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# State Intervention in Pregnancy

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## STATE INTERVENTION IN PREGNANCY

On April 18, 1991, a Florida appellate court upheld Jennifer Johnson's conviction for delivery of a controlled substance to a minor. The minor was her newborn infant, and the method of delivery was through the umbilical cord in the sixty to ninety second period immediately following birth. Johnson told her obstetrician that she had used crack cocaine that morning while she was in labor.<sup>1</sup>

There have been at least sixty women across this country who have been criminally charged for substance abuse during pregnancy.<sup>2</sup> A majority of Americans support such prosecutions,<sup>3</sup> but the *Johnson* case was the first time an appellate court has ever upheld such a conviction. Most courts have stated that the drug delivery statutes routinely used by prosecutors were never intended for such purpose and have referred the problem back to state legislatures for clearer directives.

There are other available responses to the problem of maternal substance abuse. Some of these are committing the mother to a hospital for the duration of the pregnancy, confinement to jail for the duration of the pregnancy, or removing the child from the mother after birth. Prosecutors like the one in the *Johnson* case have recently been turning to the option of prosecuting mothers after birth, presumably because the already existing methods of state intervention are not working well enough. Whichever option is chosen, the state is intervening in a delicate situation in an attempt to protect the life and health of the child.

Pregnancy presents a unique scenario in a legal system used to dealing with individual rights. In the situation of pregnancy, the rights at stake are more complicated than those of a single individual. The mother has rights as an individual, and the state has interest in the protection of fetal life. Because of the nature of pregnancy, one potential

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1. *Johnson v. State*, 578 So. 2d 419, 421 (Fla. App. 5th Dist. 1991) (Cobb, J., concurring). The prosecution used Fla. Stat. § 893.13(1)(c), which states in pertinent part:

Except as authorized by this chapter, it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years, or to use or hire a person under the age of 18 years as an agent or employee in the sale or delivery of such a substance, or to use such person to assist in avoiding detection or apprehension for a violation of this chapter.

2. Fla. Stat. Ann. § 893.13(1)(c) (West Supp. 1992). Rorie Sherman, *Courts Disagree on Mothers' Liability*, Nat'l L.J., May 13, 1991, at 30.

3. Rorie Sherman, *Bioethics Debate*, Nat'l L.J., May 13, 1991, at 1. A National Law Journal/Lexis poll showed that 52% of Americans believe a mother should be held criminally liable when her substance abuse results in impairment of her child.

life which is completely powerless to protect itself is subordinated to the will of another. Due to this relationship, controlling what a pregnant woman does with her body is in reality a difficult if not impossible task. But because of the great need to protect the unborn child, states have formulated different plans to prevent maternal substance abuse—civil commitment to a hospital, jail confinement during pregnancy, child abuse proceedings after birth, and criminal prosecution of the mother after birth.

This comment will address the constitutionality and wisdom of choosing the option of criminalization of maternal substance abuse.<sup>4</sup> It will first discuss the physical effects of cocaine use on the fetus, the history of such prosecutions, and the statutes some states have recently enacted to more directly address the problem.<sup>5</sup> It will then discuss the constitutionality of criminalization of maternal substance abuse. Finally, it will address whether criminalization is an effective method of addressing this problem and whether the other methods of state intervention are more promising.

## I. DIMENSIONS OF THE PROBLEM OF MATERNAL COCAINE ABUSE

### A. *What Are the Numbers?*

Fetal abuse has always been a serious problem, but the current popularity of crack, a cheap and highly addictive cocaine derivative, has made the situation even more dire.<sup>6</sup> Though estimates vary, the number of pregnant women who use cocaine is high. In major cities such as New York, many hospitals estimate that twenty percent or more of the babies delivered there have been exposed to drugs in utero.<sup>7</sup> Experts estimate that eleven percent of pregnant women have used illegal drugs during their pregnancy, and of that eleven percent, seventy-five percent have used cocaine.<sup>8</sup>

The actual number of infants exposed to drugs was estimated by two different sources based on the results of the same study. Taking the low and high numbers from each assessment, between 350,000 and 739,200 infants are born each year having been exposed to one or more

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4. Michele Magar, *The Sins of the Mothers*, *Student Law.*, Sept. 1991, at 30.

5. This comment addresses the issue of maternal substance abuse by focusing exclusively on cocaine as an example, but the same arguments would apply to other illegal substances as well.

6. *Legal Interventions During Pregnancy; Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 *JAMA* 2663, 2666 (1990) [hereinafter *Interventions*].

7. Anastasia Toufexis, *Innocent Victims*, *Time*, May 13, 1991, at 56, 57.

8. *Interventions*, supra note 6, at 2666.

illicit drugs.<sup>9</sup> These statistics indicate a huge problem exists in this country today, and current methods of deterrence are not working satisfactorily.

*B. How Does Cocaine Affect the Fetus?*

Cocaine reaches the fetal bloodstream by crossing the placenta after maternal use, and it can have serious effects on the fetus.<sup>10</sup> Cocaine constricts the blood vessels, thereby reducing the flow of blood and other nutrients. Since fetal cells multiply greatly during the early months of pregnancy, early maternal cocaine use can cause severe damage to the fetus.<sup>11</sup>

Cocaine is not a physically addictive drug like heroin or other opiate drugs; rather, it is habit-forming.<sup>12</sup> When a pregnant woman uses cocaine, the derivative benzoylecgonine is found in the infant's blood. Cocaine remains in the user's bloodstream anywhere from forty-two to seventy-two hours. Thus, for a woman to give birth to a child with cocaine in its blood, she would have had to ingest cocaine within seventy-two hours prior to birth.<sup>13</sup>

Pre-natal exposure to cocaine can cause strokes in utero and spontaneous abortions. It also increases the infant mortality rate in other ways. Even those cocaine babies who live have, on the average, lower birth weights, shorter body lengths at birth, and smaller head circumferences.<sup>14</sup> This unusually small head circumference is associated with low IQ scores.<sup>15</sup> Cocaine-exposed infants can also experience irritability and a resistance to interaction with other babies.<sup>16</sup> This resistance to interaction is caused because cocaine affects the brain chemistry by

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9. Ira J. Chasnoff, *Drugs, Alcohol, Pregnancy, and the Neonate; Pay Now or Pay Later*, 266 JAMA 1565, 1567 (1991) [hereinafter *Drugs*]. The National Institute on Drug Abuse performed household surveys in 1988 and 1990. Both the Institute of Medicine and the team of Gomby and Shiono did studies based on these surveys. The Institute of Medicine estimated that between 350,000 and 625,000 exposed newborns are born each year, while Gomby and Shiono placed the number at between 554,400 and 739,200.

10. *Drug-Exposed Infants*, 86 Pediatrics 639 (1990) [hereinafter *Drug-Exposed*].

