PRENATAL DRUG EXPOSURE: THE CONSTITUTIONAL IMPLICATIONS OF THREE GOVERNMENTAL APPROACHES

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I. INTRODUCTION

A growing number of pregnant mothers who regularly use drugs are giving birth to drug-addicted or drug-exposed infants. Indeed, several studies have shown that the number of babies born drug-exposed has steadily increased.[1] The number of women using one or more illegal drugs during pregnancy each year is estimated in one study to be 739,200.[2] The same study concluded that two to three percent of newborn babies each year may be cocaine-exposed.[3] In fact, numerical estimates of newborn babies exposed to crack or cocaine range from 30,000 to 159,400 annually.[4]

One of the major problems confronting our society today is how to deal with the mother who gives birth to a drug-addicted or drug-exposed child. Courts and administrative agencies have adopted a variety of approaches to the problem. One approach, which appears increasingly acceptable, is criminal prosecution of the mother. A second approach seeks to protect the fetus by controlling a pregnant woman's conduct. This too seems to be growing in popularity. A third approach is the use of neglect and abuse statutes and proceedings to remove the children of addicted parents from the home either temporarily or permanently. Each one of these approaches, however, raises serious constitutional issues. This article examines the three approaches and discusses the constitutional issues raised by each one.

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[1] Fink, *Effects of Crack and Cocaine Upon Infants: A Brief Review of the Literature*, 10 CHILDREN'S LEGAL RTS. J. 2, 4 (1989). This report indicates that by 1987, some 20 million people in the United States had used cocaine and some five million were regular users. *Id.* at 2.

[2] Gomby & Shiono, *Estimating the Number of Substance-Exposed Infants*, 1 THE FUTURE OF CHILDREN 17, 22 (1991).

[3] *Id.* at 23.

[4] *Id.* at 22.

II. THE CRIMINAL APPROACH

A. RECENT TRENDS IN CRIMINAL TREATMENT

Recently, several states have used or attempted to use the criminal approach to deal with mothers giving birth to drug-addicted babies. The charges brought against these mothers, however, vary from state to state. In Florida, for example, a mother was prosecuted for the delivery of cocaine to her child after birth and before the clamping of the umbilical cord.[5] In Michigan, a mother was prosecuted for child abuse and delivery of cocaine to her newborn child.[6] In Texas, a mother was charged with the delivery of cocaine to her stillborn baby.[7] In California, a mother was charged with felony child endangering after she gave birth to twin boys addicted to heroin.[8] Moreover, the State of South Carolina has adopted a program of prosecuting expectant mothers refusing to enter a drug treatment program after testing positive for illegal drug use.[9]

Of the more than fifty state criminal prosecutions, at least two have

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[5] Johnson v. State, 578 So. 2d 419 (Fla. App. 1991).

[6] People v. Hardy, 188 Mich. App. 305, 307, 469 N.W.2d 50, 51-52 (Mich. App. 1991), *amended* 471 N.W.2d 619 (1991).

[7] Houston Chronicle, July 9, 1991, at 13, col. A.

[8] Reyes v. Superior Court, etc., 75 Cal. App. 3d 214, 216, 141 Cal. Rptr. 912, 912-13 (1977).

[9] Horger, Brown & Condon, *Cocaine in Pregnancy: Confronting the Problem*, 86 J. S.C. MED. A. 527 (Oct. 1990). Because a growing number of pregnant women were found to be using cocaine, the Medical University Hospital in Charleston, South Carolina, adopted a policy, beginning on April 1, 1989, requiring urine drug screens in cases where there was evidence of: (1) no prenatal care; (2) abruptio placentae or a premature separation of the placenta from the wall of the uterus; (3) intrauterine fetal death; (4) preterm labor; (5) intrauterine growth retardation; or (6) previous drug or alcohol abuse. *Id.* at 528. The objective of this program was to require the woman to enter drug counselling and treatment programs. *Id.* at 528, 529. If the woman tested positive for drugs a second time or failed to complete a program, she would then be arrested. *Id.* at 529. Charges could include possession of drugs and delivery of drugs to a fetus. *Id.* There were ten arrests from October through December 1989. *Id.* at 530. Eventually, a policy was established that there would be no arrest if a woman completed a drug rehabilitation program. *Id.* Since the program was initiated, the number of women testing positive for drugs has declined. *Id.* Since the early period of the program, the number of arrests has also declined. Interview with Charles Molony Condon, Solicitor of the Ninth Judicial Circuit, Charleston, South Carolina (October 11, 1991). As of October 1991, there have been 23 arrests since the commencement of the program and only two convictions. *Id.*

proceeded to appellate courts as of the spring of 1991.[10] In fact, the Florida Supreme Court is now considering a case upholding criminal sanctions against a mother whose child was born drug-addicted.[11] In *Johnson v. State*,[12] the mother was charged with delivering a controlled substance to two children immediately after their birth and before the umbilical cord was clamped.[13] The mother was subsequently convicted in the Circuit Court for Seminole County for violating a state statute prohibiting the transfer of drugs from an adult to a minor.[14] Following her conviction, Johnson appealed to the District Court of Appeals of Florida for the Fifth Circuit.[15] Upholding the conviction by a two-to-one vote, the appellate court relied on what it considered to be the clear language of the statute which made it unlawful for a person eighteen

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[10] Larson, *Overview of State Legislative and Judicial Responses*, 1 THE FUTURE OF CHILDREN 72 (1991). *See* Johnson v. State, 578 So. 2d 419 (Fla. App. 1991); People v. Hardy, 188 Mich. App. 305, 469 N.W.2d 50 (1991).

[11] *Johnson*, 578 So. 2d 419.

[12] *Id.* The basic facts of the *Johnson* case were stated in the majority and dissenting opinions of the Florida appellate court. *See id.* The first child was born to the defendant on October 3, 1987. *Id.* at 420. The time which elapsed from the appearance of the head of the infant out of the birth canal to the clamping of the umbilical cord was approximately one and one-half minutes. *Id.* Johnson admitted to the baby's pediatrician that she had taken cocaine the night before the baby's birth. *Id.* There was expert testimony that both Johnson and her son tested positive for a break-down product from cocaine known as benzoylecgonine. *Id.* A second child was born on January 23, 1989. *Id.* The time which elapsed from the appearance of the head of this baby to the clamping of the umbilical cord was sixty to ninety seconds. *Id.* Johnson admitted to her obstetrician that during the morning, while she was in labor, she had used crack cocaine. *Id.* Johnson also admitted to an investigator of her alleged child abuse that she regularly used marijuana and cocaine during her pregnancy. *Id.* In December 1988, approximately one month prior to the birth of the second child, Johnson had overdosed on crack. *Id.*

[13] *Id.*

[14] The Florida statute on which Johnson's conviction was based provided in pertinent part:

> Except as authorized by this chapter, it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years, or to use or hire a person under the age of 18 years as an agent or employee in the sale or delivery of such a substance, or to use such person to assist in avoiding detection or apprehension for a violation of this chapter. Any person who violates this provision with respect to:
> 1. A controlled substance . . . is guilty of a felony of the first degree.

FLA. STAT. § 893.13(1)(c)(1) (1991).

[15] *See* Johnson v. State, 578 So. 2d 419 (Fla. App. 1991).

years of age or older to give a controlled substance to a minor.[16] While stating that it had considered a number of privacy arguments relating to personal autonomy and reproduction, the court gave no detailed reasons for rejecting them in favor of the statutory mandate.[17]

In a factually similar case, a Michigan appellate court reached the opposite result by dismissing criminal charges against a mother who gave birth to a drug-exposed baby.[18] *People v. Hardy*[19] involved a mother charged with second degree child abuse and the delivery of less than fifty grams of a mixture containing cocaine to her child.[20] Following a

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[16] *Id.* at 420.

[17] *Id.* The court stated as follows:

> We have spent the necessary time and effort considering the many arguments of appellant and her supporters who argue the mother's rights to her body and the analogies to the abortion cases. We have also considered appellant's assertion that the Florida legislature declined to pass a child abuse statute which forbade similar conduct. We have considered other arguments, such as what pregnant mothers might resort to if they know they may be charged with this crime; we were singularly unimpressed with those latter arguments.
>
> The appellant on two occasions took cocaine into her pregnant body and caused the passage of that cocaine to each of her children through the umbilical cord after birth of the child, then an infant person. The statute was twice violated.

Id.

In a concurring opinion, Judge Cobb expressed the view that the only issue was the intent of the defendant. *Id.* (Cobb, J., concurring). The judge concluded that the defendant knew that her cocaine use so close to birth meant that cocaine would be passed on to the newborn. *Id.* In dissent, Judge Sharp maintained that there was no showing that the legislature intended to criminalize the defendant's conduct. *Id.* at 421 (Sharp, J., dissenting).

[18] *See* People v. Hardy, 188 Mich. App. 305, 469 N.W.2d 50 (1991), *amended*, 471 N.W.2d 619 (Mich. 1991).

[19] *Id.*

[20] In *Hardy*, the defendant gave birth to a son on August 20, 1989, after only 7 1/2 months of pregnancy. *Id.* at 306, 469 N.W.2d at 51. Because the baby was small for his gestational age, constantly vomiting, and was not eating regularly, a doctor ordered a drug screening test on the infant's urine. *Id.* at 306-07, 469 N.W.2d at 51. The results "indicated the presence of cocaine metabolites." *Id.* at 307, 469 N.W.2d at 51. The defendant then admitted to smoking crack cocaine within thirteen hours before she gave birth. *Id.*

The Michigan statute under which the defendant was charged provided in pertinent part:

> (1) Except as authorized by this article, a person shall not manufacture, deliver,

preliminary examination of the facts, a judge found sufficient evidence to bind the defendant over to the circuit court on both counts.[21] The defendant then moved to quash both the charges and the results of the drug screening tests leading to them.[22] The circuit judge granted the motion with respect to the charge of child abuse based upon the insufficiency of the evidence showing that the mother's ingestion of cocaine had caused harm to the child.[23] The judge denied, however, the motions relating to the delivery charge and the admission of the drug screening tests.[24]

On appeal, the Court of Appeals of Michigan reversed the circuit court solely on the ground that the state had failed to demonstrate that the legislature had intended to apply the statute prohibiting the delivery of a controlled substance to the facts of the case at bar.[25] In so holding, the court stated:

> [T]his Court is not at liberty to create a crime. We are not persuaded that a pregnant woman's use of cocaine, which might result in the postpartum transfer of cocaine metabolites through the umbilical cord to her infant, is the type of conduct that the Legislature intended to be prosecuted under the delivery-of-cocaine statute, thereby subjecting the woman to the possibility of up to twenty years in prison and a fine of $25,000. This, in our opinion, would not be a reasonable construction of the

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or possess with intent to manufacture or deliver, a controlled substance, a prescription form, an official prescription form, or a counterfeit prescription form. . . .

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(*iv*) and:

. . . .

(*iv*) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 1 year, nor more than 20 years, and may be fined not more than $25,000.00, or placed on probation for life.

MICH. COMP. LAWS § 333.7401 (1991) (footnote omitted).

[21] *Hardy*, 188 Mich. App. at 308, 469 N.W.2d at 52.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

statute.[26]

B. CONSTITUTIONAL ISSUES

The criminal prosecution of mothers who give birth to drug-addicted or drug-exposed babies raises several serious constitutional issues. The first is whether the prosecution and punishment of a mother who uses or is addicted to drugs and who gives birth to a drug-addicted or drug-exposed child is "cruel and unusual punishment" in violation of the eighth amendment to the United States Constitution, particularly in light of the Supreme Court's decision in *Robinson v. California*.[27] The second is whether the due process clause of the fourteenth amendment is violated by the lack of notice to the defendants that their conduct is criminal.[28] The third issue involves whether the due process clause is violated absent a showing by the state that the legislature had intended to make criminal the conduct of the drug-addicted mother who passes on controlled substances to a fetus or a newborn child.[29] The fourth concerns the use of admissions made by a defendant to her doctor and her children's doctor in her conviction.[30] The fifth raises the due process issue of the quantum of proof necessary to convict a person for allegedly passing cocaine through the umbilical cord to a newborn child.[31] Finally, the sixth issue concerns the discriminatory impact of criminal prosecution since the majority of the defendants in these cases are black women.[32]

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[26] *Id.* at 310, 469 N.W.2d at 53. In his concurrence, Judge Reilly determined that another issue raised in the case warranted discussion. *Id.* at 310-11, 469 N.W.2d at 53 (Reilly, J., concurring). According to Judge Reilly, the prosecutor in *Hardy* argued that there was a need for strong law enforcement for the purpose of "protecting a newborn from its mother's selfish and destructive conduct." *Id.* at 315-16, 469 N.W.2d at 55 (Reilly, J., concurring). In rejecting this argument, the concurring judge stated that "the argument ignores the underlying problem of addiction and the compulsive behavior it generates." *Id.* at 316, 469 N.W.2d at 55 (Reilly, J., concurring).

[27] 370 U.S. 660 (1962). *See infra* notes 33-49 and accompanying text.

[28] *See infra* notes 50-65 and accompanying text.

[29] *See infra* notes 66-69 and accompanying text.

[30] *See infra* notes 70-77 and accompanying text.

[31] *See infra* notes 78-83 and accompanying text.

[32] *See infra* notes 84-102 and accompanying text.

