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## COMMENT

# PREGNANCY, DRUG USE, AND THE UNBORN CHILD: WHEN A BABY'S LIFELINE LEADS TO NEONATAL DRUG WITHDRAWAL

*Kristie M. Pierce*<sup>†</sup>

### ABSTRACT

*As the war on drugs rages on in America, the most innocent victims shine a beacon of hope on the controversial laws concerning fetal personhood. Conflicting state laws regarding criminal prosecution of women who use drugs during pregnancy have illuminated the deficient legal rights afforded to the unborn in America. A society has a duty to protect its most fragile citizens from exposure to toxic drugs, including its unborn children. Recent cases in Alabama, North Dakota, and New Jersey have reflected the tension in states trying to balance this duty to protect with the rights of women in the modern privacy rights era. This article evaluates these cases and suggests the best approach for states struggling to navigate the treacherous landscape of fetal rights.*

*The criminalization of drug use during pregnancy has the potential to open a new era of protection for the unborn. It is time for the states to recognize fetal lives as children and afford them the utmost protection against abuse. This article unlocks the current state of the law against mothers who abuse drugs during pregnancy and reveals the proper guides for states dealing with women who have given birth to drug addicted infants.*

### I. INTRODUCTION

Drug-addicted women and unexpected pregnancies are unfortunate companions. In some cases, these women curb their addictions throughout their pregnancies with the support of their families and health care providers. But what about the women who cannot put their addictions on

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hold for the approximately nine months that it takes to carry a child? Currently, whether a woman will face repercussions for exposing her unborn child to harmful drugs depends on a number of factors. The lack of proper attention to the rights of unborn children has caused many children to be born struggling to break free from drug addiction. This Comment reviews the current legal treatment of prenatal drug abuse and addresses how the law should respond when newborns test positive for illegal drugs.

Modern abortion laws have made it clear that for certain purposes, unborn children are not always entitled to the right to life.<sup>1</sup> However, in the realm of torts, a person may be held liable for injuries inflicted on a fetus, so long as that fetus is later born alive.<sup>2</sup> Many states, however, protect women from facing any penalty for actions taken during pregnancy, intentionally or unintentionally, which harm their child upon birth. This complex medley of definitions and protections has led to a judicial system that recognizes that an unborn child may be a person, and something other than a person, at the same time. In recent years, this inconsistency has carried over to the realm of criminal child abuse prosecutions.<sup>3</sup>

The prosecution of mothers using illegal substances during pregnancy, for the resulting harm caused to their children, has reignited the discussion of personhood for the unborn. The issue is a sensitive issue that requires courts to balance many competing critical interests.<sup>4</sup> One court noted that two of the competing interests are a parent's constitutionally protected right "to raise a child and maintain a relationship with that child, without undue interference by the state," and "the State's *parens patriae* responsibility to protect the welfare of children."<sup>5</sup> Despite the ultimate goal of child protection, the majority of courts have hesitated to find mothers guilty of criminal offenses for using drugs while pregnant.<sup>6</sup>

This Comment addresses the judicial history and modern debate regarding prenatal personhood with respect to child abuse prosecutions for drug use during pregnancy. To supplement the limited body of criminal law

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1. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

2. *Jasinsky v. Potts*, 92 N.E.2d 809 (Ohio 1950).

3. See discussion *infra* Part II.

4. *N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L.*, 59 A.3d 576, 585-86 (2013).

5. *Id.*

6. James G. Hodge, Annotation, *Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child*, 70 A.L.R.5th 461 (1999).

regarding prenatal drug abuse, some civil child protection law will also be discussed. Part II addresses the evolution of the issue. First, the development and history of prosecutions for drug use during pregnancy will be discussed. Next, Part II discusses recent state supreme court cases, illustrating the inconsistency among the state courts. Part III addresses the problems that have arisen because of these inconsistent standards being applied to new mothers struggling to understand the complex law. Lastly, Part IV proposes a number of measures that should be employed on the state and federal levels to address mothers whose newborn children test positive for drugs.

## II. BACKGROUND

### A. *The Rise of Rights for the Addicted Infant*

The first attempt to charge a drug-using expectant mother with child abuse occurred just four years after the landmark case of *Roe v. Wade*.<sup>7</sup> The California case rejected the prosecution of a mother on the basis that an unborn child is not within the intended statutory meaning of the word "child."<sup>8</sup> The first conviction for prenatal child abuse resulting from a pregnant mother's drug use occurred in 1997 in South Carolina in *Whitner v. State*.<sup>9</sup> The defendant appealed to the Supreme Court of the United States, which declined to accept the matter.<sup>10</sup> The Court's denial of certiorari allowed the states to continue resolving the matter on a state-by-state basis. Recently, women in other states faced criminal charges for using drugs during pregnancy.<sup>11</sup> Several of the women charged brought the issue before their highest state courts.<sup>12</sup> These developments are discussed below.

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7. *Roe v. Wade*, 410 U.S. 113 (1973); *Reyes v. Super. Ct.*, 75 Cal. App. 3d 214 (Cal. Ct. App. 1977).

8. *Reyes*, 75 Cal. App. 3d at 216.

9. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

10. *Whitner v. South Carolina*, 523 U.S. 1145 (1998).

11. See *Ex parte Ankrom*, 2013 WL 135748 (Ala. 2013); *State v. Stegall*, 828 N.W.2d 526 (N.D. 2013); *N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L.*, 59 A.3d 576 (N.J. 2013).

12. *Ankrom*, 2013 WL 135748; *Stegall*, 828 N.W.2d 526; *A.L.*, 59 A.3d 576.

1. *Reyes v. Superior Court of San Bernardino County*: The Beginning of the Issue

The first case dealing with prenatal child abuse related to exposure of controlled substances in the womb was *Reyes v. Superior Court of San Bernardino County*.<sup>13</sup> The California Court of Appeals considered whether a woman addicted to heroin could be charged with child endangerment for using heroin throughout her pregnancy.<sup>14</sup> The defendant, a mother who ignored warnings from a public health nurse, gave birth to twins, both addicted to heroin and suffering symptoms of withdrawal.<sup>15</sup> The prosecutor charged the woman with two counts of felony child endangerment.<sup>16</sup> The California child-endangerment statute provided for criminal charges to anyone who willfully caused a child within their custody to be placed in a dangerous situation, or a situation likely to produce great bodily harm or death to the child.<sup>17</sup>

On the heels of *Roe v. Wade*,<sup>18</sup> the court focused its analysis on the determination of whether a fetus constituted a "child."<sup>19</sup> Ultimately, the court held that a fetus was not within the legislature's intended definition of a child for the purpose of criminal child endangerment.<sup>20</sup> The court reasoned that, despite the recognition of a fetus as a person in other areas of law, an unborn child is not generally thought to be in the custody of its mother until birth.<sup>21</sup> Additionally, the court acknowledged that it would be disproportionate to punish mothers who use drugs during pregnancy more severely than those who obtained illegal abortions.<sup>22</sup> While the application of this ruling was limited to California, it began a line of future decisions regarding prenatal drug abuse with similar holdings.<sup>23</sup>

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13. *Reyes*, 75 Cal. App. 3d at 214.

14. *Id.* at 216.

15. *Id.*

16. *Id.*

17. *Id.*; CAL. PENAL CODE § 273(a) (West 1997).

18. *Roe v. Wade*, 410 U.S. 113 (1973).

19. *Reyes*, 75 Cal. App. 3d at 217.

20. *Id.* at 219.

21. *Id.* at 218-19.

22. *Id.* at 218.

23. See *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist Ct. App. 1991); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992).

2. *Whitner v. State*: The First Criminal Conviction for Pre-Natal Substance Use

a. Factual setting of the case

*Whitner v. State*<sup>24</sup> was the first appellate-level case in which a state successfully prosecuted a mother for using illicit drugs during pregnancy.<sup>25</sup> The case involved a woman who used cocaine during her third trimester of pregnancy.<sup>26</sup> The woman later gave birth to a son who had cocaine metabolites in his system.<sup>27</sup> The court did not mention any specific symptom or illness affecting the child, however, the woman was charged with criminal child neglect.<sup>28</sup> The defendant pleaded guilty to the offense, reserving the right to appeal, and received a sentence of eight years in prison.<sup>29</sup>

The defendant appealed her conviction on the basis that the court lacked subject matter jurisdiction because child neglect was not intended to apply to harm caused by a mother to her unborn child.<sup>30</sup> The South Carolina Supreme Court considered this argument but determined that the state had a long history of considering the term “person” to include fetuses.<sup>31</sup> With respect to the lack of evidence of actual harm, the court noted that it is well documented and within common knowledge that the use of drugs can cause serious harm to a viable unborn child.<sup>32</sup>

b. Definition of child

The main argument before the court was whether the term “child” can include a viable fetus for the criminal child neglect statute.<sup>33</sup> The court highlighted a long line of cases in other states that have excluded fetuses from the class of individuals protected under criminal child abuse statutes,

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24. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); James G. Hodge, Jr., Annotation, *Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child*, 70 A.L.R.5th 461 (Supp. 1999).

