug abusing pregnant woman to get treatment before the child is born; nor will they provide sufficient protection for the fetus.

Nevertheless, what if the pregnant drug abusing woman has other children? For example, a woman has one child and goes to the doctor for a pregnancy test. She is pregnant for the second time, and the urine test also indicates the presence of illegal drugs in her system. The doctor warns her of the possible harm to the fetus and encourages her to enter treatment. She refuses, and the doctor then reports the positive drug results to the child protective services agency. Caseworkers investigate and find that the mother is addicted to illegal drugs. As with removal actions for a newborn child, in some states, mere drug use by itself is sufficient to authorize removal of the addict's other children without any inquiry as to whether, aside from the addiction, the woman demonstrates decent parenting skills.<sup>172</sup> In other jurisdictions, there must be a nexus between the addiction and the mother's ability to care for her other children. For example, the court might consider additional actions by the parents such as “the withholding of parental attention and care, and the diversion of family resources in order to support a drug habit, . . . [resulting in] neg-

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167. See, e.g., CAL. WELF. & INST. CODE § 300 (West 2000); FLA. STAT. ANN. § 39.01 (West 2000); TEX. FAM. CODE ANN. § 261.001 (Vernon 2000).

168. See, e.g., *Ex. rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 740 (Wis. 1997) (stating that petition for child in need of protection cannot be filed with respect to fetus because it must be child that is born).

169. See, e.g., IOWA CODE ANN. § 232.68(2)(f) (West 2000).

170. See, e.g., CAL. WELF. & INST. CODE § 300 (b) (West 2000) (stating there can be finding of abuse if parent fails to provide “regular care” for their child due to substance abuse).

171. See, e.g., *In re Fletcher*, 533 N.Y.S.2d 241, 243 (N.Y. Fam. Ct. 1988) (rejecting notion that prenatal conduct alone could constitute finding of neglect of child after it is born leading to removal of child from mother).

172. For a further discussion, see *supra* note 169 and accompanying text.

lect and lack of nurture for the child.”<sup>173</sup> Without this additional evidence of maltreatment, in these states, there can be no removal of the woman’s other children, on the theory that drug abusing women do not necessarily neglect or abuse their children.

In all states, social workers and drug abusing pregnant women, with or without other children, are authorized to enter into voluntary agreements in which the state foregoes a civil suit to remove the child if the mother takes the necessary steps to protect her children.<sup>174</sup> For the crack addicted pregnant woman, this would mean entering a drug treatment program. In the states that direct automatic removal of other children of substance abusing pregnant women, if the mother refuses to enter the program or discontinues treatment, a removal petition will be filed. In those states that require more than just addiction, whether a petition is filed depends on the facts and circumstances of each case.<sup>175</sup>

Assuming the caseworker has sufficient grounds to file a petition, either because drug use is an automatic basis for removal, or because there is other evidence demonstrating parental unfitness, there will be a hearing to determine if removal is proper and necessary.<sup>176</sup> As a matter of federal constitutional law, the indigent mother is not entitled to an attorney at these temporary removal proceedings,<sup>177</sup> although some states do assign attorneys, particularly when it appears that there will ultimately be a termination hearing.<sup>178</sup> The burdens of proof at these proceedings range from

173. *In re Guardianship of K.H.O.*, 736 A.2d 1246, 1254 (N.J. 1999). The New Jersey Supreme Court found that other factors besides a mother’s drug use, indicate continued neglect or abuse by the parent. *See id.*

174. This can happen in one of two ways. The child protective services agency may leave the child in the home with the mother and provide services for the family. *See* CAL. WELF. & INST. CODE § 300 (West 2000) (“[N]othing in this section is intended to limit the offering of voluntary services to those families in need of assistance but who do not come within the descriptions of this section”). In other situations, the agency may try to convince a parent to voluntarily relinquish custody for a short period of time to correct things in the home. *See* N.Y. SOC. SERV. LAW § 358-a, 384-a (McKinney 2000) (allowing for voluntary placement of child for up to thirty days without filing of petition); TEX. FAM. CODE ANN. § 263.003 (Vernon 2000) (allowing voluntary placement of child for up to sixty days prior to filing petition).

175. In reality, however, such voluntary agreements are seldom used. Because of the limited personnel and resources, child protective agencies rarely provide preventive services for at risk families, and they are even less likely to extend programs to protect an unborn child.