11. *Toufexis*, supra note 7, at 59.

12. Brian C. Spitzer, Comment, *A Response to "Cocaine Babies"—Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent*, 15 Fla. St. U. L. Rev. 865, 878 (1987). Cocaine is a habit-forming drug rather than a physically addictive one, like heroin. For purposes of this paper, cocaine abuse is referred to as an "addiction" because the psychological habit is so strong, even though in a purely medical sense cocaine use is not physically addictive.

13. Kary Moss, *Substance Abuse During Pregnancy*, 13 Harv. Women's L.J. 278, 282 (1990).

14. *Drugs*, supra note 9, at 1567-68, citing B. Zuckerman, D.A. Frank, R. Hingson, et al., *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 New Eng. J. Med. 762-68 (1989).

15. *Toufexis*, supra note 7, at 59.

16. *Id.* at 60.

altering the activity of neurotransmitters, which help control mood and responsiveness. This can explain the impulsiveness and moodiness found in some cocaine babies as they develop. Another manifestation of this alteration is that cocaine babies are often unable to distinguish between their mothers and strangers.<sup>17</sup> This is especially harmful because the natural bond between child and mother can be impaired. However, unlike many infants exposed to heroin and other drugs in utero, infants exposed to cocaine often exhibit no withdrawal symptoms, and a specific cocaine-withdrawal syndrome has not been clearly defined in infants.<sup>18</sup>

A study at the University of California at San Diego of eighty-two drug-exposed infants showed that one-third have lesions of the brain, usually in areas that govern learning and thinking. A similar percentage of babies who are ill but who have not been exposed to drugs have these brain lesions, but only five percent of healthy newborns do.<sup>19</sup> Researchers believe that infants exposed to cocaine in utero will be more likely to experience learning disabilities.<sup>20</sup>

In most cases, nobody knows exactly how these children will be affected, and this is a hotly debated subject among doctors. Some believe that the infants are irreversibly harmed, while others feel that with intensive treatment, cocaine babies can lead normal lives.<sup>21</sup> Surprisingly, only a small percentage of babies exposed to cocaine in utero will develop serious problems later because of the exposure.<sup>22</sup> One major problem is that doctors are unable to tell which exposed infants will require intensive treatment. This means that all babies born addicted to cocaine must be tested and monitored for numerous potential problems. Therefore, hospital costs for the care of these infants are astounding.

### *C. How Much Does Care for These Babies Cost?*

A recent study compared hospital costs for the care/treatment of cocaine-exposed newborns and non-exposed infants. The study found that, on the average, neonatal costs were \$5200 more for cocaine-exposed babies than for unexposed ones. These costs were concentrated among infants suffering serious illnesses requiring intensive care stays.<sup>23</sup> Cocaine

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17. *Id.* A foster mother of a cocaine baby stated: "You don't do things that come naturally. The more you bounce them and coo at them, the more they arch their backs to get away."

18. *Drug-Exposed*, *supra* note 10, at 639-40.

19. *Toufexis*, *supra* note 7, at 60.

20. *Interventions*, *supra* note 6, at 2666.

21. *Toufexis*, *supra* note 7, at 60.

22. Brenda Coleman, *Cocaine Babies' Hospital Costs Exceed \$500 Million Annually*, *Alexandria Daily Town Talk*, Sept. 18, 1991, at A8.

23. Ciaran S. Phibbs, David A. Bateman, Rachel M. Schwartz, *The Neonatal Costs of Maternal Cocaine Use*, 266 *JAMA* 1523 (1991).

babies were fifty percent more likely than unexposed babies to require neonatal ICU stays and more than twice as likely to have very low birth weights.<sup>24</sup> The study predicted that for 1990, the national cost for medical care for these infants was \$504 million.<sup>25</sup>

Another cost to be considered is that of special education for many of these children, who will have learning disabilities as a result of their mothers' drug abuse. Pediatrician Evelyn Davis says that these children can definitely be taught to lead normal lives, if society is willing to pay the costs.<sup>26</sup> In Boston, Massachusetts, one year of special education for a drug-exposed child can cost \$13,000, compared with the \$5,000 cost of regular schooling.<sup>27</sup> A Harvard pediatrician states, "If we worked with these infants from the first, it would cost us one-tenth or one-hundredth as much as it will cost us later. To educate them, to keep them off the streets, to keep them in prisons will cost us billions."<sup>28</sup> A workable solution to this problem could not only ease the suffering, but could reduce the cost.

## II. HISTORY OF CRIMINALIZATION OF MATERNAL SUBSTANCE ABUSE

The first criminal prosecution for maternal substance abuse was brought in 1985 against Pamela Rae Stewart.<sup>29</sup> Stewart was prosecuted under a child support statute for failing to follow her doctor's instructions to abstain from using amphetamines and having sexual intercourse, and to seek medical attention if she began to hemorrhage.<sup>30</sup> She gave birth to a brain dead child who only lived for several weeks. The case was ultimately dismissed on grounds that the statute utilized by the prosecution was not designed to include this type of behavior.

Unlike the lack of support theory used in *Stewart*, the prosecutor in the *Johnson* case, referred to at the beginning of this article, successfully argued that Jennifer Johnson had "delivered" cocaine to her baby through the umbilical cord immediately following birth.<sup>31</sup> The court emphasized the fact that Johnson had voluntarily ingested cocaine,

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24. *Id.* at 1524.

25. *Id.* at 1525.

26. Toufexis, *supra* note 7, at 59.

27. *Id.*

28. *Id.*

29. *People v. Pamela Rae Stewart*, No. M508197 (San Diego Mun. Ct. 1987); Moss, *supra* note 13, at 279.

30. Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 *Harv. L. Rev.* 994, 994-95 (1988). Stewart responded that she was unable to care for her children from bed, and she did not go to the hospital after she began bleeding because she had medication that had stopped the bleeding on prior occasions.

31. *Johnson v. Florida*, 578 So. 2d 419, 420 (Fla. App. 5th Dist. 1991).

"knowing it would pass to her fetus and knowing (or should have known) that birth was imminent. She is deemed to know that an infant at birth is a person, and a minor, and that delivery of cocaine to the infant is illegal."<sup>32</sup> The court felt it had no choice but to interpret the delivery statute strictly, and it certified the question to the legislature.