25. *Id.*

26. *Id.* at 778-79.

27. *Id.* at 778.

28. *Id.*

29. *Id.* at 778-79.

30. *Id.* at 779.

31. *Id.*

32. *Id.* at 782.

33. *Id.* at 779.

but distinguished many of those cases because they dealt specifically with defining the terms “delivery” and “distribution.”<sup>34</sup> Relying on a body of case law specific to South Carolina, the court extended prosecution to a pregnant mother’s drug use.<sup>35</sup> The court noted South Carolina’s longstanding recognition that a viable human fetus is a person with certain rights and privileges.<sup>36</sup> Citing previous South Carolina cases, the court relied on the determination that “since a viable child is a person before separation from the body of its mother and since prenatal injuries tortiously inflicted on such a child are actionable, it is apparent that the complaint alleges such an ‘act, neglect or default’ by the defendant, to the injury of the child.”<sup>37</sup>

The court, in later discussion, also analyzed a Massachusetts case similar to *Whitner*.<sup>38</sup> The Massachusetts case required the court to determine the rights of a fetus injured by the mother’s drug use.<sup>39</sup> The Massachusetts court concluded that a fetus has rights pursuant *only* to the parent’s desires.<sup>40</sup> Additionally, the court acknowledged that the state has an interest in vindicating the life of a viable fetus, but this is not a right of the unborn child, rather it is a state right.<sup>41</sup> The *Whitner* court declined to adopt the reasoning held by Massachusetts, stating: “the rationale underlying our body of law—protection of the viable fetus—is radically different from that underlying the law of Massachusetts.”<sup>42</sup> Therefore, the court determined that a fetus is included in the plain meaning of the word “child.”<sup>43</sup>

### c. Defendant’s challenge

In addition to her jurisdictional challenge, the defendant argued two constitutional issues. First, the defendant argued that the statute, as written, failed to provide her with fair notice.<sup>44</sup> This argument was quickly dismissed

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34. *Id.* at 782.

35. *Id.* at 782-83.

36. *Id.* at 779.

37. *Id.* at 780 (citing *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964)) (emphasis omitted).

38. *Id.* at 782-83 (citing *Commonwealth v. Pellegrini*, No. 87970 (Mass. Super. Ct. Oct. 15, 1990)).

39. *Id.* at 783.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 785.

44. *Id.* at 784.

by the court on the basis that a fetus is within the plain meaning of the word “child,” and on the basis that the potential for injuries caused by the use of cocaine during pregnancy is common knowledge.<sup>45</sup> The defendant’s second constitutional argument was a “right to privacy” argument inspired by the reasoning of the United States Supreme Court in *Roe v. Wade*.<sup>46</sup> The court dismissed the defendant’s assertion that she had a fundamental right to privacy to use crack cocaine during her pregnancy.<sup>47</sup> The court reasoned that because the use of crack cocaine is illegal regardless of one’s pregnancy status, merely being pregnant was insufficient to elevate the defendant’s drug use to a fundamental right.<sup>48</sup> Since the defendant’s rights did not change during her pregnancy, the court found that her right to privacy had not been violated.<sup>49</sup> After the South Carolina Supreme Court affirmed the defendant’s conviction, Whitner appealed to the Supreme Court of the United States.<sup>50</sup> However, the Court denied certiorari, leaving the matter to be resolved by the states on a case-by-case basis.<sup>51</sup>

### 3. *In re Baby Boy Blackshear*

#### a. Definition of child

In 2000, the Ohio Supreme Court affirmed the conviction of child abuse after a woman gave birth to a son who tested positive for cocaine metabolites in his system.<sup>52</sup> The court, much like South Carolina, determined whether the charges were appropriate by determining whether the word “child” includes an unborn fetus.<sup>53</sup> After stating, “It is clear that the action taken by [the mother] caused [the child] injury—both before and after birth,”<sup>54</sup> the court determined that the legislature intended the statute

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45. *Id.* at 785.

46. *Id.*; see *Roe v. Wade*, 410 U.S. 113 (1973).

47. *Whitner*, 492 S.E.2d at 785.

48. *Id.* at 786.

49. *Id.*

50. *Whitner v. South Carolina*, 523 U.S. 1145 (1998).

51. *Id.*

52. *In re Baby Boy Blackshear*, 736 N.E.2d 462 (Ohio 2000). The court previously established that, for child custody proceedings, neglect and abuse includes injuries inflicted by a mother’s use of cocaine and opiates during pregnancy. *In re Ruiz*, 500 N.E.2d 935, 936 (Ohio C.P. Juv. Div. 1986).

53. *Blackshear*, 736 N.E.2d at 463.

54. *Id.* at 464-65.



to cover a child's post-birth injury.<sup>55</sup> Thus, the court held that when a newborn tests positive for an illegal drug, due to prenatal drug abuse, the newborn is "per se an abused child."<sup>56</sup> The court reached its conclusion after noting that newborns are entitled to constitutional rights, and "there can be no more sacred or precious right of a newborn infant than the right to life and to begin that life, where medically possible, healthy, and uninjured."<sup>57</sup>

b. Dissenting opinion

The majority opinion in *Blackshear* was met by a dissent that focused on an essential issue. Justice Cook disagreed with the majority's classification of a child exposed to drugs in utero as a "per se abused child."<sup>58</sup> The dissent noted that the statute does "not require that the parents *inflict injury after birth*. It merely requires that the child *suffer injury*, due to an act by the parents, that harms or threatens to harm the child's health or welfare."<sup>59</sup> The dissent takes issue with the court's equation of a positive drug screen with injury of the newborn.<sup>60</sup> While a positive drug screen of an infant would support the conclusion that an infant has been injured, the injury must be proven by clear and convincing evidence rather than simply assumed.<sup>61</sup> As such, the dissent suggested the case should be remanded for a further examination of the record to determine whether the exposure to cocaine caused an actual harm, or threat of harm, to the child.<sup>62</sup> This view has gained popularity with courts today and will be discussed at length in the next section.<sup>63</sup>

Following the *Blackshear* case, the state of Ohio has returned to its previous determination that a mother may not be prosecuted for child endangerment for drug use during pregnancy.<sup>64</sup> This shift is illustrated in the 2013 case of *State v. Clemons*<sup>65</sup> where the court dismissed criminal charges, of corrupting another with drugs, that were filed against one

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55. *Id.* at 465.

56. *Id.*

57. *Id.*

58. *Id.* at 465-66 (Cook, J., dissenting).

59. *Id.* at 466.

60. *Id.*

61. *Id.*

62. *Id.*

63. See discussion *infra* Part II.B.3.

64. *State v. Gray*, 584 N.E.2d 710 (Ohio 1992).

65. *State v. Clemons*, 996 N.E.2d 507 (Ohio Ct. App. 2013).

mother.<sup>66</sup> Despite the court's determination that a fetus was within the definition of a person, the Ohio legislature provided specific exemptions to mothers whose conduct during pregnancy results in harm to the child.<sup>67</sup> In holding as such, the court encouraged the legislature to consider an appropriate response to the growing problem of prenatal drug use.<sup>68</sup>

### B. *The Continuing Debate*

After *Blackshear*, there was little recognition of criminal prosecution for mothers who abused chemical substances during pregnancy.<sup>69</sup> Recently, however, some states have illustrated a shift towards broader recognition of fetal rights with respect to prenatal child abuse. The following section discusses three recent state supreme court cases that address the present state of prenatal child abuse. The split today closely follows the prevailing opinions when this issue first arose in the 1970's. Additional courts, however, have recognized that an unborn child either does, or may under certain circumstances, have rights concerning a mother's drug use during pregnancy. The strengthening split in the jurisdictions has reopened the discussion of defining an unborn child as a "person" or "child."

#### 1. *Ex Parte Ankrom*

Alabama's approach, illustrated in *Ex Parte Ankrom*,<sup>70</sup> represents one extreme regarding fetal rights. In a case that turned on whether an unborn child would be recognized as a "child," the court held that unborn children

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66. *Id.* at 507.

67. *Id.* at 511. The statute "essentially protects conduct by a woman during her pregnancy that might or does result in the injury, illness, impairment or death of her child, either before or after its birth. Thus, based upon a plain reading of the statute, a woman cannot be criminally prosecuted for her conduct during pregnancy that results in harm to her child." *Id.* (citing OHIO REV. CODE ANN. § 2901.01(B)(2)(b) (West 2012)).

68. *Clemons*, 966 N.E.2d at 512.

69. See *State v. Armstard*, 991 So. 2d 116 (La. Ct. App. 2008) (holding that a mother cannot be charged with juvenile endangerment for drug use during pregnancy because the transmission of the substance through the umbilical cord to the child was not a voluntary act); *State v. Wade*, 232 S.W.3d 663 (Mo. Ct. App. 2007) (holding that the child endangerment statute does not apply to a mother's conduct against her unborn child); *State v. Martinez*, 137 P.3d 1195 (N.M. Ct. App. 2006) (holding that the state could not prosecute the mother for child abuse for using cocaine during her pregnancy); *State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005) (overturning a mother's manslaughter charges and determining that a fetus is not a person under the manslaughter statute).