176. *See* TEX. FAM. CODE ANN. § 262.105 (Vernon 2000) (hearing must be held within one working day of time child is taken into custody without court order); TEX. FAM. CODE ANN. § 262.201 (Vernon 2000) (requiring full adversary hearing within fourteen days after child is taken into custody).

177. The Supreme Court has not ruled on this issue. The Court has determined, however, that under certain circumstances parents may be entitled to an attorney at a termination proceeding. *See infra* notes 205-07 and accompanying text.

178. *See* CONN. GEN. STAT. ANN. § 46b-129(b)(iv) (West 2000) (granting attorney for indigent parent at hearing).



reasonable suspicion<sup>179</sup> to clear and convincing.<sup>180</sup> Evidence obtained from mandatory reporters is generally admissible in civil dependency actions to remove the child (or for that matter, to terminate parental rights).<sup>181</sup> Claims that the incriminating information was confidential and thus inadmissible, or that the exclusionary rule applies,<sup>182</sup> are routinely rejected by the courts.<sup>183</sup> The basis for using confidential information, either from doctors, nurses, teachers, therapists or social workers, is that it is necessary for the court to have access to all information so as to make an informed judgment as to what is in the best interest of the child. It is these professionals who are more likely to first learn of the abuse, and who are in a better position to provide the information necessary to protect the children.

Parental neglect and abuse resulting in temporary removal of children outweighs the parents' fundamental right to the care, custody and

179. See CONN. GEN. STAT. ANN. § 46b-129(b) (West 2000) (allowing placement of child outside home to continue if, at hearing, "there is reasonable cause to believe" child is suffering physical danger).

180. See CAL. WELF. & INST. CODE § 361(c) (West 2000) (requiring finding, by clear and convincing evidence, that child is in substantial danger for removal of child from parent's home).

181. See CONN. GEN. STAT. ANN. § 46b-129(g) (West 2000) (allowing presentation of hearsay evidence at removal hearing when such has been made to mandatory reporter).

182. The Supreme Court has not ruled on these issues, but in various types of civil proceedings, even where the deprivation is great, the Court has held that the exclusionary rule does not apply. In *United States v. Janis*, 428 U.S. 433 (1976), the Court held that the exclusionary rule did not apply in a federal civil tax proceeding. In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Court held that the exclusionary rule was not applicable to deportation proceedings. Even where the proceeding can lead to criminal prosecution, as with grand jury hearings, the Court refuses to apply the exclusionary rule. See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (finding that exclusionary rule has never been "interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons"). Therefore, even though a civil abuse and neglect action can result in a criminal prosecution for child abuse, it would probably not trigger the exclusionary rule.

The Court dislikes the exclusionary rule because it suppresses reliable evidence and often helps the guilty. Therefore, it would be surprising if the federal exclusionary rule were found applicable in civil proceedings to temporarily remove a child, which is not considered as much of a deprivation as some other losses, and is permitted in order for the state to exercise its *parens patriae* power of protecting the child. State courts also are unlikely to find the exclusionary rule applicable in child protective hearings either as a matter of federal or state law. In *State v. C.R.*, 982 P.2d 73 (Utah 1999), the Utah Supreme Court stated that whether the exclusionary rule applies depends on the type of proceeding. The purpose of civil child protection proceedings is to protect children and their interests, and in fact, "children are removed only when it is in their best interest," not for "'punishment' to the parent." *Id.* at 78.

183. See *Betty J.B. v. Div. of Soc. Servs.*, 460 A.2d 528, 532 (Del. 1983) (holding that mother's right to exert privilege in regard to her mental health records had to bow to court being able to determine child's well-being).

control of their offspring.<sup>184</sup> In jurisdictions in which removal may be ordered on something less than clear and convincing evidence,<sup>185</sup> the court is likely to grant the request for removal of a child from addicted parents.<sup>186</sup> Before the judge grants removal, however, the state must show that removing the children from the parents' care is the least restrictive alternative available, and the least detrimental to the welfare of the children.<sup>187</sup> In jurisdictions where the evidentiary standard for removal is clear and convincing,<sup>188</sup> it may be more difficult for the state to justify even temporary removal of the children. Regardless of the strength of the burden of proof at this stage, however, as a matter of practice, the courts tend to resolve doubts in favor of removal.<sup>189</sup>