1. Cruel and Unusual Punishment

The criminal prosecution of drug-addicted mothers based upon the addiction of their newborn offspring may violate the United States Supreme Court's decision in *Robinson v. California*.[33] In *Robinson*, the defendant was convicted of violating a California statute which made it a crime "to be addicted to the use of narcotics," and provided for incarceration in the event that such addiction could be established.[34] In reversing the defendant's conviction, the Supreme Court held that the California statute violated the eighth amendment's prohibition of "cruel and unusual punishment."[35] Noting that counsel for the State of California recognized drug addiction as an illness,[36] Justice Stewart, writing for the majority, stated that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular

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[33] 370 U.S. 660 (1962).

[34] *See* CAL. HEALTH & SAFETY CODE § 11721 (West 1970) (repealed 1972). The California statute provided:

> No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail.

Id.

Prior to his arrest, a police officer examined Robinson's arms and noticed needle marks and a scab. *Robinson*, 370 U.S. at 661. The circumstances under which the officer came to examine Robinson's arms were not disclosed. One officer also testified that the defendant had admitted to using narcotics on occasion. *Id.* at 662. The defendant denied both allegations. *Id.* The conviction was affirmed by the Appellate Department of the Los Angeles County Superior Court. *Id.*

[35] *Robinson*, 370 U.S. at 662. The eighth amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend VIII.

[36] *Id.* at 667.

behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment."[37]

Although the *Robinson* majority concluded that drug addiction alone could not be a crime, Justice Stewart's language, specifically his statement: "even though he has never touched any narcotic drug within the state or been guilty of any irregular behavior there,"[38] is subject to two distinct interpretations. First, it could mean that if an addict touched a narcotic drug within the state or engaged in "irregular behavior" in that state, she could be prosecuted for drug addiction. Second, it may mean that the addict, even though she could not be prosecuted for drug addiction, could still be prosecuted for possession of drugs within a state or for "irregular," that is, criminal, conduct such as the sale of narcotics or a burglary to support his or her drug addiction.

The application of *Robinson* to a mother who gives birth to a drug-addicted or drug-exposed infant, therefore, turns on the meaning of Justice Stewart's language. While the dissent in *Robinson* believed the facts did not warrant the conclusion that the defendant in that case had

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[37] *Id.* The concurring opinion of Justice Douglas in *Robinson* was more cogent than the decision of the majority in its statement that an addict could not be prosecuted for his or her addiction. Moreover, several passages from the concurring opinion illustrate this point. *See e.g., id.* at 674 (Douglas, J. concurring) ("But I do not see how under our system *being an addict* can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person.") (emphasis in original); *id.* at 676 (Douglas, J. concurring) ("The addict is a sick person. He may, of course, be confined for treatment or for the protection of society. Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime."); *id.* at 678 (Douglas, J., concurring) ("We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action.").

Although Justice Harlan concurred in the decision in *Robinson*, the Justice disagreed with the Court's finding that drug addiction could not be criminalized, stating:

> I am not prepared to hold that on the present state of medical knowledge it is completely irrational and hence unconstitutional for a State to conclude that narcotics addiction is something other than an illness nor that it amounts to cruel and unusual punishment for the State to subject narcotics addicts to its criminal law.

Id. at 678 (Harlan, J., concurring). The Justice further emphasized that if addiction were associated with the use or possession of illegal drugs within a state, it could "be reached by the State's criminal law." *Id.* In other words, Justice Harlan was not prepared to conclude that drug addiction was an illness nor that an addict could not be the subject of a criminal prosecution. *See id.*

[38] *Id.* at 667.

an uncontrolled addiction,[39] it is fair to say that the majority believed he did.[40] Thus, if the addiction of the mother is uncontrollable to the extent that her drug use is not voluntary, then it follows, consistent with due process, that she could not be prosecuted for the involuntary act of passing drugs to her fetus. Furthermore, the same mother could not, consistent with the eighth amendment's prohibition of cruel and unusual punishment, be punished for those actions.

The argument that *Robinson* applies not only to addiction, but also to actions taken as a result of an addiction, was raised six years later in *Powell v. Texas*.[41] In *Powell*, the Supreme Court upheld a conviction under a Texas statute prohibiting intoxication in public places.[42] Justice Marshall, writing for the Court,[43] gave a limited interpretation to *Robinson* and determined that the challenged statute penalized the

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[39] In dissent, Justice Clark joined by Justice White explained that there are at least two kinds of narcotic addiction and that the result reached in this case turned on the type of addiction involved. *Id.* at 679-81 (Clark, J., dissenting). The narcotic addict who is subject to criminal penalties under section 11721, according to the dissent, is one who has not yet lost control and could still act in a volitional way to stop using drugs. *Id.* at 680 (Clark, J., dissenting). Justice Clark stated that section 11721 "applies to the incipient narcotic addict who retains self-control, requiring confinement of three months to one year and parole with frequent tests to detect renewed use of drugs. Its overriding purpose is to cure the less seriously addicted person by preventing further use." *Id.* at 681 (Clark, J., dissenting). The Justice contrasted the treatment of an addict accused of a crime under section 11721 with the addict who could be civilly committed to a state hospital for three months to two years. *Id.* Such an addict, proffered the dissent, is one who in the language of the statute "habitually takes or otherwise uses to the extent of having lost the power of self-control any opium, morphine, cocaine, or other narcotic drug." *Id.* (quoting CAL. WELFARE & INST. CODE § 5355 (West 1970)).

[40] *Id.* at 666. The majority opinion stated:

> This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms."

Id.

[41] 392 U.S. 514 (1968).

[42] The Texas statute provided in pertinent part: "An individual commits an offense if the individual appears in a public place under the influence of alcohol or any other substance, to the degree that the individual may endanger himself or another." TEX. PENAL CODE ANN. § 42.08(a) (Vernon 1952).

[43] Three of the justices participating in the majority decision were also part of the majority in *Robinson*; namely, Chief Justice Warren, and Justices Black and Harlan.

defendant's conduct rather than imputing his status as an alcoholic.[44]

In contrast, the dissent, per Justice Fortas,[45] adopted the wider reaching implications of *Robinson* which, in effect, lead to the conclusion that actions directly flowing from an involuntary condition such as addiction, are no more punishable than the condition itself.[46] Justice Fortas maintained that the defendant in *Powell*, like the defendant in *Robinson*, was powerless to control his conduct and, therefore, should not be convicted for public intoxication.[47]

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[44] *Powell*, 392 U.S. at 532. The majority opinion stated:

> On its face the present case does not fall within [the *Robinson*] holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and aesthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being "mentally ill, or a leper. . . ."

Id. (citing Robinson v. California, 370 U.S. 660, 666 (1962)).

[45] Justice Fortas was joined by Justice Stewart, the author of the majority opinion in *Robinson*, and Justices Douglas and Brennan. *Id.* at 554 (Fortas, J., dissenting). Moreover, it is worth noting that all of the dissenters in *Powell*, with the exception of Justice Fortas, who was appointed to the Supreme Court after *Robinson*, were part of the majority in *Robinson*.

[46] *Id.* at 566-67 (Fortas, J., dissenting).

[47] *Id.* at 567-68 (Fortas, J., dissenting). A passage from the dissent in *Powell* emphasizes the point:

> *Robinson* stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: *Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.* In all probability, Robinson at some time before his conviction elected to take narcotics. But the crime as defined did not punish this conduct. The statute imposed a penalty for the offense of "addiction"—a condition which Robinson could not control. Once Robinson had become an addict, he was utterly powerless to avoid criminal guilt. He was powerless to choose not to violate the law.
>
> In the present case, appellant is charged with a crime composed of two elements—being intoxicated and being found in a public place while in that condition. The crime, so defined, differs from that in *Robinson*. The statute covers more than a mere status. But the essential constitutional defect here is

The reluctance of the *Powell* majority to extend or interpret *Robinson* as anything more than a prohibition against prosecution for having a status is based upon the impact such an extension or interpretation might have on law enforcement. Moreover, the majority in *Powell* rejected the proposition that *Robinson* applies to conduct which results from the "compulsion" of drugs or some other substance,[48] stating that such application would undermine and radically alter the doctrine of criminal responsibility for actions.[49]

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the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid. The trial judge sitting as trier of fact found, upon the medical and other relevant testimony, that Powell is a "chronic alcoholic." He defined appellant's chronic alcoholism as "a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol." He also found that "a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." I read these findings to mean that appellant was powerless to avoid drinking; that having taken his first drink, he had "an uncontrollable compulsion to drink" to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places.

Id. (emphasis added) (citations omitted).

[48] *Id.* at 532-34.

[49] *Id.* at 531-32. The court stated:

Appellant claims that his conviction on the facts of this case would violate the Cruel and Unusual Punishment Clause of the Eighth Amendment as applied to the States through the Fourteenth Amendment. The primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed.

. . . .

It is suggested in dissent that *Robinson* stands for the "simple" but "subtle" principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change . . . ." In that view, appellant's "condition" of public intoxication was "occasioned by a compulsion symptomatic of the disease" of chronic alcoholism, and thus, apparently, his behavior lacked the critical element of *mens rea*. Whatever may be the merits of such a doctrine of criminal responsibility, it surely cannot be said to follow from *Robinson*. The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is,

The majority in *Powell* was obviously concerned that applying *Robinson* to so-called "compulsive" conduct would call into question the foundation of criminal liability—namely, criminal responsibility. A logical extension of this theory is that just as the majority in *Powell* would not extend *Robinson* to the case of a chronic alcoholic, they also would not extend *Robinson* to cover the criminal acts of a drug addict committed to satisfy her drug addiction. Obviously, if the *Powell* interpretation of *Robinson* prevails, then both cases stand as an obstacle to the criminal prosecution of mothers who bear drug-addicted or drug-exposed infants.

2. Lack of Notice

A second constitutional problem with the prosecution of mothers who bear drug-addicted or drug-exposed infants is the lack of notice that their conduct is criminal under the statutes used to indict them. It has only been since the late 1980's—after the explosion of the "crack" cocaine epidemic—that mothers have been criminally prosecuted for the injurious effects of their drug use on their fetuses.[50] The statutes they are accused of violating, however, generally predate the problem and were intended to address a very different set of circumstances. Thus, the issue of notice in prosecuting mothers giving birth to drug-addicted or drug-exposed infants warrants consideration.

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in some sense, "involuntary" or "occasioned by a compulsion."

. . . .

Ultimately, then, the most troubling aspects of this case, were *Robinson* to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility. In the dissent it is urged that the decision could be limited to conduct which is "a characteristic and involuntary part of the pattern of the disease as it afflicts" the particular individual, and that "[i]t is not foreseeable 'that it would be applied' in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery . . . ." That is limitation by fiat. In the first place, nothing in the logic of the dissent would limit its application to chronic alcoholics. If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a "compulsion" to kill, which is an "exceedingly strong influence," but "not completely overpowering." Even if we limit our consideration to chronic alcoholics, it would seem impossible to confine the principle within the arbitrary bounds which the dissent seems to envision.

Id. at 531-34.

[50] *See* Larson, *supra* note 10, at 72.

It is well established that the absence of notice in a statute that conduct is criminal runs afoul of the fourteenth amendment's due process clause.[51] For example, in 1926, the United States Supreme Court found a due process violation in the form of an unconstitutionally vague statute imposing criminal penalties for a failure to pay the current per diem wage in a designated work area.[52] Concluding that the obscurity of the statute's language failed to provide sufficient notice that the conduct at issue was criminal,[53] Justice Sutherland, writing for the Court, stated:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. . . . [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[54]

The Supreme Court came to a similar conclusion in *Lanzetta v. New Jersey*,[55] wherein the Court invalidated a statute making it a criminal offense to be without a "lawful occupation," to be a member of a gang of two or more persons, and to have been convicted at least three times of being a disorderly person or convicted of a crime.[56] Holding that the statute was a clear violation of due process, the Court supported this conclusion by emphasizing the lack of clarity in the meaning of the word "gang" as used in the statute, and the consequent lack of notice to those prosecuted under the statute.[57]

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[51] *See* United States v. Harriss, 347 U.S. 612 (1954); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Construction Co., 269 U.S. 385 (1926).

[52] *Connally*, 269 U.S. 385.

[53] *Id.* at 391.

[54] *Id.*

[55] 306 U.S. 451 (1939).

[56] *Id.* at 452 (citation omitted).

[57] *Id.* at 456-458. The Supreme Court cited the *Connally* case and added the following: "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Id.* at 453 (citations omitted). The *Lanzetta* Court further explained that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be

Similarly, in *United States v. Harriss*,[58] although ruling that certain provisions of the Federal Regulation of Lobbying Act were not so vague as to constitute a violation of due process, the Supreme Court again enunciated that due process requires fair notice of the criminality of conduct penalized under a statute.[59] In so holding, the Court stated:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that *no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.*[60]

Applying these cases to the statutes under which some mothers have been prosecuted, it is clear that unless those statutes have been recently amended to include mothers who bear drug-addicted or drug-exposed babies, there are serious problems of fair notice and due process.[61] For instance, the intermediate appellate court in *Johnson v. State* addressed the issue of notice by observing that the plain meaning of the statute proscribed the mother's conduct in transferring drugs to her newborn child.[62] That statement, however, is subject to question. Indeed, prior to *Johnson*, the Florida legislature debated the issue of how to address the problem of mothers who give birth to drug-exposed infants.[63] The legislature specifically rejected a provision that would have automatically

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informed as to what the State commands or forbids." *Id.*

[58] 347 U.S. 612 (1954).