The dissent in *Johnson* focused on the fact that there was no evidence of an actual delivery of drugs between mother and child. The prosecution presented no evidence that cocaine was actually transferred to the infant through the umbilical cord. The dissent also pointed out that Johnson could not have timed her ingestion of cocaine to have it delivered to the infant.<sup>33</sup> Had she gone into labor one or two days later, no prosecution would have occurred. The dissent also reasoned that the legislature had never intended for the drug delivery statute to be put to this use.<sup>34</sup>

Prosecutors have used this delivery theory in other cases, such as *State v. Gray*<sup>35</sup> and *People v. Hardy*.<sup>36</sup> In both of these cases the courts dismissed the argument on the grounds that legislatures did not intend for this type of behavior to be punished under such statutes. In response to these decisions, several states have enacted statutes specifically punishing women for ingesting cocaine or other controlled substances during pregnancy.<sup>37</sup> These statutes are being used in abuse and neglect proceedings to remove custody of the infant, at least temporarily, from the mother.

For example, Oklahoma has modified the definition of "deprived child" to include a child born in a condition of dependence on a controlled substance.<sup>38</sup> Minnesota now defines "neglect" as including "prenatal exposure to a controlled substance."<sup>39</sup> In Indiana, a child is "in need of services" if it is born with "an addiction to a controlled substance or a legend drug."<sup>40</sup> Nevada<sup>41</sup> and Florida<sup>42</sup> have enacted

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32. *Id.*

33. *Id.* at 423 (Sharp, J., dissenting).

34. *Id.* (Sharp, J., dissenting).

35. *State v. Gray*, 584 N.E.2d 710 (Ohio 1972).

36. *People v. Hardy*, 188 Mich. App. 305, 469 N.W.2d 50 (1991).

37. Moss, *supra* note 13, at 292. "Punishing" involves including maternal substance abuse among the reasons for which abuse or neglect proceedings can be instituted, but does not include actual criminalization through specific statutes.

38. Okla. Stat. Ann. tit. 10, § 1101(4)(c) (West 1990) ("Deprived child" means a child "who is a child in need of special care and treatment because of his physical or mental condition including a child born in a condition of dependence on a controlled dangerous substance . . .").

39. Minn. Stat. Ann. § 626.556, subd. 2(c) (West Supp. 1992).

40. Ind. Code Ann. § 31-6-4-3.1(1)(B) (West Supp. 1991).

41. Nev. Rev. Stat. § 432B.330(1)(b) (1991) ("A child is in need of protection if:

similar statutes. Other states have enacted laws which require physicians to report the birth of any child which the physician has reason to suspect may have been exposed to drugs in utero.<sup>43</sup> States have specifically expanded their abuse and neglect statute definitions to include situations in which a child is born addicted to or having been exposed to controlled substances.

These laws adopt a civil response to the problem of cocaine-exposed infants. Such laws which specifically include prenatal drug exposure within the definition of neglect are used to provide more social services for these families or to remove some infants from their mothers. Although there are no such statutes in existence today, some states are now considering enacting criminal statutes which would specifically cover the problem of drug-exposed newborns. Such statutes would not encounter the problem of application that prosecutors have faced in past cases.<sup>44</sup>

Louisiana is one of the states which has not yet addressed this problem, either jurisprudentially or statutorily. The rest of this comment will assume that Louisiana has enacted a statute under which a woman can be prosecuted for giving birth to a drug-addicted infant.<sup>45</sup> Assuming

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. . . [h]e is suffering from congenital drug addiction or the fetal alcohol syndrome, because of the faults or habits of a person responsible for his welfare.").

42. Fla. Stat. Ann. § 415.503(9)(a)(2) (West Supp. 1992).

"Harm" to a child's health or welfare can occur when the parent or other person responsible for the child's welfare: [i]nflicts, . . . upon the child physical . . . injury. Such injury includes . . . [p]hysical dependency of a newborn infant upon any drug controlled in Schedule 1 . . . provided that no parent of such a newborn infant shall be subject to criminal investigation solely on the basis of such infant's drug dependency.

43. Okla. Stat. Ann. tit. 21, § 846 (West Supp. 1992) ("Every physician or surgeon . . . attending the birth of a child who appears to be a child born in a condition of dependence on a controlled dangerous substance shall promptly report the matter to the county office of the Department of Human Services . . .").

44. In *People v. Hardy*, the court declined to uphold Ms. Hardy's conviction for delivering cocaine to her fetus on the ground that it did not believe the legislature meant to include maternal cocaine use within the ambit of the cocaine delivery statute. The Court of Appeals of Michigan stated:

A court should not place a tenuous construction on this statute to address a problem to which legislative attention is readily directed and which it can readily resolve if in its judgment it is an appropriate subject of legislation.

The Legislature is an appropriate forum to discuss public policy, as well as the complexity of prenatal drug abuse, its effect upon an infant, and its criminalization.

*People v. Hardy*, 188 Mich. App. 305, 309-10, 469 N.W.2d 50, 53 (1991). This can be seen as an invitation to the state legislature to enact a statute specifically criminalizing maternal substance abuse.

45. Since there are no existing maternal substance abuse statutes on which to model this example, I will use one of the abuse and neglect statutes which are used in civil



such a statute existed, would it be constitutional? The predominant constitutional challenges against these types of statutes are equal protection claims and violation of the maternal right to privacy.

### III. CONSTITUTIONALITY

Pregnancy presents an interesting constitutional issue in that the mother, an individual, contains the fetus, a potential individual, inside her body. Though a fetus is not considered a person,<sup>46</sup> courts have held that a fetus can have certain rights under certain circumstances.<sup>47</sup> The issue becomes whether the state can constitutionally constrain a woman's activity pre-birth in order to protect the child. Though possession and distribution of drugs is properly criminalized, the status of addiction is not.<sup>48</sup> A woman addicted to cocaine cannot be criminally prosecuted for her status as an addict. But when her addicted status also affects her unborn child, the situation becomes different. This no longer belongs in the "victimless" crime category, although the victim cannot technically be considered a person. This interdependence is the framework within which a constitutional analysis of laws affecting pregnancy must take place.

#### A. Equal Protection Analysis

The Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>49</sup> This has been interpreted by courts to mean that any statute discriminating against a class of persons must be scrutinized to determine if it complies with the amendment. The Court applies different levels of scrutiny depending upon the nature of the class which is allegedly being discriminated against. Statutes involving gender discrimination receive an intermediate level of scrutiny.<sup>50</sup> Gender-based classifications must there-

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situations. (Examples of these statutes are found in footnotes 37-42.) The two main types of these abuse and neglect statutes are those which define neglect as neonatal *addiction* to a controlled substance, and those which define it as fetal *exposure* to a controlled substance. I will address both of these types of statutes.

46. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973).

47. *In re Baby X*, 97 Mich. App. 111, 115, 293 N.W.2d 736, 738-39 (1980) ("This limited recognition of a child *en ventre sa mere* as a child *in esse* is appropriate when it is for the child's best interest . . . [and] [s]ince a child has a legal right to begin life with a sound mind and body, [citation omitted] it is within this best interest to examine all prenatal conduct bearing on that right.").