In the jurisdictional phase, the court makes a finding of civil neglect or abuse if there is sufficient evidence.<sup>190</sup> The state agency then develops a plan for the family. Thereafter, a dispositional hearing is held. At that time, the judge will determine the temporary placement of the children and approve a mandatory service plan. Where substance abuse is an issue, one condition of the plan will usually be that the mother enter into a residential drug treatment program, attend on an outpatient basis or submit to periodic drug testing.<sup>191</sup> The service plan is likely to have other requirements, as it is rare in such cases that substance abuse is the only

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184. *See, e.g.*, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) (holding state law requiring children to attend public schools unconstitutional because it interfered with "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (invalidating state law prohibiting teaching of modern foreign languages to young children as it interfered with the fundamental right of "individual[s] . . . to marry, establish a home and bring up children").

185. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (requiring clear and convincing evidence as proof in termination of parental rights cases, but not in removal cases in findings of neglect).

186. *See Hardy v. Dep't of Health & Rehabilitative Servs.*, 568 So. 2d 1314, 1316 (Fla. Dist. Ct. App. 1990) (concluding that finding of neglect can be based on preponderance of evidence).

187. *See, e.g.*, TEX. FAM. CODE ANN. § 262.201 (Vernon 2000) (requiring, for removal of child from parents' home, finding that "remain[ing] in the home is contrary to the welfare of the child," that there is urgent need for protection and that reasonable efforts were made to prevent removal of child from home).

188. For further discussion, see *supra* note 180 and accompanying text.

189. As a public defender and as Director of the Clinical Programs at the University of Houston Law Center, I have observed that judges normally err on the side of caution and will remove a child from the home based on the recommendations of the child protective services agency caseworker.

190. During the first hearing, the court determines if there is abuse and neglect. Then, if there is sufficient evidence, the court adjudicates the child a dependent of the court.

191. Every state has statutes dictating the contents of the service plan that must be developed between the state agency and the parents. *See* TEX. FAM. CODE ANN. § 263.102(a)(3) (Vernon 2000). The service plan must be in writing, specific, state a goal for the plan, provide actions and responsibilities necessary in order for the child to be returned and who the parents can contact for information regarding their child and services. The plan is developed between the agency

problem the family is facing. The parents will have to address these other issues as well.<sup>192</sup> If the mother refuses or discontinues treatment, fails drug tests or violates other conditions of the service plan, she will not have her children returned to her, and the state may remove the child with whom she is pregnant once he or she is born.<sup>193</sup>

In the above scenarios, a petition is filed only if the addicted woman has already given birth or if she has other children. Another possibility, which no state now pursues, is a statute that allows the filing of an abuse and neglect petition regarding the fetus before birth, even if the woman has no other children, if the addicted pregnant woman refuses treatment. In such circumstances, without such a statute, the state cannot use an abuse or neglect proceeding to spur the woman into treatment. The Wisconsin Supreme Court in *Ex rel. Angela M.W. v. Kruzicki*<sup>194</sup> refused to find that the meaning of the word "child" in civil dependency actions included the fetus.<sup>195</sup> The court explained that it would be difficult, if not impossible, to apply the statutory scheme that was in place if the legislature had meant for the term child to mean a fetus in addition to a child already born. Under the statutes, said the court, a "child" may be taken into custody if the child's welfare necessitates that he or she be removed from the home, a parent must be notified of where the "child" is placed within twenty-four hours, and every effort must be made to return a "child" in custody to the parent as soon as possible. None of these provisions could be applied to a fetus.<sup>196</sup>

Presumably, states do not permit the filing of such petitions before the child is born on the belief that the woman will not appreciate that her conduct during pregnancy will result in removal when the child is delivered. Thus, because there is no incentive for the woman to enter into treatment, there is nothing the state could do to protect the fetus. Such a position may be too pessimistic. The actual filing of the petition may be a way of demonstrating to the woman, particularly those with no other children, the consequences of a refusal to enter and stay in treatment. If the threat of future removal does not work, the only legal option for the state

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and the parents and must be signed by all parties. The court is responsible for reviewing the service plan on a regular basis.

192. See, e.g., *In re J.J.*, 737 N.E.2d 1080, 1083 (Ill. App. 2000) (noting that caseworker had developed several plans for family over duration of case, and although primary cause of abuse stemmed from alcohol consumption, service plans included such objectives as "attendance at Alcoholics Anonymous meetings and parenting classes, achievement of financial stability and maintenance of a clean and safe home").

