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Punishing Drug Use During Pregnancy: Is It Time to "Just Say No" to Fetal Rights?

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Punishing Drug Use During Pregnancy

IS IT TIME TO "JUST SAY NO" TO FETAL RIGHTS?

INTRODUCTION

In New York City, a young woman gives birth to a healthy baby girl.[1] Shortly thereafter, the woman is drug tested without her knowledge or consent. She is told that she tested positive for marijuana. Consequently, hospital staff inform the woman that her baby must also be tested. When the baby's urine sample comes back negative, the woman is flooded with relief and sent home. However, at a doctor's visit with her newborn, the pediatrician tells the woman that her baby's second drug test is positive. The doctor explains that, as a formality, she must contact the state's child protective services. The next day, the woman receives a visit from a child protective worker who notes that the home is clean, the baby seems healthy and well-cared for, and the woman does not appear impaired.

Despite the absence of harm to the baby, the state worker tells the woman that her newborn must be removed from her care due to the positive toxicology report. The woman persuades the worker to allow the baby's father to care for the newborn, on the condition that the woman leaves the home and does not return before her court date. Left with no other choice, the woman resorts to sleeping on trains for the weekend to not inconvenience her family.

The woman is assigned an attorney in family court, who convinces the judge to allow the woman to return home. The fact that the case was filed, however, means that child protective services will be involved in the family's life for at least a year, supervising the woman, ordering drug tests, and permitting random inspections of the child and the home.

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[1] The following anecdote was described in *Oversight—Impact of Marijuana Policies on Child Welfare: Hearing Before the N.Y.C. Council Comm. on Gen. Welfare Jointly with the Comm. on Hosps.*, Council Sess. 2018–2021 4–5 (2019) [hereinafter *Oversight Hearing*] (written testimony of The Bronx Defenders by Emma S. Ketteringham, Managing Director, Family Defense Practice; Anne Venhuizen, Supervising Attorney, Family Defense Practice; and Jessica Prince, Attorney, Family Defense Practice).

The preceding story may sound draconian, but it was the harsh reality for one New York woman and remains the reality for many just like her.[2] Civil neglect and abuse petitions are routinely brought against women in family court for their actions during pregnancy, often resulting in the removal of the child from the home.[3] Twenty-three states and the District of Columbia consider drug use[4] during pregnancy as child abuse under their child welfare statutes.[5] Twenty-five states and the District of Columbia require medical professionals to report prenatal drug use, and eight states require testing for drug exposure if substance use is suspected.[6] Three states even consider drug use during pregnancy to be grounds for civil commitment.[7]

Ultimately, state responses to drug use during pregnancy can be framed in terms of the degree to which government may police pregnant people's behavior in the name of protecting the unborn.[8] This note argues that government intervention based only on actions taken while pregnant, and without a showing of harm or risk of harm to the child once born, violates women's bodily autonomy, reproductive liberty, and right to privacy. A mother[9] is a constitutionally recognized person who is thus afforded the autonomy to dictate the course of her life, pregnancy, and family.[10]

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[2] *See id.* at 5 (recounting the case study of the woman described above; the woman's "story is typical of what [they] see all too often in the Bronx").

[3] Ellen L. Townsend, Note, *Maternal Drug Use During Pregnancy as Child Neglect or Abuse*, 93 W. VA. L. REV. 1083, 1084 (1991). While data on the number of parents under the supervision of the child welfare system is scant, "some studies estimate that over 80% of all foster system cases involve caretaker drug use allegations at some point in the life of the case." LISA SANGOI, MOVEMENT FOR FAM. POWER, "WHATEVER THEY DO, I'M HER COMFORT, I'M HER PROTECTOR.": HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR 13 (2020) [hereinafter MOVEMENT FOR FAM. POWER], https://www.movementforfamilypower.org/ground-zero [https://perma.cc/L7ZR-BLS4].

[4] While there are instances in which neglect or abuse allegations are founded on legal substance use, such as alcohol, tobacco, or prescription opioids, this note will not delve into legal substance use and instead will focus broadly on illicit substances, like nonprescription opioids, cocaine, marijuana, etc.

[5] *Substance Use During Pregnancy*, GUTTMACHER INST. (Sept. 1, 2021) [hereinafter *Substance Use During Pregnancy*], https://www.guttmacher.org/print/state-policy/explore/substance-use-during-pregnancy [https://perma.cc/394B-RUQF].

[6] *Id.*; *see also* Sandra Anderson Garcia & Ingo Keilitz, *Involuntary Civil Commitment of Drug-Dependent Persons with Special Reference to Pregnant Women*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 418, 418 (1991) (describing "[i]nvoluntary civil commitment . . . as a means to forcibly admit and retain drug addicts in treatment programs").

[7] The three states are Minnesota, South Dakota, and Wisconsin. *See Substance Use During Pregnancy*, *supra* note 5.

[8] Samantha Weyrauch, Comment, *The Fetus and the Drug Addicted Mother: Whose Rights Should Prevail?*, 5 J. MED. & L. 95, 96 (2001).

[9] This note will refer to pregnant people interchangeably as "mothers" or "pregnant people" to reflect that some individuals who are capable of becoming pregnant do not identify as women or mothers upon birth of the child.

[10] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851–52 (1992); *id.* at 884 (plurality opinion).

Conversely, unborn children—fetuses—are not yet constitutionally recognized persons and, by consequence, are not afforded these same protections.[11]

This conclusion was the ultimate holding of the foundational Supreme Court case, *Roe v. Wade*.[12] Initially, the decision reflected wider societal attitudes around abortion and was uncontroversial by today's standards.[13] Before long, however, "Republican strategists recognized in abortion an explosively emotional issue that could motivate evangelical voters and divide Democrats."[14] For example, during Ronald Reagan's 1980 presidential campaign, he championed the "rights of the unborn" to drum up support for Republicans from the anti-choice base, despite signing a remarkably liberal abortion law as governor of California six years before *Roe* was decided.[15] Since then, attacks on abortion rights have emanated from state laws and court decisions in an overt attempt to recognize a fetus as a person under the law, thereby diminishing

[11] *See, e.g.*, *id.* at 852 (majority opinion) (noting that "[t]he destiny of [a] woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society"); *id.* at 913–14 (Stevens, J., concurring in part and dissenting in part) (reiterating that a fetus is not yet a person under the law). *See generally* Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016) (upholding *Casey*'s general holding and applying its undue burden test).

[12] *See* Roe v. Wade, 410 U.S. 113, 164 (1973) (holding that "a state criminal abortion statute . . . that excepts from criminal[liability] only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved," is unconstitutional (emphasis omitted)). In *Roe*, the Court laid out a "trimester" framework, asserting that "prior to approximately the end of the first trimester, the abortion decision . . . must be left to the medical judgment of the pregnant woman's attending physician." *Id.* The Court emphasized the end of the first trimester as when a fetus is not yet capable of sustaining life outside the womb—in other words, a state cannot constitutionally prohibit a person from choosing an abortion prior to fetal viability. *Id.*

[13] Editorial Board, Opinion, *A Woman's Rights*, N.Y. TIMES (Dec. 28, 2018) [hereinafter Editorial Board, *A Woman's Rights*], https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html?searchResultPosition=3 [https://perma.cc/ZNW6-7262] (stating that the "Republican [p]arty once treated abortion as a private matter" and noting that in 1972, 68 percent of Republicans believed the choice to terminate a pregnancy should be between a woman and her doctor).

[14] *Id.*

[15] *Id.* Today, the politicization of abortion continues—states with Republican-majority governments have enacted abortion restrictions specifically "designed to directly challenge *Roe v. Wade* and the U.S. constitutional right to abortion." *See* Elizabeth Nash & Lauren Cross, *2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INST., https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades [https://perma.cc/7TQ6-B67K] (noting that 561 abortion restrictions and a striking 165 flat-out abortion bans have been introduced thus far). For example, Texas enacted a new law banning abortion after just six weeks—a timeframe so extreme that abortion is rendered impossible before many people even realize they are pregnant. *Id.* To make matters worse, the law permits *anyone* opposed to abortion to sue not only a physician who performs abortions, but also anyone who helps a pregnant person obtain an abortion, financially or otherwise. *Id.*

the pregnant person's status as a fully autonomous and constitutionally protected being.[16] *Roe*'s holding continues to spark debate among political and religious groups, and the Court's stance that states have a compelling interest in the potential life of a fetus contributes to the general call to recognize fetal rights under the law.[17]

This note focuses on the bipartisan effort to recognize fetal personhood in the child welfare context by punishing people who use substances while pregnant.[18] Less obvious than overt anti-choice activism, those fighting for fetal rights have seen success by connecting anti-abortion sentiment and other volatile causes or marginalized groups.[19] Such activists have been able to paint young mothers—overwhelmingly poor women of color—as careless and dangerous, rendering them the "hardest to defend in the court of public opinion."[20] Pro-choice advocates, easily blinded by the rhetoric of child protection, overlook the connection between punishing pregnant drug users and the threat to the protections guaranteed by *Roe*, thus imperiling the very reproductive liberties they fought so hard to secure.[21]

In particular, this note will look to New York State's child welfare statute,[22] used to justify state intervention due to a pregnant person's drug use, and how courts interpret the statutory framework. New York falls within the group of states that require a showing of harm to the child once born before a neglect finding may be sustained.[23] New York is thus distinguishable from the twenty-three states which permit a

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[16] Editorial Board, *A Woman's Rights*, *supra* note 13 (noting that the backlash to *Roe* came in many forms, including direct attacks on the right to choose an abortion, and in more subtle efforts, like issuing birth certificates to stillborn fetuses).

[17] Nora Christie Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy*, 26 LAW & INEQ. 171, 178 (2008).

[18] While anti-choice activism is often associated with the Republican party, both Republican and Democratic federal governments have poured funding into state foster care systems. *See, e.g.*, MOVEMENT FOR FAM. POWER, *supra* note 3, at 18 (noting that "[f]rom 1982 to 2003, federal funding for removing children from their homes increased by 20,000%," from $25 million in 1982 to a whopping $5 billion in 2003).

[19] Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1001 (1999).

[20] *Id.* at 1002.

[21] *Id.* at 1005.

[22] Section 1012(f) of the Family Court Act of the State of New York defines a "neglected child" and is the statutory provision most pertinent to this note. *See infra* Section II.B.2.

[23] *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 845 (N.Y. 2004) (laying out a two-part test to determine when a child is neglected under New York's FCA: (1) proof of imminent harm or risk of harm to the child, and (2) proof that the imminent harm or risk of harm was caused by the parent's actions); *see also* Nassau Cnty. Dep't of Soc. Servs. *ex rel.* Dante M. v. Denise J., 661 N.E.2d 138, 140–41 (N.Y. 1994) (holding that a positive toxicology report alone is insufficient to support a finding of neglect).

finding of neglect after a person uses drugs while pregnant without any requirement that the child actually suffered harm.[24]

This note argues that a finding of abuse or neglect based on the pregnant person's prenatal conduct alone, without a medically informed showing of harm to the child caused by prenatal drug use, infringes on the right to privacy, bodily autonomy, and reproductive liberty. Furthermore, a finding of neglect or abuse based on prenatal substance use is contrary to the purported rehabilitative purpose of family court.[25] New York State's statute for establishing abuse or neglect due to prenatal drug use is preferable to other state approaches because it requires a showing of actual or imminent harm to the child.[26] However, New York's approach can be vastly improved to safeguard pregnant women's constitutionally recognized rights without beginning the descent down the slippery slope of fetal personhood.[27]

Part I of this note will provide an overview of the Supreme Court's reproductive liberty jurisprudence, as well as the development of the separate fetal rights doctrine.[28] Part II will examine state justifications for family court intervention based on drug use during pregnancy, arguing that these justifications are remnants from the United States' infamous "war on drugs." Finally, Part III will analyze New York State's child welfare statute—Family Court Act (FCA) Section 1012—and provide suggestions to better defend pregnant individuals' constitutional rights.