48. *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417 (1962) (the "status" of addiction as a criminal offense constitutes cruel and unusual punishment); but cf. *Powell v. Texas*, 392 U.S. 514, 88 S. Ct. 2145 (1968).

49. U.S. Const. amend. XIV, § 1.

50. *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451 (1976).

fore "serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>51</sup>

Maternal drug abuse statutes arguably single out women for punishment. Most of the defects sought to be prevented by these statutes result from maternal cocaine use during pregnancy. Thus, to a certain degree, nature dictates this singling out of women. But what about men who supply these pregnant women with drugs? They are effectively contributing to the harm caused to the fetus. Further, evidence also indicates that the sperm of male substance abusers can cause defects in infants even if the mother herself does not use drugs.<sup>52</sup> If more research is done, and it is conclusively proven that paternal cocaine abuse can affect the fetus, then fathers should be equally liable under such laws.

The Court in *Michael M. v. Superior Court*<sup>53</sup> faced an equal protection challenge against a rape statute making only men liable for statutory rape. The Court upheld the statute, noting that some statutes which discriminate based on the fact that the sexes are simply not similarly situated can pass constitutional muster in some circumstances. The Court also quoted *Rinaldi v. Yeager*,<sup>54</sup> stating that the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same."<sup>55</sup> Thus the Court has specifically upheld statutes which discriminate against a gender based on a fundamental and realistic difference between men and women.

Pregnancy is obviously such a realistic and fundamental difference. The Court in *Geduldig v. Aiello*<sup>56</sup> upheld a California disability statute which excluded from coverage disabilities relating to pregnancy. The Court said this was not a distinction based on gender, but rather one based on pregnancy. It simply excluded those individuals who were pregnant from coverage rather than all women.

The obvious counter-argument to the reasoning in *Geduldig* is that only women can become pregnant, so in that sense women are limited in a way that men can never be. If this insurance coverage is an important factor in a woman's life, her choice to become pregnant may be restricted

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51. *Id.* at 197, 97 S. Ct. at 457.

52. See Janny Scott, Study Finds Cocaine Can Bind to Sperm, L.A. Times, Oct. 9, 1991, at A1. This study found that cocaine can bind to human sperm without impairing the sperm's mobility or survival. The research is currently in very early stages, and the results are not conclusive that paternal cocaine use could damage a fetus. But animal studies have shown that male mice exposed to cocaine and methadone seem to run a higher risk of birth defects than unexposed mice.

53. 450 U.S. 464, 101 S. Ct. 1200 (1981).

54. 384 U.S. 305, 86 S. Ct. 1497 (1966).

55. *Id.* at 309, 86 S. Ct. at 1499 (citing *Tigner v. State of Texas*, 310 U.S. 141, 147, 60 S. Ct. 879, 882 (1940)).

56. 417 U.S. 484, 94 S. Ct. 2485 (1974).

by this statute. In this context, the distinction between pregnant and non-pregnant women is a distinction based on gender.

Thus, a statute that punishes women for giving birth to drug-addicted babies could be seen in two ways—as a distinction based on gender, or as a distinction based on pregnancy, as in *Geduldig*. Regardless of how the statute would be classified, the highest level of scrutiny afforded it would be the intermediate level, which requires important governmental objectives and means substantially related to achieving those objectives.<sup>57</sup> The governmental interest is the protection of potential human life, and this objective is undoubtedly an important one. The analysis would question whether punishing women who give birth to drug-addicted babies is substantially related to the goal of protecting human life. There is a persuasive argument that it is. Since the mother is in the best situation to protect her infant, controlling her behavior would be substantially related to the protection of the child.

In conclusion, criminal maternal substance abuse statutes would probably survive an equal protection attack. A solution to any such attack would be to enact gender-neutral statutes which punish men as well as women for the harm to the infants.<sup>58</sup> These statutes would punish those men who abuse substances and then father children who are ultimately harmed because of that paternal abuse. Enforcement of this type of statute against men would be problematic. The issue of causation would be difficult to prove—that the drugs ingested by the father were in fact the cause of the damage suffered by the infant. Since the fetus is actually physically connected to the mother, causation is much more direct. Anything the mother takes into her body will also eventually enter the child's body. But the only contact the father has with the fetus in utero is through his sperm. The prosecution would therefore be required to prove that at the time of conception the father was abusing substances, that the sperm contributing to the formation of this child was affected by that abuse, and that the damage the child suffered resulted from that affected sperm, and not any of the myriad other causes of fetal deformation. There would obviously be very few convictions of men under this type of statute. But such a statute would eliminate the equal protection claim that maternal substance abuse statutes single out women for punishment.

Another claim that is being made against such statutes is that they violate a woman's Fourteenth Amendment right to privacy, recognized under *Roe v. Wade*.<sup>59</sup> This type of challenge has a greater potential for success than the equal protection challenge.

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57. *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451 (1976).

58. James Denison, Note, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. Cal. L. Rev. 1103, 1132 (1991).

59. 410 U.S. 113, 93 S. Ct. 705 (1973).

### B. Privacy Violations

The cases that have addressed the issue of maternal substance abuse have pivoted on whether the alleged conduct falls within the ambit of the particular criminal statute. Constitutional implications of such statutes have never been discussed, but commentators seem to agree that the correct analysis is under the framework established in *Roe v. Wade*.<sup>60</sup>

#### 1. What Does Roe Mean and How Have Subsequent Cases Affected Its Meaning?

The Court in *Roe* faced a challenge to a Texas criminal statute which prohibited abortions at any stage of pregnancy except to save the life of the mother. The plaintiffs claimed that the Fourteenth Amendment encompassed a personal "liberty" right, which included a woman's right to terminate her pregnancy.<sup>61</sup> The Court noted that while the Constitution does not explicitly mention any right to privacy, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."<sup>62</sup> The Court then found that this right to privacy does encompass a woman's right to terminate her pregnancy. The opinion went on to qualify that right by recognizing that the state also has legitimate interests in regulating abortions—protection of the mother's health, maintenance of medical standards, and protection of potential human life.<sup>63</sup>

Since this privacy interest is a fundamental right, the Court applied a strict scrutiny analysis to the statute, stating that the state interest must be compelling and the statute narrowly drawn to further those interests.<sup>64</sup>

According to *Roe*, a fetus is not a "person" within the meaning of the Fourteenth Amendment.<sup>65</sup> The Court specifically stated that it

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60. Rebecca Manson & Judy Marolt, Comment, A New Crime, Fetal Neglect: State Intervention to Protect the Unborn—Protection at What Cost?, 24 Cal. W. L. Rev. 161, 165 (1987-1988); Doretta Massardo McGinnis, Comment, Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory, 139 U. Pa. L. Rev. 505, 513, 516 (1990); Note, *supra* note 30, at 996.