70. *Ex parte Ankrom*, 2013 WL 135748 (Ala. 2013).

do qualify as children under state law.<sup>71</sup> As illustrated in this Comment, this approach is held by only a minority of courts, but is gaining recognition. Alabama focused on the need to protect unborn children and combat the problem of drug use during pregnancy.<sup>72</sup> The court considered this interest in protecting children as one that outweighed a mother's interest in avoiding criminal penalties for prenatal activity.<sup>73</sup>

a. Factual setting of the case

*Ex parte Ankrom* was the appeal of two consolidated cases before the Alabama Supreme Court.<sup>74</sup> Two mothers, both charged for acts during pregnancy, appealed their criminal child abuse convictions.<sup>75</sup> The first mother gave birth to a child who tested positive for cocaine shortly after birth.<sup>76</sup> The mother was "arrested and charged with chemical endangerment of a child."<sup>77</sup> The second mother was charged after her child was born more than fourteen weeks premature and lived only nineteen minutes.<sup>78</sup> The child's cause of death was determined to be acute methamphetamine intoxication.<sup>79</sup> The second child's mother was charged with chemical endangerment of a child that resulted in death.<sup>80</sup> The mother in the first case pleaded guilty and was sentenced to three years' imprisonment.<sup>81</sup> The sentence was suspended in exchange for one year of probation.<sup>82</sup> The mother in the second case also pleaded guilty, reserving the right to appeal.<sup>83</sup> She was sentenced to ten years' imprisonment.<sup>84</sup>

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71. *Id.* at \*20.

72. *Id.* at \*1.

73. *Id.*

74. *Id.* at \*1.

75. *Id.* at \*1-2.

76. *Id.*

77. *Id.* at \*1.

78. *Id.* at \*3.

79. *Id.*

80. *Id.* at \*2.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

### b. Legal Analysis

Following the convictions, both mothers appealed.<sup>85</sup> The cases were consolidated, and the mothers raised three main arguments in their appeal: i) the term “child” does not include a viable fetus; ii) convicting new mothers who struggle with substance abuse is bad public policy; and iii) the convictions violated the United States and Alabama Constitutions.<sup>86</sup> The court spent the majority of its analysis on the first challenge. The court refrained from considering the public policy issue, recognizing the legislature is free to amend the statute to produce a different result.<sup>87</sup> The constitutional arguments were not addressed because the defendants failed to raise the issues in their initial grounds of first impression, on which the court granted certiorari review.<sup>88</sup> Thus, the case again turned on the court’s definition of the word “child.”<sup>89</sup>

The court upheld the convictions after finding that the term “child” includes all persons under the age of eighteen, rather than a person between the age of birth and eighteen.<sup>90</sup> In doing so, the court rejected the opinion held by the majority of states that have denied extending protection to unborn children from their mothers’ prenatal drug abuse.<sup>91</sup> The court reasoned that the meaning intended by the legislature is the meaning that should be used.<sup>92</sup> The court determined the legislative intent regarding the meaning of the word “child” was not evident.<sup>93</sup> Thus, the court applied the “plain meaning” of the word as defined in the statute, which it determined was broad enough to include the unborn within its protection.<sup>94</sup>

*Ex Parte Ankrom* is representative of the conservative views held in South Carolina and Alabama.<sup>95</sup> These states have each noted that they have

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85. *Id.* at \*4.

86. *Id.* at \*8.

87. *Id.* at \*19.

88. *Id.*

89. *Id.* at \*20.

90. *Id.* at \*17.

91. *Id.*

92. *Id.* at \*19.

93. *Id.* at \*15.

94. *Id.* In 2006, Alabama enacted the Brody Act, which redefined the term “person” for the purpose of criminal homicide as “a human being, including an unborn child in utero at any stage of development, regardless of viability.” ALA. CODE § 13A-6-1 (2014).

95. *State v. Stegall*, 828 N.W.2d 526, 532 (N.D. 2013).

a history of including the unborn within the definition of “child.”<sup>96</sup> The court in *Ankrom* noted that Alabama has afforded a viable fetus certain protections in the fields of homicide law and civil liability for wrongful death.<sup>97</sup> The court cited an earlier case stating, “[I]t would be ‘grossly inconsistent . . . to construe a viable fetus as a ‘person’ for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context.”<sup>98</sup> Two justices dissented, reasoning that the legislature did not intend to include the unborn within the protection of the chemical endangerment statute.<sup>99</sup>

The Alabama Supreme Court confirmed its position regarding the chemical endangerment of a child exposed to drugs while in utero in April 2014.<sup>100</sup> In *Hicks v. State*, a woman appealed her conviction for chemical endangerment after she delivered a child who tested positive for cocaine in his system at birth.<sup>101</sup> The court reiterated that the term “child” in the chemical-endangerment statute<sup>102</sup> unambiguously refers to all children—born and unborn.<sup>103</sup> The court also held that the statute, as applied against mothers who use drugs during pregnancy, is not unconstitutionally vague.<sup>104</sup> Rather, the court stated that the statute plainly “protects all children, born and unborn, from exposure to controlled substances.”<sup>105</sup>

## 2. *State v. Stegall*

The Supreme Court of North Dakota also addressed prenatal substance abuse in 2013.<sup>106</sup> Unlike the *Ankrom* case, the court in *State v. Stegall*<sup>107</sup> ultimately held that an unborn child is not within the protection of the North Dakota statute regarding child endangerment.<sup>108</sup> *Stegall* followed the

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96. *Id.*

97. *Ankrom*, 2013 WL 135748 at \*6 (citing *Fowler v. Woodward*, 138 S.E.2d 42 (1964) and *State v. Horne*, 319 S.E.2d 703 (1984)).

98. *Id.* (citing *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984)).

99. *Id.* at \*24 (Murdock, J., dissenting); *id.* at \*25 (Malone, J., dissenting).

100. *Hicks v. State*, 2014 WL 1508698 (2014).

101. *Id.* at \*1.

102. ALA. CODE § 26-15-3.2 (2014).

103. *Hicks*, 2014 WL 1508698 at \*5-6.

104. *Id.* at \*12.

105. *Id.*

106. *State v. Stegall*, 828 N.W.2d 526 (N.D. 2013).

107. *Id.*

108. *Id.* at 531-33.

2009 North Dakota Supreme Court case of *State v. Geiser*,<sup>109</sup> which held that a woman who overdosed on drugs and gave birth to a deceased child at twenty-nine weeks was exempt from punishment under the state statute pertaining to offenses committed against the unborn.<sup>110</sup> Four years later, *Stegall* required the court to address the issue of women who expose their unborn children to drugs during pregnancy and later give birth to living children who test positive for drugs.<sup>111</sup>

a. Factual setting of the case

*Stegall* was the consolidation of three cases addressing criminal child endangerment charges for prenatal drug use.<sup>112</sup> *Stegall* gave birth to a child who tested positive for methamphetamine shortly after birth.<sup>113</sup> As a result, the state charged *Stegall* with endangerment of a child.<sup>114</sup> Following the charges, *Stegall* fled from arrest, but was apprehended six months later.<sup>115</sup> The case was dismissed by the trial court on the determination that *Stegall* had not “knowingly or intentionally” caused the child’s exposure to the chemical substance.<sup>116</sup>

The second defendant in the case, *Hettich*, was charged with criminal child endangerment after giving birth to twins.<sup>117</sup> The twins tested positive for methamphetamine shortly after birth.<sup>118</sup> Testing done at the hospital also revealed that the mother had methamphetamine in her system.<sup>119</sup> The trial court dismissed the complaint, holding that the state failed to prove probable cause to support a charge of child endangerment.<sup>120</sup> The third defendant, *Lamon*, was charged with one count of endangerment of a child

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109. *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009).

110. *Id.* at 470. Under North Dakota law, “[a] person is guilty of negligent homicide of an unborn child, a class C felony, if the person negligently causes the death of an unborn child.” N.D. CENT. CODE ANN. § 12.1-17.1-04 (West 1987). However, the word “person,” as applicable to criminal offenses against unborn children, does not include the child’s mother. N.D. CENT. CODE ANN. § 12.1-17.1-01(2) (West 1987).

111. *Stegall*, 828 N.W.2d at 528.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 529.

after giving birth to a son who tested positive for methamphetamine immediately after birth.<sup>121</sup> The trial court dismissed the complaint despite the state's argument that the child continued to be exposed to the substance after birth.<sup>122</sup>

b. Legal analysis

The North Dakota Supreme Court had previously determined that the child endangerment statute was not intended to apply to drug use that causes a pregnant mother to give birth to a stillborn child.<sup>123</sup> Thus, the court in *Stegall* was addressing only the narrow issue of whether the child endangerment statute applies to postpartum injuries sustained by a child due to a mother's drug use during pregnancy.<sup>124</sup> Relying on the *Geiser* case, the court determined that the statute was not intended to apply to injuries inflicted in utero.<sup>125</sup> Balancing this case with the court's previous holdings, the court reasoned that it would be inconsistent to punish a mother whose child is born alive with drugs in its system, but not to punish a mother whose drug use caused fatal injury to the child before its birth.<sup>126</sup> The court stated that it would be an "absurd result" to "criminalize conduct that is not a crime at the time the conduct occurs, is not a crime if the unborn child dies in utero, but is a crime only by virtue of its effect on the child born alive."<sup>127</sup> Thus, the court affirmed all three of the dismissals.<sup>128</sup> This case solidified the rule of law in North Dakota that unborn children have little protection against the actions of their mothers regardless of whether they suffer minimal, life-long, or even fatal injuries.