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[24] *Substance Use During Pregnancy*, *supra* note 5.

[25] *See, e.g.*, People v. Roselle, 643 N.E.2d 72, 74 (N.Y. 1994) ("The orientation of Family Court is rehabilitative, directed at protecting the vulnerable child, as distinct from the penal nature of a criminal action which aims to assess blame for a wrongful act and punish the offender."); *see also* Lynn M. Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 474 (2005) (noting agreement among child welfare experts that child welfare schemes are *not* designed to simply punish parents for past wrongs).

[26] *See infra* Section II.B.2; *see also infra* Part III.

[27] *See, e.g.*, Editorial Board, *A Woman's Rights*, *supra* note 13 (noting that recent cases in which fetal health is prioritized above all else, including the pregnant person's own liberty and autonomy, show that the country is moving "away from a centuries-long tradition in Western law and toward the embrace of a relatively new concept: that a fetus in the womb has the same rights as a fully formed person" and referring to examples of pregnant people charged with crimes for endangering the health of the fetus, by getting into a car accident, falling down the stairs, or even eating a poppy seed bagel and failing a drug test). While the trend toward criminalizing pregnant people is real and alarming, the criminal legal system's recognition of fetal rights is beyond the scope of this note.

[28] The fetal rights doctrine is the phenomenon in which the law grants certain rights and privileges, previously only extended to persons, to fetuses. *See infra* Section I.C.

I. REPRODUCTIVE LIBERTY, PERSONAL AUTONOMY, PRIVACY, AND THE DOCTRINE OF FETAL RIGHTS

The greatest minds of history have wrestled with the question of when life "begins."[29] Aristotle argued that a fetus had a soul and was a person at forty days gestation.[30] Muslim scholars recognize human life around the fourth month of pregnancy, when the fetus begins to move in the womb.[31] A prominent view in Judaism is that life begins at birth, as breath is essential to the concept of life in the Torah.[32] The Catholic Church asserts that life begins at conception, when "the spiritual soul is infused into the human subject."[33] The Supreme Court initially answered the question of when life "begins," and thus when a fetus is imbued with some form of legal protections, in the language of fetal viability.[34] The answer to this conundrum is necessarily more complex than the aforementioned definitions, and the modern scientific perspective is that human development in the womb, and therefore personhood in general, is a continuum.[35]

The Supreme Court's abortion rights jurisprudence is illuminating in the discussion of family court interventions resulting from drug use during pregnancy.[36] Both abortion and child protective measures in this context require an analysis of the "woman's liberty interests and rights to make a decision regarding her body, the fetus's right to physical integrity, and the state's right to protect the potential for human life."[37]

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[29] *See generally* C. Cameron & R. Williamson, *In the World of Dolly, When Does a Human Embryo Acquire Respect?*, 31 J. MED. ETHICS 215–17 (2005) (outlining differing religious and philosophical perspectives regarding the beginning of human life).

[30] *See id.*

[31] *Id.* at 216.

[32] Joseph G. Schenker, *The Beginning of Human Life: Status of Embryo. Perspectives in Halakha (Jewish Religious Law)*, 25 J. ASSISTED REPROD. & GENETICS 271, 272 (2008).

[33] Cameron & Williamson, *supra* note 29, at 215.

[34] *See* Roe v. Wade, 410 U.S. 113, 163 (1973) (holding that the state's interest in "potential life" becomes compelling at viability and thus "[s]tate regulation[s] protective of fetal life after viability thus has both logical and biological justifications").

[35] Cameron & Williamson, *supra* note 29, at 216 ("Most scientists do not believe that a new human life can be defined as beginning at any particular moment, but see it as evolving gradually during embryonic development.").

[36] *See generally Roe*, 410 U.S. 113 (broadly refusing to engage in the "when life begins" debate, for example, yet recognizing protections for fetuses post-viability); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (affirming that states may not prohibit the choice of abortion prior to viability while recognizing a state interest in "potential" fetal life that becomes compelling as the fetus nears birth).

[37] Maria D. Kroeger, Note, *Too Many Solutions: A Cross-Cultural Perspective of Neonatal Abstinence Syndrome and the Current Legal Approaches in the United States*, 55 U. LOUISVILLE L. REV. 81, 89–90 (2017).

A. Establishing the Right of Privacy

Anti-choice activists are correct when they argue that the right to choose abortion is not explicitly enumerated in the Constitution.[38] The Supreme Court has held, however, that the genesis of the "right to privacy" is in the Bill of Rights.[39] In *Griswold v. Connecticut*, the Court examined the constitutionality of a state law prohibiting practitioners from providing contraceptive measures after a physician had given contraception to a married couple.[40] The Court held that certain guarantees within the Bill of Rights created "penumbras" of privacy, also not explicitly enumerated.[41] In other words, the general spirit of certain amendments in the Bill of Rights secures the right to be free from unwarranted government intrusion into private matters.[42] The prohibition of contraception in *Griswold*, which applied even to married couples, presented an issue squarely within this "zone of privacy" into which the government could not so sweepingly intrude.[43]

Like other rights enumerated explicitly in the Bill of Rights, the Supreme Court held in *Griswold* that the right to privacy is fundamental.[44] Therefore, any state or governmental action infringing upon these rights is subject to strict scrutiny analysis.[45] To satisfy strict scrutiny, laws conflicting with fundamental rights must be necessary and narrowly tailored to further a compelling state interest.[46] In the years leading up to

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[38] *See, e.g.*, *Pro-Life Theory and Discussion Tactics*, STAN. STUDENTS FOR LIFE (2013), https://prolife.stanford.edu/qanda/q4-1.html [https://perma.cc/XG3P-N88C] (arguing that abortion rights are not constitutionally protected because, inter alia, "abortion is nowhere mentioned in the Constitution").

[39] Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965).

[40] *Id.* at 480.

[41] *Id.* at 484.

[42] The *Griswold* Court noted that the First, Third, Fourth, Fifth, and Ninth Amendments "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.*

[43] *Id.* at 485.

[44] *Id.* (finding that the case at issue "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees" and thus concluding that a governmental objective to control such a relationship "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms" (quoting Nat'l Ass'n for the Advancement of Colored People v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307 (1964)).

[45] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

[46] *See, e.g.*, Reno v. Flores, 507 U.S. 292, 301–02 (1993) ("[T]he Fifth and Fourteenth Amendments' guarantee of 'due process of law' . . . include[s] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.").

the Supreme Court's recognition of the right to choose an abortion in *Roe*, it expanded *Griswold*'s penumbra of privacy, thereby laying the foundation for its analysis of abortion, reproductive liberty, and personal autonomy.[47]

B. The Right of Privacy as the Genesis of the Right to Choose

When *Roe* was decided in 1973, the justices skirted the "difficult question of when life begins," implying that the quandary is better suited for philosophical analysis.[48] The Court recognized, however, that any rights a fetus may be entitled to are generally dependent upon a live birth.[49] The Court therefore determined that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[50] After this decision, states could not prohibit abortion prior to fetal viability.[51]

In another principle abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court affirmed *Roe*'s essential holding regarding pre-viability abortions.[52] Concurring with the majority, Justice Stevens explained that, according to the "fundamental premise of our constitutional law governing reproductive autonomy," a developing fetus is *not* a person, and as such, has no "right to life."[53] The majority opinion, however, emphasized that, while states may not prohibit a person from choosing an abortion prior to viability, states do have an interest in the "potential" fetal life which becomes compelling as the fetus becomes viable and nears birth.[54] The *Casey* Court stated:

> Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are

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[47] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 440, 453 (1972) (holding that marriage is not the dispositive factor in the right to privacy in terms of reproductive choices—the right applies to all individuals).

[48] Roe v. Wade, 410 U.S. 113, 159 (1973) ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to answer.").

[49] *Id.* at 162.

[50] *Id.* at 153.

[51] *Id.* at 164.

[52] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 913–14 (1992) (Stevens, J., concurring in part and dissenting in part). The issues in *Casey* included (1) an informed consent provision, (2) a twenty-four-hour waiting period after giving this consent before undergoing an abortion, (3) an informed consent provision of a parent whose minor child is seeking an abortion, (4) a spousal notification provision, and (5) various reporting requirements for facilities that perform abortions. *Id.* at 844 (majority opinion).

[53] *Id.* at 913–14 (Stevens, J., concurring in part and dissenting in part).

[54] *Id.* at 870, 882–83 (plurality opinion).

> philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . . [T]he State has an interest in protecting the life of the unborn.[55]

With this emphasis on the state interest, the Court adopted the "undue burden" test, holding that only a state regulation that constitutes an undue burden on a pregnant person's decision to choose an abortion violates the constitutionally protected right of *Roe*.[56] Even if a law has the "incidental effect" of making abortions more difficult or expensive, the law may still stand.[57] While *Casey* upheld the twenty-year-old *Roe* holding, the decision eased a state's ability to restrict access to abortion with its undue burden test, laying the groundwork for fetal rights and aggressive policies that policed pregnant people in the name of fetal protection.[58]

In *Gonzales v. Carhart*, the Court analyzed the Partial-Birth Abortion Ban Act of 2003 (the Act), which prohibited a type of abortion procedure known as intact dilation and extraction (D&E).[59] While reaffirming that the government may not completely prohibit abortion prior to viability in terms of the "undue burden" test, the Court upheld the Act.[60] According to the Court, the Act's ban of intact D&E procedures furthered the federal government's objectives in promoting the value of human life, shielding women from potential feelings of "regret" for their decision, and "protecting the integrity and ethics of the medical profession."[61]

As dissenting Justice Ginsburg noted, the decision in *Gonzales* is a striking departure from *Roe*.[62] Of particular concern is the lack of a maternal health exception in the Act.[63] Furthermore, despite the Court's consistent view that abortion is a constitutionally recognized right prior to viability, Justice

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55 *Id.* at 872–73.

56 *Id.* at 874.

57 *Id.* Applying the undue burden test to the provisions of the law at issue, the Court held, for example, that the informed consent provision did not constitute such an "undue burden" as there was "no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion." *Id.* at 884–85. Conversely, due to factors like domestic violence within relationships, the spousal notification provision was "likely to prevent a significant number of women from obtaining an abortion," and as such, constituted an undue burden. *Id.* at 893 (majority opinion).

58 Weyrauch, *supra* note 8, at 115 (noting that fetal right advocates interpret *Roe* and cases like *Casey* "as implying that the state's interest in potential life exists at conception and not at the point of viability").