61. *Roe*, 410 U.S. at 129, 93 S. Ct. at 715.

62. *Id.* at 152, 93 S. Ct. at 726. The Court has recognized a right to privacy with respect to contraception both within and outside of marriage. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972) (outside of marriage); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965) (within marriage). But cf. *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986) (sodomy statute did not violate the fundamental rights of homosexuals). The Court has also recognized a basic right to reproduction. *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110 (1942). However, the Court had never discussed whether this right of privacy extended to a woman seeking an abortion.

63. *Roe*, 410 U.S. at 154, 93 S. Ct. at 727.

64. *Id.* at 155, 93 S. Ct. at 728.

65. *Id.* at 158, 93 S. Ct. at 729.

was not required in this particular case to decide at what point life begins,<sup>66</sup> but then outlined the trimester framework as the basis of its holding. During the first trimester of pregnancy, the state cannot regulate abortion at all. The state's legitimate interest in the health of the mother becomes compelling at the end of the first trimester. During the second trimester the state can implement regulations which bear some rational relationship to the preservation of maternal health. The state's interest in potential life becomes compelling at viability, when the fetus is capable of living separately from its mother. After viability a state may prohibit abortions except to save the life of the mother.<sup>67</sup>

This trimester framework has been criticized since *Roe*.<sup>68</sup> The most recent case, *Webster v. Reproductive Health Services*,<sup>69</sup> does not expressly overrule *Roe*, but makes its holding seem tenuous. In *Webster*, a Missouri abortion statute which prohibited state employees from performing abortions and banned the use of public facilities for performing abortions was challenged. The Court upheld this part of the statute, finding that the statute did not burden the right of procreation.<sup>70</sup> The most important aspect of the *Webster* case is that a plurality of the Court explicitly rejected the trimester system of *Roe* as unworkable. The main proponent of this idea was Justice O'Connor, who stated that the state's interest in protecting potential life is compelling throughout pregnancy. The cases since *Roe* have chipped away at its holding, and the future of the trimester system seems shaky at best. With the present composition of the Court, many believe that *Roe* will soon be expressly overruled,<sup>71</sup> and that a woman, with few exceptions,<sup>72</sup> will not have a right to have an abortion. However, the fact that *Roe* is still controlling in Louisiana has been recently affirmed.

*Sojourner v. Roemer*,<sup>73</sup> a recent Louisiana case, granted an injunction of the Louisiana abortion statute, citing *Roe*. In a brief opinion, the district court stated that it felt it had no choice but to follow *Roe*, since it had not been expressly overruled. In light of this case, *Roe* is

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66. *Id.* at 159, 93 S. Ct. at 730.

67. *Id.* at 163, 93 S. Ct. at 731-32.

68. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S. Ct. 2481 (1983).

69. 492 U.S. 490, 109 S. Ct. 3040 (1989).

70. *Id.* at 495-96, 109 S. Ct. at 3046. Another provision of the statute provided that physicians must perform viability tests before performing abortions on women they suspect to be twenty or more weeks pregnant. The Court invalidated this section of the statute because it conflicted with the trimester system of *Roe*.

71. The Supreme Court has granted certiorari to decide whether Pennsylvania's abortion statute is unconstitutional. 112 S. Ct. 931 (1992).

72. The usual exceptions include cases where the mother has been a victim of incest or rape, and when the life of the mother is in danger because of her pregnancy.

73. 772 F. Supp. 938 (E.D. La. 1991).

still the law in Louisiana, and apparently will continue to be until it is overruled.

2. *Analysis of the Issue of Maternal Substance Abuse Under Roe*

Because *Roe* is still the law, the constitutionality of prosecutions under these types of statutes will be discussed in light of that case. The prosecutions that have been brought under the drug delivery statutes have only prosecuted women who ingested cocaine shortly before giving birth. This is usually during the third trimester, so at that point, even according to *Roe*, the state would have a compelling interest in the potential life of the fetus. If a state can ban abortions during the third trimester, it presumably can also ban substance abuse during that trimester. The state's interest in protecting human life would seem to permit both these regulations.

However, some maternal substance abuse statutes make it a crime to give birth to a child born addicted to a controlled substance.<sup>74</sup> This does not require the connexity between ingestion and birth that the delivery statutes do, because the mother can be prosecuted for drug use occurring at any time in the pregnancy which results in fetal addiction. However, a child would not be born addicted to cocaine if its mother had not ingested any during the forty-two to seventy-two hours prior to giving birth.<sup>75</sup> Thus, if cocaine is the drug the mother was ingesting, she would not give birth to a drug-addicted infant unless she used the drug during the last trimester. The statutes make no distinction between cocaine, heroin, and other drugs, so one factual issue concerning this statute would be whether the infant was in fact "addicted," as opposed to having a "habit," at birth.

The "addiction" statute raises another issue when examined under the *Roe* trimester framework. What if a woman gives birth at the end of the second trimester, at which point the state's interest in potential life is not compelling? Under *Roe*, a state may not prohibit abortion except during the third trimester. This "addiction" statute's application to a woman delivering during the second trimester might be invalidated under *Roe*. The counter-argument would be that the true holding of *Roe* is that the state's interest in potential life becomes compelling at viability and not at the rigid beginning of the third trimester. And since this child was born alive, it was obviously viable. In either situation, under *Roe*, the state should be able to regulate drug ingestion during the third trimester because its interest can be said to be compelling.

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74. See *supra* notes 41-43.

75. See Moss, *supra* note 13.

Minnesota's statute, however, states that "neglect includes prenatal exposure to a controlled substance."<sup>76</sup> This seems to punish a mother for ingesting cocaine at any point during her pregnancy. If Louisiana adopted such a statute, there would be an apparent conflict between this statute and *Roe*, as the state does not have an interest in interfering with the mother's autonomy during the first trimester of her pregnancy. Such a statute purports to punish a mother for fetal drug exposure at any point during the pregnancy, and this seems to be an impermissible infringement under *Roe*.

An analysis of this issue under the framework of *Roe* raises many difficult issues. But, as discussed earlier, the holding in that case may soon be overruled, and maternal substance abuse statutes would then be examined under the traditional strict scrutiny analysis.

### 3. *Strict Scrutiny Analysis of the Issue of Maternal Substance Abuse*

When a fundamental right is at stake, the Court has stated that it will apply strict scrutiny to the statute, requiring both a compelling governmental end and means necessary to achieve that end.<sup>77</sup> If the Court did overrule *Roe*, the analysis applied to the maternal substance abuse statutes would still involve strict scrutiny because of the nature of the right involved. However, the reasoning applied might not follow that set forth by the Court in the *Roe* opinion. The rights of the mother can be phrased in two ways—the right to procreation and the right to bodily integrity.

