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A LIMITED ROLE FOR THE LEGAL SYSTEM IN RESPONDING TO MATERNAL SUBSTANCE ABUSE DURING PREGNANCY

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A tiny premature baby cries inconsolably from the hospital crib which is its only home. The infant is a "boarder baby," one of the increasing number of infants abandoned at birth by addicted parents whose craving for crack cocaine is so powerful that it shatters the bond between parent and child.[1] As many as 300,000 infants are born annually to American women who use crack cocaine during pregnancy.[2] An additional 10,000 children are born each year to women using opiates.[3]

With as many as one child in ten affected by maternal drug use during pregnancy,[4] the social implications of the problem are staggering. Everyone agrees that society must respond, but few agree on what should be done. In particular, there is controversy over whether the legal system can play a constructive role in the response to maternal drug use. This article begins with discussion of criminal prosecution of women whose drug use during pregnancy harms their child. Although a defensible argument can be made for prosecution, I conclude that utilization of the criminal justice system is likely to do more harm than good. Rejecting prosecution as a viable alternative, I turn to the juvenile court. Although the juvenile court cannot solve the problem of maternal drug use during pregnancy, a revitalized and reoriented juvenile court can play a positive and meaningful role. Before the juvenile court can achieve this

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1. *See* Fomufod & Street, *Rearing Children in Hospital Facilities*, 85 PEDIATRICS 137 (1990) ("A telephone survey of Washington, D.C. area hospitals in June 1989 was conducted using the term 'boarder' babies, and there were 41 such infants reported in six hospitals").

2. Bays, *Substance Abuse and Child Abuse: The Impact of Addiction on the Child*, 37 PEDIATRIC CLINICS N. AM. 881 (1990).

3. Bays, *supra* note 2.

4. *See* National Association for Perinatal Addiction Research and Education, *A First: National Hospital Incidence Survey* (1989). *See also In re* Troy D., 215 Cal. App. 3d 889, 263 Cal. Rptr. 869, 872 (1989) ("It has been estimated that 11 percent of children born in United States hospitals are born having been exposed to dangerous drugs and are consequently at risk").

goal, however, significant and controversial changes must occur. I conclude the article with a proposal to return the juvenile court to its roots at the beginning of this century, to a time when the court was not so highly governed by the adversary system of decision-making.

I. CRIMINAL PROSECUTION

Should women whose drug use during pregnancy harms their child be prosecuted? A number of legislators[5] and prosecutors think so.[6] For example, in July 1989, a Florida woman was convicted of delivering cocaine through the umbilical cord to her newborn infant.[7] Charles Condon, the Circuit Solicitor for Charleston County, South Carolina has instituted a program under which pregnant women on drugs are informed that unless they submit to drug treatment, they may be prosecuted.[8] The primary goal of the program is to induce women to get off drugs and into treatment. In 1986, criminal charges were brought against a California woman who ignored a doctor's advice to refrain from sexual intercourse and drugs during pregnancy. The woman's child was born with brain damage, and died within two months. The case did not proceed to trial, however, because a judge ruled the woman could not be charged under the statute relied on by the prosecutor.[9] In

5. STAFF OF HOUSE SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, 101ST CONG., 2D SESS., HEARING SUMMARY: LAW AND POLICY AFFECTING ADDICTED WOMEN AND THEIR CHILDREN (1990) [hereinafter HEARING SUMMARY]. The Hearing Summary reports that Kary L. Moss, Staff Attorney, Women's Rights Project of the ACLU, testified that legislation to make drug use during pregnancy a crime has been introduced in Ohio, Georgia, Louisiana, and Rhode Island.

6. *See* Moss, *Substance Abuse During Pregnancy* 13 HARV. WOMEN'S L.J. 278, 285 (1990). ("In Colorado, prosecutors have charged pregnant drug addicts with felony use of a controlled substance and misdemeanor child abuse. Women have also been arrested in Connecticut, Illinois, Massachusetts, Michigan, and Ohio.") (footnotes omitted). *See also* HEARING SUMMARY, *supra* note 5, which notes testimony that at least 50 women have been charged with crimes based on drug or alcohol use during pregnancy.

7. State v. Johnson, No. E89-890-CFA, (Fla. Cir. Ct. July 13, 1989), appeal docketed, No. 89-1765 (Fla. Dist. Ct. App. Aug. 31, 1989).

8. *See* Condon, Substance Abuse During Pregnancy: A Description of the Interagency Policy in Charleston County, South Carolina (unpublished paper available from J. Myers).

For a highly critical perspective of the South Carolina program and other efforts to prosecute women for drug use during pregnancy, see Partlow, *When Becoming Pregnant is a Crime*, 9 CRIM. JUST. ETHICS 41 (1990).

9. For discussion of this case see Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994, 994-95 (1988) [hereinafter *Maternal Rights*].

1989, a Massachusetts woman whose baby was born with metabolites of cocaine in its urine was indicted for distributing cocaine to a minor. The indictment was dismissed by the trial court on statutory and constitutional grounds.[10] In 1987, an Ohio woman gave birth to a cocaine affected baby. The woman was indicted under a statute punishing child endangerment. The trial judge dismissed the indictment, and the Ohio Court of Appeals affirmed in an unpublished opinion.[11] In 1989, an Illinois grand jury refused to indict a woman whom the prosecutor charged with involuntary manslaughter and supplying drugs to a minor. The infant, who tested positive for cocaine, died two days after birth.[12] Although prosecutorial efforts remain isolated occurrences, prosecutors feel mounting pressure to act.[13]

To appreciate the policy and legal implications of prosecution, it is useful to examine the issue from two distinct, although overlapping, perspectives. American criminal law is grounded in Western moral philosophy; therefore, I begin the discussion of prosecution by drawing on the literature of moral philosophy, particularly the work of Joel Feinberg. Following the analysis from moral philosophy, the discussion shifts to principles of constitutional law. Although it is artificial and not always possible to separate the moral from the constitutional debate, the separation is useful. Legislators and other policy makers grappling with the policy implications of maternal drug use during pregnancy need information from the moral perspective as much as, if not more than, information on the constitutional permissibility of prosecution.

A. *An Analysis from Moral Philosophy*

A responsible moral argument can be constructed for limited prosecution of women whose drug use during pregnancy harms their unborn child.[14] The proponent of prosecution

10. Commonwealth v. Pellegrini, No. 87970 (Sup. Ct. Crim. Act. Mass. Oct. 15, 1990).

11. State v. Gray, No. L-89-239 (Ohio App. Ct. Aug. 31, 1990).

12. Marcotte, *Crime & Pregnancy: Prosecutors, New Drug Laws, Torts Pit Mom Against Baby*, 75 A.B.A. J. 14 (1989).

13. Logi, *Drugs in the Womb: The Newest Battlefield in the War on Drugs*, 9 CRIM. JUST. ETHICS 23 (1990).

14. For commentary regarding prosecution see Berrien, *Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures*, 2 YALE J.L. & FEMINISM 239 (1990); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983) (supporting prosecution); Moss, *supra* note 6 (arguing against prosecution); Kleinig, *Criminal Liability for Fetal Endangerment*, 9 CRIM. JUST. ETHICS 11 (1990); *Maternal Rights*, *supra* note

does well to admit at the outset that criminalization limits women's liberty insofar as it restricts what women may do during pregnancy. The proponent of prosecution must overcome what Feinberg calls a

> 'presumption in favor of liberty' requiring that whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should leave individuals free to make their own choices. Liberty should be the norm; coercion always needs some special justification.[15]

In view of the fundamental importance of liberty and the stinging social stigma associated with criminal conviction, the presumption in favor of liberty is heavy indeed.

To overcome the presumption favoring liberty, those favoring prosecution of women using drugs during pregnancy turn to principles which justify coercion through law. The most cogent of these "liberty-limiting principles" is the "harm to others principle," which empowers society to prohibit its members from seriously harming one another.[16] John Stuart Mill described the "harm principle" in *On Liberty*, where he wrote that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[17] Feinberg reminds us that it is often "legiti-

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9 (opposing prosecution); Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325 (1990) (arguing against prosecution); Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357 (1989).

15. J. FEINBERG, HARM TO OTHERS 9 (1984).

16. *See id.* at 26-27, for a summation of the liberty-limiting principles.

17. J. MILL, ON LIBERTY ch. 1, para. 9 (1859). Mill overstated the case when he asserted that preventing individuals from harming each other is the "sole" and "only" justification for restraint on liberty. As Feinberg points out, Mill acknowledged another "liberty-limiting principle." Feinberg writes that "Mill often wrote as if prevention of private harm is the *sole* valid ground for state coercion, but this must not have been his considered intention." J. FEINBERG, SOCIAL PHILOSOPHY 25 (1973) (emphasis in original). Mill acknowledged that certain acts that could not be prohibited under the "harm principle" are nevertheless legitimately proscribed. Mill wrote that "there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners and, coming thus within the category of offenses against others, may rightly be prohibited." J. MILL, ON LIBERTY, ch. 5, para. 7 (1859). Feinberg writes that Mill came upon "the offense to others" principle "as a kind of afterthought. . . ." J. FEINBERG, *supra* note 15, at 14.

mate for the state to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm. . . ."[18] Maternal drug use during pregnancy risks the type of physical and mental injury which, in ordinary circumstances, invokes the harm principle. The difficulty with maternal drug use during pregnancy is that it is not the ordinary circumstance.