[59] *Id.* at 617.

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

[61] Most statutes dealing with the delivery or sale of narcotics to another, or with possession of drugs were, arguably, passed without attention to the problem of addicted mothers and newborn infants. While the criminal prosecution of mothers addicted to drugs who give birth to drug-addicted babies does raise issues of cruel and unusual punishment under the eighth and fourteenth amendments and due process under the fourteenth amendment, other constitutional issues are implicated as well. Those issues which involve mandatory testing and mandatory reporting of test results will be dealt with in the third approach to dealing with drug-addicted or drug-exposed mothers and drug-addicted and drug-exposed newborns. *See infra* notes 140-366 and accompanying text.

[62] Johnson v. State, 578 So. 2d 419, 420 (Fla. App. 1991).

[63] For a discussion of this treatment, see Spitzer, *A Response to "Cocaine Babies"—Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent*, 15 FLA. L. REV. 865 (1987).

criminalized a mother's conduct in giving birth to a drug-exposed child.[64] Instead, it chose to treat the problem via civil intervention.[65] Such an alternative treatment may demonstrate the legislature's interpretation of the existing law and, consequently, its inapplicability to the defendant in *Johnson*. The alternative interpretations of the intended applicability of the law, therefore, raise the quintessential due process concerns of vagueness and lack of notice.

3. Legislative Intent

Closely akin to the due process issue of notice is that of legislative intent. Where a legislature decides to deal criminally with a mother who gives birth to a drug-addicted or drug-exposed baby, it must do so specifically. The absence of such specificity, especially in recently enacted legislation, has led some courts to reject the criminal prosecution of drug using mothers. Thus in *People v. Hardy*,[66] the court concluded that an insufficient showing of legislative intent to criminalize the mother's conduct was fatal to the state's case.[67] Writing for a unanimous court, Judge Murphy declared that the court "cannot reasonably infer that the Legislature intended [a criminal] application, absent unmistakable evidence of legislative intent."[68] Adhering to conservative rules of legislative interpretation, the court noted:

> A court should not place a tenuous construction on this statute to address a problem to which legislative attention is readily directed and which it can readily resolve if in its judgment it is an appropriate subject of legislation.[69]

If the *Hardy* court's reluctance to assume the applicability of general criminal distribution statutes to mothers bearing drug-addicted or drug-exposed infants is any indication of judicial views, then the application of such statutes predating the recent trend in prosecuting defendant mothers should prove ineffective.

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[64] *Johnson*, 578 So. 2d at 420.

[65] *Id.*

[66] 188 Mich App. 305, 469 N.W.2d 50 (1991), *amended*, 471 N.W.2d 619 (Mich. 1991).

[67] *Id.* at 309, 469 N.W.2d at 53.

[68] *Id.* at 307, 469 N.W.2d at 52-53.

[69] *Id.*, 469 N.W.2d at 53 (quoting People v. Gilbert, 414 Mich. 191, 212-13, 324 N.W.2d 834 (1982)).

4. Doctor-Patient Privilege: Admission Used for Criminal Prosecution

A fourth constitutional argument stemming from the prosecution of pregnant drug users is that there results a fifth and fourteenth amendment self-incrimination violation, as well a fifth and fourteenth amendment due process violation, when a mother's own admissions to her physician are used in her criminal prosecution. Few would argue that a statement by the mother that she has ingested drugs is unimportant to the diagnosis and treatment of a newborn undergoing physical difficulties, including drug withdrawal symptoms.

Moreover, it is well established that any statement to a physician, made to effectuate the best possible treatment for the newborn or the mother, is a confidential communication subject to the physician-patient privilege.[70] Nevertheless, there are limits to a doctor-patient privilege. While states provide for confidentiality between doctor and patient, that confidentiality ceases when either drugs or children are involved.[71] Thus, a doctor may be obligated to report drug use by a patient or

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[70] For example, in New York, N.Y. CIV. PRAC. L & R § 4504(a) (McKinney 1971), provides for a doctor-patient privilege and reads, in part, as follows:

> Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing or dentistry, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.

Id.

[71] Despite N.Y. CIV. PRAC. L & R § 4504(a), a physician must report a patient with a drug addiction or habitual drug use. Moreover, N.Y. PUB. HEALTH LAW § 3372 (McKinney 1985) requires such reporting:

> It shall be the duty of every attending practitioner and every consulting practitioner to report promptly to the commissioner, or his duly designated agent, the name and, if possible, the address of, and such other data as may be required by the commissioner with respect to, any person under treatment if he finds that such person is an addict or a habitual user of any narcotic drug. Such report shall be kept confidential and may be utilized only for statistical, epidemiological or research purposes, except that those reports which originate in the course of a criminal proceeding other than under section 81.25 of the mental hygiene law shall be subject only to the confidentiality requirements of section thirty-three hundred seventy-one of this article.

Id.

drug-exposure in an infant.[72]

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[72] While the reports of drug addiction or habitual use are generally confidential, such confidentiality can give way "to a judicial subpoena or court order in a criminal investigation or proceeding." *See* N.Y. PUB. HEALTH LAW § 3371 (McKinney 1985). The New York statute provides:

> 1. No person, who has knowledge by virtue of his office of the identity of a particular patient or research subject, a manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, *except*:
> (a) to another person employed by the department, for purposes of executing provisions of this article; or
> (b) *pursuant to judicial subpoena or court order in a criminal investigation or proceeding*; or
> (c) to any agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by this article to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board; or
> (d) to a central registry established pursuant to this article.
> 2. In the course of any proceeding where such information is disclosed, except when necessary to effectuate the rights of a party to the proceeding, the court or presiding officer shall take such action as is necessary to insure that such information, or record or report of such information is not made public.

Id. (emphasis added). For purposes of the reporting and disclosure required by statute, the doctor-client privilege is set aside. Indeed, pursuant to N.Y. PUB. HEALTH LAW § 3373 (McKinney 1985): "For the purposes of duties arising out of this article, no communication made to a practitioner shall be deemed confidential within the meaning of the civil practice law and rules relating to confidential communications between such practitioner and patient." *Id.*

New Jersey also provides for a doctor-patient privilege which may not apply to a child born drug-addicted or drug-exposed. *See* N.J. STAT. ANN. § 2A:84A-22.2 (West 1976). The New Jersey statute provides for a doctor-patient privilege and reads as follows:

> Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a crime or violation of the disorderly persons law or for an act of juvenile delinquency to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who

In *Miranda v. Arizona*,[73] the United States Supreme Court held that where a person is subjected to a custodial interrogation by a law enforcement agent or deprived of his freedom of movement in any significant way, the person was entitled to the four-fold *Miranda* warnings.[74] Arguably, even though statements by a mother concerning her drug use may not be made to a law enforcement officer during a formal interrogation absent a *Miranda* warning, the fact that these statements are elicited by social welfare investigators, or available to such investigators for transfer to prosecuting authorities, may raise *Miranda*-type issues. Certainly, if the statement is made during questioning by an agent of prosecuting authorities, a violation of *Miranda* may occur.[75]

For the warnings to become mandated, however, *Miranda* requires that a person be in custody or deprived of their freedom of movement in a significant way.[76] In theory, therefore, a mother who gives

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obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

Id. Moreover, as in New York, a doctor's testimony concerning the drug addiction or drug exposure of a newborn is not privileged in New Jersey. *See* N.J. STAT. ANN. § 9:17-50(c) (West 1991). The New Jersey Statute reads as follows: "Testimony of a physician concerning the medical circumstances of the pregnancy, and the condition and characteristics of the child upon birth is not privileged." *Id.*

[73] 384 U.S. 436 (1966).

[74] *Id.* at 444. The warnings are: (1) You have the right to remain silent. (2) Anything you say may be used against you in a court of law. (3) You have the right to an attorney. (4) If you cannot afford an attorney, one will be provided for you free of charge. *Id.* at 479.

[75] For example, in United States v. Henry, 447 U.S. 264 (1980), the Supreme Court held that the right to counsel was violated when an informant and cell-block mate of the defendant deliberately obtained incriminating statements from the defendant. *Id.* at 274. However, in Kuhlmann v. Wilson, 477 U.S. 436 (1986), the Supreme Court held that the right to counsel was not violated when the defendant in his cell voluntarily made statements to a police informer. *Id.* at 459. It should be noted that criminal proceedings had begun in both of these actions prior to the conversations with the informer and this fact appeared to be crucial in both cases. *See Kuhlmann*, 477 U.S. at 456-59; *Henry*, 447 U.S. at 269-70.

[76] In Orozco v. Texas, 394 U.S. 324 (1969), police officers went to defendant's home, found him sleeping in his bedroom, awoke and, in effect, arrested him. *Id.* at 325. Without *Miranda* warnings being given, the defendant was questioned and confessed. *Id.* The Supreme Court ruled that *Miranda* applied even though the questioning did not take place in a police station. *Id.* at 327. In Oregon v. Mathiason, 429 U.S. 492 (1977),

information to her doctor or another person in a hospital, or in her home after she has given birth, is not in custody and, therefore, is not constitutionally entitled to the *Miranda* warnings. In fact, *Miranda* would be invoked only if the mother is arrested or taken into custody and then questioned.

This, however, does not end the inquiry. Even though *Miranda* warnings are not likely to be required, an incriminating statement of a mother can still be challenged as involuntary and, consequently, a violation of due process.[77] Moreover, it is arguable that a mother who has just given birth, and who fears for the health of her newborn, is under substantial psychological pressure to reveal her own drug use. A claim of duress under questioning by a government official or agent who takes advantage of the situation may, therefore, raise very real and substantial due process concerns.

5. Evidence: Constitutional Implications in Establishing Delivery of Drugs to a Newborn

The quantum of evidence necessary to convict a mother charged with passing cocaine or any other controlled substance to a newborn infant in the few seconds between the time the newborn appears out of the birth canal and the time the umbilical cord is clamped presents a fifth topic of constitutional concern. At the outset, expert testimony is necessary to establish that the substance was passed prior to the clamping of the umbilical cord—the timing of the transfer is crucial in delivery cases.

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the defendant went to a police station at the request of the police. *Id.* at 493. While there, he was told that he was not under arrest and was questioned without being *Mirandized*. *Id.* at 493-94. The Supreme Court held that he was not in custody and that no *Miranda* warnings were necessary. *Id.* at 495.

[77] *See* New York v. Quarles, 467 U.S. 649, 655 (1984). In *Quarles*, a woman told police that a man had just raped her and that he had just entered a nearby grocery store. *Id.* at 651-52. The police entered the store and detained the suspect. *Id.* at 652. Upon frisking him the police found an empty holster. *Id.* Without *Mirandizing* him, the police officer asked the defendant where the gun was located. *Id.* Defendant replied, "[t]he gun is over there." *Id.* The defendant was then formally arrested and read his *Miranda* warnings. *Id.* He then answered questions revealing his ownership of the gun and the place where he had obtained it. *Id.* The Supreme Court, in announcing a "public safety exception" to the necessity of giving *Miranda* warnings, noted that the defendant could still argue that his statement was coerced and, consequently, a violation of due process. *Id.* at 655. Moreover, the Court stated: "As the *Miranda* Court itself recognized, the failure to provide *Miranda* warnings in and of itself does not render a confession involuntary . . . and respondent is certainly free on remand to argue that his statement was coerced under traditional due process standards." *Id.* at 655 n.5.

Moreover, the state's contention that the transfer occurred when the baby was out of the birth canal must be established, like all elements of a crime, beyond a reasonable doubt.[78] To the extent that the evidence fails to show delivery within those few seconds, due process problems are created.

In *Johnson v. State*,[79] for example, it appears that the state failed to provide evidence sufficient to establish beyond a reasonable doubt that cocaine had been delivered from the mother to the newborn in the few seconds between the appearance of the baby from the birth canal and the clamping.[80] Likewise, in *People v. Hardy*,[81] the evidence did not establish beyond a reasonable doubt that cocaine had been delivered to

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[78] Justice Brennan concisely stated the requirement in *In re* Winship, 397 U.S. 358 (1970): "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every facet necessary to constitute the crime with which he is charged." *Id.* at 364.

[79] 578 So. 2d 419 (Fla. App. 1991). For a further elaboration of the *Johnson* case, see *supra* notes 10-17 and accompanying text.

[80] Dr. Tompkins, an obstetrician, explained that a mother delivers nutrients, oxygen and chemicals in her blood to an unborn child "by a diffusion exchange at the capillary level from the womb to the placenta . . . ." *Johnson*, 578 So. 2d at 422. According to Dr. Tompkins, metabolized cocaine travels in the blood from the mother's womb to the placenta and then through the umbilical cord to the child. *Id.* Dr. Tompkins also stated that "a measurable amount of blood is transferred from the placenta to the baby through the umbilical cord during delivery and after birth." *Id.*

Dr. Shasi Gore testified that some cocaine would remain in a mother's blood for 48-72 hours after it is taken. *Id.* Thus, Dr. Gore explained, a woman who had smoked cocaine at 10:00 p.m. and smoked it again between 6:00 and 7:00 a.m. the next morning would have cocaine in her blood when she gave birth at 1:00 p.m. that afternoon. *Id.* Dr. Gore further testified that if a woman smoked cocaine sometime at night and delivered a child at 8:00 a.m. the following morning, she would still have cocaine or benzoylecgonine in her system. *Id.*

It was the testimony of defendant's expert, Dr. Stephen Kandall, a neonatologist, which raised questions about the sufficiency of the proof in *Johnson*. Dr. Kandall testified that it was impossible to tell whether cocaine in a newborn's urine passed from the mother before or after delivery. *Id.* He also testified that it was possible that cocaine could pass from the mother to a newborn in the thirty to sixty second period between birth and the clamping of the umbilical cord, but that the amount would be small. *Id.*

[81] 188 Mich. App. 305, 469 N.W.2d 50 (1991), *amended*, 471 N.W.2d 619 (Mich. 1991). For a more elaborate discussion of *Hardy*, see *supra* notes 18-26 and accompanying text.

the newborn immediately after birth.[82] In both cases, the states' experts were able to testify only that it was probable or possible that the mother delivered cocaine to her newborn within the relevant thirty to sixty seconds.[83] In neither case did the testimony prove the necessary facts beyond a reasonable doubt.