The right to procreation has been explicitly recognized by the Court in several areas, for example, birth control,<sup>78</sup> abortion,<sup>79</sup> and sterilization.<sup>80</sup> The right at stake in the issue of maternal substance abuse is the right to continue a pregnancy without any kind of restrictions or interference. This would include the right to ingest drugs if the mother so desired. This type of argument focuses on the nature of reproductive rights and the fundamental right to procreate.

The strict scrutiny analysis would require a determination of whether punishing the mother would be a means necessary to achievement of the state's compelling interest in protecting potential life. One way to ensure that a child is not born addicted to drugs is to control the actions of its mother. There is a persuasive argument that criminalization

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76. See *supra* note 39.

77. *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967).

78. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965).

79. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973).

80. *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110 (1942).

is an effective means of control. There are also other arguments that criminalization is not only unnecessary, but counterproductive. Many advocate education and more available substance abuse treatment as the most effective means of combating this problem.<sup>81</sup> The merits of that argument will be discussed in a later section of this paper. The Court will be the ultimate arbiter in determining which of these means is "necessary" to achieve the end.

#### 4. *Possible Distinctions Between Roe and the Issue of Maternal Substance Abuse*

The activity involved in *Roe* and *Webster*, though similar in many ways to the issue of maternal substance abuse, is markedly different from it in one very important way. These maternal substance abuse statutes criminalize the activity of the mother, while the statutes challenged in *Roe* and *Webster* criminalized the activity of the doctor performing the abortion. This difference is crucial because in the abortion context, state statutes limit a woman's access to an abortion, not her right to have one. Therefore the abortion statutes can be seen as simply *burdening* a woman's right to an abortion, while in the substance abuse arena, the statutes completely *prohibit* the activity. Thus maternal substance abuse statutes can be seen as an impermissible burden on pregnancy in a way that the abortion statutes are not.

The activity being prohibited in the abortion context is very different from that being prohibited in the maternal substance abuse context. With an abortion, the child's life is abruptly and definitively terminated. There are no effects from the act; it is an end unto itself. But with maternal drug abuse, the exact effect on each child is uncertain.<sup>82</sup> Some children will not be affected at all, and those that are will be affected in different ways. With the right to have an abortion, a woman has a right to end the fetus' life. With maternal substance abuse, it is uncertain what she has the right to do. With the effects so uncertain, to punish all pregnant women who abuse drugs would be to punish some women whose children are not affected at all by their activity.

Arguments have also been made that a woman has a right to an abortion, but once she forgoes that right and decides to carry her child, she has a duty not to engage in activity potentially harmful to the fetus.<sup>83</sup> This argument raises the issue of whether pregnant women can be punished for non-criminal activity such as drinking alcohol and smoking. These are activities which have also been shown to have a

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81. Drug-Exposed, *supra* note 10, at 641-42.

82. See Toufexis, *supra* note 7.

83. McGinnis, *supra* note 60, at 518.



detrimental effect on the fetus, but which have not been criminalized like cocaine use.

#### IV. IS CRIMINALIZATION A GOOD IDEA?

Criminalization of maternal substance abuse is not an effective method of addressing the problem of infants being exposed to drugs because it does not address the real problem, and because punishing the mother can cause more harm to the child. Everyone will readily agree that the thought of a child born addicted to cocaine because its mother smoked crack as she went into labor is a grisly and chilling thought. This is the type of behavior that must be deterred, but criminalization is not the answer because the problem is not the birth of the infant, but the drug abuse of its mother. The problem is that many pregnant women are addicted to cocaine. Punishing them for this behavior will not make them stop using the drug, because they are addicts. Punishing the mother also will not help her child in any way; the damage has already been done. The remedy for this situation must be preventive rather than punitive.

The American Medical Association has stated that "it is clear that addiction is not simply the product of a failure of individual will-power."<sup>84</sup> In all but a few cases, taking a harmful substance such as cocaine is not meant to harm the fetus but to satisfy an acute psychological and physical need for that particular substance. If a pregnant woman suffers from a substance dependency, it is the physical impossibility of avoiding an impact on fetal health that causes severe damage to the fetus, not an intentional or malicious wish to cause harm.<sup>85</sup> Therefore it is obvious that criminalization will not address the problem. Punishing a person for something that is beyond his or her control is not an effective deterrent to the punished behavior. There are already criminal statutes prohibiting the use of drugs, and pregnant addicts have obviously not been deterred by those statutes. Arguably they will remain similarly unaffected by statutes which impose additional punishments for substance abuse while pregnant.

Many believe that criminalization will result in great societal harm.<sup>86</sup> The California Medical Association stated:

While unhealthy behavior cannot be condoned, to bring criminal charges against a pregnant woman for activities which may be

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84. Interventions, *supra* note 6, at 2667 (citing Drug Abuse in the United States: A Policy Report. In: Proceedings of the House of Delegates, 137th annual meeting of the Board of Trustees of the American Medical Association, June 26-30, 1988).

85. *Id.* at 2668.

86. Spitzer, *supra* note 12, at 881. Spitzer argues that statutes punishing pregnant women for substance abuse during pregnancy would encourage them to terminate or conceal their pregnancies.

harmful to her fetus is inappropriate. Such prosecution is counterproductive to the public interest as it may discourage a woman from seeking prenatal care or dissuade her from providing accurate information to health care providers out of fear of self-incrimination. This failure to seek proper care or to withhold vital information concerning her health could increase the risks to herself and her baby.<sup>87</sup>

If women know that maternal substance abuse is criminalized, they will be reluctant to seek prenatal care because of fear of prosecution. In addition, an addict may find herself in a situation in which she is initially unaware of the fact that she is pregnant. By the time she realizes her condition, it is too late for her, without help, to stop using the drugs. She may want to seek professional help, but in many places she will face prosecution if she goes to a hospital in that condition.

Another problem is that there are very few available drug rehabilitation programs which will accept pregnant women.<sup>88</sup> Jennifer Johnson, the first woman whose conviction for maternal substance abuse was upheld by an appellate court, tried to obtain drug treatment but was turned away from a substance abuse treatment center.<sup>89</sup> Major reasons for this are the high risk and liability in a pregnancy involving drugs.<sup>90</sup> In 1990, one study showed that eighty-seven percent of New York City's drug abuse programs refused to treat pregnant crack addicts.<sup>91</sup> A National Association of State Alcohol and Drug Abuse Directors survey showed that more than a quarter million pregnant women were turned away from government-funded treatment programs in 1989.<sup>92</sup> Less than twenty percent of the drug treatment centers in the Washington, D.C. area will treat pregnant women, regardless of whether they are on Medicaid, and very few private treatment centers accept pregnant women at all.<sup>93</sup> There are only fifteen beds available for the treatment of addicted pregnant women in Massachusetts.<sup>94</sup> These women are in a situation in which

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87. Interventions, *supra* note 6, at 2669.