Opponents of prosecution may assert that the harm principle has no application to drug use during pregnancy because the fetus is not a "person" who can be harmed. They point to *Roe v. Wade*,[19] in which the Supreme Court ruled that an unborn child is not a "person" as that term is defined in the Fourteenth Amendment.[20] It seems disingenuous, however, to suggest that an unborn child cannot be damaged within the contemplation of the harm principle. A fetus may not be a Fourteenth Amendment "person," but neither is it a moral nonentity.[21] Whatever uncertainty surrounds the legal status of the unborn child, it cannot be denied that the unborn child has the *potential* to inherit the full mantle of moral and legal personhood, and this potential should not be ignored. Indeed, the most ardent critics of prosecution agree that a pregnant woman has at least a moral responsibility to refrain from needless harm to her unborn child.[22] To assert that a woman owes no moral obligation to her unborn child would lead to what Phillip Johnson calls the "monstrous moral conclusion" that a woman could, without scruple, engage in behavior designed to rob her unborn child of the opportunity for a meaningful life.[23]

Focusing on the child, it is difficult to discern a moral distinction between administering crack or cocaine to a nine-

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18. J. FEINBERG, *supra* note 15, at 11.

19. 410 U.S. 113 (1973).

20. *Id.* at 158.

21. *See* Kalafut v. Gruver, 239 Va. 278, 389 S.E.2d 681 (1990). In *Kalafut*, the Virginia Supreme Court ruled that a tortfeasor could be liable for damage to a fetus later born alive. The court wrote:

> When a child is born alive, the argument that an unborn child is not a "person" misses the point. "There is no question that conception sets in motion biological processes which if undisturbed will produce what every one will concede to be a person in being. If in the meanwhile those processes can be disrupted resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being. . . .
>
> While a fetus is not a "person," it is not a nonentity.

389 S.E.2d at 685.

22. *See* Johnson, *A New Threat to Pregnant Women's Autonomy*, 17 HASTINGS CENTER REP. 33 (1987).

23. Johnson, *The ACLU Philosophy and the Right to Abuse the Unborn*, 9 CRIM. JUST. ETHICS 48, 50 (1990).

month-old infant and giving the same drug to a nine-month-old fetus. The consequences may well be the same for both children, a lifetime of damage and disability. From a moral perspective, then, the argument is strong that an unborn child can be injured as that term is employed in the harm principle. But the conclusion that an unborn child deserves protection under the harm principle does not constitute a sufficient justification to criminalize maternal conduct during pregnancy.[24] Four additional factors must be evaluated to reach a conclusion: (1) the seriousness of the harm to be prevented by prosecution, (2) the likelihood of harm to the unborn child, (3) the balance of interests between the mother and her unborn child, and (4) the social utility of criminal prosecution.

1. Seriousness of Harm Caused by Maternal Substance Abuse During Pregnancy

The harm principle does not authorize the state to prohibit every harm, no matter how slight: *De minimis non curat lex*.[25] The medical literature increasingly reveals, however, that maternal use of drugs such as cocaine and heroine during pregnancy causes serious short- and long-term harm to many children. Many "cocaine babies" are significantly smaller in birth weight, length, and head circumference than infants whose mothers did not abuse drugs during pregnancy.[26] Infants exposed to cocaine during pregnancy are at increased risk of

24. The harm principle standing alone is neither a necessary nor a sufficient reason to declare harmful conduct criminal. *See* J. FEINBERG, *supra* note 15, at 187. The harm principle is not a necessary condition because other liberty-limiting principles can be employed to justify criminalization of certain behaviors. Nor is the harm principle a sufficient condition to declare harmful conduct criminal because society is not justified in prohibiting all harms.

25. "The law does not concern itself with trifles."

26. *See* Bays, *supra* note 2; Chasnoff, Griffith, MacGregor, Dirkes & Burns, *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 J. A.M.A. 1741, 1742 (1989); Frank, Zuckerman, Amaro, Aboagye, Bauchner, Cabral, Fried, Hingson, Kayne, Levenson, Parker, Reece & Vinci, *Cocaine Use During Pregnancy: Prevalence and Correlates*, 82 PEDIATRICS 88 (1988); MacGregor, Keith, Chasnoff, Rosner, Chisum, Shaw & Minoque, *Cocaine Use During Pregnancy: Adverse Perinatal Outcome*, 157 AM. J. OBSTETRICS & GYNECOLOGY 686 (1987); Madden, Payne & Miller, *Maternal Cocaine Abuse and Effect on the Newborn*, 77 PEDIATRICS 209 (1986); Oro & Dixon, *Perinatal Cocaine and Methamphetamine Exposure: Maternal and Neonatal Correlates*, 111 J. PEDIATRICS 571 (1987); Zuckerman, Frank, Hingson, Amaro, Levenson, Kayne, Parker, Vinci, Aboagye, Fried, Cabral, Timperi & Bauchner, *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 NEW ENG. J. MED. 762 (1989).

birth defects and neurological impairment.[27] Research on the long-term consequences of exposure to cocaine *in utero* is incomplete, although preliminary results are not encouraging.[28] Many toddlers and preschool children demonstrate neurological, motor, and behavioral deficits that bode poorly for the future. Like "cocaine babies," infants exposed to heroin during pregnancy are at risk of growth retardation and small head circumference. Many newborns suffer withdrawal symptoms, including tremors, poor sleep and feeding patterns, high-pitched crying, seizures, and impaired ability to relate to adult caretakers. Studies on the long-term effects of opiate exposure during pregnancy reveal that many children are harmed. "Observed deficits include impaired motor performance and cognition, poor organization and perception, lack of concentration, hyperactivity, impulsiveness, aggressiveness, lack of inhibition, and poor visual-motor coordination."[29] Children with impairments related to maternal use of cocaine and heroin during pregnancy are prime candidates for educational and social failure, and eventual difficulty with the law.

2. Likelihood of Harm

Maternal drug use does not affect every unborn child.[30] Research discloses, however, that the probability of harm is sufficiently great to warrant considerable concern.[31] Pediatrician Jan Bays describes some of the perinatal effects of cocaine:

> Cocaine causes a ten fold increased rate of hemorrhage or placental abruption, a 23% to 38% rate of spontaneous abortions, and increased rates of premature labor, precipitous delivery, [and] fetal distress. . . . Cocaine-induced vasospasm may be responsible for the increased rate of genitourinary, cardiac and central nervous system anomalies reported in these infants. . . . Dixon reports that over one-third of cocaine-exposed neonates had structural abnormalities of the brain on ultrasound or CAT scan.[32]

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27. *See* authorities listed in Bays, *supra* note 2.

28. *See* Bays, *supra* note 2.

29. *Id.* at 885.

30. *Are Cocaine Babies Doomed to a Lifetime of Failure?*, PEDIATRIC NEWS, Nov. 1990, at 2, col. 3.

31. *Id.* at 28 ("[s]ome degree of significant developmental problem was noted in most of the cocaine-exposed children studied, regardless of whether their mother used the drug only during the first trimester or throughout pregnancy . . .").

32. Bays, *supra* note 2, at 883.

Davis and Fennoy studied the medical records of 70 children exposed to cocaine during pregnancy.[33] The children received a comprehensive medical and developmental assessment. The mean age at time of assessment was slightly above nineteen months. Ninety-four percent of the children had language delay. Nearly sixty-three percent had fine motor delay. Thirty-seven percent had gross motor delays. Fifty-four percent were delayed in acquiring appropriate social skills. Behavioral abnormalities were seen in fifty-eight percent of the children, and thirty percent were hyperactive. Eleven percent of the children met the diagnostic criteria for autism. The authors write that "[S]ignificant neurodevelopmental abnormalities and an alarming frequency of autism were seen. The high rate of autistic disorders previously unreported in children exposed to alcohol or opioids alone suggests specific cocaine effects."[34]

The expanding literature discloses that children exposed to cocaine and other drugs during pregnancy are at considerable risk of serious harm. With appropriate compensatory programming and services, many of these children will overcome the damage inflicted by maternal drug use. There seems little doubt, however, that thousands of children will suffer long-term damage. When the high probability of harm is combined with the seriousness of the harm, the argument for legal intervention gains ground.

3. Balancing Competing Interests

Before prosecution of mothers can be justified, competing interests must be identified and balanced. There is no dispute that maternal drug use during pregnancy poses serious risks for unborn children. Thus, the interests at stake for the fetus are weighty. If prosecution holds meaningful promise of reducing the probability of harm to an unborn child, it seems the child's wish would be to be spared the ravages of prenatal exposure to toxic drugs.