The court further exposed children to abuse by explicitly stating that the state would not punish mothers whose drug use results in a miscarriage, noting:

[T]here is no distinction between a factual scenario in which the pregnant woman prenatally ingests a controlled substance and the child subsequently dies in utero and the factual scenario in which the child is born alive for purposes of criminal prosecution

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121. *Id.*

122. *Id.*

123. *Id.* at 531-32 (citing *State v. Geiser*, 763 N.W.2d 469, 470 (N.D. 2009)).

124. *Stegall*, 828 N.W.2d at 529.

125. *Id.* at 532-33.

126. *Id.* at 533.

127. *Id.*

128. *Id.*

of the mother. This conclusion is supported by our decision in *Geiser* in which we held an unborn viable fetus is not a child under the endangerment of a child statute and, therefore, a mother is not criminally liable for endangerment of a child under [the statute] for acts she commits that expose her unborn child to controlled substances.<sup>129</sup>

As such, a pregnant woman in North Dakota cannot face criminal penalties for any prenatal conduct that ultimately harms her child.<sup>130</sup>

3. *New Jersey Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L.*

As the name indicates, the case of *New Jersey Department of Children and Family Services*<sup>131</sup> was a child custody proceeding rather than a criminal case. Despite the difference in the nature of the proceedings, it lends helpful insight to the issue of child abuse and neglect resulting from prenatal drug use. The court held similarly to the dissenting opinion in *Blackshear*,<sup>132</sup> noting that the statute could apply to drug use during pregnancy only if the child clearly manifested some actual post-birth injury.<sup>133</sup>

a. Factual setting of the case

The New Jersey case involved a woman, identified only as A.L., who gave birth to a child that tested positive for cocaine.<sup>134</sup> The mother also tested positive for cocaine shortly before the birth of her child.<sup>135</sup> The child was monitored at the hospital and all tests revealed that the child was healthy and “normal” shortly after his birth, the following day, and upon discharge.<sup>136</sup> Despite multiple positive drug tests during her pregnancy, the mother denied using drugs.<sup>137</sup> The Division of Youth & Family Services

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129. *Id.* at 532-33 (citing *State v. Geiser*, 763 N.W.2d 469, 469 (N.D. 2009)).

130. *Id.*

131. *N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L.*, 59 A.3d 576 (N.J. 2013).

132. *In re Baby Boy Blackshear*, 736 N.E.2d 462, 465-66 (Ohio 2000) (Cook, J., dissenting).

133. *A.L.*, 59 A.3d at 592.

134. *Id.* at 581.

135. *Id.*

136. *Id.* at 582.

137. *Id.* at 581.



promptly responded to the positive drug report from the hospital.<sup>138</sup> Their investigation included discussions with A.L.'s five-year-old child, A.L.'s parents, with whom the older child lived, and the father of the newborn child.<sup>139</sup> The report from these initial meetings revealed that the older child was appropriately dressed and groomed, however, the Division initiated a Safety Protection Plan, which required A.L.'s parents to supervise her contacts with her children.<sup>140</sup>

Solely in response to the mother's two positive drug tests during her pregnancy and the child's positive drug test, the Division moved for a finding of abuse and neglect by A.L. and had the children placed in protective custody.<sup>141</sup> The trial court entered the order of abuse and neglect against the mother after finding that the existence of cocaine in the child's system was evidence that the mother had exposed the child to "substantial risk of harm."<sup>142</sup> The appellate court affirmed the findings.<sup>143</sup> The lower courts focused on the *potential* for imminent harm and the strong risk for harm that is present when newborns test positive for cocaine.<sup>144</sup>

b. Legal analysis

The New Jersey Supreme Court reversed the finding of the lower courts and the Division of Youth & Family Services after determining that the record lacked evidence of any actual harm suffered by the child.<sup>145</sup> The court noted that the use of the word "child" in the neglect and abuse statute had been interpreted to apply to a child from birth to eighteen years.<sup>146</sup> Thus, "the primary question under Title 9 [the abuse and neglect statute,] is whether A.D., as a newborn, had been impaired or was in imminent danger of becoming impaired as a result of his mother's failure to exercise a minimum degree of care . . . ."<sup>147</sup> The court analyzed the New Jersey child protection statutes in detail, noting that several other statutes exist to deal

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138. *Id.*

139. *Id.*

140. *Id.* at 581-82.

141. *Id.* at 582.

142. *Id.* at 583.

143. *Id.*

144. *Id.* at 583-84.

145. *Id.* at 592.

146. *Id.* at 587.

147. *Id.* at 588 (internal quotation marks omitted).

particularly with expectant mothers struggling with drug addiction.<sup>148</sup> The court specifically noted:

The Legislature has also provided two additional bases to protect children in these circumstances: (1) the Division can offer services to expectant and new mothers under certain circumstances, with their consent; and (2) the Division can seek a court order to intervene and require a mother to undergo treatment, or seek other relief, if the best interests of the child so require.<sup>149</sup>

Thus, the court held that the neglect and abuse statute was improperly applied to the case of A.L. due to the lack of any proven harm or imminent risk to the child.<sup>150</sup> It is important to note that the court focused not on the fact that the child had not been injured, but on the lack of evidence to reveal the severity or extent of the mother's drug use, how recently she had used drugs, and the potential for future harm to the child.<sup>151</sup>

### c. Balancing of interests in New Jersey

Because this case was a child protection case rather than a criminal case, the court was able to evaluate the issue of prenatal drug use in the context of a large body of established law protecting children from various forms of abuse.<sup>152</sup> This case sufficiently recognizes that unborn children have a need for protection, yet a family unit may not be best served by severe sanctions against a mother who has given birth to an otherwise normal child.<sup>153</sup> The

148. *Id.* at 595.

149. *Id.* at 581 (citations omitted).

150. *Id.* at 592. Montana has taken a similar approach regarding children who suffer visible injury at the time of birth. *In re M.J.*, 296 P.3d 1197, 1198 (Mont. 2013). Custody of one mother was terminated in a neglect and abuse proceeding when her baby, who tested positive for methamphetamine and marijuana, was born suffering "from liver disease, gastric reflux disease, cycocel trite, cloudy corneas, a partial occipital infarct, hearing and visual impairments, seizures, and brain damage." *Id.*

151. *A.L.*, 59 A.3d at 589. ("A court 'need not wait to act until a child is actually irreparably impaired by parental inattention or neglect.'") (citing *In re Guardianship of D.M.H.*, 736 A.2d 1261 (N.J. 1999)).

152. *Id.* at 580.

153. *See id.*

outcome of this case may have been entirely different had the child been born with clear signs of harm due to its prenatal exposure to drugs.<sup>154</sup>

In the realm of child protective services, the focus of the proceedings is broadened and the ultimate goal is to find a solution that is in the best interest of the child.<sup>155</sup> The courts must balance the competing interests of “a parent’s constitutionally protected right to raise a child and maintain a relationship with that child, without undue interference by the state, and the State’s *parens patriae* responsibility to protect the welfare of children.”<sup>156</sup> This broader approach of considering the state’s interest in protecting children from harm by their mothers during and after pregnancy should be the standard in criminal proceedings as well.

d. Application of the New Jersey rule

The ruling in the case of *A.L.* has been applied in two subsequent cases in which the court found that the mothers’ drug use during pregnancy constituted abuse and neglect.<sup>157</sup> In both cases, the children suffered from observable physical ailments as a result of the exposure to drugs in the womb.<sup>158</sup> In *New Jersey Division of Youth & Family Services v. D.E.J.*,<sup>159</sup> the court found that a mother of four neglected her newborn child who tested positive for drugs.<sup>160</sup> The judge reasoned that the infant’s positive drug test and withdrawal symptoms were sufficient to sustain an abuse and neglect finding.<sup>161</sup> The court noted that the mother had previously given birth to two other children who tested positive for drugs at birth.<sup>162</sup> With the current child, the withdrawal symptoms required that the newborn remain

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154. *Id.* at 584. See *In re Guardianship of K.H.O.*, 161 N.J. 337, 344, 351 (1999) (holding that parental rights were appropriately terminated when the child required a month-long hospitalization due to withdrawal symptoms, required two surgeries for a cleft palette, and experienced long-term hearing impairment).

155. *A.L.*, 59 A.3d at 586.

156. *Id.* at 585-86 (citations omitted) (internal quotation marks omitted).