Therefore, unless expert opinion testimony is able to provide a reasonable degree of medical certainty that drugs have passed from mother to infant immediately after birth in a particular case, and unless that opinion can be scientifically supported beyond a reasonable doubt, criminal conviction of a mother for delivery of the drugs clearly violates the established due process standard.

6. Racial Discrimination

Finally, the fact that the vast majority of prosecutions of women who bear drug-addicted or drug-exposed babies are against non-white women raises serious questions of racial discrimination.[84] One report indicates that as of October 1990, fifty-three women were criminally prosecuted because of their conduct during pregnancy.[85] Of the forty-seven women whose race could be determined, eighty percent were black.[86] Another study, focusing on a single county in Florida, showed that although drug use in the county was approximately the same for both black and white pregnant women, substance abuse by black women was ten times more likely to be reported.[87]

The disproportionate number of black women criminally prosecuted after giving birth to drug-addicted babies could make available such defenses as selective prosecution and denial of equal protection under

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[82] Dr. Charles Winslow, a neonatologist, testified that "it is highly probable that finite amount(s) of cocaine were moving through the umbilical cord in the direction of mother to baby between the time the child's body parts were delivered and the umbilical cord [was] subsequently clamped." *Hardy*, 188 Mich. App. at 307, 469 N.W.2d at 52.

[83] *See supra* notes 80-82 and accompanying text.

[84] Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV 1419 (1991).

[85] Paltrow, Goetz & Shende, *Overview of ACLU National Survey of Criminal Prosecutions Brought Against Pregnant Women: 80% Brought Against Women of Color*, American Civil Liberties Foundation (October 3, 1990).

[86] *Id.*

[87] Chasnoff, Landress & Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 325 NEW ENG. J. MED. 1202 (1990).

the fourteenth amendment.[88] The difficulty with raising such defenses appears to be the requirement that the defense establish an intent to discriminate on an impermissible basis such as race.[89]

Nevertheless, the fact that a showing of intent is required to establish selective prosecution or a denial of equal protection need not be an insuperable barrier to these defenses. Indeed, in *Keyes v. School District No. 1*[90] the United States Supreme Court held that a showing of intentional segregation of one portion of a city school system was *prima facie* evidence of intentional segregation of the whole, thus placing a burden on the school board to rebut the presumption and to establish that other segregated schools in the system were not the result of intentional acts.[91] Since the *Keyes* case, the Supreme Court as well as other courts have explored three models of proof needed to establish discrimination in the face of content-neutral statutes.

First, the "subjective intent" model requires a showing that a legislative body or administrative agency intentionally fostered a segregated system of enforcement.[92] One difficulty with such an approach, however, is that the courts appear hesitant to allow evidence of improper discriminatory motivation.[93]

Second, the "objective intent" model permits a finding of discriminatory intent where it can be shown that segregation was the

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[88] LAFAVE & ISRAEL, CRIMINAL PROCEDURE § 13.4, at 185-203 (West 1984).

[89] *Id.* *See also* Oyler v. Boles, 368 U.S. 448 (1962). In *Oyler*, the United States Supreme Court refused to grant relief to a defendant who claimed he was denied equal protection by being sentenced as an habitual criminal while others with worse criminal records were not. *Id.* Rejecting the petitioner's contention, the Supreme Court stated:

> Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.

Id. at 456.

[90] 413 U.S. 189 (1973).

[91] *See* Note, *Reading the Mind of the School Board: Segregative Intent and the* De Facto/De Jure *Distinction*, 86 YALE L. J. 317, 321 (1976).

[92] *See* Bronson v. Board of Educ., 525 F.2d 344 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); Soria v. Oxnard School Dist. Bd. of Trustees, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974).

[93] Note, *supra* note 91, at 325.

foreseeable result of a particular legislative act or omission.[94] In contrast to the previous approach, the "objective intent" model places a great deal of emphasis on result-based evidence.[95] Thus, for example, where a defendant is able to show that a particular jurisdiction harbors racial imbalances in the enforcement of its laws, ordinances and regulations, those imbalances may provide the requisite foreseeability to raise equal protection concerns.[96] In other words, the improper intent to permit racially imbalanced law enforcement may be inferred from the foreseeability of the proven result.[97] The "objective intent" model thus eliminates any *de facto/de jure* distinction in the mechanism of deriving intent largely from established result-based evidence and provides a far more accessible defense for overly prosecuted minorities.[98]

Finally, the "institutional intent" model allows objective evidence of a discriminatory policy to establish a *prima facie* showing that the policy was derived from a discriminatory legislative or administrative intent.[99] Such a showing shifts the burden of proof to the relevant legislative or administrative body to affirmatively establish that the policy underlying the law is racially neutral.[100] The model "allows for the objective identification of purposely discriminatory acts by [government bodies] in order to identify . . . discrimination in the absence of explicit racial classifications in city or state laws."[101] Although this last approach appears to back away from the more sympathetic standard established under the "subjective intent" model, it nonetheless permits a minority defendant to raise the issue sufficiently to require the government to justify its actions.

Given the requirements of the three models, the trend in equal protection defenses currently favors the use of result-based evidence. Even though the "institutional intent" model looks to remain the more

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[94] *Id.* at 328. *See also* Hart v. Community School Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975).

[95] Note, *supra* note 91, at 329.

[96] *Id.*

[97] *Id.* at 330.

[98] *Id.*

[99] *Id.* at 343.

[100] *Id.* at 335. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458 (1979); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1976).

[101] J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, § 14.4, at 601 (4th ed. 1991) [hereinafter NOWAK, ROTUNDA & YOUNG].

dominant approach for the near future,[102] it still provides for a ready fourteenth amendment defense in the face of the racially imbalanced prosecution of mothers giving birth to drug-addicted or drug-exposed infants.

III. CONTROL OF A WOMAN'S CONDUCT DURING PREGNANCY

A second approach to dealing with the problems of mothers bearing drug-addicted or drug-exposed infants is through state agency and court control of the mother's conduct during pregnancy. This approach, however, raises questions as to a woman's right to privacy as discerned by the Supreme Court in 1973.[103] This section first examines the holding in *Roe v. Wade*,[104] and then discusses efforts to control a pregnant woman's conduct in light of that decision.

In 1973, the United States Supreme Court declared unconstitutional two Texas statutes criminalizing abortion in the absence of medical authorization which stipulated that the abortion was necessary to save the mother's life.[105] In *Roe,* the petitioner maintained that she was unmarried, pregnant, and wished to safely terminate her pregnancy, but claimed she could not afford to travel to a jurisdiction where abortion was legal.[106] Invalidating the statutes, the Supreme Court announced that there was indeed a right to privacy—grounded in the fourteenth amendment's concept of personal liberty, and in restrictions on state action—broad enough to cover a woman's decision to terminate pregnancy.[107] The Court did not, however, hold that the privacy right

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[102] *Id.* at 636.

[103] Roe v. Wade, 410 U.S. 113 (1973).

[104] *Id.*

[105] *Id.* at 117-18 (citations omitted).

[106] *Id.* at 120. Other than the petitioner, the Court ruled that none of the other parties to the case had standing. *Id.* at 125-29. One of the parties was a doctor who had been permitted to intervene in the case, claiming that he had been arrested for performing abortions. *Id.* at 120-21. Another party consisted of a married couple alleging that the wife's pregnancy jeopardized her already frail health. *Id.* at 121.

[107] *Id.* at 153. The Court stated:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

to terminate pregnancy was absolute. Instead, the Court found that the right gave way to increasingly compelling state interests as the pregnancy progressed.[108]

Moreover, Justice Blackmun, writing for a five-to-four majority, concluded that during the first trimester of pregnancy the right of privacy was paramount and the decision to abort was entirely that of the woman and her physician.[109] Once the first trimester had ended, however, the Court determined that the state obtained an interest in protecting the health of the mother.[110] Finally, once a fetus became viable—capable of existing, even with help, outside of the mother's womb—the Court found a compelling interest in the state to intervene on behalf of the fetus to preserve its life.[111]

Id.

[108] *Id.* at 154-55. The Court's view was stated as follows:

> We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.
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> . . . .
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> Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Id.

[109] *Id.* at 163.

[110] *Id.* The Court posited:

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.

Id.

[111] *Id.* The Court defended the state's interest by noting that:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.

As the *Roe* Court noted, a fetus is not a person for purposes of the fourteenth amendment.[112] Nevertheless, the idea that a fetus should have some protection predates the *Roe* decision.[113] Indeed, courts have recognized a recovery in tort actions for injury to a fetus.[114] While the courts in some such cases required that the fetus be viable, that condition has never been considered universally necessary.[115] Thus, courts have permitted recovery in some instances even though the fetus was not viable or "quick."[116]

Still, it is one thing to permit an action by a third party for harm to a fetus, and entirely another to exercise control over a pregnant mother on behalf of a nonviable fetus. Moreover, since *Roe*, courts have required specific actions by the pregnant woman in order to justify intervention. For example, in *Jefferson v. Griffin Spalding County Hospital*,[117] the Supreme Court of Georgia, citing *Roe v. Wade* and the state's interest in protecting a fetus, gave temporary custody of an unborn child to the state and directed that the mother undergo a caesarean section despite the mother's refusal to undergo the surgery for

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> State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Id. at 163-64.

[112] *Id.* at 157.

[113] *See* W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 55, at 367-73 (Prenatal Injuries) (West 5th ed. 1984) [hereinafter PROSSER & KEETON].

[114] *Id.*

[115] *Id.* at 368-69.

[116] *Id.* The authors note:

> There are, however, two problems on which there is as yet no complete agreement. One concerns the stage of development of the unborn child at the time of the original injury. Most of the cases allowing recovery have involved a fetus which was then viable, meaning capable of independent life, if only in an incubator. Many of them have said, by way of dictum, that recovery must be limited to such cases, and others have said that the child, if not viable, must at least be "quick." But when actually faced with the issue for decision, most courts have allowed recovery, even though the injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick.

Id.

[117] 247 Ga. 86, 274 S.E.2d 457 (1981).

religious reasons.[118]

In *In re Jamaica Hospital*,[119] doctors sought court intervention to give the mother a blood transfusion she had refused on the basis of her religious beliefs.[120] Citing *Roe* and *Jefferson* in support of the state's interest in protecting the life of the fetus, Judge Lonschein appointed a medical doctor as guardian of the unborn child and directed him to use his medical judgment to save its life—including giving a blood transfusion to the mother.[121]

The lesson of cases such as *Jefferson* and *In re Jamaica Hospital* is that courts have intervened to protect a fetus where a danger to the very existence of the fetus is balanced against a woman's actions undertaken on the basis of her religion. Indeed, it has only been within these narrowly prescribed constitutional limits that privacy rights have been overcome. Such results, however, are by no means universal. For instance, in *Taft v. Taft*,[122] the Supreme Judicial Court of Massachusetts refused to require a woman to undergo surgery to sustain

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[118] *Id.* at 88, 274 S.E.2d at 459-60. Although the mother had adequate prenatal care and was in her last week of pregnancy, she refused to undergo the caesarean operation for religious reasons. *Id.* at 87-88, 274 S.E.2d at 458. The medical opinion was that the child had a 99-100% chance of not surviving a vaginal delivery and a 99-100% chance of surviving a caesarean section. *Id.* The evidence also showed that the mother herself had only a 50% chance of surviving a vaginal delivery. *Id.*

[119] 128 Misc.2d 1006, 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985).