88. *Id.* (citing Coordinating Federal and Drug Policy for Women, Infants, and Children. Hearings before the Senate Committee on Governmental Affairs, 101st Cong., 1st Sess. (1989)).

89. Derrick Z. Jackson, Inequality and the "Fetal Rights" Concept, *Boston Globe*, March 25, 1990 at A24 [hereinafter Jackson].

90. Jan Hoffman, Pregnant, Addicted, & Guilty?, *New York Times Magazine*, Aug. 19, 1990, at 44.

91. *Id.* at 57.

92. Magar, *supra* note 4, at 34.

93. Michele L. Norris, Cries in Dark Often Go Unanswered, *Wash.*, July 2, 1991, at A1, A8 col. 5.

94. Eileen McNamara, Birth in the "Death Zones," *Boston Globe*, September 12, 1990, *Metro/Region* at 1 [hereinafter McNamara]. The same article stated that a 1990

they have few choices. If they go to a hospital, they are very likely to be prosecuted. They are arguably forced to continue their present behavior or go to jail. Most will opt for the continuation, which often results in greater harm to the fetus.

The costs associated with criminalization are high. The cost per inmate per year is \$30,000 to \$50,000,<sup>95</sup> and with an estimated 375,000<sup>96</sup> drug-exposed infants being born each year, the total cost of keeping these mothers in jail would be staggering.

Also, the social policy behind criminalization can be used as an argument against it. The purpose of punishing pregnant women for substance abuse during pregnancy is to deter them from doing it so that their unborn children will be protected. The ultimate goal of such statutes and prosecutions is the welfare of the child. But by taking the child away from its mother, it will be harmed even more.<sup>97</sup>

Another concern voiced by both sides of the debate over the propriety of criminalization is that it could lead to punishing pregnant women for engaging in activities that are legal but harmful to the fetus.<sup>98</sup> An example of this is *People v. Stewart*. Stewart was charged with failing to furnish medical services under California Penal Code section 270.<sup>99</sup> Stewart's doctor had told her to discontinue amphetamine use during her pregnancy, abstain from sexual intercourse, and seek medical attention if she began to bleed. She delayed seeking help after beginning to bleed, and delivered a brain dead child.<sup>100</sup> The judge dismissed this case, reasoning that this statute was intended to enforce child support arrangements rather than to punish women for activity during pregnancy.<sup>101</sup> If the statute had been applicable to a pregnant woman's activity, would Stewart's conduct have been punishable? None of her activities were illegal, yet they resulted in harm to her fetus. Legal activities like using alcohol and tobacco products can potentially cause

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survey by the National Association of State Alcohol and Drug Abuse Directors showed that less than 11% of the 280,000 pregnant women nationwide who need drug treatment actually receive care.

95. Jackson, *supra* note 89.

96. See Drugs, *supra* note 9.

97. Kenneth Jost, *Mother versus Child: Law and Medicine*, 75 ABA J. 84 (1989).

98. Magar, *supra* note 4, at 32. Both ACLU attorney Kary Moss and Charleston, South Carolina prosecutor Charles C. Condon agree on this point.

99. The statute provides in part:

If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor . . . .

Cal. Penal Code § 270 (West 1988).

100. Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 Harv. L. Rev. 1325 (1990).

101. Note, *supra* note 30, at 994.

great harm to a fetus.<sup>102</sup> When legal and illegal activity result in the same type of harm to the fetus, where is the line to be drawn in determining what activity is punishable? If the effect on the fetus is the same, there arguably should not be a distinction.

#### V. ARE OTHER METHODS OF STATE INTERVENTION WORKING?

If criminalization is not the answer to the problem of maternal substance abuse, what is? Some women have been confined to jail for the duration of their pregnancies, while others have had their children taken away. Many criticisms have been made of the present system, and this is one reason some states have turned to criminal prosecutions. While criminal prosecutions may not be the answer, and the present situation may not be completely effective, it may be best to leave the status quo as it is.

First of all, there are some unique problems posed by pregnancy which make it a sensitive issue. The first is that a woman is an autonomous individual carrying the child inside her body, and monitoring of pregnant women would be extremely difficult. If there were mandatory treatment programs, who would ensure that all pregnant women attend them regularly, let alone get there in the first place? With 375,000<sup>103</sup> drug-exposed infants born each year, that means there are 375,000 women to monitor during their entire pregnancies.

Even if there were enough drug treatment centers which did accept pregnant women, another problem would be getting the women into treatment. A 1986 study of treatment programs in thirty-four cities by the National Association of Junior Leagues showed that lack of child care was the number one reason why many women did not seek available treatment.<sup>104</sup> For lower income women with several children, lack of care for their children would prevent them from obtaining treatment.

Another issue related to the large number of pregnant women who abuse drugs is the cost associated with monitoring their newborns for drug derivatives. Should we implement mandatory drug screening for all newborn babies? Pregnant women cannot be forced to undergo toxicology testing unless they are under the jurisdiction of the criminal justice system,<sup>105</sup> but newborns can be tested by a hospital without

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102. Interventions, *supra* note 6, at 2666-67. "Cigarette smoking by pregnant women results in higher rates of spontaneous abortion, premature birth, increased perinatal mortality, low birth weight, and negative effects on later growth and development in infants. . . . Babies born with fetal alcohol syndrome suffer from prenatal and postnatal growth retardation; cardiovascular, limb, skull, and facial defects; impaired fine- and gross-motor function; and impaired intellectual function."

103. See *Drugs*, *supra* note 9.

104. Norris, *supra* note 93, at A8 col. 6.

105. Rorie Sherman, *Keeping Baby Safe From Mom*, *Nat'l L.J.*, Oct. 3, 1988, at 1, 24 col. 1.

parental consent.<sup>106</sup> None of the fifty states has enacted legislation regarding infant toxicology testing.<sup>107</sup> Therefore, testing is at the discretion of the health care provider, and most hospitals do not have a specific plan for newborn toxicology testing.<sup>108</sup> Many doctors are reluctant to administer such tests, because a positive result means making a decision whether to inform the child welfare authorities.<sup>109</sup> Another problem with the present methods of infant screening is that they are administered in a racially biased way—physicians tend to test poor women and black women more often.<sup>110</sup> If such a plan was implemented, who would pay for all the toxicology tests? Each urine test performed costs between \$15 and \$20, and the test to confirm the results costs between \$100 and \$200, creating a possible tab of \$100 million for nationwide testing.<sup>111</sup> This expense makes universal testing an almost impossible option.