157. See *N.J. Div. of Youth & Family Servs. v. D.E.J.*, 2013 WL 3064447, \*5 (N.J. Super. Ct. App. Div. 2013) (holding that the mother abused and neglected the child born with a positive drug test and suffered feeding intolerance, symptoms of withdrawal and was in a “medically fragile” state); *N.J. Div. of Youth & Family Servs. v. Y.N.*, 431 N.J. Super. 74 (N.J. Super. Ct. App. Div. 2013).

158. *D.E.J.*, 2013 WL at \*5; *Y.N.*, 431 N.J. Super. at 76.

159. *D.E.J.*, 2013 WL 3064447.

160. *Id.* at \*1, \*9.

161. *Id.*

162. *Id.* at \*9.

hospitalized for five weeks after birth.<sup>163</sup> The court reiterated that “not every instance of drug use by a parent during pregnancy, standing alone, will substantiate a finding of abuse and neglect[.]”<sup>164</sup> Moreover, “[p]roof that a child’s mother frequently used cocaine or other dangerous substances during pregnancy would be relevant to that issue.”<sup>165</sup>

In a second case, the Superior Court of New Jersey affirmed a finding of abuse and neglect in the case of a mother who gave birth to a child whose severe withdrawal required treatment in the NICU and numerous doses of morphine over an extended period of time.<sup>166</sup> The court also noted that “[w]here there is evidence of actual impairment, it is immaterial whether the drugs taken were from a legal or illicit source.”<sup>167</sup> These cases illustrate that the New Jersey law is more workable than the approaches of Alabama and North Dakota. The approach not only recognizes that unborn children are entitled to a healthy life, but also preserves the mother’s rights by punishing the mother only when actual damages have arisen.

### III. PROBLEM

#### A. *The Reason for the Various State Statutes*

The cases addressed above illustrate the complexity of the competing interests to be considered when approaching the topic of sanctioning drug use during pregnancy. To date, at least seventeen states have attempted to criminally prosecute women who have exposed their unborn children to drugs during pregnancy.<sup>168</sup> Whether the consequences are criminal punishment, or termination of parental rights, the impact of the law in this area can be life long. The courts must properly consider women’s

163. *Id.*

164. *Id.* at \*8 (alteration in original) (internal quotation marks omitted).

165. *Id.* (emphasis in original) (citations omitted).

166. N.J. Div. of Youth & Family Servs. v. Y.N., 431 N.J. Super. 74 (N.J. Super. Ct. App. Div. 2013).

167. *Id.* at 82.

168. Matthew Derringer, *If Addiction Is A Mental Disease, Let’s Start Treating It Like One: An Additional Recommendation for the Indiana General Assembly’s Prenatal Substance Abuse Commission*, 8 IND. HEALTH L. REV. 141, 147-48 (2011). The states include Indiana, Florida, Michigan, Pennsylvania, Texas, Ohio, Nevada, Maryland, Missouri, Kentucky, Louisiana and South Carolina. *Id.* at 148 n.34. Additionally, charges have been filed for prenatal drug use in North Dakota, Hawaii, California, Alabama, and New Mexico. See *supra* Part II; see also *supra* text accompanying note 69.

reproductive and parental rights while safeguarding the health and safety of its future citizens. This, of course, can lead to an array of legal and social issues. The following section further details many of the difficulties that have led to the current checkerboard approach of punishing mothers who use drugs during pregnancy.

### 1. What Exactly is a Fetus?

One of the determining factors in most states is whether a fetus is entitled to the same legal protections as a child, or more plainly, whether a fetus is a child.<sup>169</sup> Courts have chosen to answer this question in a variety of ways.<sup>170</sup> Therefore, the answer not only depends on the location of a mother and her unborn child, but also on the legal context of the issue. As illustrated in *Whitner v. State*, the Supreme Court of Alabama emphatically held that a viable fetus is a child.<sup>171</sup> Based on this strong conviction in Alabama, the state has determined that the chemical-endangerment of a child extends to born and unborn children alike.<sup>172</sup>

There are, however, also many states that exclude the unborn from certain legal rights and protections.<sup>173</sup> These states generally focus not on the interest of protecting unborn children, but on complex statutory schemes that have been developed in a piecemeal fashion and applied in a variety of contexts.<sup>174</sup> When given a chance to protect unborn children from the harmful effects of pre-birth exposure to drugs, states like New Jersey have instead defined their child neglect and abuse statutes to specifically protect only children from birth to age eighteen.<sup>175</sup> In such states, unborn children only receive protection when the results of the drug use can be fit into another category of crime. The resulting legal scheme fails to consistently protect the victims of prenatal drug use. Sadly, this approach also does little to deter women from prenatal drug use and has led to many successful constitutional challenges of the law as applied against mothers.

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169. See discussion *supra* Part II.

170. See discussion *supra* Part II.B.

171. *Whitner v. State*, 492 S.E.2d 777, 785 (S.C. 1997).

172. *Id.*

173. See discussion *supra* Part II.

174. *Reyes v. Super. Ct.*, 75 Cal. App. 3d 214, 217-18 (Ct. App. 1977); see discussion *supra* note 67.

175. *N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L.*, 59 A.3d 576, 587 (N.J. 2013).

In jurisdictions that do not consider the term “child” to include the victims of prenatal drug abuse, the next consideration is whether a fetus is an independent being from its mother. Some states have determined that until a child is born and living independently from its mother’s body, it is merely an extension of the mother’s body.<sup>176</sup> In this situation, drug use by a pregnant woman is equivalent to drug use by any other person. Thus, there would not be grounds for any heightened punishment relating to the health and welfare of the child.

While a fetus needs its mother for continued development and growth, significant problems arise when the law takes the position that a fetus is a mere part of the mother’s body.<sup>177</sup> This approach leads to the belief that a mother is free to do anything to her body and the child she carries. For example, in Virginia, one woman could not be criminally charged after she smothered her newborn child while the umbilical cord was still attached and the placenta was inside her body.<sup>178</sup> The Virginia law treats a fetus as a part of the mother’s body, and only provides penalties for individuals who injure “the fetus of another.”<sup>179</sup> If the act would have been committed by a third party, rather than the child’s mother, he or she would have been charged with a felony, punishable by five to forty years in prison.<sup>180</sup> Additionally, in Virginia an individual who knowingly murders a pregnant woman may receive a heightened sentence to account for the life of the unborn child.<sup>181</sup> These laws are applied in a discriminate fashion due to the confusion of fetal rights before the law. As a result, unborn children, even those children in their first moments of life outside the womb, are left to suffer at the hands of their mothers.

a. State personhood statutes

Three states have attempted to pass statutes explicitly granting “personhood” to unborn children. Colorado attempted, in 2008 and again in 2010, to pass statutes that would grant unborn children personhood

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176. Angela Hatcher, *Campbell County Mother Can't be Charged in Baby's Death*, WWBT-TV NBC 12 (Dec. 16, 2009), <http://www.nbc12.com/Global/story.asp?S=11690000>.

177. *Id.*

178. *Id.*

179. VA. CODE ANN. § 18.2-32.2 (West 2013).

180. *Id.*

181. VA. CODE ANN. § 18.2-32.1 (West 2013).

status.<sup>182</sup> Both ballot measures involved amending the state's constitution to define the word "person."<sup>183</sup> The 2008 proposed amendment defined the term person as "any human being from the moment of fertilization."<sup>184</sup> The 2010 version omitted the word fertilization and instead defined a person as "every human being from the beginning of the biological development of that human being."<sup>185</sup> The goals of the proposed amendments were to grant unborn children the same rights as all who have been born and to prohibit abortions.<sup>186</sup> Neither amendment was adopted.<sup>187</sup>

Mississippi and Oklahoma have also attempted to enact fetal personhood laws.<sup>188</sup> The Mississippi initiative proposed in 2011 would have amended the state constitution to extend personhood to "every human being from the moment of fertilization, cloning, or the functional equivalent thereof."<sup>189</sup> The Mississippi initiative was rejected by voters in 2011 and died on the

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182. Colo. amend. 48, Definition of Person (2008), [www.leg.state.co.us/lcs/ballothistory.nsf/](http://www.leg.state.co.us/lcs/ballothistory.nsf/) (follow "Next" hyperlink; then follow "Definition of Person" hyperlink); Colo. amend. 62, Application of the Term Person (2010), [www.leg.state.co.us/lcs/ballothistory.nsf/](http://www.leg.state.co.us/lcs/ballothistory.nsf/) (follow "Application of the Term Person" hyperlink).

183. *Id.*

184. Colo. amend. 48, Definition of Person (2008), [www.leg.state.co.us/lcs/ballothistory.nsf/](http://www.leg.state.co.us/lcs/ballothistory.nsf/) (follow "Next" hyperlink; then follow "Definition of Person" hyperlink).

185. Colo. amend. 62, Application of the Term Person (2010), [www.leg.state.co.us/lcs/ballothistory.nsf/](http://www.leg.state.co.us/lcs/ballothistory.nsf/) (follow "Application of the Term Person" hyperlink). This change was done in an attempt to grant broader rights to the unborn, including asexually reproduced human beings.