Society has an interest in preventing harm to its members, particularly children, who are incapable of self-protection. Phillip Johnson observes that "there is a societal interest in protecting the health of unborn children who will one day be citizens."[35] Thus, at first blush it seems the interests of society

33. Davis & Fennoy, *Growth and Development in Children of Cocaine Abusing Mothers*, 144 AM. J. DISEASES CHILDHOOD 426 (1990).

34. *Id.*

35. Johnson, *supra* note 23, at 49.

align with those of the unborn child. It is important to note, however, that more than one state interest is at work. In addition to its stake in child protection, the state has an interest in preserving the autonomy and privacy of its members, including pregnant women. In view of the legacy of discrimination against women, it is particularly important to avoid unwarranted invasion of maternal rights.

Which of these conflicting state interests predominates? If prosecution of mothers will protect more children than it harms, the balance of state interests tips toward prosecution. The harm to be prevented is clear, as is the benefit to individual children. Although the state has a strong interest in nurturing privacy and autonomy, this interest is diminished (if not extinguished) in the context of maternal use of illegal drugs. The state has already decided that in a contest between autonomy and drug use, autonomy loses. The state has no discernable interest in protecting a woman's ability to take prohibited drugs that may harm her unborn child. Thus, assuming again the positive social utility of prosecution, the state interest in protecting children predominates over the state interest in preserving maternal autonomy.

What maternal interests are balanced against those of the unborn child and the state? If criminalization of maternal drug use is restricted to substances that are prohibited for all adults, it is difficult to see how any morally defensible interest of the woman is implicated. There is no moral right to take illegal drugs. A woman cannot argue credibly that she has a morally defensible right to endanger her fetus by indulging in illegal behavior. Thus, it seems that the interests of the child and the state outweigh the woman's interests. This conclusion, however, downplays the reality of addiction. To inform a pregnant addict that her behavior is morally indefensible has the hollow ring of self-righteous moralizing, and disregards the insatiable, and in many cases, overpowering craving experienced by many cocaine and opiate addicts. The power of these drugs over the addict's will does not excuse the addict's behavior when an unborn child is likely to be harmed, but the cruel reality of addiction certainly dampens the enthusiasm to prosecute.

The argument might be made that since a woman has a legal right to abort her pre-viable fetus, that is, to disregard its interests altogether by killing it, she necessarily possesses the lesser right to engage in activity that may harm but not kill. In response, it should first be noted that this argument has no application to a viable fetus because abortion is not an option following viability unless the woman's life or health is at risk.

Second, even in the context of a non-viable fetus, the argument that the abortion right incorporates a right to engage in behavior that could seriously damage the fetus is not persuasive. The fundamental distinction between abortion and birth should not be ignored. In the case of abortion, a post-birth child never comes into being. When a woman decides against abortion, however, the likelihood is that a child will be born; a child whose entire life may be marred by drug use during pregnancy. Neither logic nor morality dictate the conclusion that a right to prevent all life from occurring includes a right to impair a life that will exist.

The balancing process outlined above is complex. Reasonable minds can differ on the interests to be weighed and the ultimate outcome. Nevertheless, grim reality demands that a balance be struck. Drug affected babies are born every hour. Because the maternal behavior involved — use of illegal drugs — is morally indefensible, the balance of interests appears to tip in the direction of upholding the legitimacy of prosecution intended to prevent needless harm.

If an attempt is made to punish pregnant women for use of *legal* substances that harm the unborn, the balance of interests shifts. For example, the medical literature establishes that cigarettes and alcohol can harm the unborn. Indeed, alcohol consumption during pregnancy may be the leading cause of mental retardation in the United States.[36] As many as one percent of all infants may be adversely affected by maternal alcohol consumption.[37] Unlike prosecution for maternal use of illegal drugs, however, punishing women for smoking or drinking during pregnancy deprives women of liberty interests enjoyed by the rest of adult society.

Criminalizing maternal use of *legal* substances that could harm the fetus raises the specter of massive government intervention into women's privacy. To avoid this slippery slope, the dichotomy between legal and illegal drugs offers a workable, albeit imperfect and not very satisfying, line of demarcation. Punishing a woman for harm caused by illegal drugs does not seriously trammel morally defensible interests of the woman. By contrast, criminalizing legal behavior implicates legitimate privacy interests and conjures up frightening images of "pregnancy police" monitoring every aspect of pregnancy. Smoking, drinking, and other activities that may harm unborn children

36. Bays, *supra* note 2, at 882.

37. *Id.*

are fit subjects for education and moral suasion, but probably not prosecution.

When attention is limited to maternal use of *illegal* drugs during pregnancy, a morally defensible argument can be made that in selected cases the "harm principle" justifies criminal punishment. As I mention several times, however, the linchpin in this argument is the assumption that prosecution does more good than harm. Pull out that linchpin and the argument collapses.

4. The Social Utility of Prosecution

There is reason to believe that the social benefit of prosecuting women whose use of illegal drugs during pregnancy harms their children is outweighed by the social costs of prosecution. There is very little, if any, evidence that the threat of criminal punishment deters pregnant women as a group from using drugs. Thus, there is no evidence of what might be called macro-deterrence. There is considerable evidence, however, that the threat of prosecution will deter women from obtaining essential prenatal care.[38] The medical literature discloses that even without the threat of prosecution, most women using illicit drugs receive little or no prenatal care.[39] If prosecution becomes commonplace, drug abusing women will soon realize that it is unsafe to deal with medical professionals because obtaining prenatal care may involve the police.

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38. *See* Jessup & Roth, *Clinical and Legal Perspective on Prenatal Drug and Alcohol Use: Guidelines for Individual and Community Response*, 7 MED. & LAW 377 (1988).

39. *See* Cherukuri, Minkoff, Feldman, Parekh & Glass, *A Cohort Study of Alkaloidal Cocaine ("Crack") in Pregnancy*, 72 OBSTETRICS & GYNECOLOGY 147 (1988) (in this study "[s]ixty percent of crack-using mothers received no prenatal care"); Yonekura, Inkelis & Smith-Wallace, Cocaine Intoxication During Parturition: Maternal and Neonatal Complications (paper presented at 7th annual meeting of the Society of Perinatal Obstetricians, February 6, 1987). Describing a study at Harbor/UCLA Medical Center, the authors write that "[w]hereas 93% of non-addicted parturients at our institution have prenatal care, the majority of parturients with positive toxicology screens have no prenatal care."

Maternal use of drugs during pregnancy is by no means limited to low-income women. *See* National Association for Perinatal Addiction Research and Education, *A First: National Hospital Incidence Survey* (1989). Many women who use illicit drugs during pregnancy are poor, however, and poor women as a group receive less prenatal care than women who are not poor. *See* Cooney, *What Determines the Start of Prenatal Care?*, 23 MED. CARE 986 (1985); Miller, Margolis, Schwethelm & Smith, *Barriers to Implementation of a Prenatal Care Program for Low Income Women*, 79 AM. J. PUB. HEALTH 62 (1989).

After speaking with prosecutors who indicate that the threat of prosecution is a useful tool to coerce some drug abusing pregnant women into treatment, I conclude that individual women may be deterred by the threat of prosecution — what might be called micro-deterrence. The question is whether the benefit of micro-deterrence of a relatively small number of pregnant women outweighs the risk that large numbers of drug abusing pregnant women will avoid medical care. Based on limited present knowledge, the benefits of micro-deterrence appear to be outweighed by the risks entailed in prosecution. The ultimate irony of prosecuting maternal drug use during pregnancy could be that the state harms more children than it helps.

Focusing prosecutorial attention on women who take drugs during pregnancy drains limited law enforcement resources away from the real enemies in the "war on drugs" — suppliers and pushers. Reducing the supply of illegal drugs holds greater promise than prosecuting mothers who use them.

Entrusting complex social problems to the legal system is dangerous because the public may be lulled into a false sense of security. With the highly visible wheels of the criminal justice system in motion, the inaccurate impression may emerge that meaningful steps are underway to deal with maternal drug use. There is a collective sigh of relief: "Something is finally being done." Policy makers may escape the responsibility of grappling with the underlying causes of drug abuse.

Prosecuting women for their conduct during pregnancy may exacerbate stereotypes of women as less than fully autonomous persons. George Annas warns that coercing pregnant women's behavior through the threat of prosecution treats women as little more than "fetal containers."[40] Annas writes that

> [a]ttempts to define fetal neglect, and to establish a prenatal police force to protect fetuses from their mothers, are steps backwards in terms of both women's rights and fetal protection. Women's rights will only be fostered when we treat women equally. The best chance the state has to protect fetuses is through actions to enhance the status of all women. . . .[41]

Dawn Johnson agrees, writing that "[f]etal rights laws would not only infringe on constitutionally protected liberty and pri-

40. Annas, *Pregnant Women as Fetal Containers*, 16 HASTINGS CENTER REP. 13 (1986).

41. *Id.* at 14.

vacy rights of individual women, they would also serve to disadvantage women as women by further stigmatizing and penalizing them on the basis of the very characteristic that historically has been used to perpetuate a system of sex inequality."[42] Although I believe Annas and Johnson exaggerate the dangers to women's autonomy interests, their warnings are important.