Since the issue is state intervention to prevent fetal harm, would such laws have to include women who drink alcohol and smoke? Or women who do not eat enough, or eat well enough during pregnancy? These raise phenomenal issues of monitoring, and of intrusion on the individual rights of the mother. And where can we draw the line at what behavior can be monitored? Many draw a distinction between activity that is illegal and that which is not, but not eating well or drinking alcohol, which can result in fetal alcohol syndrome, can result in deformity as well. Deciding which behavior to punish would be a very difficult issue, and if activities like drinking and smoking were banned for pregnant women, these laws would be impossible to enforce.

Another possibility for state intervention is forced confinement of the mother for the remainder of her pregnancy. Brenda Vaughan, a 30-year old pregnant woman, was sentenced to jail until her due date after being found guilty of forging about \$700 worth of checks.<sup>112</sup> The judge said that, although this first-time offense usually would not receive jail time, he sentenced Vaughan because he wanted to protect her fetus from her cocaine addiction.<sup>113</sup> The constitutional issues raised by forced confinement, either in jail or in a hospital, for the remainder of a pregnancy, are other problems which must be analyzed. Could a woman be forced to be confined for the duration of a pregnancy, up to possibly

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106. *Id.*

107. Terry A. Adirim & Nandini Sen Gupta, A National Survey of State Maternal and Newborn Drug Testing and Reporting Policies, 106 *Pub. Health Rep.* 292 (May/June 1991).

108. McNamara, *supra* note 94.

109. *Id.*

110. Adirim, *supra* note 107, at 295.

111. *Id.*

112. Rorie Sherman, Keeping Baby Safe From Mom, *Nat'l L.J.*, Oct. 3, 1988, at 1.

113. *Id.*

eight months, to ensure the birth of a drug-free child? This option might be the only one that would definitely produce children who had not been exposed to drugs in utero, because it may be the only monitoring option which would work. But again, at what cost?<sup>114</sup> And if these mothers were jailed, without access to a treatment program, they might resume their drug habits after they were released. Or they might even be supplied with drugs while in jail. Confinement to a hospital would presumably also entail mandatory drug treatment.

Another problem with forced confinement until the end of the pregnancy is that it could remove the woman from any other children she might have. If she had no other family, there might be no one to care for the rest of her children. This situation is not only costly and violative of a woman's rights, but it could be detrimental to the other children as well. If pregnant drug abusers knew this was an option, they might be hesitant to seek help.

Abuse and neglect proceedings are an example of post-birth intervention. The state bases its allegation of neglect on the fact that the child was exposed to drugs in utero. While most states require a finding of potential future neglect, some courts have recently allowed evidence of prenatal neglect (in the form of drug exposure) to suffice for removal of custody from the mother.<sup>115</sup> In *In re Baby X*, a probate court temporarily removed custody of an infant exhibiting signs of drug withdrawal from its mother.<sup>116</sup> There was no evidence of post-birth neglect, but the court held that prenatal abuse was enough to temporarily remove custody from the mother.<sup>117</sup> A California state appellate court removed custody from its mother of a newborn suffering from drug withdrawal.<sup>118</sup> While removal of custody of the child is necessary if its mother is unable to function because of her drug addiction, many times separation of the family only harms the child more. Many times evidence of drug use does not indicate neglect, but only that the mother ingested drugs a short time prior to giving birth.<sup>119</sup> This does not necessarily mean that she will not care for her baby properly, and many times the child will be better off staying with its mother. It will form natural bonds with its real family, rather than being placed in temporary care until its mother can rehabilitate, or in some cases being placed permanently in a foster home. This only exacerbates the problem, because the damage

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114. See Jackson, *supra* note 89.

115. Moss, *supra* note 13, at 289-92.

116. *In re Baby X*, 97 Mich. App. 111, 293 N.W.2d 736 (1980).

117. *Id.* at 116, 293 N.W.2d at 739.

118. *In re Troy D.*, 215 Cal. App. 3d 889, 263 Cal. Rptr. 869 (Cal. App. 4th Dist. 1989).

119. Moss, *supra* note 13, at 290.

to the child has already been done, and now the family environment is also disrupted.

The District of Columbia's director of the Office of Alcohol and Drug Abuse, Jackson, believes that making treatment more available is just the first step. Rarely are all eighteen beds which are set aside exclusively for pregnant women in the District occupied.<sup>120</sup> He believes that women "are deterred by social and legal barriers such as child-care quandaries, fear of prosecution, uncooperative spouses and the lengthy admitting process, not to mention their own weaknesses."<sup>121</sup>

Social problems like the ones stated by Jackson work together to make maternal substance abuse a difficult problem to address. Even if the fear of prosecution was removed, other factors might still prevent women from seeking help. This is the type of problem that we cannot expect to eliminate, but we can take certain steps to prevent the frequency of its occurrence. The important thing is that the focus of any legislation should be on prevention rather than punishment. Women should be encouraged to seek prenatal care and substance abuse treatment without worrying about possible prosecution.

Whatever method is used to address this problem, the emphasis must be on rehabilitation of pregnant drug abusers rather than punishment. The deterrence factor is too great when a pregnant woman thinks she will be punished for seeking prenatal care. Many children who could have been helped by prenatal care would be harmed even more. States should enact laws which require substance abuse centers to be open to pregnant women. Missouri has already enacted such a law.<sup>122</sup> States should also allocate funds to create more substance abuse centers. Other than encouraging pregnant women to seek help, there are few effective options. One answer might be to try to control individuals who sell or provide drugs to pregnant women. Penalties for sale to pregnant women could be increased. This would be problematical in that enforcement would involve finding the individuals sold to and determining whether they were pregnant. And certainly many addicts would say they were not pregnant in order to obtain drugs. But if such a law were enacted and strictly enforced, it would raise societal awareness and possibly have an effect.

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120. Michele L. Norris, *Cries in the Dark Often Go Unanswered; For Drug-Addicted Mothers, Treatment is Hard to Find, Even Harder to Stick With*, *Washington Post*, July 2, 1991, at A1.

121. *Id.*

122. S.B. 190, 86th Gen. Assembly, 1st Reg. Sess., 1991 Mo. Legis. Serv. 226. Section 4 states that "[a] pregnant woman referred for substance abuse treatment shall be a first priority user of available treatment. . . . Substance abuse treatment facilities which receive public funds shall not refuse to treat women solely because they are pregnant."

## VI. CONCLUSION

When children are born injured because mothers are abusing drugs, the first reaction is to punish the woman in the hope that other women will be deterred. But the nature of drug abuse is not conducive to this type of deterrent, and our system ends up harming the children even more by removing them from their families, while simultaneously doing nothing to reduce the number of infants born each year that have been exposed to drugs. A system that will work does not involve criminalization of this behavior; it involves getting help for these women so that they will stop harming their children by exposing them to drugs.

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