186. Electa Draper, "Personhood" Amendment Fails By 3-1 Margin, DENVER POST (Nov. 3, 2010), [www.denverpost.com/election2012/ci\\_16506253](http://www.denverpost.com/election2012/ci_16506253).

187. Colo. amend. 48, Definition of Person (2008), [www.leg.state.co.us/lcs/ballothistory.nsf/](http://www.leg.state.co.us/lcs/ballothistory.nsf/) (follow "Next" hyperlink; then follow "Definition of Person" hyperlink); Colo. amend. 62, Application of the Term Person (2010), [www.leg.state.co.us/lcs/ballothistory.nsf/](http://www.leg.state.co.us/lcs/ballothistory.nsf/) (follow "Application of the Term Person" hyperlink).

188. Miss. Initiative 26, Definition of "Person," (2011), <http://www.sos.ms.gov/Elections-Voting/Documents/Definition%20of%20Person-PW%20Revised.pdf>; Steve Olafson, *Oklahoma "Personhood" Bill Fails in Legislature*, REUTERS (Apr. 19, 2012), [www.reuters.com/article/2012/04/20/us-usa-oklahoma-personhood-idUSBRE83J02N20120420](http://www.reuters.com/article/2012/04/20/us-usa-oklahoma-personhood-idUSBRE83J02N20120420).

189. Miss. Initiative 26, Definition of "Person," (2011), <http://www.sos.ms.gov/Elections-Voting/Documents/Definition%20of%20Person-PW%20Revised.pdf>.

legislative floor when it was reintroduced in the 2012 legislative session.<sup>190</sup> Oklahoma also attempted to enact a personhood statute pertaining to the rights of the unborn.<sup>191</sup> The Oklahoma Supreme Court, however, determined that the statute was in violation of the U.S. Constitution.<sup>192</sup> As such, the bill was struck from the ballot.<sup>193</sup>

Unfortunately, these personhood bills were fraught with uncertainties that left much to be desired. The focus of both support and criticism for all three bills was the effect they would have on abortion and stem cell research.<sup>194</sup> The right to equal protection of the unborn in all other areas of law, such as prenatal substances abuse, was immediately overshadowed by these uncertainties. The complexities of abortion law are certainly important and will continue to play out for years to come. Because of the polarizing nature of proposed state regulations of abortion, the personhood initiatives are unlikely to be a viable route to justice for victims of prenatal drug abuse.

## 2. Difficulties With Measuring the Harm

As the case law has reflected, unless the harm is immediately apparent, it can be difficult to measure the risk of injury to the newborn. With insufficient evidence regarding the extent of harm caused by the drug use of the mother, punishment for the drug exposure can become even more inconsistent. In Ohio, the court relied on the generally accepted position that cocaine is harmful to its users.<sup>195</sup> As such, the court determined that, regardless of outward signs of injury, drug use during pregnancy always harms a child.<sup>196</sup> While much of the research is outdated, research by the National Institute on Drug Abuse shows:

Illicit drug use during pregnancy has been associated with a variety of adverse effects, though more research is needed to

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190. Virginia Chamlee, *Mississippi 'Personhood' Efforts Revived*, FLA. INDEP., <http://floridaindependent.com/72888/mississippi-personhood-efforts-revived> (last visited Feb. 19, 2014).

191. Olafson, *supra* note 188.

192. *Nova Health Sys. v. Pruitt*, 292 P.3d 28 (Okla. 2012) (cert. denied, 134 S. Ct. 617, 187 L. Ed. 2d 400 (U.S. 2013)) (citing the Supremacy Clause *and* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

193. *Id.*

194. Olafson, *supra* note 188.

195. *In re Baby Blackshear*, 736 N.E.2d 466 (Ohio 2000).

196. *Id.* at 465.



draw causal connections. Effects may be subtle, and generally range from low birth weight to developmental deficits affecting behavior and cognition. For example, impaired attention, language, and learning skills, as well as behavioral problems, have been seen in children exposed to cocaine and marijuana, all of which can affect success in school. Methamphetamine exposure has been associated with fetal growth restriction, decreased arousal, and poor quality of movement in infants. And although use of heroin (an opiate) during pregnancy has been associated with low birth weight, the impact of prescription opiate abuse on pregnancy outcomes is not well understood.<sup>197</sup>

Thus, it is true that drug use during pregnancy may cause long-term effects that are not initially observable.<sup>198</sup> It would, however, be far too speculative for judges to simply guess about what developmental issues a child may face and which of those potential issues could be directly linked to the mother's drug use. Unfortunately, this lack of comprehensive research creates more questions than answers for courts attempting to measure the potential long-term harm caused by mothers who use drugs while pregnant. The only harm that can truly be measured is that which is manifested at the time of a child's birth or is supported by expert testimony.

### 3. Compatibility With Other Laws Concerning Unborn Children

To better understand the current fetal rights in the United States, it is helpful to briefly compare a few common approaches. Injuries to unborn children have been addressed in various types of law. States have taken different approaches depending on whether the injury is inflicted by mothers, fathers, or unrelated third parties. Generally, in the civil context, unborn children are not entitled to individual causes of action.<sup>199</sup> However, a child may have its own cause of action for injuries sustained in utero

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197. NAT'L INST. ON DRUG ABUSE, *PRENATAL EXPOSURE TO DRUGS OF ABUSE* (May 2011), available at [www.drugabuse.gov/sites/default/files/prenatal.pdf](http://www.drugabuse.gov/sites/default/files/prenatal.pdf).

198. *Id.*

199. Aaron Wagner, Comment, *Texas Two-Step: Serving Up Fetal Rights by Side-Stepping Roe v. Wade Has Set the Table for Another Showdown on Fetal Personhood in Texas and Beyond*, 32 TEX. TECH L. REV. 1085, 1099-1100 (2001) ("The entire fetal rights debate turns on at what point the fetus' rights 'attach.' States have not agreed on when this point should be, but most commonly states base the attachment of fetal rights on one of two theories. The 'born-alive' rule and the theory of 'viability' are oftentimes dispositive of a court's or legislature's treatment of a fetus . . .").

when it is later born alive with a physical injury.<sup>200</sup> Parents may also take other legal action when an injury against the mother causes the child to die before birth.<sup>201</sup> Such claims are, however, considered legal remedies to the parents for the loss of the child.<sup>202</sup>

The rationale for the “born alive rule” is similar to the approach of New Jersey, which focuses on actual post-birth harm.<sup>203</sup> However, North Dakota has expressly rejected the born alive rule with respect to injuries resulting from drug use during pregnancy.<sup>204</sup> This creates problems, such as those in Virginia, where unborn children are not protected from abuse by their mothers.<sup>205</sup> The rule leaves large gaps in the law and permits individuals to get away with causing fatal injuries to unborn children. Similarly, the North Dakota courts have noted that there is no need to treat unborn children as a “person” for some laws but not others.<sup>206</sup> Other courts, however, declined to extend this position in two recent cases involving the exposure of innocent unborn children to drugs.<sup>207</sup> Thus, nearly all states have left their most fragile citizens with legal rights that continually fail to protect them from serious injury, or even death, caused by their own mothers.

Federal law has also addressed the problem of crimes against fetal life with the Unborn Victims of Violence Act first introduced in 2001.<sup>208</sup> The Act provides penalties for crimes committed against unborn children.<sup>209</sup> The federal law defines the term “unborn child” as “a member of the species *homo sapiens*, at any stage of development, who is carried in the womb.”<sup>210</sup> According to the Act:

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200. *Id.* at 1108.

201. *Id.*

202. *Id.*

203. N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L., 59 A.3d 576, 592 (N.J. 2013).

204. *State v. Stegall*, 828 N.W.2d 526, 532 (N.D. 2013).

205. *See* discussion *supra* Part III.A.1.

206. *See Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D. 1984) (“We believe that it is commonly understood that an unborn child is a human being or person which has life and which, even prior to the process of birth, can experience death.”).

207. *See* discussion *supra* Part II.B.2.

208. Unborn Victims of Violence Act of 2001, H.R.503, 107th Cong. (2001) (codified at 18 USC § 1841).

209. 18 U.S.C. § 1841 (2012).

210. 18 U.S.C. § 1841(d) (2012).

Whoever engages in conduct that violates [specified provisions of the Federal Criminal Code, including the Controlled Substance Act of 1970] and thereby causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section. . . . [T]he punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.<sup>211</sup>

Unfortunately, the Act provides exceptions barring prosecution of any woman with respect to her own unborn child.<sup>212</sup> This is yet another example of the lack of consistent protection for unborn children victimized by their own mothers. This federal law illustrates that there is certainly a recognized interest in protecting the unborn, but that the mother's rights are again given greater weight.

#### 4. Difficulties with Prosecuting New and Expectant Mothers

In the minority of states that criminalize drug use during pregnancy, the penalty of admitted or discovered drug use is often incarceration. Some scholars have argued that the threat of incarceration of new and expectant mothers can deter women from seeking appropriate medical care or seeking help with their addictions.<sup>213</sup> Additionally, the lack of pertinent laws results in prosecutors charging these women with crimes ranging from child endangerment to murder.<sup>214</sup> Criminal punishment of mothers for prior drug use has also been seen as a retroactive solution to the problem, since at the time the baby tests positive for drugs, the harm has already occurred.<sup>215</sup> Despite these concerns, the strong interest in protecting unborn children can quickly outweigh the issues presented by prosecuting and incarcerating new mothers. The system can work to restore both the health of the child and the health of the mother.