The desire to come to the aid of unborn children who may be harmed by maternal substance abuse should be tempered with a healthy dose of skepticism about the will and ability of government to restrain itself from unwarranted intervention in the private lives of citizens. Justice Brandeis once observed that the tendency of government officials to overstep the limits of appropriate intervention into private matters often manifests itself when officials act in the name of beneficence. Brandeis wrote that "[e]xperience should teach us most to be on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding."[43]

The most effective response to the tragedy of maternal drug use is vastly increased funding for drug treatment programs and prenatal care, coupled with expanded education programs to inform women about the dangers of drug use during pregnancy.[44] Virtually all women want to give birth to healthy babies. Thus, pregnant women, unborn children, and society share the same goal. Achievement of this shared objective is more likely if women are supported rather than prosecuted. In the end, the moral high road leads away from prosecution.

The argument now shifts from moral philosophy to constitutional law. Narrowly tailored statutes authorizing prosecution for drug use during pregnancy might well survive

42. Johnson, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 620 (1986).

43. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

44. *See Legal Issues Affecting Drug-Exposed Infants*, 11 J. NAT'L CENTER YOUTH LAW (1990); Jessup & Roth, *Clinical and Legal Perspectives on Prenatal Drug and Alcohol Use: Guidelines for Individual and Community Response*, 7 MED. & LAW 377 (1988); American Bar Association Center on Children and the Law, Drug Exposed Infants and their Families: Coordinating Responses of the Legal, Medical and Child Protection System (1990).

constitutional challenge,[45] but, again, they are not a viable solution.

B. *An Analysis from Constitutional Law*

Constitutional analysis begins with the woman's fundamental right of privacy — "the right to be let alone."[46] The Supreme Court's privacy decisions deal largely with "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States' power to substantively regulate conduct."[47] The Supreme Court's procreative freedom cases protect a woman's decision to become pregnant and, within the increasingly uncertain limits of *Roe v. Wade*,[48] to terminate her pregnancy. The autonomy protected by these decisions is premised on longstanding respect for privacy regarding intimate personal matters. As the Court wrote in *Eisenstadt v. Baird*,[49] "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[50]

It can be argued that prosecuting women for drug use during pregnancy affects procreative privacy by forcing women to choose between prosecution and abortion.[51] There is strength in this argument. It is not difficult to imagine a pregnant, drug abusing woman saying to herself, "I'd better have an abortion or I may be prosecuted if my drug use harms my baby." Thus, prosecution may impact women's procreative privacy by encouraging abortion. In response, it may be argued that the possibility that government action may, in some cases, impact on procreative decision making cannot completely tie the government's hands, and foreclose its ability to respond to a serious social problem. Furthermore, the act to be prohibited — illegal drug use — is so far removed from the values protected by procreative privacy that such conduct does not deserve con-

45. *See Maternal Rights*, *supra* note 9.

46. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

47. Paul v. Davis, 424 U.S. 693, 713 (1976).

48. 410 U.S. 113 (1973).

49. 405 U.S. 438 (1972). Although *Eisenstadt* was decided on equal protection grounds, the decision contains a very useful discussion of the right of privacy regarding procreation.

50. *Id.* at 453 (emphasis in original).

51. Moss, *supra* note 6, at 284.

stitutional protection. In sum, I am not persuaded by the argument that prosecution places an unconstitutional burden on procreative privacy. As the Supreme Court pointed out in *Wisconsin v. Yoder*,[52] the state has considerable authority to restrict parental decision making that "will jeopardize the health or safety of the child."[53]

Turning to another important constitutional right, individuals enjoy a right to physical liberty and freedom from restraint.[54] This right may well be implicated by state action *during* pregnancy to coerce women to refrain from activity that harms the fetus. When it comes to prosecution *following* the birth of a damaged child, however, the right to freedom from restraint is not implicated.

Proponents of prosecution draw from an arsenal of state powers and interests, beginning with the police power, which authorizes the state "both to prevent its citizens from harming one another and to promote all aspects of the public welfare."[55] Statutes prohibiting child abuse and neglect are based on the police power, as are laws prohibiting use of drugs like cocaine and heroin. The police power is supplemented by the *parens patriae* authority, under which the state has limited authority to protect those who cannot protect themselves. As the Supreme Court stated in *Prince v. Massachusetts*,[56] "the state as *parens patriae* . . . has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[57] The police and *parens patriae* powers have direct and compelling force in the context of child abuse. In *New York v. Ferber*,[58] the Supreme Court wrote that prevention of child abuse "constitutes a government objective of surpassing importance."[59] Chief Judge Fuld of the New York Court of Appeals described the state's interest in child welfare as "transcendent."[60]

In addition to the police power and the *parens patriae* authority, the state has an "important and legitimate interest in

52. 406 U.S. 205 (1972).

53. *Id.* at 234.

54. *See* Youngberg v. Romeo, 457 U.S. 307 (1982).

55. *Special Project, Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198-99 (1980).

56. 321 U.S. 158 (1944).

57. *Id.* at 166-67.

58. 458 U.S. 747 (1982).

59. *Id.* at 757.

60. People v. Kahan, 15 N.Y. 311, 312, 206 N.E.2d 333, 334, 258 N.Y.S.2d 391, 392 (1965) (Fuld, J., concurring).

protecting the potentiality of human life."[61] In *Roe v. Wade* the Court ruled that the interest in potential life exists throughout pregnancy, grows "in substantiality as the woman approaches term"[62] and becomes compelling at the point of viability. In *Webster v. Reproductive Health Services*,[63] Chief Justice Rehnquist, writing for himself and Justices Kennedy and White, rejected the concept that the state's interest in the unborn child is less than compelling prior to viability. The Chief Justice wrote that "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability. . . . '[T]he State's interest, if compelling after viability, is equally compelling before viability.' "[64] With the departure from the Court of Justice Brennan, *Roe v. Wade*'s holding that the state interest in the unborn becomes compelling only at viability may one day change. At a minimum, the *Webster* decision indicates that a majority of the Supreme Court is apparently willing to tolerate restrictions on abortion that might not have passed constitutional muster a few years ago. One senses greater deference for the state interest in the unborn child.

The state has an interest in protecting the general welfare of children. In *Prince v. Massachusetts*,[65] the Court wrote that ". . . the state's assertion of authority to that end . . . is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent . . . citizens."[66] Although the Supreme Court's decisions are unclear on the point, it is probable that the state interest in the "potentiality of human life" articulated in *Roe v. Wade* is the pre-birth equivalent of the state interest in children described in *Prince v. Massachusetts*, and not a separate and additional state interest. Thus, the proponent of prosecution should not be allowed to tally two state interests in an effort to strengthen the argument for prosecution. In reality, only one state interest, the interest in children, is at work.

In addition to the state interest in protecting children, born and unborn, the state has an "interest in the protection

61. Roe v. Wade, 410 U.S. 113, 162 (1973).
62. *Id.* at 162-63.
63. 109 S.Ct. 3040 (1989).
64. *Id.* at 3057.
65. 321 U.S. 158 (1944).
66. *Id.* at 165.

and preservation of human life. . . ."[67] There is no reason why this state interest should not apply to unborn children. The medical literature discloses that maternal drug use during pregnancy causes some drug affected fetuses to die *in utero*. Thus, the state interest in preserving life can be frustrated by maternal drug use, and the interest in life dovetails with the state's interest in child protection to support prosecution.

Does an unborn child have "rights" to consider? Michael Wald aptly observes that "neither legislatures nor courts have developed a coherent philosophy or approach when addressing questions relating to children's rights."[68] It is clear that children who are already born possess legal rights. The United States Supreme Court wrote in *In re Gault*[69] that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[70] And in *Bellotti v. Baird*,[71] the Court stated that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution."[72] Yet, in *Roe v. Wade* the Court held that an unborn child is not a "person" within the meaning of the Fourteenth Amendment.[73] Thus, unborn children lack constitutional rights.

Nevertheless, unborn children are protected by a growing body of non-Fourteenth Amendment law.[74] The Supreme Court observed in *Webster* that "State law has offered protections to unborn children in tort and probate law. . . ."[75] Tort law in particular provides considerable protection for the unborn. The Second Restatement of Torts states that "[o]ne who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive."[76] Since a child-to-be-born bears the scars of a tortfeasor's conduct to the same extent as a child injured following birth, it is appropriate to apply similar rules of civil liability for pre- and post-natal injury.

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67. Cruzan v. Director, Missouri Department of Health, 110 S. Ct. 2841 (1990).

68. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 258 (1979).

69. 387 U.S. 1 (1967).

70. *Id.* at 13.

71. 443 U.S. 622 (1979).

72. *Id.* at 633.

73. 410 U.S. at 158.

74. *See* Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1, 4-14 (1984).

75. 109 S. Ct. at 3050.