[120] *Id.* at 1007, 491 N.Y.S.2d at 899. The testimony of the two doctors at the patient's bedside and the hospital record indicated that without the transfusion neither the fetus nor the woman would survive. *Id.*

[121] *Id.* at 1008, 491 N.Y.S.2d at 900 (citations omitted). Even though the fetus was not yet viable, being only 18 weeks old, the judge ordered the doctor to take all necessary steps to save the fetus. *Id.*

Moreover, in 1964, prior to the *Roe* decision, the New Jersey Supreme Court appointed a guardian for an unborn thirty-two-week-old fetus and directed that any medical action necessary be taken to preserve the fetus. Raleigh-Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964). Because she was a Jehovah's Witness, the mother had refused any blood transfusion as being against her religious convictions. *Id.* at 422, 201 A.2d at 537-38. The evidence was that, at some point during her pregnancy, neither the mother nor the fetus would survive without a blood transfusion. *Id.* at 423, 201 A.2d at 538. In support of its holding, the court stated that "the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them." *Id.*

[122] 388 Mass. 331, 446 N.E.2d 395 (1983).

the life of her fetus.[123] Citing both privacy and religious reasons for its ruling, the court further noted that the bareness of the record—particularly the absence of a description of the operation—the risks involved, and the possibility of carrying the baby to term without the surgery, all contributed to its decision.[124]

The judiciary, therefore, does not uniformly favor a state's right to intervene in a woman's pregnancy when she raises religious reasons in protest to a surgical mandate. Nonetheless, the standard analysis as enunciated in *Roe* and its progeny may change when the issue is not the *survival* of the fetus, but merely one of harm to it. Admittedly, there is no doubt that a pregnant drug addict risks harming the newborn in the form of low birth weight and withdrawal symptoms.[125] In fact, it has been suggested that cocaine use causes "congenital malformations, including anomalies of the central nervous system, skull, cardiovascular system, genito-urinary tract, and extremities" and other immediate and long-term medical and psychological problems.[126] At the present time, however, there exists no nation-wide, uniform, scientifically and ethically-based plan or program for dealing with pregnant, drug-addicted mothers so as to insure the safety of their fetuses. Because courts are forced to wait for the appropriate cases to come before them, and because they are limited by the available facts and resources, the current approach can be best described as "doing what can be done under the circumstances." Two cases illustrate this point.

One approach to controlling the conduct of a pregnant mother in order to protect the fetus involves the imprisonment of the mother. Indeed, in 1988, in *United States v. Vaughn*,[127] a judge sentenced a pregnant woman to jail for forging checks, noting that incarceration was necessary to prevent harm to the fetus from the mother's drug

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[123] *Id.* at 332-33, 446 N.E.2d at 397. The operation would have meant suturing in order for the cervix to maintain the fetus. *Id.* at 332, 446 N.E.2d at 396. The woman had previously undergone a similar operation to "hold" her pregnancy with three-of-four other fetuses. *Id.* Although both husband and wife wanted the child, the wife had become a "Born-Again-Christian" and refused to undergo the operation. *Id.*, 446 N.E.2d at 395-96.

[124] *Id.* at 333, 446 N.E.2d at 397.

[125] Bandstra, *Medical Issues for Mothers and Infants Arising from Perinatal Use of Cocaine, Drug-Exposed Infants and Their Families: Coordinating Responses of the Legal, Medical and Child Protection Systems*, ABA Convention, Washington, D.C. (1990).

[126] *Id.*

[127] Crim. No. F 2172-88B (D.C. Super. Ct.).

addiction.[128] In contrast, an Ohio court, in *Cox v. Court of Common Pleas of Franklin County*,[129] sought to protect a fetus by controlling the woman's conduct via a screening program.[130] *Cox* involved a complaint filed against woman in her seventh month of pregnancy alleging that she was neglecting her unborn child through drug use.[131] The juvenile court directed the woman not to use drugs that would harm the unborn child and required that she receive periodic medical examinations.[132] On appeal, the Ohio Court of Appeals granted the defendant's writ of prohibition, agreeing with Cox that under Ohio law, the juvenile court had no jurisdiction over a person who, like Cox, was over eighteen years of age.[133]

Control of a pregnant woman's conduct to the extent of preventing or controlling drug abuse is arguably consistent with the expansion of fetal rights over the past few decades.[134] Indeed, at least one aspect of this expansion is reflected in the recent effort to prevent women from engaging in work that may expose a fetus to harm. In the recent case of *International Union v. Johnson Controls, Inc.*,[135] the United States Supreme Court affirmed an employer's motion for summary judgment, dismissing a claim by unions and employees that precluding fertile women from working in positions exposing them to high levels of lead violated Title VII of the Civil Rights Act of 1964.[136] While such regulations are subject to the criticism that they perpetuate discrimination against women,[137] there appears to be a growing recognition on behalf of the Supreme Court that potential harm to the

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[128] *Id.*

[129] 42 Ohio App. 3d 171, 537 N.E.2d 721 (1988).

[130] *Id.*

[131] *Id.* at 172, 537 N.E.2d at 722-23. The woman was known to abuse cocaine and opiates and was currently in a methadone program. *Id.* During her pregnancy she had failed drug screenings on 23 occasions. *Id.* at 173, 537 N.E.2d at 723.

[132] *Id.*, 537 N.E.2d at 723.

[133] *Id.* at 175, 537 N.E.2d at 725.

[134] For an elaborate discussion on the expansion of fetal rights, see Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection* 95 YALE L.J. 599 (1986).

[135] 111 S. Ct. 1196 (1991).

[136] *Id.* (citations omitted).

[137] *See* Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641 (1981).

fetus is of great significance in the work place.[138]

Thus, it appears that what is needed to counter a pregnant woman's drug use in order to protect her fetus is not the "what-else-can-we-do" approach suggested by the treatment of the mothers in *Vaughan* and *Cox*, but a uniform, national policy. Such a policy should be based upon at least four considerations: (1) the effect of particular drugs on the fetus; (2) the appropriate point during pregnancy for judicial intervention; (3) the nature of court intervention; and (4) the resources required to establish a national policy.[139] Absent any coherent policy, however, there appears to be little hope for a consistent treatment balancing the rights of mothers and fetuses in the near future.

IV. NEGLECT AND ABUSE PROCEEDINGS: A THIRD APPROACH

A third approach to addressing the problem of drug-exposed newborns is through intervention by state child protective agencies immediately following the child's birth.[140] Such intervention may take the form of immediate, temporary removal of the infant from the custody of the mother initiated by the filing of a report of suspected child abuse or maltreatment by hospital personnel or other persons who may be required by state law to make a report.[141] Should an investigation by the agency reveal that the report is well-founded, the agency must take steps necessary to protect the health and safety of the subject child, as well as that of other children under the control of the

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[138] Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 577 (1985-86).

[139] *See* Cahalane, *Court-Ordered Confinement of Pregnant Women*, 15 NEW ENG. J. CRIM. & CIV. CONFINEMENT 203 (1989). Cahalane's article explores the bases of a court-ordered confinement of a pregnant woman. *See id.* It does not generally address the drug-addicted mother who may give birth to a drug-addicted child. *See id.* Rather, it discusses the grounds for, and possibility of, court-ordered confinement for (1) a woman who does not have a high-risk pregnancy but wants to deliver her child at home and (2) a woman who suffers from diabetes and does have a high-risk pregnancy. *Id.* at 206.

[140] The child welfare law of each state designates the social services agency responsible for receiving and investigating reports of child abuse or maltreatment and for commencing civil proceedings against persons legally responsible for the child's care. *See, e.g.*, FLA. STAT. ANN. §§ 415.503(5), .504 (West 1986); ILL. ANN. STAT. ch. 23, para. 2057.3 (Smith-Hurd 1988); MD. FAM. LAW CODE ANN. §§ 5.704, .706 (Supp. 1991); N.J. STAT. ANN. § 9:6-8.10 (West Supp. 1991).

[141] *See supra* note 140; *but see infra* note 184 (New York State Department of Social Services, Child Welfare Administration memorandum).

same caretaker who may be maltreated or in danger of maltreatment.[142] Thereafter, civil abuse or neglect proceedings, known in some jurisdictions as "dependency" proceedings, may be commenced by such agencies in a family court, probate court, or other designated tribunal.[143] The purpose of these judicial proceedings is to bring the child believed to be maltreated and his parents within the court's jurisdiction so as to enable the court to intervene, often against the will of the parents, for the protection of the child.[144]

In the case of drug-exposed infants, judicial intervention may begin with a request by the agency for temporary foster care placement while the child is still in the hospital. Based upon the child's chemical dependency, positive toxicology screens for either the mother or newborn

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[142] *See* Child Abuse Prevention and Maltreatment Act, 42 U.S.C.S. §§ 5106(a)-(b) (Law Co-op 1989 & Supp. 1991); CAL. PENAL CODE § 11165 (West Supp. 1991); CONN. GEN. STAT ANN. § 17-38 (West 1988); FLA. STAT. ANN. §§ 415.501-.513 (West 1986 & Supp. 1991); HAW. REV. STAT. §§ 587-1, 587-2, 587-21, 587-22, 587-24 (1985 & Supp. 1990); ILL. ANN. STAT. ch. 23, para. 2052-57 (Smith-Hurd 1988 & Supp. 1991); MASS. GEN. LAWS ANN. ch. 119, §§ 51A-F (West Supp. 1991); MD. FAM. LAW CODE ANN. § 5.701-.714 (Supp. 1991); MICH. COMP. LAWS ANN. §§ 722.621-.628 (West Supp. 1991); MINN. STAT. ANN. § 626.556 (West 1983 & Supp. 1991); N.J. STAT. ANN. § 9:6-8.8-.30 (West Supp. 1991); N.Y. SOC. SERV. LAW §§ 413-14 (Consol. 1984); OKLA. STAT. ANN. tit. 21, § 846 (West Supp. 1992); 23 PA. CONS. STAT. ANN. §§ 6311-19 (Purdon 1991); UTAH CODE ANN. §§ 4-501-13 (1989).

[143] Indeed, before commencing judicial proceedings the agency, where appropriate, will attempt to offer supportive services to the family. In 1980, Congress adopted Public Law 96-272 which mandates that welfare agencies focus not only on the safety of the child, but also on the needs of the child within the family—the assumption being that "children develop best in their own families and that most families are worth preserving." *See* McCullough, *The Child Welfare Response*, 1 THE FUTURE OF CHILDREN 61, 64-67 (1991) (citation omitted). Accordingly, child protective agencies are now required to make "reasonable efforts" to avoid the placement of children in foster care or to make diligent effort to reunite the family within a specified period of time once a child has been removed from the parent's custody. *Id.* at 67-68 (citation omitted). Moreover, many states have also adopted statutes requiring diligent efforts on the part of social services agencies to preserve the family. *See, e.g.*, N.Y. FAM. CT. ACT § 1022 (Consol. 1987) (requiring that in determining whether temporary removal of a child from the home is necessary to avoid imminent danger to a child, the Family Court determine whether reasonable efforts were made by the agency to provide services to the child and parent which would have eliminated the need for such removal). *See also* N.Y. SOC. SERV. LAW § 384b(7) (Consol. 1984) (providing that before the rights of a parent whose child is in foster care may be terminated on the grounds of "permanent neglect," it be established that the parents' failure to maintain contact with the child or to plan for the child's future was despite "the agency's diligent efforts to encourage and strengthen the parental relationship").

[144] *See, e.g.*, N.Y. FAM. CT. ACT § 1011 (Consol. 1987).

and the mother's admission to drug use, inadequate home accommodations, or other facts adversely bearing upon her ability to care for the infant, the agency may seek a preliminary order of the court preventing the hospital's release of the infant to the parent and placing the child in foster care.[145] When a drug-exposed infant requires extended hospitalization due to prematurity, low birth weight, drug withdrawal reaction, or other medical complications, there may be no imminent risk that the child will be discharged by the hospital and thus, no need for judicial determination as to placement until after a full hearing.[146]

Nonetheless, upon a finding of abuse or neglect following a complete hearing, the infant may be placed in foster care for a specified period.[147] Whether or not the child is removed from the mother's custody, the court's disposition upon such a finding usually includes referral of the mother to a drug treatment and rehabilitation program.[148] Because drug-exposed infants are often born with

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[145] *See infra* notes 184-85 (discussing a memorandum of the Executive Deputy Commissioner and General Counsel to the Child Welfare Administration of the New York City Human Resources Administration and letter of R. Wolfinger, Esq., New Jersey Department of Human Services, Division of Youth and Family Services).

[146] Grimm, *Drug-Exposed Infants Pose New Problems for Juvenile Courts*, 11 YOUTH L. NEWS 9, 12 (1990); Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 100 (1984).

[147] Decisions concerning the child's placement or other disposition are separate inquires from the abuse, neglect, or dependency adjudication. Before commencing a dispositional hearing, the court might order that the parent submit to court-ordered random drug testing as an aid in its assessment of the parent's present substance abuse. Most child protective statutes give courts broad power to order medical, psychological, and other evaluations of the parent or child. *See, e.g.*, N.Y. FAM. CT. ACT § 251 (Consol. 1987), WIS. STAT. ANN. § 146.0255 (West Supp. 1991) (allowing the court to order substance abuse testing of parents when their ability to care for a child is in issue). *See also* Grimm, *supra* note 146, at 13-14.