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211. 18 U.S.C. § 1841(a)(1)-(2)(A) (2012).

212. 18 U.S.C. § 1841(c)(3) (2012).

213. Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC'Y 241, 251 (2011).

214. Derringer, *supra* note 168, at 147.

215. *Id.* at 150. Indiana has attempted to implement a civil commitment program to proactively aid mothers who struggle with drug use *during* their pregnancies. For more on the civil commitment approach, see *id.* at 154-64.

#### IV. PROPOSAL

##### A. *How States Can Better Protect the Victims of Fetal Drug Abuse*

Currently, drug use during pregnancy has only been addressed on the state level. Thus, states have broad freedom to draft solutions that eliminate many of the problems with the current approach. Now is the time for state legislatures to exercise their power to protect the most innocent victims of drug abuse. Many of the consistency issues have resulted from the lack of state legislation addressing the unique issue of drug use during pregnancy. To better serve mothers and their children, states should draft appropriate statutes that provide clear consequences to women who expose their unborn children to harmful amounts of drugs while in the womb.

##### 1. Statutory Protection

##### a. Defining child

First, to properly address this issue, states need to clearly define the term “child” as including unborn children. Such a definition would permit states to prosecute women who expose their unborn children to drugs in the same manner as if the child were already born. To take such a bold approach in statutorily defining life would eliminate many of the inconsistency problems seen in today’s laws regarding the unborn. The example of the laws in Virginia illustrates how states have failed to hold women accountable for harming their infant children even after the child has taken its first breath.<sup>216</sup> Harmonious recognition that the right to life begins at conception is essential to sufficiently protecting unborn victims of neglect and abuse.

At the very least, states must provide clarification in the state neglect and abuse or chemical-endangerment statutes as to the consequences of inflicting injury upon fetal life. The statutes providing exemptions for mothers who negligently or intentionally harm their unborn children must be eliminated. There is simply no excuse to continue to allow mothers to knowingly poison their unborn children with illicit drugs. The adoption of statutes specifically targeted towards mothers who use drugs during pregnancy would allow certainty in the courts and would provide consistent results. This would also ensure that an appeal by a woman convicted of drug use during pregnancy would fail due to vagueness or lack of notice.

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216. See discussion *supra* Part III.A.1.

b. Measuring the harm

A state response to the issue of prenatal child abuse would also require courts and legislatures to work together to find the appropriate barometer of abuse. The courts have struggled between adopting a law that finds any drug use to be *per se* abuse and a law that refuses to acknowledge the vast potential for harm. As states have already seen, it is difficult to speculate what harm might come to a child. A proper state response should provide pertinent factors or guidelines for courts attempting to measure the harm. To best draft statutes pertaining to prenatal drug use, the legislatures must also have evidence that the actions of the mother are indeed harmful.

The New Jersey courts have prudently recognized the difficulty of measuring the injury sustained by infants who are exposed to drugs in utero.<sup>217</sup> There, the courts have limited abuse and neglect findings to cases that demonstrated actual or imminent risk of harm.<sup>218</sup> This rule works well because it bases establishment of guilt not just on actions of the mother but also on actual proof of injury to the child. This is in contrast to the State of Ohio, which once considered a positive drug test of a newborn to be *per se* criminal child abuse.<sup>219</sup> It is certainly concerning anytime a child tests positive for harmful substances. However, it rings close to a strict liability crime when mothers are charged for child abuse despite the lack of proof that any harm actually has or will occur. Thus, to have significant notice of the crime, and the full deterrence effect, states wanting to charge mothers with *per se* abuse need to draft appropriate criminal statutes to deal with prenatal drug use.

Effective April 28, 2014, the State of Tennessee imposed a statute that imposes criminal punishment on women who use illegal narcotics during pregnancy and the child “is born addicted to, or harmed by the narcotic drug and the addiction or harm is the result of [the mother’s] illegal use of a narcotic taken while pregnant.”<sup>220</sup> The Tennessee courts have not yet had a chance to articulate the specific meaning of the language of the statute,<sup>221</sup>

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217. See discussion *supra* Part II.B.3.

218. N.J. Dep’t of Children & Families, Div. of Youth & Family Servs. v. A.L., 59 A.3d 576, 592 (N.J. 2013).

219. *In re Baby Boy Blackshear*, 736 N.E.2d 462, 465 (Ohio 2000).

220. TENN. CODE ANN. § 39-13-107(c)(2) (2014).

221. Aaron Wright, *Mom Charged Under Drug-Addicted Baby Law Going to Rehab* (August 5, 2014), available at [www.wbir.com/story/news/local/mcminn-monroe/2014/08/05/woman-charged-under-drug-addicted-baby-law-to-appear-in-court/13614755/](http://www.wbir.com/story/news/local/mcminn-monroe/2014/08/05/woman-charged-under-drug-addicted-baby-law-to-appear-in-court/13614755/). The first woman to be charged under the new statute admitted to using meth just days before delivering her child in the

but it appears to require a showing that the child suffered actual harm or actual symptoms of addiction to the illegal narcotic.<sup>222</sup> Thus, the statute shows the legislature's efforts to expressly address prenatal substance abuse and efforts to attempt to measure the harm.<sup>223</sup> It will be important to track the application of this statute in future cases to see if it has its intended effect.

The child abuse and neglect statutes implicated by prenatal drug abuse criminalize not only actual harm to a child, but also *substantial risk* of harm. The court in New Jersey noted that the degree of speculation is in part due to the lack of evidence presented by the government to illustrate the risk of ongoing harm.<sup>224</sup> A federal database that tracks the long-term effects of prenatal drug exposure would provide useful evidence of the severity and certainty of the injuries a child may ultimately suffer due to the prenatal drug exposure. A federal study would allow the prosecution to articulate and support the true risk of harm to the child. This research would also allow for better diagnoses and treatment for children suffering from the effects of prenatal drug abuse. Such research tracking the effects of drug use during pregnancy is essential for courts and legislatures to appropriately measure the harm done to unborn children.

## 2. Providing Rehabilitation-Focused Resources

Once states have ensured that the law is sufficiently clear, states can further aid the victims of prenatal drug use by providing better resources in the event that a woman is convicted of using drugs while pregnant. While traditional incarceration of new or expectant mothers may be counterproductive, many states offer treatment programs to women during, or in the place of, incarceration. These programs fill a gap in caring for addicted mothers since private rehabilitation is often unavailable to low-income, pregnant women.<sup>225</sup> Fortunately, all fifty states participate to some extent in the federally funded Residential Substance Abuse Treatment

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summer of 2014. *Id.* The judge agreed to stay the assault charge for sixth months while the mother attended a rehabilitation program. *Id.* According to the woman's attorney, she was hopeful that her course of action would allow her to have continued visitation with her baby girl. *Id.*

222. TENN. CODE ANN. § 39-13-107(c)(2) (2014).

223. *Id.*

224. See discussion *supra* Part II.B.3.b.

225. David F. Chavkin, "For Their Own Good": Civil Commitment of Alcohol and Drug-Dependent Pregnant Women, 37 S.D. L. REV. 224, 240 n.115 (1992).

(“RSAT”) Program.<sup>226</sup> The RSAT program provides specialized help and aftercare for individuals in jail on drug related offenses.<sup>227</sup> Over seventy percent of program participants completed the program between 2010 and 2012.<sup>228</sup> While not all participants go on to live drug free lives, seventy-two percent of program participants remained arrest-free one year after completion.<sup>229</sup> This program, and others like it, offer people the tools they need to break their addictions and live more fulfilling lives post incarceration. Rehabilitative incarceration programs like RSAT allow new mothers to take the time they need to recover from their addiction before returning to care for their children.

Some states also work with mothers to allow them to stay with their children while serving out their sentences and working through rehabilitation. California has addressed the issue of incarcerating pregnant and new mothers with a special program tailored to pregnant drug users called the Pregnant and Parenting Women's Alternative Sentencing Program Act.<sup>230</sup> Eligibility for the program is limited to pregnant or parenting women with an established history of substance abuse who have one or more children under six years old at the time of entry into the program.<sup>231</sup> For women with young children, the children reside with the mother in the treatment facility.<sup>232</sup> Further exclusions apply to women convicted of certain violent offenses or offenses committed against children.<sup>233</sup>

The California program is designed to provide a rehab focused environment where mothers can continue to interact with their children on a daily basis.<sup>234</sup> The women who complete the one-year program serve an additional year of intense parole before being discharged from parole.<sup>235</sup>

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226. BUREAU OF JUSTICE ASSISTANCE, RESIDENTIAL SUBSTANCE ABUSE TREATMENT PROGRAM CLOSEOUT REPORT, Jan. 2010–Mar. 2012, available at <https://www.bja.gov/Publications/RSAT0312CloseoutReport.pdf>.