76. RESTATEMENT (SECOND) OF TORTS § 869(1) (1977).

If a third-party tortfeasor is liable for injuries inflicted on a fetus later born alive, does the same liability extend to the child's mother? In *Grodin v. Grodin*[77] the Michigan Court of Appeals answered in the affirmative, writing that a "child's mother would bear the same liability for injurious, negligent conduct [prior to birth] as would a third person."[78] The Supreme Court of Illinois forcefully rejected the concept of tort liability for pregnant women in *Stallman v. Youngquist*,[79] where the court wrote:

> It is clear that the recognition of a legal right to begin life with a sound mind and body on the part of a fetus which is assertable after birth against its mother would have serious ramifications for all women and their families, and for the way in which society views women and women's reproductive abilities. The recognition of such a right by a fetus would necessitate the recognition of a legal duty on the part of the woman who is the mother; a legal duty, as opposed to a moral duty, to effectuate the best prenatal environment possible. The recognition of such a legal duty would create a new tort: a cause of action assertable by a fetus, subsequently born alive, against its mother for the unintentional infliction of prenatal injuries.
>
> It is the firmly held belief of some that a woman should subordinate her right to control her life when she decides to become pregnant or does become pregnant: anything which might possibly harm the developing fetus should be prohibited and all things which might positively affect the developing fetus should be mandated under penalty of law, be it criminal or civil. Since anything which a pregnant woman does or does not do may have an impact, either positive or negative, on her developing fetus, any act or omission on her part could render her liable to her subsequently born child. While such a view is consistent with the recognition of a fetus having rights which are superior to those of its mother, such is not and cannot be the law of this State.[80]

There is no denying the power of the Illinois court's reasoning. The pervasiveness of the court's argument lies in part in the specter of pervasive control of women's lives. When

77. 102 Mich. App. 396, 301 N.W.2d 869 (1981).
78. 301 N.W.2d at 870.
79. 125 Ill.2d 267, 531 N.E.2d 355 (1988).
80. 531 N.E.2d at 359.

control is limited to maternal use of illegal drugs, however, concern over privacy is lessened to more tolerable levels, and the argument for "fetal rights" is more appealing.[81] The unborn child may be said to possess a right to protection from injury caused by maternal substance abuse. Recognition of such a right is consistent with the state's interest in the potentiality of human life, and with societal interests in the prevention of needless harm to others.

The unborn child is completely incapable of protecting its interest in freedom from damage inflicted by maternal substance abuse. Therefore, if the unborn child is to be protected, the responsibility falls to the state. The interests of the fetus align with the state interest in child protection, adding force to the argument in favor of prosecution.

This brings us to the balancing process utilized to determine whether the state may infringe private interests. The pregnant woman cannot assert a defensible claim to take illegal drugs. I have already rejected the argument that prosecution interferes with procreative privacy. Thus, if prosecution is limited to women who use prohibited substances during pregnancy, the woman has very little to place on the scale. By contrast, the interests of the unborn child and the state weigh heavily in the balance. When the conflicting interests are balanced, the scale tips decisively toward child protection. Thus, a defensible argument can be made that prosecution of illegal drug use during pregnancy passes constitutional muster.[82]

Suppose, however, that a woman avoids illegal drugs, and decides instead to drink to excess. All perfectly legal. As a result, her baby is born with fetal alcohol syndrome and accompanying mental retardation. Does the Constitution tolerate prosecution in this case? To make the urge for retribution stronger, suppose the woman knew the risk of drinking because she gave birth to two other children with fetal alcohol syn-

81. A considerable number of articles discuss the pros and cons of recognizing "fetal rights." *See* Trammel, *Fetal Rights — A Bibliography*, 10 N. ILL. U.L. REV. 69 (1989).

82. *Compare Maternal Rights*, *supra* note 9, at 995, where the author states that "[t]he current constitutional body of privacy law in general, and abortion law in particular, strongly suggests the existence of a maternal privacy interest that would be infringed by [criminal] statutes, thus requiring strict scrutiny by courts" *with* Robertson, *supra* note 14, at 442-43, where the author writes that "[b]ecause there is no fundamental right to use psychoactive substances, the state would not have to show a compelling interest in order to restrict their use by pregnant women. A statute forbidding pregnant women the use of alcohol or tobacco in order to minimize risks to their fetuses would pass the courts' 'rational basis' test."

drome. A defensible argument can be made under the police power for prohibiting certain otherwise legal behavior — such as drinking — because such behavior by pregnant women carries a known risk of serious harm to unborn children.

In response to the proponent's argument in favor of prosecuting certain behaviors that normally are legal, opponents argue that prosecution violates the Equal Protection Clause of the Fourteenth Amendment. Pregnant women are treated differently than all non-pregnant persons. The equal protection argument is unlikely to succeed, however, in light of the Supreme Court's apparent tolerance of gender based classifications that promote important state interests,[83] and, more particularly, in view of the Court's holding in *Geduldig v. Aiello* [84] that classifications on the basis of pregnancy are not necessarily gender based classifications for purposes of equal protection analysis.

Criminalization of maternal use of certain drugs, particularly illegal drugs, may survive constitutional challenge, but should probably be avoided for the reasons outlined in the analysis from moral philosophy. The more effective response to the problem of maternal drug use is nonpunitive in nature. If prosecution is ruled out as an acceptable response in nearly all cases, attention shifts to the authority of the juvenile court to protect abused and neglected children. The remainder of this article describes the utility of juvenile court intervention, with particular attention on reforming the court to reduce the current emphasis on adversarial processes and decision making.

II. JUVENILE COURT INTERVENTION

There are disadvantages accompanying any form of legal intervention in the family. Nevertheless, the reality of maternal substance abuse during pregnancy occasionally necessitates intervention, and the juvenile court is the appropriate institution for the task. The positive social utility of juvenile court intervention, and the benefit for individual children, sometimes outweigh the invasion of important maternal rights.

Juvenile court intervention can occur at two points: shortly following birth to protect newborn children from the likelihood of neglect in the future, and prior to birth. Although both types of intervention are controversial, intervention dur-

83. *See* J. NOWAK, R. ROTUNDA & N. YOUNG, CONSTITUTIONAL LAW 714 (2d ed. 1983).

84. 417 U.S. 484 (1981).

ing pregnancy raises the most serious constitutional and moral concerns.

A. *Intervention Shortly Following Birth*

Infants who are born prematurely because of maternal drug use, infants who demonstrate signs of withdrawal or other drug related conditions, and newborns whose mothers are known to seriously abuse drugs, may need specialized medical care in the hospital. Following release from the hospital, some drug-affected babies require special care, time, and attention that drug-abusing parents, particularly addicts, cannot provide.[85] The social science and medical literature support the conclusion that in some cases it is neither appropriate nor safe to release newborn babies to the unsupervised custody of substance abusing parents. Jan Bays describes the risks inherent in placing newborn children in homes where one or both parents seriously abuse drugs or alcohol. Bays highlights the degree of risk in her report:

> Chemically dependent families have attributes in common with families who abuse children. Characteristics of chemically dependent parents and their children contribute to increase the risk of abuse and neglect.
>
> Parental Risk Factors
>
> *Diversion of Resources*: To the extent an addicted parent's time and resources are occupied with obtaining and using drugs, these resources are not available to their children. Significant amounts of money are diverted to drugs in an addicted family . . . .
>
> An addicted parent diverts time from family activities to efforts seeking, using, being high on and recovering from drugs . . . .
>
> As basic a resource as food may be diverted to drugs. "Some addicts spend their entire monthly allotment of food stamps on drugs in a day or two, even if it means letting their children go hungry."
>
> *Mental and Physical Illness*: Up to 90% of drug abusers have evidence of other mental, emotional or personality disorders which can compromise their ability to care for children . . . .
>
> *Poor Parenting Skills*: . . . A University of Utah study characterizes clear differences in parenting between

85. Bays, *supra* note 2, at 888-93.

drug-abusing and non-abusing families. Drug-abusing families were more socially isolated, less involved in religious, recreational, social and cultural activities . . . . Family life was more chaotic and unpredictable . . . . Neglect, including emotional neglect, was common . . . .

Side Effects of Drugs: Intoxicated adults can become violent, paranoid, and less constrained about injuring, molesting or neglecting their children. Most addicts suffer side effects which can interfere with good parenting or caretaking. Cocaine, methamphetamine, and PCP use causes anxiety and fearfulness, distrust of others, hallucinations, and physical aggressiveness . . . .

Amphetamine abuse follows a cyclical pattern of action and reaction. In the action phase the abuser injects amphetamine one to ten times a day for several days. Between injections the addict is euphoric, hyperactive and hyperexcitable. In the reaction phase the addict may sleep 24-48 hours and experience intolerable psychological depression.

Although opiates purportedly have a calming effect, Black and colleagues found that opiate-addicted parents reported that they were using heroin at the time they lost control while disciplining, inflicting marks or serious bruises. Stress or seemingly minor events can trigger intense arousal and drug craving, causing parents to leave their children unattended and begin seeking drugs. Cocaine users describe cravings triggered by "the sight of cocaine-using friends or locations, the use of alcohol, the sight of white bread crumbs on the carpet, and even the sight of talcum powder while changing a child's diaper." A research group studying addicted families in Los Angeles reports: "Parents who are addicted to drugs have a primary commitment to chemicals, not to their children. Disruption and chaos in the household often result in the neglect or disregard of the child's needs."[86]

Dr. Bays provides information on the risks to infants exposed to drugs and alcohol. "Drug and alcohol-exposed infants exhibit characteristics which may interfere with parent-child attachment and place them at greater risk of abuse. Separation occurs early after delivery because of medical treatment for withdrawal, prematurity, intrauterine growth retardation, or infection."[87] Bay describes a report from the Netherlands

86. *Id.* at 888-89.
87. *Id.* at 889-90.

which characterizes the outcome for very premature or very low birth weight infants born to addicted mothers as disastrous.