[148] When drug or alcohol abuse has been identified as a contributing factor to a finding of abuse, neglect, or dependency, the court, as part of its dispositional order—whether or not the child is returned to the parent—may direct that the parent enroll in a substance abuse treatment program. Kumpfer, *Treatment Programs for Drug-Abusing Women*, 1 THE FUTURE OF CHILDREN 50, 59 (1991); Jameson & Halfon, *Treatment Programs for Drug-Dependent Women and Their Children*, 11 YOUTH L. NEWS 20, 26 (1990). The court may also direct that the child protective agency refer the parents to a specific program and monitor the parents' performance. Kumpfer, *supra*, at 60-63; Jameson & Halfon, *supra*, at 26. Substance abuse treatment is offered through a variety of modalities, utilizing a residential or an out-patient approach. Kumpfer, *supra*, at 62; Jameson & Halfon, *supra*, at 26. Residential programs, which target the more heavily impaired drug or alcohol users, include therapeutic communities with programs of

physiological and neurobehavioral deficiencies, the mother may also be referred to a parental skills program.[149]

Intervention by state child welfare agencies upon the birth of a drug-exposed infant and the institution by such agencies of judicial proceedings to declare children abused, neglected or dependant, has been justified on two grounds. The first relates to the demonstrable

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several months to a year in duration, as well as drug treatment centers requiring shorter stays of two to four weeks. Kumpfer, *supra*, at 63; Jameson & Halfon, *supra*, at 27. Few residential programs, however, allow children to reside with their parents. Kumpfer, *supra*, at 63; Jameson & Halfon, *supra*, at 27. As an alternative for those with children, some residential programs have developed intensive daily outpatient programs for patients who require intensive therapy but cannot live at the center. Kumpfer, *supra*, at 63; Jameson & Halfon, *supra*, at 27. The only drawback to these programs is that they must, consequently, be located in close proximity to the patient's home or be easily accessible by public transportation in order to provide a realistic alternative. Kumpfer, *supra*, at 63-64; Jameson & Halfon, *supra*, at 27. Outpatient programs designed to assist less impaired substance abuses are offered by centers, community mental health programs, self-help groups, churches, and private counselors. *See* Kumpfer, *supra*, at 58; Jameson & Halfon, *supra*, at 26. Unfortunately, public funding for women's drug treatment has been historically inadequate; women who have no health care insurance or who are on medicaid are often excluded from private treatment programs. *See* Kumpfer, *supra*, at 58; Jameson & Halfon, *supra*, at 26. Additionally, because substance abuse programs were largely developed to address the needs of male addicts, it is believed that few, if any, of these programs are sensitive to the different emotional, social, and economic realities of women's lives. *See* Kumpfer, *supra*, at 55; McNultry, *Pregnancy Police, The Health, Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L & SOC. CHANGE 277, 301 (1987-88).

[149] *See* Cole, *Legal Interventions During Pregnancy*, 264 J. AM. MED. A. 2663, 2666 (1990). Infants who have had prenatal exposure to cocaine are more likely to be premature, have low birth weight, small head size, or deformed hearts, lungs, digestive systems or limbs. Zuckerman, *Drug-Exposed Infants: Understanding the Medical Risk*, 1 THE FUTURE OF CHILDREN 26, 27 (1991). Moreover, babies exposed to cocaine have exhibited neurobehavioral problems including organizational problems, poor attention, mood dysfunction and impaired human interaction. Feig, *Drug Exposed Infants and Children: Service Needs and Policy Questions*, 11 YOUTH LAW NEWS 4, 7 (1990). The National Association for Parental Addiction Research and Education estimates that cocaine-exposed newborns have a ten times greater risk of sudden infant death syndrome (SIDS). *See* Roberts, *supra* note 84, at 1429 (citation omitted).

Parental skills programs are aimed at preventing child abuse and neglect by teaching parents how to cope. Such programs seek to educate parents as to the stages of child development and about ways to nurture their children. They teach parents communication skills, methods for handling anger, conflict resolution skills, and more effective ways to discipline children. In New York City, Family Dynamics, Inc. is a private social services organization offering twelve session workshops. Parents are referred to the program by courts and agencies throughout New York City.

physical harm that *in utero* drug use may have caused to the newborn.[150] The second ground relates to the substantial risk of serious future harm to the child,[151] premised upon an assumption that a mother's prenatal drug use is predictive of the lack of care the mother will likely provide to the newborn.[152]

However, intervention by state child protection agencies upon the child's birth raises a number of issues relating to: how drug-exposed newborns should be identified, when and upon whom drug tests should be performed, and whether positive drug tests results, without more, warrant removal of the child from a parent's care upon a finding of neglect.

A growing number of child abuse and neglect laws now specifically require that pregnant women and newborns be tested for non-prescription drugs and further mandate reporting to the appropriate agencies any positive findings.[153] These reports often form the basis

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[150] For a discussion of the physical and psychological effects of drug use upon the infant, see *supra* note 149. *See also In re* Stefanel Tyesha C., 157 A.D.2d 322, 326-27 (N.Y. App. Div. 1990) (recognizing that an affirmative test result for cocaine in a newborn constitutes an "'actual impairment' for the purpose of withstanding a motion to dismiss a neglect petition for lack of sufficiency").

[151] *See, e.g.*, CAL. PENAL CODE § 11165.2 (West Supp. 1991) (defining "neglect" as maltreatment "indicating harm or threatened harm"); FLA. STAT. ANN. § 415.503(1) (West Supp. 1991) (defining an abused or neglected child as one "whose physical or mental health or welfare is harmed, or threatened with harm"); FLA. STAT. ANN. § 39.01(2) (West 1988) (defining abuse as "any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause the child's physical, mental or emotional health to be significantly impaired"); N.Y. FAM. CT. ACT § 1012(f) (McKinney Supp. 1991) (defining a neglected child as "one whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired").

[152] *See In re* Troy D., 215 Cal. App. 3d 889 (Cal. Ct. App. 1989). For a discussion of *In re Troy D.*, see *infra* notes 338-51 and accompanying text. *See also* Behrman, Larson, Gomby, Lewitt & Shiono, *Recommendations/Analysis*, 1 THE FUTURE OF CHILDREN 8, 10 (1991); Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return To Principled Intervention*, 42 STAN. L. REV. 745 (1990); *but see* Larson, *supra* note 10, at 76 (Argument that while research suggests that drug addicts are often poor parents, no research has demonstrated that use of illegal drugs during pregnancy is predictive of subsequent child abuse or neglect. Rather, Larson argues, a mother who continues to use drugs or alcohol, but who is motivated, may still properly care for her child).

[153] *See, e.g.*, FLA. STAT. ANN. § 415.503(9)(a)(2) (West Supp. 1991) (defining an abused child as a physically dependent newborn); IND. CODE ANN. § 31-6-4-3.1 (West Supp. 1991) (defining a child in need of services to include a child born with addiction); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1991) (defining an abused child as one determined to be physically dependent upon an addictive drug at birth); MINN. STAT. ANN. § 626.5562 (West Supp. 1991) (requiring doctors to test newborns for

for abuse and neglect proceedings. Arguably, to the extent that state statutes impose upon a pregnant woman a duty of care to the fetus, they implicate a woman's right to privacy in the matter of child bearing, autonomy, and bodily integrity, as well as freedom from "unreasonable searches and seizures" under the fourth amendment.[154]

This section will discuss the constitutional rights implicated and the issues raised: (1) by present state statutes and policies authorizing drug testing of mothers and their newborns and mandating the reporting to child protection agencies of positive test results, and (2) by the civil prosecution of child abuse, neglect, and dependency proceedings against women based upon such positive toxicological results.

A. DRUG TESTING AND REPORTING STATUTES

Child abuse reporting laws have been in existence only since the early 1960's. At that time, professional recognition of the widespread nature of child abuse caused states to incorporate mandatory reporting into

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controlled substances if they have reason to believe the infant has been exposed to such substances based upon a medical assessment of either the mother or infant); MINN. STAT. ANN. § 626.5563(a) (West Supp. 1991) (requiring medical professionals and other mandated reporters to report to the local child welfare agency any pregnant woman they have reason to believe has illegally used a controlled substance during pregnancy); OKLA. STAT. ANN. tit. 21, § 846(A) (West Supp. 1991) (defining an abused child as one who appears to be in a condition of dependence on a controlled dangerous substance); UTAH CODE ANN. § 62A-4-504 (1989) (requiring health professionals to report to the designated child protective agency any newborn suffering with fetal alcohol syndrome or fetal drug dependency); WIS. STAT. ANN. § 146.0255(2) (West Supp. 1991) (providing that physicians may perform tests of the infant if the parent consents and there is a substantial risk of prenatal drug exposure).

[154] The fourth amendment to the United States Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. For a discussion of the privacy and autonomy interests infringed by state reporting statutes, see Moss, *Legal Issues: Drug Testing of Postpartum Women and Newborns as the Basis for Civil and Criminal Proceedings*, 1 CLEARINGHOUSE REV. 1406 (1990); Robin-Vergeer, *supra* note 152, at 785.

This same duty of care may someday be imposed upon potential fathers. Indeed, a recent scientific study which examined the interaction of cocaine with spermatozoa supports the hypothesis that cocaine binds to sperm, that sperm may act as a vector to transplant cocaine into an ovum, and that this mechanism could be involved in the abnormal development of the off-spring of cocaine-exposed males. Yazig, Odem, & Polakoski, *Demonstration of Scientific Binding of Cocaine to Human Spermatozoa*, 266 A.M.A. J. 1956, 1956-59 (1991).

their child abuse laws.[155] Between 1963 and 1965, all 50 states and the District of Columbia enacted laws requiring physicians and health care workers to report suspected incidents of child abuse to local child protection agencies.[156]

In 1974, Congress enacted the Child Abuse Prevention and Treatment Act,[157] which conditions receipt of financial assistance upon

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[155] Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 99 (1984).

[156] Connolly & Marshall, *Drug Addiction, Pregnancy and Childbirth: Legal Issues for the Medical and Social Services Communities; Drug-Exposed Infants and Their Families: Coordinating Responses of the Legal, Medical and Child Protective Systems*, at 29, ABA Convention, Washington, D.C. (1990) [hereinafter Connolly & Marshall]. *See also* Note, *Civil Liability for Failing to Report Child Abuse*, 1 DET. C.L. REV. 135, 147-50 (1977).

[157] Today, the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. 5106(a) provides in part:

> (a) Development and operation grants. The Secretary, through the Center, is authorized to make grants to the States for purposes of assisting the States in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs.
> (b) Eligibility requirements. In order for a State to qualify for a grant under subsection (a) of this section, such State shall
> (1) have in effect a State law relating to child abuse and neglect, including
> (A) provisions for the reporting of known and suspected instances of child abuse and neglect; and
> (B) provisions for immunity from prosecution under State and local laws for persons who report instances of child abuse or neglect for circumstances arising from such reporting;
> (2) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and, upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child and of any other child under the same care who may be in danger of abuse or neglect;
> (3) demonstrate that there are in effect throughout the State, in connection with the enforcement of child abuse and neglect laws and with the reporting of suspected instances of child abuse and neglect, such
> (A) administrative procedures;
> (B) personnel trained in child abuse and neglect prevention and treatment;
> (C) training procedures;
> (D) institutional and other facilities (public and private); and
> (E) such related multidisciplinary programs and services, as may be necessary or appropriate to ensure that the State will deal effectively with child abuse and neglect cases in the State;
> (4) provide for methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians;
> (5) provide for the cooperation of law enforcement officials, courts of competent jurisdiction, and appropriate State agencies providing human services;

a state having in effect a child abuse and neglect law which, *inter alia*, (1) provides for the reporting of *known or suspected* instances of child abuse and neglect; (2) immunizes persons reporting instances of abuse and neglect from prosecution arising out of the reporting; (3) provides for the prompt investigation of such reports and, upon a finding of abuse or neglect, immediate action to protect the health and welfare of the subject child, as well as that of any other child under the same person's care who may be in danger of abuse or neglect; (4) provides for the confidentiality of all records; and (5) provides for the appointment of a *guardian ad litem* to represent the child in every resulting judicial proceeding.[158]

Today, all states mandate reporting by certain professionals, in addition to health care workers, who have "reasonable cause" to believe, or "reasonable suspicion" that a child has been abused.[159] New Jersey's child abuse reporting statute,[160] like the statutes of Utah[161]

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(6) provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings.

42 U.S.C.S. § 5106(a) (1974 & Supp 1991) (original version at 42 U.S.C. § 5101 (1974)).

[158] *Id.* Today, most state statutes mandate reporting by medical and other professionals, such as social workers, teachers, school administrators, and law enforcement officers who regularly have contact with children, and who are likely, therefore, to observe the symptoms of child abuse and neglect. Connolly & Marshall, *supra* note 156, at 34. The reporting statutes of a number of states further allow for voluntary reporting by individuals who are not so required, and permit voluntary reporting under circumstances wherein a report would not otherwise be required. *See, e.g.*, N.Y. SOC. SERV. LAW § 414 (McKinney 1953) (providing that "any person may make such a report if such person has reasonable cause to suspect that a child is an abused or maltreated child").

[159] *See, e.g.*, CONN. GEN. STAT. ANN. § 17a-101(b) (West 1991); D.C. CODE ANN. § 2-1352(a) (Supp. 1991); FLA. STAT. ANN. § 415.504(1) (West 1991); ILL. REV. STAT. ch. 23, para. 2054 (1988 & Supp. 1991); MD. FAM. LAW CODE ANN. § 5-704 (Supp. 1991); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1991); MICH. COMP. LAWS ANN. § 722.623(1) (Supp. 1991); MINN. STAT. ANN. § 626.556(3) (West 1991); N.J. STAT. ANN. § 9:6-8.10 (West 1976 & Supp. 1991); N.Y. SOC. SERV. LAW § 413(1) (McKinney 1991); OKLA. STAT. ANN. tit. 21, § 846(A) (West 1983 & Supp. 1991); UTAH CODE ANN. § 62A-4-503(1) (West 1989).

[160] N.J. STAT. ANN. § 9:6-8.10 (West 1976 & Supp. 1991).