59 Gonzales v. Carhart, 550 U.S. 124, 136–38 (2007) (describing in detail the procedure, which involves dilation of the cervix, the partial delivery of the fetus, and an incision at the base of the fetus's skull in order to evacuate the skull contents).

60 *Id.* at 146, 168.

61 *Id.* at 157–59 (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

62 *Id.* at 170–71 (Ginsburg, J., dissenting).

63 *Id.* at 171.

Kennedy, writing for the majority, used paternalistic and graphic language that anti-choice activists might find familiar.[64] He claimed:

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[65]

Justice Kennedy's patronizing assertion that these laws protect women from feelings of shame or regret[66] both infantilizes and insults women, negating their ability to dictate their own lives and make informed medical decisions on their own.[67] He also repeatedly wrote that the D&E procedure *kills* the fetus or ends its *life*,[68] thus imbuing the fetus with person-like qualities and ostensibly implying that a fetus has a right to life, even if at odds with the mother's right to privacy and reproductive liberty.[69]

C. The Fetal Rights Doctrine

The fetal rights doctrine is the process by which the law grants rights to fetuses that were previously only extended to persons.[70] This doctrine existed even as the Supreme Court deemed that the fundamental right to privacy encompassed the right to choose an abortion in *Roe*.[71] Despite its longstanding existence, fetal personhood must be carefully scrutinized because, "[b]y creating an adversarial relationship between the

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[64] *See, e.g.*, *Where We Stand*, PRO-LIFE ACTION LEAGUE, https://prolifeaction.org/fact_type/where-we-stand/ [https://perma.cc/5Z5J-SQWK] (stating that "[t]he Pro-Life Action League opposes abortion because abortion *kills* an innocent unborn *child*, a human *person*" (emphasis added)).

[65] *Gonzales*, 550 U.S. at 159–60.

[66] *See id.* at 159.

[67] Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569, 570 (1992) (noting that policies focused on fetal health impact women's "ability to decide how to live their own lives").

[68] *Gonzales*, 550 U.S. at 134, 136, 139.

[69] *See* Johnsen, *supra* note 67, at 570 (noting that certain governmental policies focusing on fetal health "can lead to significant and unnecessary intrusions on women's fundamental liberties" This is fundamentally because fetal health can be addressed "only through the woman's body and actions," *not* by imbuing the fetus with substantive rights).

[70] Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 599 (1986).

[71] Roe v. Wade, 410 U.S. 113 (1973). *See, e.g.*, Sam S. Kepfield, Note, *Perinatal Substance Abuse: The Rhetoric and Reality of "Rights," and Beyond*, 1 CARDOZO'S WOMEN'S L.J. 49, 51 (1993) (citing *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946), in which the court held that the father-plaintiff was permitted to recover damages for injuries to the child due to negligent delivery, one of the first cases permitting such recovery).

woman and her fetus, the state provides itself with a powerful means for controlling women's behavior during pregnancy, thereby threatening women's fundamental rights," including the right to privacy and reproductive liberty.[72]

The fetal rights doctrine stems from an 1884 decision by then-Massachusetts Supreme Judicial Court Justice Oliver Wendell Holmes, Jr.[73] In *Dietrich v. Inhabitants of Northampton*, a pregnant woman tripped and fell on a defective city sidewalk.[74] The blow caused her to go into labor when she was four to five months pregnant, and the child died shortly after its birth.[75] Holmes explained that "[a] fetus unable to live outside its mother did not have the standing to sue."[76]

The *Dietrich* rule went unchallenged for more than fifty years, until the District Court for the District of Columbia permitted a father to recover damages from medical malpractice for injuries to his child during a negligent delivery.[77] The court held that because the fetus was viable at the time of its injury, it had standing to sue.[78] Thus, twenty-five years before *Roe*, courts were beginning to recognize that viable fetuses had some legal protections against prenatal injuries inflicted by third parties.[79] However, these rights were limited and "consistent with the prevailing view of the fetus as part of the woman."[80] Accordingly, a fetus had no independent rights—only after birth did the fetus come to be a "person" and acquire separate legal protections.[81]

However, after *Roe*, various areas of the law began imbuing the fetus with limited rights as a separate entity.[82] Both the parents and the fetus initially benefitted from the remedies stemming from these rights.[83] Despite the appearance of mutual benefit, the danger of fetal rights is in the potential for "identifying the *fetus* rather than

[72] Johnsen, *supra* note 70, at 600.

[73] Kepfield, *supra* note 71, at 50; *see also* Johnsen, *supra* note 70, at 601 n.7 (citing *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884), as an example prior to *Bonbrest*).

[74] *See Dietrich*, 138 Mass. at 14, *cited in* Kepfield, *supra* note 71, at 50.

[75] *Id.* at 14–15.

[76] Kepfield, *supra* note 71, at 50.

[77] *See id.*

[78] *Id.*

[79] *Id.* at 51 (citing *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960), in which the New Jersey Supreme Court permitted a fetus to recover for injuries it sustained in a car accident, as an example of courts providing legal protections against injuries caused to the fetus by a third party).

[80] Johnsen, *supra* note 70, at 601.

[81] *Id.*

[82] *Id.* at 602 (noting that fetuses who die *in utero* may be considered "persons" under some wrongful death statutes, e.g., a Massachusetts court held that a fetus was a person under the state's vehicular homicide statute, and that some states impose criminal penalties for the death of a fetus akin to criminal sanctions for murder).

[83] *See id.* at 602–03 (noting that recognizing a fetus in a wrongful death action, for example, served to benefit the parents for the loss of the potential child).

the woman as the locus of the right."[84] Instead of viewing the mother-fetus relationship as a symbiosis, in which the fetus depends on the mother for survival, this conceptualization can tempt an adversarial stance between mother and fetus, in which the "rights" of the fetus compete with the rights and liberties of the pregnant person.[85]

Forced medical intervention is a striking example of where fetal interests and maternal rights clash.[86] In *Jefferson v. Griffin Spalding County Hospital Authority*, the Supreme Court of Georgia granted the hospital's request to mandate a cesarean section.[87] The mother had "complete placenta previa," rendering it almost certain that the fetus would not survive vaginal childbirth.[88] The mother had only a 50 percent chance of surviving delivery.[89] The mother had objected to a cesarean on religious grounds, but the court held that fetal interest in life trumped the mother's wishes.[90] The court reasoned that, because the child was viable, it had "the right under the U. S. [sic] Constitution to the protection of the State through such statutes prohibiting the arbitrary termination of the life of an unborn fetus."[91] Because the mother and fetus were, "at the moment, inseparable, the Court deem[ed] it appropriate to infringe upon the wishes of the mother . . . to give the child an opportunity to live."[92] This case is a prime example of how establishing fetal rights in the civil context has been an "ongoing and concomitant part of the anti-choice strategy" that grew out of *Roe*'s cultural backlash.[93]

II. A FUNDAMENTAL RIGHTS ANALYSIS OF CHILD PROTECTIVE STATUTES

The Supreme Court has yet to decide any constitutional challenges to child protective statutes that subject pregnant drug users to family court involvement.[94] However, the Supreme Court has recognized that parents have a fundamental right to the care

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[84] *Id.* at 603 (emphasis added).

[85] *Id.* at 613.

[86] Kepfield, *supra* note 71, at 56.

[87] Jefferson v. Griffin Spalding Cnty. Hosp. Auth., 274 S.E.2d 457, 460 (Ga. 1981).

[88] *Id.* at 458.

[89] *Id.* at 458–59.

[90] *Id.* at 459–60 (the parents' refusal of the cesarean stemmed from their belief that "the Lord has healed [the mother's] body and that whatever happens to the child will be the Lord's will").

[91] *Id.* at 458.

[92] *Id.*

[93] Paltrow, *supra* note 19, at 1000.

[94] *See* Kroeger, *supra* note 37, at 89.

and custody of their children.[95] Combined with the rights to privacy and reproductive liberty, laws infringing upon this fundamental right, including child welfare statutes which allow for removal or the termination of rights based on abuse or neglect, are subject to strict scrutiny and must be narrowly tailored to further a compelling state interest.[96]

In the context of a legal dispute involving abuse or neglect, the state interest would likely be the protection of (1) fetal health, and (2) the child's subsequent health once it is born.[97] As the Supreme Court has noted regarding the first asserted interest, however, a state's interest in fetal health is directly linked to the fact that the fetus is a "potential life."[98] In other words, the health of the fetus is not the only state interest that could justify state involvement due to drug use during pregnancy—the fetus is not a child, and thus not a "life," until birth when its potential for life is realized.[99] Therefore, the child's health once born would serve as the primary justification for child protection statutes that restrict pregnant women's fundamental rights.[100]

The inference behind this interest is that drug use during pregnancy results in harmful health and developmental outcomes in the child after birth.[101] The state may also argue that drug use during pregnancy indicates poor parenting abilities, therefore the child would be at risk for future harm while in the care of a person who would imperil its health by using illicit substances.[102]

These arguments are reminiscent of the fetal rights doctrine—the underlying assumption is that a fetus is a

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[95] *See generally* Troxel v. Granville, 530 U.S. 57 (2000) (recognizing that the child-rearing decisions of "fit" parents cannot be usurped by the state). Of course, this begs the question of determining fitness at the outset.

[96] *See* Ian Vandewalker, *Taking the Baby Before It's Born: Termination of the Parental Rights of Women Who Use Illegal Drugs While Pregnant*, 32 N.Y.U. REV. L. & SOC. CHANGE 423, 444 (2008).

[97] *Id.* at 445.

[98] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992) (plurality opinion).

[99] Vandewalker, *supra* note 96, 445–46 (arguing that states cannot purport to have a *per se* interest in fetal health as the abortion rights cases only held that a "state has an interest in fetal life . . . in the context of abortion" and that women's reproductive liberties may sometimes trump fetal life; in other words, the Supreme Court's abortion jurisprudence does "*not* support the proposition that fetal health is a compelling state interest" (emphasis added)).

[100] *Id.* at 446.

[101] *Id.* at 447.

[102] *Id.* (citing *In re O.R.*, 767 N.E.2d 872, 879 (Ill. App. Ct. 2002), in which the court concluded that a law authorizing a state to terminate a mother's parental rights if she births more than one child who tests positive for drugs was related to a mother's "competence to care for her child in the future").

separate entity from the mother who must be protected from her.[103] To analyze this rationale, and the state interests that stem from it, it is necessary to examine the veracity of the allegedly harmful effects drugs may have on the developing fetus, and whether drug use is actually indicative of one's ability to parent.[104] Neither rationale can be addressed without careful consideration of the pervasive effect of the war on drugs.

A. The Vilification of Drug Use During Pregnancy: The War on Drugs

Aggressive anti-choice activism, bolstered by the fetal rights doctrine,[105] helped bring prenatal substance use into the spotlight. The war on drugs, the initiative designed to respond to the increase in crack cocaine in the 1980s in which the United States pursued drug policies focused on prohibition and aggressive criminal sanctions for drug sales and use, served as a catalyst.[106] With the war on drugs' militant, zero-tolerance, "Just Say No" approach, drug use during pregnancy became the newest avenue to attack reproductive liberty, personal autonomy, and the right to privacy firmly established in the Supreme Court's abortion jurisprudence.[107] Anti-choice legal arguments, coupled with attacks on low-income women of color,[108] permitted states to chip away at women's reproductive liberty and the all-encompassing principle announced in the Supreme Court's fundamental rights jurisprudence—"the right to be let alone."[109]

Media outlets and political parties alike stirred the proverbial pot, telling viewers and constituents that drugs were a plague destroying the country.[110] Of particular interest were

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[103] *See supra* Section I.C.