193. See *In re Latifah P.*, 735 N.E.2d 1004, 1010 (Ill. App. 2000) (finding that mother did not complete requirements to establish her fitness and, therefore, could not have her children returned to her).

194. 561 N.W.2d 729 (Wis. 1997).

195. See *Ex rel. Angela M.W.*, 561 N.W.2d at 740 (noting that it is legislative function to define "child").

196. See *id.* at 736 (stating that inclusion of phrase "viable fetus" within definition of "child" would render "absurd" results).

in dealing with an addicted pregnant woman with no other children would be criminal or civil commitments.

This option of temporary removal of an addicted baby, or the mother's other children, although coercive, may not seem as blunt an instrument of social control as jail or civil commitment. It permits for more focused decisions regarding the best interests of the child. Some women will be deterred by the possibility of losing their child or children, and others will not. This approach, though, allows those decisions to be made on a case-by-case basis.

There are, however, three realities implicated here. One, noted above, is that there is a paucity of drug treatment centers, particularly for women who are pregnant.<sup>197</sup> Most drug treatment programs have been designed for men and have ignored the special needs of women, let alone pregnant women. Another difficulty is that child welfare caseworkers labor under huge caseloads and have limited resources. Their attention is, of necessity, directed to more severe and direct forms of child abuse.<sup>198</sup> Lastly, there is a major shortage of quality foster homes.<sup>199</sup> Crack addicted babies are more likely to need specialized care. There are even fewer options available for this group of children. Although it appears to be counterintuitive, it is not clear that it would be better to remove children from their homes, even with drug addicted parents (absent any other form of abuse), and place them in overcrowded, poorly run and sometimes dangerous foster homes.<sup>200</sup>

#### B. Termination

Assume the court removes a crack addicted baby and his or her siblings. What next? That depends on the jurisdiction. As with temporary removal statutes, some states explicitly permit termination of parental

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197. In fact, many programs explicitly exclude pregnant women. For a further discussion, see *supra* note 109 and accompanying text.

198. Not only are there limited resources for child protective services agencies, but the number of reports of child abuse have been steadily rising. See Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 515 n.30 (1998) (noting that caseworkers have little time to file reports, which typically yield "unsubstantiated allegations of abuse").

199. U.S. GEN. ACCOUNTING OFFICE, CHILD WELFARE: COMPLEX NEEDS STRAIN CAPACITY TO PROVIDE SERVICES (1995) (citing reasons for decline in number of foster homes, including low reimbursement rates, more children with special needs, inadequate support services and better employment opportunities outside the home).

200. It is not surprising that foster homes do not always provide quality care. In one survey, only twelve percent of the foster homes had received any type of pre-placement training, and only twenty-one percent had been visited by a social worker prior to a child being placed in the home. See Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 430 n.36 (1983) (emphasizing problems associated with foster home care).

rights based solely on the baby's addiction.<sup>201</sup> In those states, the mother's addiction alone may also serve as a basis for terminating parental rights with respect to all her children.<sup>202</sup> Some states have generally worded provisions permitting termination for endangering the safety and welfare of the child,<sup>203</sup> and they can easily be read to cover the cases of crack babies and their siblings. Such laws, however, require more than the mother's addiction to drugs, such as the mother not providing appropriate food or care for the infant or other children.<sup>204</sup>

This is an extreme remedy, potentially even more severe than incarceration, and one that is constrained by constitutional procedural guarantees beyond those that are required for temporary removal. The federal constitutionally mandated burden of proof is clear and convincing evidence.<sup>205</sup> Moreover, indigent mothers may be entitled to an attorney as a matter of due process, under the Fourteenth Amendment, depending on the complexity of the case, the likelihood of future criminal charges and the ability of the mother to represent herself.<sup>206</sup> Furthermore, some states provide attorneys in every termination case as a matter of state law.<sup>207</sup>

These procedural protections, however, mask an inescapable catch-22. Most quality treatment programs require at least one year to complete,<sup>208</sup> and there can be up to a year lag period before the woman can

201. Regarding termination, however, the court must additionally find it is in the best interests of the child. *See* CAL. WELF. & INST. CODE § 366.26(h) (West 2000) (stating that "wishes" of minor must also be weighed).