> The infant mortality rate was 50% and the rate of major handicaps 21%, compared to 30% and 4% for comparable infants born to non-addicted mothers. Most of the children had been discharged home. The authors write, "We suggest that serious consideration be given to placing very preterm and/or very low birth weight children of addicted parents temporarily or permanently into the care of the social services and discharging them, not to the home of the parent(s), but to a foster home."[88]

Returning a drug-exposed infant to his parents poses considerable risk. Bays writes:

> Although mothers often promise to cease use of drugs if their infant is discharged home with them, it is rare for women to stop drug use after delivery. The postpartum period is in fact a time of increased risk for drug use. It is frustrating and unrewarding for parents to care for a baby who is irritable, sleeps less than an hour, who does not cuddle, does not suck or swallow well, averts its gaze from its mother's face, and who has a shrill penetrating cry with difficulty being consoled. Trained nurses find these infants difficult to care for in 8 hour shifts. A newborn infant is a stress to any family. If a difficult infant is given to a mother who is anxious over her ability to parent, guilty over the harm her addiction has caused her baby, and who copes with stress by turning to drugs or alcohol, are problems not to be expected?

Black and Mayer used structured interviews to investigate the adequacy of child care in 200 families addicted to heroin or alcohol. "[C]hildren in all of the families with an alcoholic or opiate addicted parent experience some degree of neglect. . . . When information on abuse and neglect of a child were combined, abuse and/or neglect of a child was found to have occurred in 41% of the families with an alcohol or opiate addicted parent."[89]

Bays concludes with the following sobering observation:

> Child welfare agencies have begun to compile and publish statistics on child abuse and chemical dependency. Half of all child abuse and neglect cases in New

88. *Id.* at 890-91.
89. *Id.*

> York City in 1987 were linked to parental substance abuse. If alcohol abuse was included, the incidence rose to 64%. A 1988 review of child fatalities in New York City revealed that in 25% of cases the child had been born with a positive toxicology. In over 25% of cases drug involvement by parents or caretakers contributed directly to the cause of death.[90]

No one relishes the thought of intervening in the family or removing children from their parents. Serious substance abuse is so destructive, however, that some users simply cannot parent, and when this happens, newborn babies who are already at risk because of maternal drug use during pregnancy need and deserve protection.[91] This is not to say that all substance abusing parents are incapable of caring for children. Furthermore, many children of drug abusing parents are cared for adequately by relatives. When there is evidence of serious substance abuse or addiction, however, there is cause for concern.

When hospital personnel have reason to believe that a newborn infant is suffering the effects of maternal drug use, serious consideration should be given to performing a toxicological drug screen on the infant.[92] A growing number of hospitals perform a drug screen when drug use is suspected.[93] Normally, the mother's consent should be obtained to perform the drug screen on the child. Performing the screen without parental consent raises legal issues, although this hurdle does not appear to be insurmountable.[94] When a baby tests positive, child protective services (CPS) authorities should be notified. State child abuse reporting statutes should be amended to require reporting when children are born with the effects of

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90. *Id.* at 892-94.

91. There is authority supporting juvenile court intervention when a handicapped child's special needs make it difficult for the child's disabled parent to care for the child. O.E.E. v. Department for Human Resources, 638 S.W.2d 282 (Ky. Ct. App. 1982). The disabling impact of serious drug abuse and addiction render it impossible for some substance abusing parents to meet the special needs of their drug affected babies.

92. For an excellent discussion of the issues involved in juvenile court involvement following birth, including drug testing, see Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745 (1990).

93. *See* Moss, *Legal Issues: Drug Testing of Postpartum Women and Newborns as the Basis for Civil and Criminal Proceedings*, 11 CLEARINGHOUSE REV. 1406 (1990).

94. *See* Larsen, *Creating Common Goals for Medical, Legal and Child Protection Communities*, in DRUG EXPOSED INFANTS AND THEIR FAMILIES: COORDINATING RESPONSES OF THE LEGAL, MEDICAL AND CHILD PROTECTION SYSTEM 3, 4-6 (1990).

maternal drug use.[95] When a newborn demonstrates no signs of maternal substance abuse, but medical professionals have evidence the mother was using illicit drugs in the days or weeks prior to delivery, or is an addict, a drug screen should be administered, and CPS notified if the results are positive. If the mother is addicted, CPS should become involved even if the drug screen is negative.

A report to CPS triggers a preliminary investigation to determine whether it is safe to discharge the newborn baby to the care of a parent who may be abusing drugs, and who may not be able to provide for the child. Except in cases of immediate risk to the child, however, newborn infants should not automatically be removed from the custody of drug abusing mothers.[96] The fact that a woman used illegal drugs during pregnancy is reason for concern, and in many cases for investigation, but drug use *alone* should not be equated with parental unfitness or immediate risk of harm to the infant.[97] Most parents who abuse illegal substances love their children dearly, and many drug abusing parents provide adequately for their children. As Bonnie Robin-Vergeer cogently points out, the temptation is strong to label women who use drugs during pregnancy as selfish and "bad."[98] A punitive response to maternal drug use does little good, however, and raises the distinct possibility of overreaction and unwarranted intervention in competent families. This is not to say that juvenile court intervention shortly following birth is never appropriate. When CPS investigation reveals an unsafe environment for the newborn, intervention is needed.

There is ample legal authority supporting juvenile court intervention to protect drug affected newborns. In *In re Troy D.*,[99] the California Court of Appeals wrote that "prenatal use

95. Several states have amended their reporting law to require reporting. *See* MINN. STAT. ANN. § 626.5561 (West 1989); OKLA. STAT. ANN. tit. 21, § 846 (West Supp. 1990); UTAH CODE ANN. § 62A-4-504 (1989 Replacement).

96. *See* Robin-Vergeer, *supra* note 92.

97. *See* State *ex rel.* Juv. Dept. v. Randall, 96 Or. App. 673, 773 P.2d 1348, 1349 (1989) ("Although we agree with the state that a parent's use of controlled substances is a proper consideration in determining whether a child should be made a ward of the state, that allegation is insufficient by itself to establish that the child's welfare is endangered. The petition must also include some factual allegation showing how the parent's drug usage endangers the welfare of the child over whom the court is asserting jurisdiction.").

98. Robin-Vergeer, *supra* note 92, at 749.

99. 215 Cal. App. 3d 889, 263 Cal. Rptr. 869 (1989).

of dangerous drugs by a mother is probative of future child neglect."[100] The Michigan Court of Appeals agreed, writing in *Matter of Baby X*[101] that "prenatal treatment can be considered probative of a child's neglect. . . . [A] newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child within the jurisdiction of the probate court."[102] In its recent decision in *Matter of Stefanel Tyesha C.*,[103] the Appellate Division of the New York Supreme Court ruled that a finding of neglect can be based on maternal drug use during pregnancy, coupled with evidence that the mother is not enrolled in drug treatment at the time juvenile court proceedings are instituted. The New York court rejected the argument that a neglect petition states a cause of action only if it alleges continued drug use following birth. The Appellate Division wrote that "a court cannot and should not 'await broken bone or shattered psyche before extending its protective cloak around a child. . . .' "[104]

Although juvenile court intervention shortly following birth is not free from controversy, the legal issues involved in postnatal intervention pale in comparison to the legal and moral questions swirling around juvenile court intervention *during* pregnancy to assist or, when all else fails, to force pregnant women to stop using drugs. The next section explores this profoundly difficult issue.

Intervention Prior to Birth

Does the state have power to intervene in the lives of pregnant women to forbid behavior that may harm unborn children? The thought is frightening, conjuring up images from Aldous Huxley's *Brave New World*[105] and George Orwell's *1984*.[106]

The question of prenatal intervention through the juvenile court arises in two situations. Quite apart from maternal drug use during pregnancy, medical professionals occasionally seek juvenile court authorization to provide medical care to an unborn child over the objection of the mother. The ability of medical science to diagnose and treat unborn children is

100. 263 Cal. Rptr. at 874.
101. 97 Mich. App. 111, 293 N.W.2d 736 (1980).
102. 97 Mich. App. at 114, 293 N.W.2d at 739.
103. 157 A.D.2d 322, 556 N.Y.S.2d 280 (1990).
104. 157 A.D.2d at 326, 556 N.Y.S.2d at 284.
105. A. HUXLEY, BRAVE NEW WORLD (1932).
106. G. ORWELL, 1984 (1949).

expanding rapidly,[107] and in rare cases physicians find themselves unable to accept a woman's decision to refuse medical treatment which would be beneficial to her fetus.