[104] Vandewalker, *supra* note 96, at 446–47.

[105] Paltrow, *supra* note 19, at 1000.

[106] *See* Weyrauch, *supra* note 8, at 95–96; *see also* Editorial Board, Opinion, *A Woman's Rights: Part 4, Slandering the Unborn*, N.Y. TIMES (Dec. 28, 2018) [hereinafter Editorial Board, *Slandering the Unborn*], https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html [https://perma.cc/WKS4-T9SX] (arguing that the manner by which fetal rights gained traction is "a story of social reaction—to the Roe decision and, more broadly, to a perceived new permissiveness in the 1970s—combined with a determined, sophisticated campaign by the anti-abortion movement to affirm the notion of fetal personhood in law and to degrade Roe's protections").

[107] *See* Paltrow, *supra* note 19, at 1023–29 (describing the media frenzy regarding drug using women and "crack" addicted newborns).

[108] *Id.* at 1004.

[109] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (noting that the spirit of the Bill of Rights constitutes the "right to be let alone" or the right to privacy and protection from unwarranted governmental intrusions).

[110] Paltrow, *supra* note 19, at 1017.

sensationalized stories depicting the effects of cocaine on a fetus.[111] These stories involved "inner-city" Black mothers who allegedly ingested crack with no regard to the developing child's health or well-being.[112] For example, a *Time* magazine cover depicted a crying young child with the title "Crack Kids: Their mothers used drugs, and now it's the children who suffer."[113] One study that the news media emphasized indicated, "based on [only] a handful of cases, that the children of mothers who had used crack remained smaller, sicker and less social than other infants."[114] A *Washington Post* opinion column argued that Black mothers were giving birth to a "bio-underclass" of children and alarmingly asserted "that the dead babies may be the lucky ones."[115] Such depictions created what can be described as a collective "moral panic."[116] Thus, when cloaked as drug control and child protective measures, assertions of fetal rights succeeded despite the likely failure of such legal arguments in the context of abortion.[117]

By associating the war on drugs with a historically socially and politically disenfranchised group, namely Black Americans in the "inner-city," anti-abortion activists were handed an astonishing victory when states responded to drug use during pregnancy with vigor.[118] But this victory was fraught with misinformation and message manipulation. Critically, in considering the justifications for state responses to drug use during pregnancy, one cannot ignore state statutory schemes' racist genesis.[119] *The New York Times* noted that "[t]he idea of a mentally impaired 'crack baby' resonated with long-held racist views about [B]lack Americans," and the press's incessant and sensationalized coverage "promoted the notion that the 'monstrous crack-smoking mother' was typical of [B]lack women."[120] Because of these underlying misconceptions, the war on drugs painted the picture of a pregnant Black drug user whose behavior causes irreparable harm to the child.[121]

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[111] *Id.*

[112] *Id.* at 1020.

[113] Editorial Board, *Slandering the Unborn*, *supra* note 106.

[114] *Id.* The researcher who published these findings emphasized the "limitations of his study and cautioned that rigorous research would be needed." *Id.*

[115] *Id.*

[116] *Id.*

[117] Paltrow, *supra* note 19, at 1021.

[118] *Id.* at 1001, 1020; *see also* Editorial Board, *Slandering the Unborn, supra* note 106.

[119] Editorial Board, *Slandering the Unborn*, *supra* note 106 (arguing that the common conceptualization of a "crack-smoking mother" was often a poor Black woman due to media portrayals).

[120] *Id.*

[121] *See, e.g.*, Editorial Board, *Slandering the Unborn*, *supra* note 106.

1. Harm to the child

In family court, it is often treated as an obvious fact that prenatal substance exposure causes harm to the child, which states purport to have a compelling interest in preventing.[122] Establishing harm, however, is not so simple.[123] It is true that drug use during pregnancy can be, at times, harmful to the fetus and child once born.[124] When a pregnant person consumes an illicit substance, neonatal abstinence syndrome (NAS) may result.[125] Before birth, the fetus becomes dependent on the drug, and after birth, once the supply is cut off, the newborn may experience withdrawal effects from the lack of the substance.[126] NAS is particularly likely to result from a mother's ingestion of opioids (like heroin or oxycodone), stimulants (like cocaine), depressants (like alcohol or marijuana), or nicotine.[127] Symptoms vary and could include intense crying, irritability, sleeping issues, fever, vomiting, and in very severe cases, seizures.[128] While the actual NAS withdrawal symptoms are not permanent, substance use during pregnancy could increase the fetus's risk of complications once born.[129] As the child grows, it may develop issues such as information processing difficulties and aggressive or disruptive behavioral tendencies.[130]

However, it is critical to note that harm to the child based on prenatal substance use is not a foregone conclusion, as "there remains genuine scientific dispute as to whether a causal link exists between [drug] use and serious fetal harm."[131] The sensationalized media coverage of the devastating effects of substance use on developing fetuses, as a byproduct of the war on drugs,[132] contributed to the overt exaggeration of the risk of permanent harm to the

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[122] *See, e.g.*, *In re* Baby Boy Blackshear, 736 N.E.2d 462, 465 (Ohio 2000) (holding that a child born with a positive toxicology report, which indicates the mother ingested drugs while pregnant, is *per se* an abused child).

[123] *See, e.g.*, *Amicus Curiae Brief: Cornelia Whitner v. the State of South Carolina*, 9 HASTINGS WOMEN'S L.J 139, 144–45 (1998) [hereinafter *Amicus Curiae Brief*] (noting the scientific dispute as to harm to the child in the context of prenatal cocaine use).

[124] Kroeger, *supra* note 37, at 83–84 (describing neonatal abstinence syndrome).

[125] *See id.*; *see also Neonatal Abstinence Syndrome*, UNIV. OF ROCHESTER MED. CTR., https://rb.gy/k5cx4p [https://perma.cc/6ANB-RY4Z].

[126] *Neonatal Abstinence Syndrome*, *supra* note 125.

[127] *Id.*

[128] *Id.*

[129] Kroeger, *supra* note 37, at 83–84.

[130] *Id.* at 84.

[131] *Amicus Curiae Brief*, *supra* note 123, at 144–45 (in the context of prenatal cocaine use).

[132] Paltrow, *supra* note 25, at 461 (remarking that "[n]ews reports were typically presented in extremely alarmist terms, reporting crack as "'a plague" that was "eating away at the fabric of America"'" (quoting Craig Reinarman & Harry G. Levine, *The Crack Attack: Politics and Media in America's Latest Drug Scare*, *in* CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 21 (Craig Reinarman & Harry G. Levine eds., 1997)).

child.[133] News organizations rushed to report studies alleging permanent, severe, life-altering harm to children caused by prenatal substance use.[134] Despite their shock value, these early studies were deeply flawed and have largely been discredited.[135] Many studies now show that cocaine's impact on the fetus and the child has been significantly exaggerated.[136] Medical professionals have decried the popular depiction of seriously and perpetually damaged children exposed to illicit substances in utero.[137] As such, "the public outcry for the punishment of substance-using mothers and the disenfranchisement of their children as [an] unsalvageable almost demonic 'biologic underclass' rests not on scientific findings but upon media hysteria fueled by selected anecdotes."[138]

In fact, conditions other than exposure to drugs in utero may be better predictors of harm to the fetus and the child once born.[139] Several studies have carefully examined the effects of confounding variables, especially poverty, and have determined that the effect of exposure to drugs on the child cannot be isolated from other environmental and systemic factors.[140] The "crack baby" can thus be appropriately characterized as a myth—"a racist myth that enabled the nation to turn its attention away from the structural causes of poor health outcomes in children, such as poverty and structural racism, and instead blame their mothers."[141]

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[133] *Id.* at 461–62; *see Amicus Curiae Brief*, *supra* note 123, at 144.

[134] *See* Paltrow, *supra* note 25, at 461; *see also Amicus Curiae Brief*, *supra* note 123, at 144 (noting that the press accounts of the harm to these children were based on only a handful of early studies from the 1980s).

[135] *Amicus Curiae Brief*, *supra* note 123, at 144 n.6 (noting that these early, now discredited studies, suffered from methodological issues like small sample size and failure to control for such confounding variables as access to prenatal care, maternal nutrition, the use of other drugs including prescribed medications, etc.).

[136] *See* Paltrow, *supra* note 25, at 461–62; *Amicus Curiae Brief*, *supra* note 123, at 144–45 & nn.4–7 (detailing the issues with early studies on which the media largely focused and reflecting the scientific data a decade later, which has generally supported the proposition that severe and permanent effects of drug use on the child, and specifically cocaine use, as the original focus of the war on drugs, is contrary to scientific consensus).

[137] *See generally Open Letter to the Media and Policy Makers Regarding Alarmist and Inaccurate Reporting on Prescription Opioid Use by Pregnant Women*, NAT'L ADVOCS. FOR PREGNANT WOMEN (Mar. 11. 2013), https://mk0nationaladvoq87fj.kinstacdn.com/wp-content/uploads/2019/10/Opioid20Open20Letter20-20March20201320-20FINAL.pdf [https://perma.cc/8KEJ-HDSF] (physicians urging the media and society at large to stop using the term "crack baby" as it is both inaccurate and stigmatizing).

[138] Paltrow, *supra* note 25, at 475 (alteration in original) (quoting D.A. Frank et al., *Maternal Cocaine Use: Impact on Child Health and Development*, 40 ADVANCES PEDIATRICS 65 (1993)).

[139] *See, e.g.*, MOVEMENT FOR FAM. POWER, *supra* note 3, at 20 (emphasizing the confounding effect of poverty on prenatal harm).

[140] Paltrow, *supra* note 25, at 462 (citing a 1999 study which found that poverty can have a greater impact than cocaine on the child's developing brain); *see also* MOVEMENT FOR FAM. POWER, *supra* note 3, at 20.

[141] MOVEMENT FOR FAM. POWER, *supra* note 3, at 20.

The New York Times recently reckoned with its role in the "crack baby" frenzy, noting that it, and others, vilified Black mothers by asserting they were giving birth to permanently damaged children who would burden the schools and service agencies as they grew.[142] It wrote:

> The myth of the "crack baby"—crafted from equal parts bad science and racist stereotypes—was debunked by the turn of the 2000s. But by then, the discredited notion that cocaine was uniquely and permanently damaging to the unborn had been written into social policies and the legal code. By the time the [crack] epidemic was over, the view that the fetus was a person with rights superseding the mother's had gained considerable traction in practice.[143]

As is clear with this *Times* statement, news organizations and lawmakers who fanned the flames of the war on drugs and the "crack baby" frenzy are acknowledging the harms caused by their rhetoric, but these apologies are too little, too late.[144] Despite the debatable science on which the presumption of harm to the child stands, that prenatal drug use causes permanent, severe harm in infants and children seeped into the national consciousness, and consequently, state policies.[145] The prioritization of fetal rights at the expense of maternal rights is clear with the onslaught of state and federal legislation punishing pregnant individuals for actions taken before the fetus was a person under the law.[146]

2. Drug Use and the Ability to Parent

A second rationale a state may use to justify family court involvement predicated on drug use during pregnancy is that such behavior indicates future inabilities to parent.[147] However, "the social cognitive literature has not been able to conclusively draw any causal connection between drug use and inferior parenting."[148]

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[142] Editorial Board, *Slandering the Unborn*, *supra* note 106.