[161] UTAH CODE ANN. § 62A-4-503(1) (1989) reads in pertinent part: "Whenever *any* person . . . has been subjected to . . . abuse, or neglect . . . or circumstances which would reasonably result in . . . abuse or neglect, he *shall* immediately notify the nearest . . . law enforcement agency or office of the division." *Id.* (emphasis added).

and Florida,[162] holds all persons responsible for reporting child abuse.[163] In New Jersey, all citizens bear the responsibility to report,[164] and any person knowingly failing to do so is guilty of a "petty offense" under the New Jersey Code of Criminal Justice.[165] The New Jersey statute further provides for immunity from civil or criminal liability for anyone reporting in accordance with its law.[166] In New Jersey, therefore, unlike many other states, the duty to report suspected child abuse is not limited to professional persons or to friends and neighbors, but extends to any person who may observe evidence of child abuse.

On the other hand, the New York Social Services Law,[167] as well

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[162] FLA. STAT. ANN. § 415.504(1) (West 1991) provides in part, "*any* person . . . who knows, or has reasonable cause to suspect that a child is an abused or neglected child *shall* report such knowledge or suspicion . . . ." *Id.* (emphasis added).

[163] N.J. STAT. ANN. § 9:6-8.10 (West 1976 & Supp. 1991). The New Jersey statute provides that "[a]ny person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report the same promptly . . . by telephone or otherwise." *Id. See also* State v. Hill, 232 N.J. Super. 353, 556 A.2d 1325 (App. Div. 1989).

[164] *See Hill*, 232 N.J. at 356, 556 A.2d at 1327.

[165] N.J. STAT. ANN. § 9:6-8.14 (West 1976) provides that any person who knowingly violates the child protection law is a "disorderly person." *Id.* N.J. REV. STAT. ANN. § 2C:1-4(b) defines disorderly persons offenses as "petty offenses" and section 2C:43-8 authorizes a fixed sentence, not exceeding six months, upon conviction. *Id.*

[166] N.J. STAT. ANN. § 9:6-8.13 (West 1976 & Supp. 1991). *See* Rubinstein v. Baron, 219 N.J. Super. 129, 529 A.2d 1061 (App. Div. 1987) (New Jersey court held that a physician, even if he acted maliciously, was granted absolute immunity by N.J.S.A. § 9:6-8.13.); *but see* F.A. v. W.J.F., 248 N.J. Super. 484, 591 A.2d 691 (App. Div. 1991) (explaining that *Rubinstein* held that "reasonable cause to believe" there is neglect must exist before absolute immunity is granted).

[167] N.Y. SOC. SERV. LAW § 413 (McKinney 1983 & Supp. 1991). The New York statute provides in pertinent part:

> Persons and officials required to report cases of suspected child abuse or maltreatment.
> 1. The following persons and officials are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child, or when they have reasonable cause to suspect that a child is an abused or maltreated child where the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge facts, conditions or circumstances which, if correct, would render the child an abused or maltreated child: any physician; surgeon; medical examiner; coroner; dentist; dental hygienist; osteopath; optometrist; chiropractor; podiatrist;

as the reporting laws of most other states, specifies those categories of persons *required* to report suspected child abuse and neglect.[168] These statutes generally require only physicians, dentists, psychologists, hospital personnel, social workers, teachers, law enforcement officials and other professionals to report child maltreatment when they learn of it while acting in their professional or official capacities.[169] Thus, in these

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resident; intern; psychologist; registered nurse; hospital personnel engaged in the admission, examination, care or treatment of persons; a Christian Science practitioner; school official; social services worker; day care center worker; provider of family or group family day care; employee or volunteer in a residential care facility defined in subdivision seven of section four hundred twelve of this chapter or any other child care or foster care worker; mental health professional; peace officer; police officer; district attorney or assistant district attorney; investigator employed in the office of a district attorney; or other law enforcement official.

Id. The law further states, "[i]n addition to those persons and officials required to report suspected child abuse or maltreatment, any person may make such a report if such person has reasonable cause to suspect that a child is an abused or maltreated child." *Id.* § 414.

[168] *See, e.g.*, D.C. CODE. ANN. § 2-1352 (West 1981 & Supp. 1991) ("(a) . . . any person specified in subsection (b) of this section who knows or has reasonable cause to suspect that a child known to him or her in his or her professional or official capacity has been or is in immediate danger of being a mentally or physically abused or neglected child . . . shall immediately report . . . . (b) Persons required to report . . . shall include every physician . . . dentist . . . nurse . . . law enforcement officer, school official, teacher . . . . (c) In addition to those persons who are required to make a report, *any other person* may make a report . . . .") (emphasis in original); ILL. REV. STAT. ch. 23, para. 2054(4) (Supp. 1991) (providing that physicians, teachers, dentists and other professionals "having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child shall immediately report . . . . In addition to the above persons required to report . . . *any other person* may make a report . . . .") (emphasis added); MD. FAM. LAW CODE ANN. § 5-704 (Supp. 1991) ("(a) . . . each health practitioner, law enforcement agency, police officer, educator or social worker who contacts, examines, attends, or treats a neglected child . . . shall (l) notify the local department . . . (c) Any person other than a health practitioner, law enforcement agency, police officer, educator or social worker . . . may file with the local department"); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1988 & Supp. 1991) ("Any physician, medical intern . . . medical examiner, psychologist, emergency medical technician, dentist, nurse . . . teacher, educational administrator . . . social worker, foster parent, . . . who, in his professional capacity shall have reasonable cause to believe that a child under the age of eighteen years is suffering . . . from abuse . . . or from neglect . . . or who is determined to be physically dependent upon an addictive drug at birth, shall immediately report such condition. . . . In addition to those persons required to report . . . *any other person* may make such a report.") (emphasis added).

[169] *See supra* note 168.

states, not only is mandated reporting limited to prescribed professionals, but the duty to report exists only when the evidence of abuse is disclosed while such persons are acting within the parameters of their official capacities. A mandated reporter who fails to report a case of suspected child abuse or maltreatment, however, is subject to criminal and civil sanctions.[170] In New York, for example, the willful failure of a mandated reporter to alert authorities to suspected maltreatment is a class A misdemeanor and may also subject the professional to civil liability for "damages proximately caused by such failure."[171]

As a result of increased incidents of prenatal drug exposure in newborn infants, several states have further amended their reporting statutes within the last several years to specifically mandate reporting when newborns experience drug withdrawal symptoms or when chemical testing of either the mother or newborn reveals a positive toxicology for a controlled drug. Specifically, in 1990, the Abuse, Maltreatment and Neglect Laws of Massachusetts were amended to require that physicians and hospital personnel immediately report to the Department of Public Welfare any newborn determined to be physically dependent upon an addictive drug.[172] Oklahoma's statute similarly requires prompt reporting by health care professionals of children who appear to be born

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[170] *See, e.g.*, ILL. REV. STAT. ch. 23, para. 2054(4) (West 1988 & Supp. 1991) (making a violation of the reporting section a Class A misdemeanor); MASS. GEN. LAWS ANN., ch. 119, § 51A (West Supp. 1991) (imposing "a fine of not more than one thousand dollars" for failure to report).

[171] N.Y. SOC. SERV. LAW § 420 (McKinney 1983). In New York, a class "A" misdemeanor is punishable by up to one year in prison. N.Y. PENAL LAW § 10(4) (McKinney 1976). New York, like other states, also grants immunity from civil or criminal liability to any persons reporting or otherwise acting in good faith pursuant to its statute. N.Y. SOC. SERV. LAW § 419 (McKinney 1983 & Supp. 1991). *See* Kempster v. Child Protective Services, 130 A.D.2d 623, 515 N.Y.S.2d 807 (App. Div. 1987) (holding that the qualified immunity provision is triggered not when a report is predicated on actual or conclusive proof of abuse or maltreatment, but rather when there is reasonable cause to suspect that the child who is the subject of the report might have been abused. Thus, in this action by parents against a hospital for libel, slander, infliction of emotional distress and *prima facie* tort, summary judgment was granted to the hospital where the child's medical records and attorney's affirmation submitted in support of the motion indicated that further investigation of possible maltreatment was warranted, the mother having been unable to explain several recent injuries to the infant.). *See also* Thomas v. Beth Israel Hosp., 710 F.Supp. 935 (S.D.N.Y. 1989). Moreover, the good faith of mandated reporters who act within the scope of their employment is presumed. N.Y. SOC. SERV. LAW § 419 (McKinney 1988 & Supp. 1991).

[172] *See* MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1991).

dependent upon a controlled substance.[173] Utah's code, effective January 1988, mandates reporting when newborns are determined to have "fetal alcohol syndrome or fetal drug dependency."[174] The State of Florida mandates reporting when a newborn is found to be physically dependent upon any controlled drug not administered to the mother during pregnancy for the purpose of medical treatment.[175] The Florida statute goes a step further to include situations in which a child at any time from birth to five years of age exhibits abnormal growth, neurological patterns, behavior problems or cognitive development problems as a result of a mother's use of a controlled substance.[176] Along these same lines the State of Indiana defines a "child in need of services" not only as a chemically dependent newborn, but also a child who suffers, or is at substantial risk of suffering, a life-threatening condition as a result of the mother's addiction to alcohol or a controlled substance during pregnancy.[177] The Illinois Statute, effective September

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[173] OKLA. STAT. ANN. tit. 21, § 846 (West 1983 & Supp. 1991) ("Every physician or surgeon . . . or any other health care professional attending the birth of a child . . . born in a condition of dependence on a controlled dangerous substance shall promptly report the matter to the county . . . in which such birth occurred.").

[174] UTAH CODE ANN. § 62A-4-504 (1988). Specifically, the code provides:

> When any person, including a licensee under the Medical Practice Act or the Nurse Practice Act, attends the birth of a child or cares for a child, and determines that the child, at the time of birth, has fetal alcohol syndrome or fetal drug dependency, he shall report that determination to the division as soon as possible.

Id.

[175] *See* FLA. STAT. ANN. § 415.503(9)(a) (West 1991). The statute defines "harm" as "[p]hysical dependency of a newborn infant upon any drug controlled [by statute] with the exception of drugs administered . . . in conjunction with medically approved treatment procedures; provided that no parent of such a newborn infant shall be subject to criminal investigation solely on the basis of such infant's drug dependency." *Id.*

[176] *Id.* The provision states that "harm" includes proof that "the mother used a controlled substance during pregnancy or that the parent or patients demonstrate continued chronic and severe use of a controlled substance and as a result of such exposure the child (from a newborn to a five year old) exhibits; . . . abnormal growth; . . . abnormal neurological patterns; abnormal behavior problems; . . . abnormal cognitive development." *Id.* § 415.503(9)(g).

[177] IND. CODE ANN. § 31-6-4-3.1 (West 1991). The Indiana statute provides in pertinent part:

> Child in need of services—Additional situations. A child is a child in need of services if:

1989, requires that a report be made not just upon evidence of chemical dependency, but when screening discloses evidence of "any amount" of a controlled substance in a newborn's blood or urine.[178]

Even where a state statute has not specifically mandated the reporting of positive toxicology results, state courts have imposed such a requirement. For example, in *In Re Troy D.*,[179] a California appellate court effectively held that the infant's positive toxicology alone was sufficient to trigger a child abuse report and to create a legal presumption of abuse under California law.[180] Similarly motivated legislative extensions can be seen in the form of pre-birth intervention by the state where maternal drug use appears evident. For example, the state legislatures of both New Jersey and Minnesota have gone so far as to provide for mandatory reporting of illegal drug use by a pregnant woman *prior* to the child's birth, and to require state intervention to protect the fetus in such situations.[181]

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(1) The child is born with:
(A) *fetal alcohol syndrome*; or
(B) *An addiction to a controlled substance or a legend drug*; or
(2) the child:
(A) has an injury;
(B) has abnormal physical or psychological development; or
(C) *is at a substantial risk of a life threatening condition; that arises or is substantially aggravated because the child's mother used alcohol, a controlled substance, or a legend drug during pregnancy; and needs care, treatment, or rehabilitation that the child is not receiving, or that is unlikely to be provided or accepted without the coercive intervention of the court.*

Id. (emphasis supplied).

[178] ILL. REV. STAT. ch. 23 para. 2053(3)(e) (West 1988 & Supp. 1991) ("'Neglected child' means . . . a newborn infant whose blood or urine contains any amount of a controlled substance . . . or a metabolite thereof, with the exception of a controlled substance or metabolite thereof whose presence in the newborn infant is a result of medical treatment administered to the mother or the newborn infant."). *See also* ILL. REV. STAT. ch. 37, para. 802-3(2-3)(c) (West 1990) (similarly defining a neglected minor); ILL. REV. STAT. ch. 23, para. 2054(4) (West 1988 & Supp. 1991) (providing that prescribed individuals acting in their professional or official capacity "shall" and that any other person "may" immediately report to the Department of Children and Family Services if they have "reasonable cause to believe" a child may be an "abused child" or "neglected child.").

[179] 263 Cal. Rptr. 869 (Cal. App. 1989).

[180] *Id.* at 872.