Providing medical care to the unborn child necessarily involves some invasion of the mother's body, thus clearly implicating the woman's rights to physical autonomy and privacy. The degree of invasion ranges from a one time blood transfusion to major surgery, most commonly Caesarean section to facilitate delivery.

The majority of commentators object to juvenile court intervention in medical care cases, arguing that state interests are not sufficient to outweigh the woman's rights to refuse medical care and control her own body.[108] I am among the small number of writers who support limited intervention through the juvenile court to provide medical care for unborn children in some cases.[109] The small number of court decisions split on the permissibility of intervention to provide medical care prior to birth.[110] By far the most thorough judicial discussion of the issue to date is found in *In re A.C.*,[111] from the District of Columbia Court of Appeals, which concluded that the woman's decision must "control in virtually all cases."[112]

When attention shifts from medical care for the fetus to illegal drug use by the mother, the argument for limited intervention during pregnancy is more persuasive. There is no doubt that drug use has serious consequences for many unborn children. The state's interests in the potentiality of human life and the preservation of life are operational, and are buttressed by the police and *parens patriae* powers. To the extent unborn children enjoy enforceable rights against their mother, these rights align with the state. A pregnant woman has no moral claim to take illegal drugs, particularly when such conduct causes serious harm to some unborn children. Furthermore, opponents run into difficulty when they argue that intervention violates women's procreative rights. As discussed in the sec-

107. *See* Mennuti, *Prenatal Diagnosis — Advances Bring New Challenges*, 320 NEW ENG. J. MED. 661 (1989).

108. *See, e.g.*, Field, *Controlling the Woman to Protect the Fetus*, 17 LAW, MED. & HEALTH CARE 114 (1989); Nelson, Buggy & Weil, *Forced Medical Treatment of Pregnant Women: Compelling Each to Live as Seems Good to the Rest*, 37 HASTINGS L.J. 703 (1986); Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Caesareans*, 74 CALIF. L. REV. 1951 (1986).

109. *See* Myers, *supra* note 74.

110. *Compare In re* A.C., 573 A.2d 1235 (D.C. 1990) *with* Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981).

111. 573 A.2d 1235 (D.C. 1990).

112. *Id.* at 1249.

tion on prosecution, illegal drug use during pregnancy is not sufficiently related to procreative privacy to prohibit intervention. Finally, unlike the medical care cases, forcing pregnant women to stop using illegal drugs involves no invasion of the woman's body.

Although a juvenile court order to stop drug use does not invade a woman's physical autonomy, intervention during pregnancy has the potential for major infringement of the fundamental rights of liberty and freedom of movement. In some cases, the only way to stop drug use — particularly by addicts — is to deprive women of their liberty.

Emotions run high when one individual's fundamental civil liberties are infringed to benefit another, especially when the one to be benefitted is unborn. Nevertheless, when the potential harm to children who will be born is considered in light of the interests of the state and the child, limited juvenile court intervention to curtail illegal maternal conduct seems morally and legally justifiable.

If one concedes the legitimacy of limited intervention to curtail maternal drug abuse during pregnancy, however, it is immediately apparent that formidable bulwarks must be erected against unwarranted interference in women's lives. Professionals who work with abused and neglected children sometimes lose sight of civil liberties in their zeal to protect children. Under current legal doctrine articulated in *Roe v. Wade*, intervention is probably justifiable only following fetal viability. Prior to viability, a woman can effectively foil state efforts to protect her unborn child by exercising her right to an abortion.[113] Extending the power to intervene prior to viability may actually encourage abortion, and aborting of an unborn child the state hopes to protect is certainly counterproductive. Staying the juvenile court's hand until viability does not ignore the fact that maternal drug use may do irreparable harm long before viability. Prohibiting juvenile court intervention until abortion is no longer an option simply recognizes present law. It will be time enough to reassess the wisdom of earlier intervention if the Supreme Court alters constitutional doctrine regarding abortion.

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113. Some commentators argue that when a woman decides to carry a pre-viable fetus to term, the woman waives her right to utilize abortion law as a means to veto state intervention to protect her pre-viable fetus. This waiver argument is flawed, as it is difficult to argue persuasively that by deciding to carry her unborn child to term, a woman has knowingly, intelligently, and voluntarily waived her rights under the Constitution. *See* Annas, *supra* note 40, at 14.

When intervention is a possibility, infringing a pregnant woman's liberty is defensible only if the danger to the unborn child is high. Intervention may be appropriate if the state establishes by clear and convincing evidence that continued maternal drug use is likely to kill the unborn child. If damage rather than death is likely to result from continued drug use, intervention may be permissible on a showing that there is a high probability that the unborn child will suffer serious harm. The greater the harm, the greater the justification for intervention.

Because a pregnant woman's rights to liberty and privacy are at stake, intervention must be by the least invasive method. As the Supreme Court remarked in *Shelton v. Tucker*,[114] even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[115] Thus, before coercion is justified, a woman should be afforded meaningful access to voluntary drug treatment unless it can be established that she is unlikely to participate in treatment and stop using drugs.

Society's response to the tragedy of maternal drug use during pregnancy should focus clearly and unequivocally on education and voluntary services for pregnant substance abusing women. So long as the primary emphasis remains on noncoercive intervention, the admittedly coercive arm of the juvenile court can play a useful subsidiary role in protecting children and assisting women in their effort to stop using drugs. In my view, however, the juvenile court will not achieve this important goal unless fundamental changes occur in its procedure and philosophy.

III. Reforming the Juvenile Court to Respond More Effectively to Maternal Drug Use During Pregnancy

Although there is a role for the juvenile court in the response to maternal drug use during pregnancy, the court will have to change to fulfill its mission. When substance abusing pregnant women get an inkling that a visit to the doctor may be followed by a "visit" to the coercive world of the juvenile court, many women will be frightened away from the prenatal care they desperately need.[116] Thus, the court must become less

114. 364 U.S. 479 (1960).

115. *Id.* at 488.

116. Bandstra, *Medical Issues for Mothers and Infants Arising from Perinatal*

threatening. At the same time, however, some pregnant women are so caught in the grip of drugs that the only way to protect their unborn children is through coercive measures. Thus, as the court becomes less threatening, it must retain its authority to override the woman's will. Is there a way out of this dilemma? I believe so, but only if the juvenile court pursues two seemingly contradictory paths to reform. On the one hand, the court must become less adversarial so that increasing numbers of parents view the court as a helping agency rather than a menace, and so that the number of women avoiding prenatal care does not increase. At the same time, however, the juvenile court must face the fact that many substance abusing parents do not cooperate voluntarily with court-ordered treatment, and for such parents the court must impose involuntary treatment. The difficult task is balancing the twin goals of decreased reliance on adversarial decision making and continued use of coercive intervention with some parents.

Turning first to the need for a less adversarial approach in handling parents who abuse drugs, it is useful to trace briefly the transformation of the juvenile court's jurisdiction over delinquent children. The social reformers who created the juvenile court at the turn of the century did not distinguish between maltreated children and delinquent youth.[117] All "troubled children" were to be brought before the fatherly juvenile court judge, who would take whatever action was necessary to solve the youngster's problem, whether the problem was criminal misbehavior or neglect at home. The juvenile court was envisioned not so much as a court of law, but as a dispenser of "social medicine," solving problems with compassion and wisdom more than legal doctrine and procedure. Since, in theory at least, the juvenile court was "treating" rather than punishing delinquent minors, the formality of process and procedure employed in criminal litigation was deemed unnecessary and, in fact, counterproductive.

Gradually, however, it became apparent that children accused of delinquent behavior were not receiving the compassionate care envisioned by the founders of the juvenile court, and a call went out to reform the court so that minors' rights to

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Use of Cocaine, in AMERICAN BAR ASSOCIATION CENTER ON CHILDREN AND THE LAW, DRUG EXPOSED INFANTS AND THEIR FAMILIES: COORDINATING RESPONSES OF THE LEGAL, MEDICAL AND CHILD PROTECTION SYSTEM 21, 22 (1990) ("Adverse effects of cocaine and marijuana usage upon fetal growth and development may be even more profound in pregnant women who fail to obtain prenatal care.").

117. *See* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

fair treatment and due process would be respected. What some call the constitutional domestication of the juvenile court began with *Kent v. United States*[118] in 1966 and *In re Gault*,[119] a year later. These landmark decisions, followed by additional Supreme Court rulings,[120] infused delinquency litigation with principles of due process and adversarial decision making. The transformation was timely and appropriate. Delinquency cases always had more in common with criminal litigation than with the paternalistic intervention envisioned by the creators of the juvenile court. Today, delinquency trials have assumed most of the trappings of criminal litigation.

Unfortunately, in my view, the trend toward increasingly adversarial delinquency litigation generalized to the juvenile court's jurisdiction over neglected and abused children.[121] The informality and nonadversarial nature of dependency proceedings withered in the name of due process and protection of parental rights. This is not to gainsay the importance of procedural fairness in dependency cases. Too often, however, dependency litigation is an all-out war of parent against state, and opportunities for conciliation, cooperation, and nonadversarial interaction are squandered.