[143] *Id.*

[144] *See, e.g.*, Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016, 3:14 PM), https://www.cnn.com/2016/03/23/politics/john-ehrlichman-richard-nixon-drug-war-blacks-hippie/index.html [https://perma.cc/S5HH-D92B]. This is just one example of policymaking rooted in racism for political gain, highlighting that the public health and child welfare justifications used at the time were a guise for government persecution and disenfranchisement of marginalized groups.

[145] *See* Paltrow, *supra* note 25, at 462–73 (detailing various state and federal responses, beginning in the 1980s, to drug use during pregnancy, ranging from increased services to pregnant women to criminal penalties for pregnant drug users).

[146] *See id.* at 491–94. "New legislative proposals on the subject of drug using pregnant women appear each year throughout the country at both the federal and state levels. Unfortunately, legislators continue to introduce highly punitive bills . . . ." *Id.* at 494.

[147] *See supra* notes 98–102 and accompanying text.

[148] MOVEMENT FOR FAM. POWER, *supra* note 3, at 21.

Similar to early studies focusing on the alleged harm to the child due to exposure to substances in the womb, studies linking substance use with poor parenting fail to control for confounding variables like poverty.[149] In addition, these studies do not employ a single, comprehensive standard for defining child maltreatment.[150] According to one advocacy group, the most common marker to determine maltreatment is a child protective worker's evaluation of whether such maltreatment exists, yet the worker is much more likely to find severe harm if the parent uses substances.[151] As a result, the claim that drug use and future child maltreatment are associated is a tautology—"the literature determines child maltreatment has occurred if a CPS caseworker says it has occurred, and a CPS case worker determines child maltreatment has occurred if they find evidence of substance use."[152] Thus, the determination of harm to the child rests primarily on the individual caseworker's subjective view that substance use causes such harm, rather than on a comprehensive, objective standard founded on research and science.[153]

Moreover, the idea that drug use during pregnancy is predictive of future inability to parent negates the nature of addiction and thereby abdicates the state's responsibility to address the underlying societal issues contributing to substance use.[154] At its core, substance use is a disease and a public health concern, not a justification for punishment or a moral failure.[155]

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[149] *Id.* at 21–22.

[150] *Id.* at 21.

[151] *Id.* at 21–22.

[152] *Id.* at 22.

[153] *Id.* The Movement for Family Power argues that, while in some instances drug use can cause real harm to families and communities, these harms can be mitigated not by punishment, but by investment in "healthcare, jobs programs, housing, evidence-based and/or culturally sensitive drug treatment and other efforts that are well known to reduce the incidence of problematic drug use . . . and the harms associated with drug use." MOVEMENT FOR FAM. POWER, *supra* note 3, at 17.

[154] *See id.* at 20 (arguing that the myth of harm caused by prenatal substance use associated with the war on drugs allows governments to ignore structural causes of poor health outcomes in fetuses and children).

[155] *See, e.g.*, Kathy Bettinardi-Angres & Daniel H. Angres, *Understanding the Disease of Addiction*, 1 J. NURSING REGUL. 31, 31 (2010) (describing addiction and the progression to recognizing alcohol and drug dependency as a disease, although not everyone accepts it as such); *see also* Heather Howard & Wendy F. Guastaferro, *Mothers with Opioid Use Disorder: Moving Toward Justice, Wellness, and Engagement*, 32 J. AM. ACAD. MATRIM. L. 29, 29–30 (2019) (noting that "[h]igh quality drug treatment and stigma reduction strategies are components of a wellness and engagement approach" as opposed to the current coercive and punitive measures in place); Kroeger, *supra* note 37, at 88 (noting that Kentucky has conformed with medical consensus, adopting a voluntary treatment model to drug use during pregnancy under its Maternal Health Act of 1992, which asserts that drug use is a public health problem and that pregnant drug users must have access to prenatal care and treatment programs).

Government's and society's continued insistence on individualized responsibility and punishment, however, allows us to ignore both the inefficacy of punishment in treating substance use and the harm such punishment causes to individuals and to communities as a whole.[156] Therefore, the notion that drug use indicates an inability to parent can be seen as a byproduct of the war on drugs and the media's ubiquitous depictions of "crack bab[ies]."[157]

B. Divergent State Approaches to Establishing Abuse or Neglect Based on Prenatal Drug Use

As detailed above, the purported justifications for family court interventions based on drug use during pregnancy depend on flawed logic.[158] This note argues that a law cannot survive strict scrutiny analysis if there is not a post-birth finding of actual harm to the child due to its mother's drug use during pregnancy. Even if there is actual harm to the child, the appropriate state response must denounce a punitive approach and endorse one that is treatment-oriented, thereby protecting the rights of the mother and the interests of the child once born.[159]

A neglect or abuse petition brought against a mother based on drug use during pregnancy may lead to prolonged periods of state involvement in the family sphere, the removal of the child from the mother, and at its most extreme, the termination of parental rights.[160] Many state statutes regarding child abuse and neglect do not specifically account for fetal protections and do not mention the word "fetus" at all.[161] Rather, family courts today base a finding of abuse or neglect on either (1) harm to the child once born (i.e., withdrawal or NAS, low birthweight, or other medical issues); or (2) prenatal drug use as per se neglect, where drug use during pregnancy is probative evidence of future neglect or abuse of the

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[156] *See, e.g.*, MOVEMENT FOR FAM. POWER, *supra* note 3, at 15 ("[T]he war on drugs, undertaken in the name of public safety, destabilized and disempowered entire communities, further entrenched the projection of white supremacy through law enforcement departments across the country, and drained resources from communities living in poverty." (citing Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012)).

[157] *See id.* at 20–21; *see also* Editorial Board, *Slandering the Unborn*, *supra* note 106.

[158] *See supra* Section II.A.

[159] *See, e.g.*, Vandewalker, *supra* note 96, at 442, 453 (arguing that states should focus on the eradication of poverty and access to drug treatment programs for pregnant women, rather than on the punishment of addicted pregnant women).

[160] *See Substance Use During Pregnancy*, *supra* note 5. While the standard for termination of parental rights is beyond the scope of this note, see *infra* Section III.B for a discussion of the harms of removing children from their parents.

[161] Townsend, *supra* note 3, at 1088.

child.[162] The threatened descent down the slippery slope of fetal rights is clear when courts permit rigorous protection of fetuses based solely on the actions of pregnant people before the fetus is born, without a showing of harm to the child.[163]

1. Drug Use During Pregnancy as Per Se Abuse or Neglect

In twenty-three states, evidence of a pregnant woman's drug use may constitute the basis for presuming that the child, once born, is neglected without any showing of actual harm caused by the drug use.[164] In other words, even if the child is perfectly healthy, the state may intervene. For example, in South Carolina, neglect is presumed if the mother or child tests positive for any controlled substance.[165] The relevant statute reads that, upon a positive toxicology test, "[i]t is presumed that a newborn child is an abused or neglected child . . . and that the child cannot be protected from further harm without being removed from the custody of the mother . . . ."[166]

Illinois's child protection statute goes one step further.[167] It states that "a 'neglected child' includes 'any newborn infant whose blood, urine, or meconium contains any amount of a controlled substance.'"[168] Satisfaction of this standard creates a rebuttable presumption that the mother is an "unfit" parent.[169] Thus, the mother is at an immediate disadvantage in the subsequent "best interests of the child" hearing, which can result in the termination of parental rights with no proof of actual, physical harm to the child.[170] Notably, the rebuttable presumption that the mother is unfit as a parent becomes *irrebuttable* if the mother has given birth to more than one infant with a positive toxicology report, resulting in almost automatic termination of parental rights without any showing that the mother's actions actually harmed the child.[171]

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[162] *See id.* at 1085–88.

[163] *See* Paltrow, *supra* note 19, at 1001–03 (arguing that the push to overturn abortion rights has taken the shape of a campaign for fetal rights in the context of the criminal prosecution of women who use illicit substance while pregnant).

[164] *Substance Use During Pregnancy*, *supra* note 5; *see also* Paltrow, *supra* note 25, at 474 (noting that an approach that does not require a showing of harm "seems to have been based more on a desire to punish than on any reliable evidence that such use was in fact causing harm or was a reliable predictor of future harm").

[165] S.C. CODE ANN. § 63-7-1660(F) (2010).

[166] *Id.*

[167] Vandewalker, *supra* note 96, at 457 (citing 750 ILL. COMP. STAT. ANN. § 50/1(D)(t) (West 2007)).

[168] *Id.* at 425 (quoting 750 ILL. COMP. STAT. § 405/2-3(1)(c) (2006)).

[169] 750 ILL. COMP. STAT. § 50/1(D)(k) (an "'[u]nfit person' means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption").

[170] Vandewalker, *supra* note 96, at 426.

[171] *Id.* (citing *In re* O.R., 767 N.E.2d 872, 875 (Ill. App. Ct. 2002) (upholding the termination of the mother's parental rights over the child despite her significant progress

Alarmingly, courts may still find that a child is abused or neglected absent explicit statutory schemes like those discussed above.[172] The primary rationale for these decisions seems to stem from the reasoning that drug use during pregnancy indicates future neglect.[173] For example, in the 2000 case *Baby Boy Blackshear*, Ohio's Supreme Court held that if a newborn tests positive for substances, "the newborn is . . . *per se* an abused child."[174] Thus, no finding of actual harm is necessary for a newborn to be designated an "abused child"—a positive test at birth is sufficient.[175] The court came to this conclusion despite the lack of such per se language in Ohio's child protective statute.[176] That judges can make such findings despite contrary statutory language indicates that judges' own subjective biases about drug use during pregnancy often take precedence, compounding the harms already suffered by families subjected to family court proceedings.[177]

While declining to engage with the mother's argument that a fetus is not a child under the relevant child protective statute, the *Blackshear* court nonetheless employed questionable terminology indicative of its stance on fetal rights.[178] Specifically, the court reasoned that "a child born alive who tests positive at birth for addiction to cocaine suffers from abuse and continued abuse no matter when the original abuse occurred."[179] The dissent rebuffed the majority's per se rule that in utero exposure to a drug constitutes abuse without a finding of actual harm to the child, arguing this is a distinct inquiry "answered by considering appropriate medical evidence."[180]

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in remaining sober and meeting all other requirements of the court because she had given birth to other children with drugs in their systems)).

[172] *See id.* at 427.

[173] *See* Kepfield, *supra* note 71, at 61.

[174] Vandewalker, *supra* note 96, at 427 (emphasis added) (quoting *In re* Baby Boy Blackshear, 736 N.E.2d 462, 465 (Ohio 2000)).

[175] *Id.* at 428.

[176] OHIO REV. CODE ANN. § 2151.031(D) (West 2021) ("As used in this chapter, an 'abused child' includes any child who . . . [b]ecause of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child's health or welfare.").