202. *See, e.g.*, ALA. CODE § 26-18-7(2) (2000) (citing, as one ground for termination, "excessive use of alcohol or controlled substances").

203. *See, e.g.*, CONN. GEN. STAT. ANN. § 17a-112(j) (West 2001) (permitting termination of parental rights if parent "has failed . . . to achieve such degree of personal rehabilitation" that there could be no reasonable belief that child could be returned home in reasonable length of time).

204. Termination petitions generally are not filed until the child is born. There are two exceptions to this general rule. First, if a woman attempts an abortion and it fails, termination proceedings may be started prior to the birth of the child. *See* TEX. FAM. CODE ANN. § 262.006(a) (Vernon 2000) (authorizing representative of Department of Protective and Regulatory Services to assume care, control and custody of child born alive, notwithstanding an abortion, as defined by Chapter 161). Second, if a man ignores his financial responsibility for the unborn child, termination proceedings may be filed prior to birth. *See* TEX. FAM. CODE ANN. § 161.001(1)(H) (Vernon 2000) (requiring that male act "voluntarily" and "with knowledge of the pregnancy" when he fails to provide financial support). In both cases, termination is not final until after the birth of the child.

205. *See Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

206. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33-34 (1981) (noting that assistance of appointed counsel applies to indigents in parental termination cases under certain circumstances).

207. *See* CAL. WELF. & INST. CODE § 366.26(f)(2) (West 2000) (requiring that if parent appears without counsel and is unable to afford counsel, court shall appoint counsel for parent, unless parent knowingly and intelligently waives such representation).

208. *See* Debra Melani, *Scarred for Life Drug Addicts Battle a Disease That Has No Cure*, ROCKY MTN. NEWS (Denver), May 29, 2001, at 3D (noting that plan created by patient and doctor is most effective).

even get into the treatment program.<sup>209</sup> All termination statutes, however, give the mother whose child or children have been temporarily removed, only a year, or at the outside, eighteen months, to show that she is a fit parent.<sup>210</sup> These short time schedules have been imposed on states as a condition of receiving federal funds for foster care placements.<sup>211</sup> If at the twelve-month hearing the state presents evidence to show that the parents did not improve the home situation, and that it is still unsafe to return the children to them, the court may terminate parental rights. The exception to this is if there is proof that the child is *likely* to return home within the following six months, the judge *may* allow parents a total of eighteen months to become fit.<sup>212</sup> But even this expanded time period would still ordinarily be insufficient for a woman to enter into and complete a quality substance abuse program.

Moreover, even if the mother could get into a program and complete it in eighteen months, there would still be a waiting period to see how the mother would do out of the program and with the child back in her care. If the child was returned within the eighteen-month period, the state may retain jurisdiction to determine how well the family is doing.<sup>213</sup> If the mother slips, though, as many crack addicts do, and turns to drugs again, even for a short period of time, the children will again be removed.<sup>214</sup> The state can then seek termination immediately as the eighteen-month period has passed.

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209. See, e.g., Maia Davis, *New Jersey Falls Far Short in Treating Addiction Study: Half of Those in Need Turned Away*, RECORD (Bergen County), Aug. 16, 2001, at A1 (stating that 67,000 adults seeking drug treatment in New Jersey are able to find treatment immediately, but 71,000 adults are turned away or are on waiting lists); Jennifer Smith, *California's Equitable Proposition: Drug Sentencing Favors Treatment*, NEWSDAY, July 23, 2001, at A6 (stating that finding a publicly-funded drug treatment program in California can take up to six months).

210. See CAL. WELF. & INST. CODE § 361.5(a)(3) (West 2000) (noting that court-ordered services may not exceed eighteen months after date child was originally removed from physical custody of parent or guardian).

211. See 42 U.S.C.A. § 671(C) (2001) (requiring that, "if continuation of reasonable efforts . . . is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child"); 42 U.S.C.A. § 675(5)(C) (2001) (defining "case review system"). Under this approach, a hearing is required to determine the best interests of the child. See *id.* (noting various courts and administrative bodies that have jurisdiction over such matters). Various determinations may be made regarding the future status of the child. See *id.* (stating that child may be "returned to parent," "remain in foster care" or be placed for "adoption"). There is a different goal for children over the age of sixteen. See *id.* (encouraging transition from foster care to "independent living").