227. *Id.* at 2.

228. *Id.* at 13.

229. *Id.*

230. CAL. PENAL CODE § 1174 (West 2013).

231. CAL. PENAL CODE § 1174.4(a)(1) (West 2013).

232. *Id.*

233. CAL. PENAL CODE § 1174.4(a)(2) (West 2013).

234. For more on the California program, see *California Department of Corrections Opens San Diego Family Foundations Program Facility*, available at <http://cdcrtoday.blogspot.com/2000/11/california-department-of-corrections.html>.

235. *Id.*

Women who do not successfully complete the program must be returned to prison and serve their original sentences.<sup>236</sup> Data early in the program's development revealed that the one-year recidivism rate was between nine to sixteen percent after successful program completion.<sup>237</sup> The program gives women a second chance to renew their roles as mothers while taking back their lives from the firm grip of drug addiction. Adoption of programs like this one give states the ability to support women struggling with substance abuse and protect the health and lives of unborn children.<sup>238</sup>

Thus, while criminal prosecution limits the individual freedom of drug-using new and expectant mothers, available assistance programs offer a wealth of resources that can break the addiction and lead to a safer, healthier lifestyle for mother and baby. It is important that states continue to develop and fund programs that offer rehabilitation to mothers both during pregnancy and while their children are young. Prosecuting mothers for drug use during pregnancy is not simply for the child's sake or the sake of society. Rather, it can effectively deter and rehabilitate women who struggle with addiction during pregnancy. The availability of resources in all fifty states would send a message that the nation cares about all of its citizens and will do what is needed to keep struggling mothers with their children.

### *B. How the Federal Law Can Better Protect the Victims of Fetal Drug Abuse*

With the issue of prenatal child abuse rising to the highest state level, and additional courts recognizing the criminal prosecution of prenatal substance abuse, there is strong potential for the issue to be addressed by the Supreme Court of the United States. The potential constitutional issues

236. CAL. PENAL CODE § 1174.4(i) (West 2013).

237. CAL. DEP'T OF CORR., FEMALE OFFENDERS PROGRAMS: COMMUNITY PRISONER MOTHER PROGRAM AND FAMILY FOUNDATION PROGRAM 5 (2008), [http://www.cdcr.ca.gov/adult\\_research\\_branch/research\\_documents/mother\\_program\\_and\\_family\\_foundation\\_may\\_2008.pdf](http://www.cdcr.ca.gov/adult_research_branch/research_documents/mother_program_and_family_foundation_may_2008.pdf).

238. Unfortunately the programs enacted under the Pregnant and Parenting Women's Alternative Sentencing Program have been phased out. The California Department of Corrections and Rehabilitation cite a decline in qualified candidates as the reason for the elimination of these community based rehabilitation programs. CAL. DEP'T OF CORR. & REHAB., REALIGNMENT FACT SHEET 4 (Dec. 19, 2013), <http://www.cdcr.ca.gov/realignment/docs/realignment-fact-sheet.pdf>. (last visited Feb. 23, 2014); CAL. DEP'T OF CORR. & REHAB., THE FUTURE OF CALIFORNIA CORRECTIONS: A BLUEPRINT TO SAVE BILLIONS OF DOLLARS, END FEDERAL COURT OVERSIGHT, AND IMPROVE THE PRISON SYSTEM 26-27 (2012), <http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf>.



of fundamental rights of the unborn, notice, and privacy may compel the Court to hear the appeal of mothers prosecuted for using drugs during pregnancy. While an appeal to the Supreme Court of the United States would pose a strong risk for further chipping away at the rights of the unborn, such an appeal would allow at least some of the inconsistencies to be resolved at a national level.

### 1. Protecting Life at Conception

While the issue of prenatal drug abuse as a whole may be best left to the states, the Supreme Court of the United States has a strong interest in ensuring that the victims of prenatal drug abuse are afforded the right to life, liberty, and the pursuit of happiness upon which our nation was founded.<sup>239</sup> It is certainly a national issue when a court in Ohio can declare that “there can be no more sacred or precious right of a newborn infant than the right to life and to begin that life, where medically possible, healthy, and uninjured,”<sup>240</sup> yet crossing state lines may defer that precious right until the child’s umbilical cord is severed and it takes its first breath. The recent prenatal drug abuse convictions have again opened the door for the Court to take a stand for unborn children and recognize that life begins at conception. Unfortunately, looking to how the Court implicitly denied personhood to unborn children in *Casey* and *Roe*, it is unlikely that a national consensus would be reached in favor of the unborn.<sup>241</sup>

### 2. Balancing the Competing Interests

Rather than granting unborn children the fundamental right to be protected from their mother’s drug use, the Court is more likely to respond as it did in *Casey*.<sup>242</sup> There, the Court entered into a general balancing test, weighing the state’s interest in protecting its future citizens against a mother’s right to privacy in her reproductive decisions.<sup>243</sup> Evaluating prenatal drug use under the same test may result in greater protection for the unborn. First, the Court has acknowledged that a woman has a

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239. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

240. *In re Baby Boy Blackshear*, 736 N.E.2d 462, 465 (Ohio 2000).

241. *Casey*, 505 U.S. at 846 (“[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”) (emphasis added); *Roe*, 410 U.S. at 154, 156, 163 (referring to State’s interest in protecting “potential life.”). Further, the Court explicitly stated that the Fourteenth Amendment’s use of “person” does not include the unborn. *Id.* at 158.

242. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

243. *Id.*

fundamental right to privacy in the decision of whether or not to give birth to a child.<sup>244</sup> This interest was then weighed against the interest of a state in protecting fetal life.<sup>245</sup> Thus, this is the framework that would likely be applied to the evaluation of a prenatal child abuse case.

In determining the interests of a mother who continues to use drugs during pregnancy, South Carolina correctly noted that the Supreme Court has recognized there is no privacy right in the use of illegal drugs.<sup>246</sup> As such, the interest of a mother, in using drugs during pregnancy, is miniscule. The interest of the state in protecting unborn children during pregnancy is “profound.”<sup>247</sup> When balanced with the low interest in using drugs during pregnancy, the Court would be likely to find that the state’s interest is stronger than the mother’s, and extend some viable options for states wishing to prosecute mothers for illegal drug use during pregnancy.

### 3. Adopting the Observable Harm Requirement

The implementation of criminal prosecution for drug use during pregnancy is best handled on the state level. However, if the Supreme Court were to address the issue, the Court may clarify the required level of harm necessary before a woman can be convicted. Categorizing a positive drug test as *per se* abuse would provide the strongest incentive to avoid drug use during pregnancy. This standard would also eliminate the problem of determining exactly when, and how often, the mother used illicit drugs. However, this standard is so high that it risks punishing women whose drug use may have been so minimal that it did very little to interfere with the child’s overall health & wellbeing. Since the consequences of being convicted for prenatal child abuse are so severe, the Court should require proof of substantial risk of harm or actual observable harm before women can be convicted. As such, if the Supreme Court addresses the issue, it should adopt an approach similar to the New Jersey civil child abuse

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244. *Id.* at 896.

245. *Id.* at 872.

246. *Whitner v. State*, 492 S.E.2d 777, 786 (S.C. 1997) (“Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.”); see *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (holding that there is no privacy right in the possession of contraband).

247. *Whitner*, 392 S.E.2d at 785-86 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) and *Roe v. Wade*, 410 U.S. 113 (1973)).

cases.<sup>248</sup> This approach provides the best barometer for the Court to determine an appropriate sentence based on the extent of exposure and injury inflicted upon the child.<sup>249</sup>

## V. CONCLUSION

Only time will tell whether criminal prosecution of drug use during pregnancy will become a springboard for fetal rights nationwide. It is clear that the issue has the potential to sculpt the legal rights of unborn children across the country. To require criminal penalties for women who expose their children to drugs in the womb is the strongest way to protect the innocent victims of prenatal drug use. However, there are many proactive steps that states can take to better treat women addicted to drugs during pregnancy. Additionally, current law fails to consistently define the process by which a woman can be charged for her use of drugs during pregnancy. With respect to federal action, as we learned in *Roe*,<sup>250</sup> the decisions made by the Supreme Court regarding fetal rights and the definition of "child" can lead to the protection, or abandonment, of an entire generation.

Action can be taken on both the state and federal levels to better protect the victims of prenatal substance abuse. Unfortunately, the broader issue of the right to life from the moment of conceptions is likely to carry on unresolved for some time to come. Nevertheless, the recognition of an unborn child's right to be free from exposure to illegal drugs is a step towards protecting life at all stages. The tragedy of prenatal child abuse has brought new momentum to the personhood debate. The vast inconsistencies in the law of fetal rights are now in the spotlight, and it is time for change. Thus, what has been a tragedy for the victims who suffer at the hands of their mothers could become a victory for future generations.

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248. See discussion *supra* Part II.B.3.

249. See discussion *supra* Part IV.A.1.b (discussing the need for establishment of a federal database).

250. *Roe v. Wade*, 410 U.S. 113 (1973).