[177] In a report by the Movement for Family Power, one advocate interviewed stated that "judges' subjective views of drug use and child rearing influence their daily decision-making so much so that one parent can lose custody of their child because of evidence of drug use in one courtroom, and next door the same circumstances will result in a service plan and supervision." MOVEMENT FOR FAM. POWER, *supra* note 3, at 32.

[178] *In re Baby Boy Blackshear*, 736 N.E.2d at 465.

[179] Vandewalker, *supra* note 96, at 427 (quoting *In re Baby Boy Blackshear*, 736 N.E.2d at 464 n.2).

[180] *In re Baby Boy Blackshear*, 736 N.E.2d at 466 (Cook., J., dissenting) ("A positive result on a newborn's drug screen is probative evidence of *in utero* exposure to illegal drugs. Whether a newborn's *in utero* exposure to an illegal substance actually harms or threatens to harm the child is, however, a separate question . . . .").

Permitting abuse or neglect proceedings, removal of the child, and termination of parental rights based solely on a person's actions while pregnant violates the rights to reproductive liberty, privacy, and bodily autonomy. This approach is not narrowly tailored to do what it purports to do—protect fetal health or child welfare.[181] Statutes like those in Illinois and South Carolina, and court decisions like *Baby Boy Blackshear*, mark a recognition of fetal rights under the guise of protecting the child, in that the fetus was not yet a person under the law when it allegedly suffered this abuse or neglect.[182] Once the fetus is legally considered a person upon birth, family court involvement may ensue despite lack of apparent harm from the prenatal exposure to substances.[183]

Such a statutory scheme harkens back to a concern raised by the Supreme Court in its abortion rights jurisprudence. While analyzing a spousal notification provision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court noted that if this portion of the law were upheld, other activities that could harm the fetus could be implicated, like drinking alcohol, smoking, or even consenting to a surgery which might affect "the husband's interest in his wife's reproductive organs."[184] Any number of prenatal activities could be risky to a fetus.[185] A per se abuse or neglect approach based on drug use during pregnancy, without more, is both underinclusive and overinclusive, and cannot pass a strict scrutiny analysis.[186] Thus, finding abuse or neglect under this per se approach based on prenatal conduct alone gives anti-choice activists much-desired ammunition to further expand fetal rights.[187] States with such schemes must remember that, when women become pregnant, they "do not waive the constitutional protections afforded to other citizens."[188]

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[181] *See* Vandewalker, *supra* note 96, at 444–57; *see also* Paltrow, *supra* note 19, at 1002.

[182] Vandewalker, *supra* note 96, at 446 (arguing that finding a compelling state interest in fetal health so as to justify intervention based on the mother's actions prior to birth requires adopting the "view that the fetus is a living person with legal rights").

[183] *Id.* at 427 (citing *In re Baby Boy Blackshear*, 736 N.E.2d at 464 n.2).

[184] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898 (1992). The spousal notification provision at issue required "a married woman seeking an abortion [to] sign a statement indicating that she has notified her husband of her intended abortion." *Id.* at 844.

[185] *See, e.g.*, Townsend, *supra* note 3, at 1086 (giving the example of "a maternal act as seemingly harmless as not eating 'well'" constituting the basis of a neglect finding if all prenatal harm were to constitute actual physical impairment).

[186] Vandewalker, *supra* note 96, at 448–53 (arguing that such an approach is underinclusive because a pregnant person could engage in many other equally harmful activities yet not be subject to child protective involvement, and overinclusive because an approach that does not require a showing of harm to the child sweeps in more women under the law's purview than necessary).

[187] *Id.* at 433–36, 445.

[188] *In re* Fletcher, 533 N.Y.S.2d 241, 243 (Fam. Ct. 1988).

2. Abuse or Neglect Based on a Showing of Actual Harm to the Child

Other approaches that require a showing of actual harm to the child, caused by prenatal drug use, are superior to one that permits liability based solely on a person's actions while pregnant. Under these "actual harm" regimes, evidence of drug use during pregnancy does not alone establish that the newborn is an abused or neglected child.[189] A finding of actual harm to the child caused by exposure to drugs in utero should be required in order for child protective statutes to pass constitutional muster. New York State's statutory scheme is illuminating on this point.[190]

The New York FCA Section 1012(f) defines a neglected child as one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care."[191] In *Nicholson v. Scoppetta*, the New York Court of Appeals held that, to establish neglect under FCA Section 1012, the petitioner, the Administration for Children's Services (ACS), must prove two elements: (1) the child has been impaired or is at risk of mental, physical, or emotional impairment and (2) a parent's actions caused said impairment.[192] Therefore, ACS must establish "*actual* (or *imminent danger of*) physical, emotional or mental impairment" *caused* by the parent's actions, and this danger "must be near or impending, not merely possible."[193] The court stressed that a finding of neglect must be predicated on "serious harm or potential harm to the child, not just . . . on what might be deemed undesirable parental behavior."[194]

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[189] *Oversight Hearing*, *supra* note 1, at 9 (written testimony of The Bronx Defenders); *see also* Nassau Cnty. Dep't of Soc. Servs. *ex rel.* Dante M. v. Denise J., 661 N.E.2d 138, 140–41 (N.Y. 1995) (holding that a positive toxicology report alone is insufficient to support a finding of neglect); *In re* Milland, 548 N.Y.S.2d 995, 998 (Fam. Ct. 1989) (stating that "a mother's [prenatal] conduct alone cannot be the basis of a neglect finding. Nor is it enough to claim abuse without showing a specific detriment to the [newborn].").

[190] *See* N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 2021); *see also* Nicholson v. Scoppetta, 820 N.E.2d 840, 845 (N.Y. 2004). It should be noted that several other states follow a similar "harm to the child" approach. *See e.g.*, DEL. CODE ANN. tit. 10 § 901(18) (West 2021) (defining neglect, in the context of substance use, as when a parent "[c]hronically and severely abuses alcohol or a controlled substance, is not active in treatment for such abuse, and the abuse threatens a child's ability to receive care necessary for that child's safety and general well-being . . . ."). In other words, Delaware's neglect standard, like New York's, requires *more* than mere evidence of substance use—it requires a nexus between said substance use and some form of endangerment to the child. *Id.* However, New York's statutory scheme is the focal point of this note.

[191] FAM. CT. ACT § 1012(f)(i).

[192] *Nicholson*, 820 N.E.2d at 845.

[193] *Id.* (emphasis added).

[194] *Id.* at 845–46 (holding that a parent's actions only constitute neglect when they fall below a "'*minimum* degree of care'—not maximum, not best, not ideal").

Under this two-pronged test, evidence of drug use during pregnancy alone may not serve as a basis for finding neglect—there must be (1) *actual* or *imminent* harm to the child (2) *caused* by the pregnant person's drug use.[195] New York has established that a positive toxicology report at birth alone is *not* sufficient to maintain a claim for neglect.[196] In *Dante M.*, the New York Court of Appeals affirmed a finding of neglect based on the mother's prenatal drug use because there was *actual harm to the child*—"[the child] was born prematurely, with a low birth weight, and . . . required a specialized level of care."[197] In its decision, the court stated:

> [A] positive toxicology for a controlled substance generally does not . . . prove that a child has been physically, mentally or emotionally impaired, or is in imminent danger of being impaired. Relying solely on a positive toxicology result for a neglect determination fails to make the necessary causative connection to all the surrounding circumstances that may or may not produce impairment or imminent risk of impairment in the newborn child.[198]

Thus, a finding of neglect based solely on prenatal drug use violates FCA Section 1012 by failing to establish the causal element—actual or imminent harm to the child *caused* by drug use.[199]

New York's statutory scheme is preferable to one that permits a finding of abuse or neglect based solely on evidence of drug use during pregnancy, absent any actual harm to the child once born. This approach can better account for the state's compelling interest in protecting children from harm while recognizing that prenatal conduct alone is insufficient to support a finding of abuse or neglect, thereby protecting the liberty interests of pregnant women—actual, constitutionally recognized persons under the law.[200] However, New York's approach, and the "harm to the child" approach more generally, is far from perfect.

III. PROPOSALS FOR NEW YORK STATE IN ORDER TO BEST ALIGN WITH CONSTITUTIONAL PRINCIPLES AND TO FURTHER THE PURPOSE OF FAMILY COURT

While New York courts engage in the appropriate inquiry—whether there is actual or imminent harm to the child—the state must improve in certain areas to truly align with the "rehabilitative"

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[195] *Id.* at 845.
[196] Nassau Cnty. Dep't of Soc. Servs. *ex rel.* Dante M. v. Denise J., 661 N.E.2d 138, 140–41 (N.Y.1995).
[197] *Id.* at 141.
[198] *Id.*
[199] *See id.*
[200] *See generally* Vandewalker, *supra* note 96 (arguing that statutory schemes focusing on fetal health are unconstitutional and improperly ignore maternal interests).

purpose of the family court system.[201] Furthermore, if the goal of the FCA is to protect children and to safeguard their overall well-being,[202] New York must grapple with whether its standard for intervention fulfills the FCA's overarching purpose while also protecting the rights of pregnant people and parents generally.

A. New York Must Adopt Clear Standards for Establishing Harm to the Child

There is no controlling standard by which judges find neglect based on drug use during pregnancy, but courts rely on various factors to establish the causal link between prenatal drug use and harm to the child.[203] New York courts have held that the following actions and inactions could support a finding of neglect: admitted drug use during pregnancy, failure to comply with a rehabilitation program, lack of prenatal care, health issues at the child's birth, prior neglect of other children, and the child's positive toxicology report at birth.[204]

For example, in *Stefanel Tyesha C.*, the Appellate Division, reviewing a family court's determination, held that New York City's commissioner of social services stated sufficient facts to support a cause of action for neglect because it did not rely only on the infant's positive toxicology report at birth.[205] Instead, the mother had admitted to using drugs during pregnancy and, when her child was born, she was not enrolled in a drug rehabilitation program.[206] The mother argued that a claim for neglect could not be sustained without evidence that she continued using drugs after birth while caring for the infant,[207] reflecting the requirement that the parent's conduct *cause* actual or imminent danger of harm to the child in FCA Section 1012.[208] However, the court took a more expansive approach. The court emphasized that it "should not await broken bone or shattered psyche before

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[201] *See, e.g.*, People v. Roselle, 643 N.E.2d 72, 74 (N.Y. 1994) (stating that "[t]he orientation of Family Court is rehabilitative, directed at protecting the vulnerable child, as distinct from the penal nature of a criminal action which aims to assess blame for a wrongful act and punish the offender"); *see also* Paltrow, *supra* note 25, at 474 (noting consensus among child welfare experts that child welfare schemes are *not* designed to simply penalize parents for prior wrongful acts).

[202] N.Y. FAM. CT. ACT § 1011 (McKinney 2021).

[203] LaShanda D. Taylor, *Creating a Causal Connection: From Prenatal Drug Use to Imminent Harm*, 25 N.Y.U REV. L. & SOC. CHANGE 383, 388 (1999).

[204] *Id. See generally In re* Natalee M., 66 N.Y.S.3d 58 (App. Div. 2017) (affirming a finding of neglect against a mother who used drugs during pregnancy because the mother admitted to using drugs and never accessed prenatal care).