212. See, e.g., CAL. WELF. & INST. CODE 361.5 (West 2000) (stating that court may only extend jurisdictional time period for dependency case if there is substantial probability that child will be returned to parent's physical custody or that reasonable services have not been provided to parents).

213. For a further discussion, see *supra* note 210 and accompanying text.

214. For a further discussion, see *supra* notes 167-75 and accompanying text.

In effect, therefore, a mother and her child or children may have to be separated for up to two and a half years before a permanent decision can be made as to the children's future. What we have is a tension between the right of a child to have a permanent and nurturing home, and the right of a parent to the care and custody of her children. This is an exquisitely difficult choice, one that could be ameliorated if the states would put more resources into drug treatment programs than into the building of more jails.

Indeed, one might argue that unless the state provides significant treatment programs for pregnant women, it should be unable to remove her children or terminate parental rights. In fact, under federal guidelines, states cannot terminate parental rights unless there is a showing that the state has provided "reasonable services" to the parent.<sup>215</sup> Reasonable, however, is a fuzzy term that may encompass *de minimis* efforts by the state.<sup>216</sup>

Prior to termination, the court holds a permanency planning hearing where the judge determines a permanent placement for the child based on the state's recommendation.<sup>217</sup> In most jurisdictions, the court can consider three options. First, the child may be returned to the parents' care if the situation has improved, and it is safe for the child.<sup>218</sup> Second, if the child cannot return home, the state may seek to terminate parental rights and place the child for adoption.<sup>219</sup> Third, the child may be placed with a relative, in long-term foster care or in a group home.<sup>220</sup> Some jurisdictions also permit juvenile guardianships, a placement midway between foster care and adoption.<sup>221</sup> It is similar to long-term foster care, but under the guardianship, it is more difficult for parents to seek custody of

215. See Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980) (establishing federal laws mandating adoption, foster care and child removal procedures).

216. See generally, Christine H. Kim, Note, *Putting Reason Back Into the Reasonable Efforts Requirements in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 296 (arguing that states define "reasonable" through statute or case law); Shawn I. Raymond, Note, *Where Are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement? Monitoring State Compliance Under the Adoption Assistance and Child Welfare Act of 1980*, 77 TEX. L. REV. 1235, 1247 (1999) (discussing study that found only "thirty seconds" was devoted to review average child's case).

217. See, e.g., CAL. WELF. & INST. CODE § 366.26 (West 2000) (enumerating exclusive procedure for terminating parental rights or establishing guardianship of dependant minors).

218. See CAL. WELF. & INST. CODE § 366.21 (West 2000) (requiring status review hearings for all dependant minors).

219. See, e.g., CAL. WELF. & INST. CODE § 366.26(b)(1) (West 2000) (granting court authority to permanently terminate parental rights and order minor be placed for adoption).

220. See, e.g., CAL. WELF. & INST. CODE § 366.26(b)(4) (West 2000) (vesting court with power to place child in foster care, subject to review of juvenile court).

221. See, e.g., CAL. WELF. & INST. CODE § 366.26(b)(3) (West 2000) (permitting court to appoint legal guardian without terminating parental rights).

their children, and the state no longer supervises the placement.<sup>222</sup> In such placements, however, parents may visit their children and are responsible for paying child support.<sup>223</sup> The state can seek any variant of this third option if it remains unsafe for the child to return home, but it would not be in the child's best interests to terminate parental rights. This might occur if the child is older and strongly bonded to the parent, the child is not likely to be adopted because of age or special needs or the person who has been caring temporarily for the child is willing to have the child live with him or her until age eighteen, but is not in a position to adopt.<sup>224</sup>

Difficult as it may be to accept, drug-abusing women do not always neglect or abuse their children, and the state should proceed slowly before terminating the natural parent-child relationship when there is no other evidence of maltreatment.<sup>225</sup> Thus, not every parent's rights should be terminated, even if the mother is an addict. When the mother otherwise demonstrates good parenting skills, as many do, courts will often let her keep her children. Courts may dissolve legal bonds between parent and child, but the emotional ties often remain.

There are, of course, other means to protect the unborn child of a crack addicted pregnant woman that may be more effective than any of the previously discussed methods. Providing additional resources to develop more programs that specifically target drug abusing women before they become pregnant or early in their pregnancy, is more likely to have a positive effect on decreasing the number of children born addicted to

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222. *See, e.g.*, CAL. WELF. & INST. CODE § 366.26(D)(4) (West 2000) (relying on this method when adoption or termination of parental rights are not in best interest of child).