I believe the juvenile court must go "back to the future" if it is to achieve its full potential. Back to its roots at the beginning of this century. Back to a time when adversarial decision making took a back seat to providing services.[122] The idea of moving away from reliance on the adversary system is anathema to many lawyers, and it is lawyers, of course, who control the juvenile court. The commitment of the legal professional to the adversary system is understandable. The training and experience of most lawyers equip them for the orchestrated hostility of trial work, but lawyers as a group are ill-prepared to understand and participate in the non-adversarial problem-solving techniques that are employed outside the legal system, and which I believe hold the greatest promise for weaning the juvenile court from its growing dependence on litigation.

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118. 383 U.S. 541 (1966).

119. 387 U.S. 1 (1967).

120. *See, e.g., In re* Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt required in delinquency cases); Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy applies in delinquency litigation).

121. *See Standards Relating to Abuse and Neglect*, JUVENILE JUSTICE STANDARDS PROJECT, INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION (1981).

122. *See* T. HURLEY, ORIGIN OF THE ILLINOIS JUVENILE COURT LAW (3d ed. 1907); Fox, *Juvenile Justice Reform: An Historical Perspective*, 23 STAN. L. REV. 1187 (1970); Mack, *supra* note 117.

The juvenile court should not be converted into "just another social welfare agency," and the judge into a social worker in a black robe. Litigation will remain a key component of a reformed juvenile court. My proposal is not to take the "court" out of juvenile court, but to shift the emphasis toward nonadversarial methods of decision making, and to reserve litigation for cases that are not amenable to less formal and, from the consumer's perspective, less frightening, threatening, and stigmatizing proceedings.

We need to redirect a portion of the court's resources away from adversarial decision-making and toward mediation. Formal mediation should be required in most abuse and neglect cases. Mediation programs exist in several jurisdictions. Nancy Thoeness, who is currently conducting research on such programs, reports that professionals involved with mediation are generally encouraged.[123]

Mediation often provides the only opportunity to get all the professionals involved in a case together in the same room. Bringing parents, attorneys, and professionals together with a trained mediator allows negotiation to take place in an environment that is less formal and adversarial than the courtroom. Many cases should settle at the mediation stage, without the necessity for formal and costly litigation.

Moving the juvenile court toward greater informality and an ethic of cooperation rather than contest is not a panacea. Drug abusing parents will not flock to the court for assistance. Nor will a less adversarial approach eliminate the danger that substance abusing women will shun prenatal care. Nevertheless, if the court is to play a constructive role, a more humane and less adversarial approach is essential. Not only will more parents find involvement with the court palatable, but medical and mental health professionals, many of whom are skeptical of court involvement in families, may find new reason for optimism.

I do not wish to imply that the juvenile court as it exists today does more harm than good. On the contrary, the juvenile court was a marvelous idea when it was conceived, and it

123. Telephone interview with Nancy Thoeness, Center for Policy Research, Denver, Colorado (July 3, 1990).

For literature discussing mediation in dependency cases, see Kaminsky & Cosmano, *Mediating Child Welfare Disputes: How to Focus on the Best Interest of the Child*, 7 MEDIATION Q. 229 (1990); Mayer, *Mediation in Child Protection Cases: The Impact of Third Party Intervention on Parental Compliance Attitudes*, in EMPIRICAL RESEARCH IN DIVORCE AND FAMILY MEDIATION, 24 MEDIATION Q. 89-106 (J. Kelly ed. 1989).

remains so today, nearly a century later. Nor do I wish to denigrate from the invaluable service and commitment of the many fine judges and attorneys serving the court. I firmly believe that the bench and the bar of the juvenile court perform an indispensible and positive role in protecting children, assisting families, and making communities better places to live. My point is simply that these able professionals could accomplish much more in a revitalized and reoriented juvenile court.

Paradoxically, just as the juvenile court is traveling the road toward mediation and a less adversarial approach to families, the court itself must be prepared to make an abrupt about-face and impose highly coercive measures on certain drug abusing women. Research demonstrates that a high percentage of substance abusing parents fail to comply with court-ordered treatment programs. Richard Famularo and his associates studied 136 juvenile court cases in which children were removed from parental custody due to serious maltreatment.[124] The research disclosed that "cases involving parental substance abuse and/or the more severe forms of child maltreatment are most resistant to treatment interventions ordered by the courts. . . . [C]ourts and social service agencies cannot rely upon the mere fact of court involvement to yield effective interventions or compliance with service plans."[125] Michael Murphy and his associates examined the prevalence of substance abuse in a sample of 206 juvenile court cases involving serious child abuse or neglect, and found a significant amount of substance abuse. Substance abusing parents were significantly less likely to comply with court-ordered services than maltreating parents who did not abuse drugs or alcohol.[126] Murphy and his colleagues write:

> Our findings indicate that in cases of serious child mistreatment, parental substance abuse is a pervasive problem which is associated with higher risk of reinjury, recidivism, danger to the child, noncompliance with treatment, and permanent removal of children by the court . . . .
>
> The current consensus among mental health clinicians is that in cases of serious substance abuse, unless

124. Famularo, Kinscherff, Bunshaft, Spivak & Fenton, *Parental Compliance to Court-Ordered Treatment Interventions in Cases of Child Maltreatment*, 13 CHILD ABUSE & NEGLECT 507 (1989).

125. *Id.* at 512.

126. Murphy, Jellinek, Quinn, Smith, Poitrast & Goshko, *Substance Abuse and Serious Child Mistreatment: Prevalence, Risk, and Outcome in a Court Sample*, 15 CHILD ABUSE & NEGLECT 197 (1991).

> this problem is identified and treated, there is very little point in beginning other forms of treatment. Continuing substance abuse has a high probability of undoing other interventions.
>
> These observations have a direct bearing on the question of what the courts should do in these cases .... Removing [substance abuse] may not solve the problem of child mistreatment, but not to remove it is to almost guarantee the failure of other intervention attempts. Identifying substance-abusing parents, requiring them to seek treatment, and monitoring and assessing their success are necessary first steps in cases with serious substance abuse.
>
> The current study suggests that parents who fail to stop using substances are unlikely to change their behaviors or to provide safer environments for their children.[127]

With the intractable nature of serious drug abuse and addiction in mind, it is apparent that in many cases, ordering pregnant women to stop using drugs and participate in drug treatment is futile. When the risk to an unborn child is high, and a woman violates a court's order regarding drug use and treatment, the *only* effective intervention in some cases is to hold the woman in contempt and order her to be confined involuntarily in a hospital or clinic where drugs are unavailable, and where treatment can be administered against the woman's will. Involuntary commitment is a drastic step, but it ignores reality to suggest that less invasive alternatives are available for some individuals.

In 1989, the Minnesota Legislature came to grips with the unfortunate need to confine some drug abusing pregnant women. Under Minnesota law, local welfare agencies may seek emergency hospitalization of pregnant women who engage in habitual or excessive use of certain drugs.[128]

When the court's attention shifts away from intervention during pregnancy, and toward drug affected newborns, juvenile court judges should make every effort to help parents and children stay together in functioning families. But again, reality dictates an honest appraisal of the poor prognosis for some substance abusing parents. In cases of serious drug abuse and addiction, the most effective approach in some cases is to place

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127. *Id.* at 208-09.

128. MINN. STAT. ANN. § 121.883 (West 1989).

newborn infants in foster care and to move swiftly toward adoption.

Of course, all the improvement in the world in the juvenile court will be for naught unless corresponding improvements are made in the terribly overburdened and underfunded child protective services system. Progress is equally unlikely without vastly increased resources for drug treatment and rehabilitation. The juvenile court cannot intervene effectively when the social services and treatment resources it depends on lie in tatters.

Can the inescapable need for coercive intervention in some cases coexist with a less adversarial juvenile court? Or do the juxtaposition of the words "less adversarial" and "court" constitute an oxymoron that is as unworkable as it is unrealistic? I do not have the final answer to this puzzle. I believe, however, that if the juvenile court is to play an effective role in responding to maternal substance abuse during pregnancy, it is time to grapple with this conundrum. There is great promise in reshaping the juvenile court along the lines envisioned before *Gault* transformed the court. Needless to say, such a transformation must be accomplished without shedding principles of due process and fairness. If work begins today on rethinking the juvenile court, there is a possibility that at the dawn of the twenty-first century, society could duplicate the stroke of brilliance that gave us the juvenile court at the beginning of the twentieth.

CONCLUSION

The legal system has a relatively minor role to play in the societal response to maternal drug abuse during pregnancy. Although an argument can be made that women whose drug use damages children should be prosecuted, the argument in favor of prosecution is outweighed by the disadvantages of the punitive approach. Greater hope lies in a rejuvenated juvenile court—a court that is committed to protecting the due process rights of parents and children in an atmosphere of cooperation rather than adversarial decision making. Yet a court that is willing to take the drastic steps that are sometimes necessary to protect children and help parents who are caught in the vice grip of addiction. If the juvenile court can achieve the goals of compassion in all cases and coercion in some, the court will fulfill its responsibility to children and parents.