[205] *In re* Stefanel Tyesha C., 556 N.Y.S.2d 280, 284, 286 (App. Div. 1990).

[206] *Id.* at 284.

[207] *Id.*

[208] *Id.* at 284–85.

extending its protective cloak around [a] child."[209] This approach, and the *Stefanel* court's emphasis on preventive intervention rather than intervention based on proven harm, indicates a lack of uniformity in establishing actual harm to the child, while also failing to account for systemic barriers that prevent many pregnant people from seeking prenatal care and accessing rehabilitation programs.[210]

First, to alleviate this lack of consistency, New York family courts must set forth a clear and uniform approach to establishing actual harm to the child based on current scientific data.[211] Courts should not simply assume that drug use during pregnancy *is* harmful or leads to future harm.[212] Furthermore, a positive toxicology screen should not be a factor in a court's calculus when determining whether harm to the child exists.[213] That an infant was born with certain substances in its system does not necessarily mean that the child will suffer long-term, adverse developmental outcomes.[214] In fact, even if the infant is diagnosed with NAS, otherwise referred to as withdrawal, this will likely "result in a set of transient, treatable symptoms."[215]

Additionally, New York must account for the pervasive barriers that may prevent people from seeking prenatal care and accessing rehabilitation programs.[216] For example, New York does not prohibit public drug treatment programs from discriminating against pregnant women.[217] Thus, unless access to services is

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[209] *Id.* at 284 (alteration in original) (internal quotation mark omitted) (quoting *In re* Anthony, 366 N.Y.S.2d 333, 336 (Fam. Ct. 1975)).

[210] *Id.* at 285–86; *see also* Editorial Board, *Slandering the Unborn*, *supra* note 106; MOVEMENT FOR FAM. POWER, *supra* note 3, at 20. *See generally* Taylor, *supra* note 203 (detailing the lack of uniformity in determining harm to the child in New York family courts).

[211] Ideally, the New York Court of Appeals or one of the Appellate Divisions should promulgate an approach for establishing harm to the child to bind lower courts, where much of the factual analysis of "harm" takes place. Courts could consider following physicians' recommendations based on the "Modified Finnegan Scoring System," a useful checklist-like analysis for determining harm to the child. *See, e.g.*, Sarah Tierney, *Identifying Neonatal Abstinence Syndrome (NAS) and Treatment Guidelines*, UNIV. OF IOWA CHILD.'S HOSP. (Nov. 2014), https://rb.gy/k5cx4p [https://perma.cc/9698-VNMN] (applying the Finnegan Scoring System).

[212] *See* Taylor, *supra* note 203, at 401 (stating that New York family courts will often assume harm or future harm whenever there is prenatal drug use).

[213] While New York does not permit a positive toxicology report alone to be a basis for family court proceedings, it is clear that ACS does not always adhere to this mandate. *See, e.g.*, *Oversight Hearing*, *supra* note 1, at 4–5 (written testimony of The Bronx Defenders) (recounting the case study of the woman described at the beginning of this note, in which child protective proceedings were initiated based solely on a positive toxicology report. The writers of the report noted that this "story is typical of what we see all too often in the Bronx.").

[214] *See supra* Section II.A.1.

[215] MOVEMENT FOR FAM. POWER, *supra* note 3, at 20–21 (in the context of opioid use).

[216] *See, e.g.*, Vandewalker, *supra* note 96, at 442 ("For poor addicts, there are often waiting periods to get into substance abuse programs.").

[217] *Substance Use During Pregnancy*, *supra* note 5.

radically transformed and becomes more available for all pregnant people, particularly low-income women of color, then lack of prenatal care and failure to engage in a treatment program should not factor into a court's harm analysis.[218]

Likewise, the idea that drug use during pregnancy is the cause of adverse birth or developmental outcomes ignores other contributing factors which may be more pervasive, yet difficult to isolate.[219] When a child is born with low birth weight, for example, the assumption that any prenatal substance use caused these outcomes overlooks the harmful effects of poverty, homelessness, and exposure to domestic violence.[220]

The only factor that should be relevant to New York courts in establishing whether there was harm to the child is just that—serious, physical, and lasting harm to the child which can be medically linked to substance use during pregnancy. Other factors like admitted drug use, lack of prenatal care, and failure to enroll in a treatment program should not be examined in the court's calculus, as these factors do not rationally bear on harm or imminent harm to the child, as New York law requires.[221] Critically, the compounding effects of extraneous variables regarding harm to the child and the parent's ability to engage with services cannot be ignored.[222]

In the rare case that serious harm can be medically linked to in utero exposure to substances, family court involvement may be warranted.[223] However, this involvement should not rise to the level of removal of the child or termination of parental rights, as this would frustrate the general rehabilitative purpose of family court.[224]

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[218] Taylor, *supra* note 203, at 388.

[219] MOVEMENT FOR FAM. POWER, *supra* note 3, at 20.

[220] *See* Editorial Board, *supra* note 106; *see also* MOVEMENT FOR FAM. POWER, *supra* note 3, at 20.

[221] Nicholson v. Scoppetta, 820 N.E.2d 840, 845 (N.Y. 2004).

[222] MOVEMENT FOR FAM. POWER, *supra* note 3, at 20 (noting that "other confounding variables, such as poverty, play a much more influential role in developmental outcomes" than drug use).

[223] *Nicholson*, 820 N.E.2d at 845–46 (If substantial physical harm is proven, and this harm is caused by the pregnant person's drug use, this would likely meet the standard promulgated in *Nicholson*, which requires *imminent* harm to the child *caused* by a parent's failure to exercise a minimum degree of care.).

[224] *See, e.g.*, People v. Roselle, 643 N.E.2d 72, 74 (N.Y. 1994) (explaining the purpose of the family court).

B. New York Must Consider the Harm of Removal in Its Harm Analysis

If an infant is born with a positive toxicology screen, indicating that the mother used illicit substances during pregnancy, a common and extreme response is to remove that child from the parents' custody.[225] However, removal should not be inevitable, even if the child is diagnosed with NAS, because drug use during pregnancy does not guarantee ongoing harm to the child once born.[226] Moreover, removing the child to protect against the perceived harm of a parent's drug use leads to an arguably greater harm—the devastating and lasting effects of removal on the developing child.[227]

In *Nicholson*, the New York Court of Appeals dictated a balancing test to determine when to effectuate a removal, holding that a court must consider more than just risk of harm to the child.[228] Instead, the court "must balance that risk against *the harm removal might bring*, and it must determine factually which course is in the child's best interests."[229] In other words, if the harm of removal to the child outweighs any harm or risk of harm to the child in remaining with its parents, removal is improper.[230]

Removal itself is extremely traumatic, for children of any age, removed for any reason.[231] One research group indicated that state-sanctioned separation of families risks severe and irrevocable harm to the child.[232] Separation can result in "acute trauma, which can trigger increased vulnerability to mental illness . . . and can impair children's neurological, social, and

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[225] *See, e.g.*, MOVEMENT FOR FAM. POWER, *supra* note 3, at 15–16, 30–31 (discussing the increase in the number of children in the foster care system with the war on drugs and the widespread "practice of CPS agencies and family courts conflating evidence of drug use, such as a positive drug test, with risk of harm" to a child).

[226] *See supra* Section II.A.1.

[227] *See, e.g.*, Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 211–12 (2016) (discussing the effects of removing children from their home).

[228] *Nicholson*, 820 N.E.2d at 852; *see also* N.Y. FAM. CT. ACT § 1012(f) (McKinney 2021).

[229] *Nicholson*, 820 N.E.2d at 852 (emphasis added).

[230] *See, e.g.*, *In re* David Edward D., 828 N.Y.S.2d 438, 440 (App. Div. 2006) (holding that ACS could not show that any imminent risk to the child outweighed the harm removal might bring, and that it was therefore "in the child's best interest to be returned to [the] father"); *In re* Chelsea BB., 825 N.Y.S.2d 551, 554 (App. Div. 2006) (holding that the lower court's decision to remove all children was unwarranted, "causing unnecessary trauma to [the] respondent's children").

[231] *See* Sankaran & Church, *supra* note 227, at 211–12 (detailing the extensive trauma removal causes, even for very short stays in foster care).

[232] *Oversight Hearing*, *supra* note 1, at 14–15 (written testimony of The Bronx Defenders) (citing Ann Kring, *Psychology Department Members Cite Research Against Family Separations*, BERKELEY NEWS (July 12, 2018)).

cognitive development."[233] The trauma of removal is especially acute in newborns, whose developing attachment to their mothers will be interrupted if removed, leading to "poor developmental outcomes."[234] Even brief removals may have devastating, lasting effects on the child's development.[235] Thus, it is imperative that harm of removal be a relevant factor, worthy of significant weight, in a court's analysis of whether to remove an infant from its mother. If the family court system wishes to align with its aim of ensuring the general well-being of children, alternative interventions must be exhausted before the state takes such a disruptive action.

However, New York courts tend to gloss over the harm of removal prong of *Nicholson* when analyzing the appropriate response to drug use during pregnancy.[236] Despite the lack of conclusive scientific evidence linking harm with prenatal drug exposure, courts routinely focus on the positive drug test and any other indicia of "harm," like low birth weight, excessive crying, admitted drug use by the mother, and the mother's failure to engage in a drug treatment program to justify intervention and subsequent removal.[237]

New York must reckon with the harm that removal can cause.[238] Because removal is so excruciatingly traumatizing, especially for infants, New York should avoid removing newborns from mothers. It is irrefutable that "the most effective and cost-saving treatment is keeping mothers and newborns together, encouraging mother-infant bonding through skin-to-skin contact, breastfeeding and other infant soothing techniques."[239] Furthermore, removal, without a medically

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[233] *Id.*

[234] *Id.* at 15 (quoting Lorie Goshin et al., *Preschool Outcomes of Children Who Lived as Infants in a Prison Nursery*, 94 Prison J. 139, 139–58 (2014)); *see also In re* Wunika A., 65 N.Y.S.3d 421, 427 (Fam. Ct. 2017) (emphasizing that the one-year-old child was at "a critical age for parent-child bonding that has implications for the ability to form emotional connections throughout life").

[235] *See* Sankaran & Church, *supra* note 227, 209–12 (focusing on children in foster care for very short stays).

[236] *See* Taylor, *supra* note 203, at 401 (noting that "New York courts frequently assume that prenatal drug use inevitably leads to harm" despite the fact that New York requires a specific showing of actual harm to justify a finding of neglect or abuse).

[237] *Id.* at 388.

[238] *See* MOVEMENT FOR FAM. POWER, *supra* note 3, at 19 ("There is compelling evidence that the resulting policy and practice is more toxic to children, parents and families than the alleged effects of drug use on pregnancy and parenting."); *see also id.* at 35 (noting that removal is "one of the most violent actions a government can take against its people"). *Nicholson v. Scoppetta* set the standard that requires analysis of the harm of removal, so New York family courts are already primed to place more emphasis on the harm of removal. *See generally* Nicholson v. Scoppetta, 820 N.E.2d 840 (N.Y. 2004). Additionally, a clear legislative standard set forth in the FCA would be beneficial.