223. *See id.* (allowing for parental visitations unless court finds visitation would be psychologically damaging to child).

224. *See, e.g.*, CAL. WELF. & INST. CODE § 366.26(c)(1)(A)-(D) (West 2000) (listing options before court if court finds termination would be detrimental to child).

225. When I was a public defender in California, I represented an alcoholic father, whose wife was addicted to crack cocaine. She had three children, and although she remained off drugs during her pregnancies, she was unable to maintain this after the children were born. She failed several treatment programs and finally gave up. She did, however, take good care of her children. The house was kept clean, her children were well fed and clothed, and they always had appropriate activities. The children were doing well and were above age level developmentally. She never took drugs in the presence of her children. The state kept trying to remove the children and terminate her parental rights. They were unable to do so, and the family has continued to do well.



drugs. Programs in New York,<sup>226</sup> Florida<sup>227</sup> and California,<sup>228</sup> which provide comprehensive treatment services to women, have been successful in stopping women from using drugs and in helping them remain drug-free, therefore, giving birth to children who have either not been exposed to drugs, or at the most, have had only minimal exposure. These approaches do not coerce women into the program by the threat of incarceration or

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226. See Susan Egelko et al., *Treatment of Perinatal Cocaine Addiction: Use of the Modified Therapeutic Community*, 22 AM. J. DRUG & ALCOHOL ABUSE 185, 186-88 (1996) (explaining elements of perinatal treatment program at Bellevue Hospital in New York City). This New York program found that as it was continued and modified to meet the needs of pregnant women, the success rate for women remaining drug-free continued to rise. See *id.* at 200. In 1994, the year prior to the evaluation of the program, 94.1% of the urine drug tests conducted on perinatal clients were drug-free. See *id.* at 200-01 (comparing rise in success rate of perinatal clients with success rate of non-perinatal clients). The program found that women who started in the program early in their pregnancy were more likely to remain drug-free after the birth of their child. Furthermore, additional components to the treatment program, such as "intensive prenatal medical services for high-risk pregnancies, parenting education, counseling and psychiatric management," helped women stay drug-free. *Id.* at 201.

227. See Mary E. Haskett et al., *Intervention with Cocaine-Abusing Mothers*, 73 FAMILIES SOC'Y: J. CONTEMP. HUM. SERVICES 451, 451-52 (1992) (examining need for intervention and treatment for addicted mothers). Perinatal Support Services (PSS) in Florida started a program to assist high-risk pregnant females with drug treatment services. See *id.* at 453 (explaining child abuse prevention aspect of program). The program included "childbirth education classes, infant-parenting classes and educational materials . . . . Counseling components include[d] one-to-one crisis counseling and support, an independent-living-skills group, and an in-school support and education group for pregnant teenagers. Finally, a core of trained volunteers provide[d] support to individual clients through an Adopt-a-Mom program." *Id.* at 454. Some of the identifiable components which led to the program's success were early identification of addicted women, case management, group supportive counseling, individual counseling, independent living skills group, parenting class, in-home follow-up, education and training, and community involvement. See *id.* at 454-58. The program administrators also identified the need for two additional components—transitional aftercare housing and day care—that would help the women transition into employment, school or training. See *id.* at 459 (exploring future evolutions that would improve program already in place).

228. See Claire Brindis et al., *Options for Recovery: Promoting Perinatal Drug and Alcohol Recovery, Child Health, and Family Stability*, 27 J. DRUG ISSUES 607 (1997) (discussing California's Option for Recovery Program). This California program was developed as a collaborative effort by several state and local agencies. Case management services were available to the women prior to, during and after treatment. The program recognized the need for services to help women deal with a variety of issues such as "physical and sexual abuse, child abuse, inter-generational chemical dependence, low self-esteem and depression, single parenthood, poverty, and homelessness." *Id.* at 609. Women who were able to remain in a treatment program for a longer period of time were more likely to remain drug-free. Furthermore, women who entered the program early in their pregnancy were much more likely to deliver a drug-free child (77%) versus those who entered the program late in their pregnancy or after giving birth (52%). Another important aspect of the program was the focus on family maintenance and reunification. The program's personnel recognized that it would take a strong commitment on the part of the woman, her family and her community to ensure she remained drug-free.

by removing their children, but rather attract them by education, counseling and quality services designed specifically to help addicted women.