[239] MOVEMENT FOR FAM. POWER, *supra* note 3, at 21.

accurate finding of harm, violates the constitutional rights to privacy, reproductive liberty, and the right to raise one's children free from unwarranted government interference.[240] This is because removal in such a situation is not narrowly tailored to fulfill the larger goal of the child welfare system and its statutory schemes—namely, the protection of fetal health or child welfare.[241]

C. *New York Must Enact Policies Promoting Maternal Health and Recovery*

As removal should rarely, if ever, be effectuated for infants, New York must commit to policies that promote treatment, recovery, and health of the mother before and after birth. This would better align with the purported rehabilitative rationale of the family court system.[242]

First, New York must prioritize the establishment of additional drug treatment programs, as there is often a significant waiting period to be admitted, especially if those seeking the services are poor.[243] This gap in services is compounded for pregnant people, due to lack of health insurance coverage or the dearth of facilities specifically for pregnant people or new mothers.[244] Moreover, the state should abandon admitted drug use as a factor in its harm to the child analysis, and a pregnant person's enrollment in a treatment program should not be a basis for ACS involvement. There is abundant research that suggests fear of child protective services is a significant barrier to treatment for pregnant women.[245] Treating one's addiction is impossible if one cannot admit to it for fear of initiating child protective proceedings.[246]

Finally, New York must reconceptualize addiction as a health issue rather than a moral failure. For example, as one advocacy group eloquently argues:

> [O]ne would never tell a parent struggling with hypertension that they would face family dissolution if not compliant with hypertension treatment. This difference underscores the problematic assumption that people with substance use disorders are uniquely culpable for their diagnosis. Despite overwhelming evidence of the difficulty in

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[240] *See supra* notes 181–188 and accompanying text.

[241] *See supra* notes 181–188 and accompanying text.

[242] *See supra* notes 181–188 and accompanying text.

[243] Vandewalker, *supra* note 96, at 442.

[244] MOVEMENT FOR FAM. POWER, *supra* note 3, at 39–40.

[245] *Oversight Hearing*, *supra* note 1, at 16 (written testimony of The Bronx Defenders).

[246] *See, e.g.*, *id.* (discussing how a parent's marijuana use is often a basis for child welfare investigations).

> accessing treatment or the poor quality of [care], the foster [care] system equates treatment non-compliance with parental unfitness.[247]

It is crucial to destigmatize the treatment process for pregnant women and drug addiction in general.[248] Gender-specific policies, which account for underlying mental health issues and past trauma, that encourage bonding between the new mother and the child must be prioritized if the societal goal is truly rehabilitation, and not just punishment.[249]

New York should adopt an approach similar to Canada's for pregnant drug users.[250] Canadian law has refrained from adopting the fetal rights doctrine, in which the mother and fetus are separate entities with rights that could potentially conflict, thereby limiting the rights of the mother.[251] A woman in Canada will not be civilly or criminally punished for harm she causes to the fetus, and thus "Canada's approach to reduce the incidence of NAS is women-centered."[252] Canada focuses on prevention programs instead of retroactive punishment.[253] Consequently, both the mother and fetus benefit from the approach, aligning with the asserted overarching goal of child protection systems—child protection and rehabilitation.[254]

D. New York Must Establish Clear Guidelines for Drug Testing and Reporting Pregnant Women, New Mothers, and Newborns

Until recently, the most concerning practice in New York involved drug testing pregnant women, new mothers, and infants without consent.[255] While some states require drug testing shortly after birth,[256] New York does not have any law requiring such

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[247] MOVEMENT FOR FAM. POWER, *supra* note 3, at 41–42.

[248] *See, e.g.*, Howard & Guastaferro, *supra* note 155, at 29–30 (suggesting stigma reduction strategies to promote a public health approach to substance use, instead of a "moral failure perspective").

[249] *Id.* at 38–39, 51.

[250] Kroeger, *supra* note 37, at 93–96.

[251] *Id.*

[252] *Id.* at 95.

[253] *Id.* at 96.

[254] N.Y. FAM. CT. ACT § 1011 (McKinney 2021); *see also* People v. Roselle, 643 N.E.2d 72, 74 (N.Y. 1994).

[255] *See Oversight Hearing*, *supra* note 1, at 5 (written testimony of The Bronx Defenders) ("In our experience, hospitals do not always obtain a woman's consent, let alone informed consent for the test and often do not even notify the woman that the test is being performed on her or her newborn.").

[256] *See Substance Use During Pregnancy*, *supra* note 5 ("[Twenty-five] states and the District of Columbia require . . . report[ing] [of] suspected prenatal drug use" while eight states mandate testing when prenatal drug use is suspected.).

testing.[257] New York does not even require providers to report a positive toxicology screen to the state central registry (often colloquially known as the child abuse hotline).[258] However, drug testing and reporting is common in New York, especially if the pregnant woman is Black, poor, or both.[259]

Despite the fact that white women and Black women use drugs at similar rates, Black women are far more likely to be reported to ACS for a positive toxicology report.[260] This is likely a product of medical professionals' racial bias and because hospitals in wealthier neighborhoods rarely test women or their infants.[261] In fact, it is common practice for "hospitals serving Medicaid-eligible populations" throughout the country to "drug test pregnant people . . . and . . . newborns without providing informed consent."[262]

While providers and hospitals may still drug test women and newborn children for the presence of drugs in their systems, New York City recently stopped performing drug tests on pregnant patients in public hospitals without written consent.[263] This change came on the heels of the New York City Commission on Human Rights' investigation into drug testing practices of private New York hospitals to determine the role of racial bias in deciding which new mothers to test.[264] Likely in response to this investigation, the new policy now states that drug use during pregnancy "is a medical issue that should be assessed for the purposes of linking women to treatment, if necessary."[265]

However, it is critical to note that this new policy does not provide guidelines regarding when to report a positive drug

[257] *Oversight Hearing*, *supra* note 1, at 5 (written testimony of The Bronx Defenders).

[258] *Id.* at 4, 7.

[259] *See id.* at 5, 10; *see also* Yasmeen Khan, *NYC Will End Practice of Drug Testing Pregnant Patients Without Written Consent*, GOTHAMIST (Nov. 17, 2020, 1:49 PM), https://gothamist.com/news/nyc-will-end-practice-drug-testing-pregnant-patients-without-written-consent [https://perma.cc/CN85-FM5P] (noting that "Black and Latino children in New York City" constitute almost 90 percent of child protective reports, despite constituting about 55 percent of the total population).

[260] *Oversight Hearing*, *supra* note 1, at 10 (written testimony of The Bronx Defenders).

[261] *See id.* at 10 (citing a *New York Daily News* survey, in which "hospitals serving primarily low-income moms make [drug] tests routine and sometimes mandatory").

[262] MOVEMENT FOR FAM. POWER, *supra* note 3, at 34 ("It is widely known that hospitals serving Medicaid-eligible populations routinely drug test pregnant people, new mothers and their newborns without providing informed consent, in contravention of the ethical guidelines of various leading medical organizations.").

[263] Khan, *supra* note 259 (noting that public hospitals in New York City are now required to obtain written consent prior to testing).

[264] Press Release, N.Y.C. Comm'n on Hum. Rts., New York City Commission on Human Rights Launches Investigation into Three Major Private Hospital Systems' Practices of Drug Testing Newborns and Parents (Nov. 16, 2020), https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Hospitals_Press_Release_11-16-2020.pdf [https://perma.cc/RFG7-SZKU].

[265] *See* Khan, *supra* note 259.

test to child protective services.[266] Although ACS emphasized that a positive drug test should not alone trigger family court involvement, racial bias could still rear its ugly head in providers' decisions of whom to report.[267] New York could mitigate providers' unbridled discretion and consequently, racial bias, by standardizing who is drug tested and reported and in what circumstances,[268] thus furthering the general purpose of family court and lessening the disparate racial impact of the child protective system.[269]

New York should require informed consent prior to drug testing pregnant people and newborns in all facilities. Additionally, clear reporting guidelines, ideally developed by physicians and rooted in modern medical research in terms of when prenatal substance use does cause harm, must be provided to practitioners. Otherwise, by presuming harm to the child based on a positive drug test conducted in a racist and classist manner, the court sanctions practices rooted in "the inflammatory rhetoric of the war on drugs and the resulting negative narrative of Black motherhood."[270] If the state's goal is children's well-being and parental rehabilitation, drug testing at birth without consent, coupled with a lack of clear reporting guidelines, exposes families to unfounded state-sanctioned intervention and thus runs directly counter to that goal.

CONCLUSION

The punishment of pregnant drug users via neglect or abuse petitions in family court has distressing implications for the hard-fought reproductive and privacy rights first recognized in *Roe v. Wade*. By linking the war on drugs to pregnant, often Black, drug users, anti-choice activism laid the foundation for aggressive state child protective statutes.[271] As a result, some states permit a finding of neglect or abuse based solely on drug use during

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[266] *Id.*

[267] *Id.* (noting that Black and Latino children constitute almost 90 percent of child neglect or abuse reports in New York City, despite comprising about 59 percent of the total child population).

[268] *Id.*

[269] *See, e.g.*, People v. Roselle, 643 N.E.2d 72, 74 (N.Y. 1994) (noting the general rehabilitative purpose of family court); *see also* MOVEMENT FOR FAM. POWER, *supra* note 3, at 6 (comparing the discretion in the child protective system to the discretion enjoyed by police and prosecutors, and noting that, as a result, the system "systematically demolish[es] black families" (alteration in original) (quoting Dorothy Roberts, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2003)).

[270] *Oversight Hearing*, *supra* note 1, at 11 (written testimony of The Bronx Defenders).

[271] *See supra* Section II.A.

pregnancy, without a showing of harm to the child once born.[272] This approach violates reproductive liberties and the right to the care and custody of one's own children—a finding of neglect or abuse should not be sustained before the fetus is a constitutionally recognized being and without medical evidence of significant harm to the child once it is born. New York State's scheme is less problematic in that it requires actual harm to the child after birth, caused by the mother's actions during pregnancy.[273] However, New York's approach can be vastly improved by promulgating clear guidelines for establishing "harm" to the child, facilitating access to treatment for pregnant women, and providing testing and reporting standards to providers. Ultimately, if the goal of family court is rehabilitative, then keeping the child with its parents with minimal state interference is the best, and arguably the only method by which to effectuate this objective.

Imagine the story, recounted at the beginning of this note, of the woman separated from her child after a positive drug test for marijuana.[274] With these guidelines in place, perhaps the woman would never have been forced to separate from her healthy newborn. Maybe the physician would have never reported the woman or even administered the drug test. The woman could have spent the first weeks of her child's life bonding with her baby, learning her needs, and becoming comfortable in her new role as a parent. Instead, she was forced to spend the beginning of her child's life in fear of losing a baby she had not yet had a chance to parent. This outcome not only violated this woman's rights to privacy and reproductive liberty—it is antithetical to the stated rehabilitative purpose of family court itself.[275]

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[272] *See supra* Section II.B.1.

[273] *See supra* Section II.B.2.

[274] *See supra* Introduction; *Oversight Hearing*, *supra* note 1, at 4–5 (written testimony of The Bronx Defenders).

[275] *See, e.g.*, *Roselle*, 643 N.E.2d at 74 ("The orientation of Family Court is rehabilitative, directed at protecting the vulnerable child, as distinct from the penal nature of a criminal action which aims to assess blame for a wrongful act and punish the offender.").

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