#### IV. CONCLUSION

Even after the *Ferguson* decision, a South Carolina woman, who allegedly killed her fetus by smoking crack cocaine when she was eight and a half months pregnant, was convicted of homicide child abuse by a jury that deliberated for fifteen minutes. She was sentenced to twelve years in prison, notwithstanding the split in expert testimony as to whether her use of crack cocaine actually caused the baby's death. Causation in these cases is often difficult to establish. The twenty-two year old woman had an IQ of seventy-two, was homeless, had suffered beatings at the hands of abusive men and had turned to crack only after her mother died. She was unable to care for her three other children.<sup>229</sup> In South Carolina, a viable fetus is considered a person, thus enabling these homicide prosecutions.<sup>230</sup> This is not the first case in which South Carolina charged crack addicted women with homicide when their babies were stillborn. The others, however, pled guilty, and thus, did not make the newspapers.<sup>231</sup> At the same time, South Carolina has a paucity of treatment services for addicted pregnant women.<sup>232</sup>

I do not deny that addiction and crack babies are a significant health and social problem in this country. Clearly, we must try harder to find efficacious ways of treating addiction. Although the law assumes that the use of drugs, even by an addict, is a voluntary act that is criminally culpable,<sup>233</sup> to treat pregnant women who are crack addicts as ordinary criminals who will be deterred by the imposition of incarceration is problematic and unnecessarily punitive. Drug addiction is tenacious and blurs moral reasoning. The incessant drumbeat of desire and need drives almost everything. These women are in the gray area between criminals who have unmitigated mens rea and those who are mentally ill. At the very least, addicts have a diminished capacity for control. Granted, when

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229. See Herbert, *supra* note 7, at A29 (noting that woman was also potentially mentally challenged).

230. See Firestone, *supra* note 7, at A11 (stating that Regina McKnight was first person in United States convicted of homicide of unborn fetus by smoking cocaine).

231. See Herbert, *supra* note 7, at A29 (noting that most defendants are poor and black).

232. See *id.* (commenting that although South Carolina leads in number of prosecutions of pregnant women, it trails with regard to treatment).

233. Compare *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that addiction is not a crime, and a person cannot be punished for his or her status, only an act), with *Powell v. Texas*, 392 U.S. 514, 532 (1968) (finding that defendant, who was found guilty of public intoxication, was punished for criminal act, not for his alcoholic status), and *United States v. Moore*, 486 F.2d 1139, 1155 (D.C. Cir. 1973) (holding that although addict can be convicted of mere possession, his sentence should be related to treatment).

addicts take the first dose, it is voluntary and intentional. Not every person, however, can foresee what will happen down the line. Although they see addicts in their neighborhood, they assume that they are different and can stop whenever they want. Speak to any confirmed smoker. In fact, there are some addicted women who, when they get pregnant, stop using drugs for the length of the pregnancy,<sup>234</sup> just as many women stop smoking or drinking. For those who cannot, however, I do not believe that the state should treat them as murderers or abusers. It may be necessary to remove their children, but what gain is there in punishment which is costly and does little to facilitate treatment?

Even removal and termination, which are also drastic approaches, are not perfect solutions to the intractable problem of drug abusing pregnant women. Removing children and terminating parental rights have serious consequences for the child, the parents and society. Nevertheless, it is sometimes necessary. But it is important to avoid unthinking, automatic responses. Not every child should be removed from the home, even if the mother is an addict. Each case must be separately evaluated, and the paucity of resources must be realistically examined before we decide to rupture a family, even one that is far from ideal.

We may have to take unpleasant steps to protect children. We must, however, do so carefully and with humility, because of our lack of knowledge and resources. Otherwise, future generations will look back at our treatment of crack addicted pregnant women in the same way we view the past treatment of the insane, from which we derive the word *bedlam*.<sup>235</sup>

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234. For a further discussion, see *supra* note 154 and accompanying text.

235. *Bedlam* is defined as "a place or scene of wild mad uproar." WEBSTER'S THIRD NEW INTERNATIONAL EDITION 196 (1986). The word was derived from the popular name of a hospital for the mentally insane in England. *See id.* (noting name of hospital was Hospital of St. Mary of Bethlehem in London).