[181] *See* N.J. STAT. ANN. § 30:4C-11 (West 1981); MINN. STAT. ANN. § 626.5561 (West 1991). The New Jersey statute provides that when it appears that the welfare of any child will be endangered, application may be made to the Bureau of Children's Services

Although several state statutes require testing of the child and mother under certain circumstances, no state has as yet required that all newborns be tested for drug or alcohol exposure.[182] Furthermore, even those statutes which do provide for testing, seldom provide pristine guidelines to determine when to examine a mother or her newborn for drug exposure. Instead, the determination is generally left to hospital officials or local child protection agencies.[183]

In New York, however, although not specifically addressing the issue of when to test, the Child Welfare Administration of the New York City Human Resources Administration—the agency charged with investigating allegations of child maltreatment—recently clarified its policy with regard to reporting, investigating, referrals for court action, and the taking of a child into protective custody where a child is born with a condition attributable to *in utero* drug or alcohol exposure. Indeed, a memorandum dated June 3, 1991, from the Executive Deputy Commissioner and General Counsel of the Child Welfare Administration to caseworkers announced that while positive toxicological test results or drug withdrawal symptoms of a newborn should be reported to the state-

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to accept custody of such child. N.J. STAT. ANN. § 30:4C-11 (West 1981). The statute further states that "[t]he provisions of this section shall be deemed to include an application on behalf of an unborn child." *Id.* As yet, no reported cases prosecuting pregnant women for fetal neglect under this statute have been found. Moreover, because the language is extremely broad and vague, and because it arguably would apply not only to prenatal drug use but to many other forms of conduct during pregnancy, it is unlikely that the statute will withstand constitutional challenge. Connolly & Marshall, *supra* note 156, at 40. Similarly, the Minnesota statute requires medical personnel to immediately report to local welfare agencies any pregnant woman who they know or have reason to believe "is pregnant and has used a controlled substance for a nonmedical purpose during the pregnancy." MINN. STAT. ANN. § 626.5561 (West 1991).

[182] Larson, *supra* note 10, at 77. *But see* Assembly Bill No. 4023, introduced in the State of New Jersey Assembly on October 11, 1990, which would require testing of all newborn infants in that state. *See id.*

[183] *See* Larson, *supra* note 10, at 77. Minnesota's child protective statute, for instance, requires a physician to "administer a toxicology test to a pregnant woman under the physician's care . . . to determine whether there is evidence that she has ingested a controlled substance, if the woman has obstetrical complications that are a medical indication of possible use of a controlled substance for a non-medical purpose." MINN. STAT. ANN. § 626.5562(1) (West 1991). Moreover, a Wisconsin statute permits a hospital employee to refer an infant to a physician for testing *if* the employee "suspects that the infant has controlled substances in his/her bodily fluids" due to the mother's use of drugs during pregnancy. WIS. LEGIS SERV. ACT. 122 of the Biennial Session § 146.0255(2) (West Supp. 1990). Under the Wisconsin law, the physician may perform the test only if the parent consents and if there is a "serious risk" that the infant was exposed to drugs prenatally. *Id.*

wide central register of child abuse and maltreatment, they may not be sufficient cause, in and of themselves, for summary removal of a child from its mother or for court action.[184] Recognizing that a positive toxicology result indicates neither the extent of the mother's drug use nor whether the child's physical, mental or emotional condition is impaired or at risk of impairment, the memorandum directs that other evidence of the mother's chronic drug use, of injury to the child, or of risk of injury exist before such action may be taken.[185]

Despite the fact that New Jersey does not have a policy of summary removal of children from the home based solely upon positive toxicology results, as in New York, a positive toxicology result in New Jersey does constitute a "reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse," thereby triggering New Jersey's mandatory reporting requirement.[186] Accordingly, the Division of Youth and Family Services of the New Jersey Department of Human Services has directed hospitals to report all positive toxicology cases to

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[184] Memorandum from the Executive Deputy Commissioner, General Counsel of the Child Welfare Administration (June 3, 1991). The memorandum read in part:

> [A] report of positive toxicology, drug withdrawal symptoms, fetal alcohol effect or fetal alcohol syndrome will be accepted by the State Central Register, but no such report can be indicated, or serve as the basis for the taking of the child into protective custody, if the only known fact is the positive toxicological test result, the drug withdrawal symptoms, fetal alcohol effect or fetal alcohol syndrome. This is because *such a result is indicative of neither the extent of drug or alcohol use by the mother nor whether the child's physical, mental or emotional condition is at risk of impairment* by the parent's failing to exercise a minimum degree of care. However, if there has been a parental admission to chronic or repeated drug or alcohol use, or if there is medical opinion or there are clinical indicators that the child's condition could only result from repeated or chronic drug or alcohol use by the mother, and there is reasonable cause to believe that such addiction or dependency will continue, or there are other indicators of neglect, a hold (detaining the child) for 24 hours or until the next court day is possible pending further investigation. This determination should be made if there is reasonable cause to believe there is imminent risk or danger to the child's life or health. It should be noted that lack of prenatal care, notwithstanding the positive toxicology result, drug withdrawal symptoms, fetal alcohol effect or fetal alcohol syndrome is not a sufficient basis for removal. "Indicated report" is defined by N.Y. SOC. SERV. LAW § 412(11) as a report wherein credible evidence of the alleged abuse or maltreatment has be found to exist following investigation.

Id. (emphasis added).

[185] *Id.*

[186] *See* N.J. STAT. ANN. 9:6-8:10 (West 1976 & Supp. 1991).

it for investigation.[187]

In addition to the constitutional issues raised by recent state statutory amendments specifically addressing *in utero* drug exposure,[188] these statutes also raise a host of other issues. For example, statutes such as those in Illinois and Minnesota which require the reporting to child protective agencies when tests of a child's urine, blood, or other body secretions reveal the presence of a controlled substance,[189] may be both too narrowly and too broadly drafted.[190] The statutes may be too narrow in that they require flagging even false positive results caused by improperly performed tests.[191] On the other hand, an "infant [might] expel the drugs through . . . urine shortly after birth and before the hospital has had an opportunity to administer [a drug screening test]."[192] Thus, some infants testing positive may in fact not be drug-exposed, while infants with negative test results may display signs of drug withdrawal.[193] Moreover, such test results reveal neither the frequency nor the degree of the mother's use,[194] nor can they reveal her level of

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[187] In New Jersey, like most other states, testing for drug and alcohol-exposed newborns is "uneven." Letter from R. Wolfinger, Esq., State of New Jersey Department of Human Services, Division of Youth and Family Services (August 13, 1991). Consequently, that state's Department of Health is currently developing a "good practice standard" for testing; for the moment, the decision when to test varies from hospital to hospital and at times from doctor to doctor. *See Id.*

[188] *See infra* notes 201-56 and accompanying text.

[189] *See* ILL. REV. STAT. ch. 37, para. 802-3(1) (West 1990); MINN. STAT. ANN. § 626.556(3) (West 1983 & Supp. 1991).

[190] English, *Prenatal Drug Exposure: Grounds for Mandatory Child Abuse Reports?* 1 YOUTH L. NEWS 3, 5 (1990).

[191] English, *supra* note 190, at 5; Moss, *supra* note 154, at 1413; Greenblatt, *Urine Drug Testing: What Does It Test?*, 23 NEW ENG. L. REV. 651 (1988-89); *A Model for Advocacy and Treatment: The Role of Prenatal Toxicology Testing*, 11 Calif. Advocs. for Pregnant Women Newsletter 1, 2-3 (July, 1990) [hereinafter Pregnant Women Newsletter].

[192] Pregnant Women Newsletter, *supra* note 190, at 2-3. *See also* Robin-Vergeer, *supra* note 152, at 785.

[193] Lockwood, *What's Known—and What's Not Known—About Drug-Exposed Infants*, 11 YOUTH L. NEWS 15, 19-20 (1990). The State of Minnesota has attempted to address this problem by requiring that positive test results be confirmed and that negative results not eliminate the duty to report if other medical evidence of prenatal exposure exists. *See* MINN. STAT. ANN. § 626.5562(2) (West 1991).

[194] Lockwood, *supra* note 193, at 22. For example, cocaine may only be detected for two to three days after its use, while marijuana may be detected for three weeks after use has been discontinued. Larson, *supra* note 10, at 4.

functioning.[195] It also has been argued that the language of the Florida, Massachusetts, Oklahoma, and Utah statutes, requiring that reports be made of children born "addicted" or "physically dependent" upon a controlled substance,[196] is not expansive enough to identify all newborns exposed *in utero* to harmful drugs because all harmful drugs are not addictive.[197]

The argument has also been advanced that mandatory reporting statutes drive pregnant addicts away from seeking prenatal care and from entering hospitals for delivery of their babies, rather than capitalizing on the incentive of some pregnant women to seek treatment so that they may bear healthy children.[198] Additionally, there exists a marked disparity in testing and reporting along racial and socio-economic lines.[199] Public hospitals which serve the poor are more likely to test women and their newborns for drug exposure than private hospitals, and, as previously noted, black women are more likely to be tested and reported to child protective agencies than white women.[200]

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[195] Robin-Vergeer, *supra* note 152, at 784; English, *supra* note 190, at 5.

[196] *See* FLA. STAT. ANN. § 415.504 (West 1991); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1991); OKLA. STAT. ANN. tit. 21, § 846 (West 1983 & Supp. 1991); UTAH CODE ANN. § 78-3b-8(1) (1987).

[197] *See* English, *supra* note 190, at 5 (noting that neither teratogenic drugs—causing disabling effects in organic development—nor toxic drugs—causing direct injury—are addictive).

[198] English, *supra* note 190, at 7 (noting that even if a woman continues to use drugs during her pregnancy, proper prenatal care will improve the chances for a healthier baby); Larson, *supra* note 10, at 6.

[199] Moss, *Legal Issues: Drug Testing of Postpartum Women and Newborns as the Basis for Civil and Criminal Proceedings*, 1 CLEARINGHOUSE REV. 1406, 1412 (1990); Roberts, *supra* note 84, at 1432.

[200] Roberts, *supra* note 84, at 1433. *See supra* notes 84-101 and accompanying text. *See also* Chasnoff, Landress & Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County Florida*, 322 NEW ENG. J. MED. 1202, 1205-07 (1990) (In a 1989 survey of 715 pregnant women in Pinellas County Florida, 14.8% had positive toxicologic test results for alcohol, opiates, cocaine or cannabinoids. There was little difference in the prevalence of drug use between those women seen in public clinics (16.3%), and those seen in private offices (13.1%). Moreover, 15.4% of white women tested positive, while 14.1% of black women tested positive. Despite the similar rates of substance abuse among black and white women, however, black women were reported to child protective services upon giving birth at approximately 10 times the rate of white women.).

B. DRUG TESTING AND THE RIGHT TO PRIVACY

Prenatal drug exposure of infants is commonly determined by urine or blood toxicological drug tests performed on the mother and/or child immediately following the child's birth.[201] A positive toxicology result for either may trigger: a report to a child protection agency, a child neglect and abuse proceeding, the criminal prosecution of the mother, and the removal of the child from the mother's custody. Such testing, therefore, raises serious issues of privacy, consent, and confidentiality. In the absence of her informed consent, a mother's right to privacy concerning issues related to childbearing, as well as her right to bodily integrity, may be infringed by drug testing her or her infant.[202]

While the United States Constitution does not explicitly mention any right of personal privacy, the United States Supreme Court recognized the existence of such a right as early as 1891 in *Union Pacific Railway Co. v. Botsford*,[203] stating:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . . "the right to be one's person may be said to be a right of complete immunity: to be let alone."[204]

In a line of decisions following *Botsford*, the United States Supreme Court has found this right, in varying contexts, in the first,[205]

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[201] Larsen, *supra* note 10, at 6.

[202] *See generally* Robin-Vergeer, *supra* note 152, at 785; English, *supra* note 190, at 4.

[203] 141 U.S. 250 (1891). In *Botsford*, the Supreme Court addressed the question of whether, in a civil personal injury action, a trial court could grant a defense application for a physical examination of the plaintiff prior to trial. *Id.* The Court held that in the absence of statutory authorization or some basis in common law, the trial court had no power to compel the plaintiff to submit to a physical examination of her person by the defendant's physician. *Id.*

[204] *Id.* at 251 (citation omitted).

[205] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

fourth,[206] fifth,[207] and ninth amendments,[208] in the first section of the fourteenth amendment,[209] and in the penumbras of the Bill of Rights.[210] Moreover, in *Griswold v. Connecticut*,[211] and in *Roe v. Wade*,[212] the Supreme Court noted that a fundamental right of personal privacy, "implicit in the concept of ordered liberty" was to be found in certain "penumbras" or "zones of privacy" emanating from the Bill of Rights.[213] The Supreme Court has also discovered similar individual

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[206] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Id. amend. IV.

[207] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Id. amend. V.

[208] "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." *Id.* amend. IX.

[209] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. amend. XIV § 1.

[210] Roe v. Wade, 410 U.S. 113, 152 (1973).

[211] 381 U.S. 479 (1965).

[212] 410 U.S. 113 (1973).

[213] In *Griswold*, the Court invalidated a Connecticut statute forbidding the use of contraceptives, declaring that such a statute violated the right of marital privacy. *Griswold*, 381 U.S. at 484-86. In *Roe*, the Court invalidated two Texas statutes which criminalized abortion with few noted exceptions, reasoning that such laws impermissibly infringe upon a woman's right of privacy. *Roe*, 410 U.S. at 152-54 (quoting Palko v.

privacy interests rooted in the first amendment in *Stanley v. Georgia*,[214] in both the fourth and fifth amendments in *Terry v. Ohio*,[215] *Katz v. United States*,[216] *Boyd v. United States*,[217] and in *Olmstead v. United*

Connecticut, 302 U.S. 319, 325 (1937). For a more elaborate discussion of *Roe*, *see supra* notes 103-11 and accompanying text.

[214] 394 U.S. 557, 564 (1969). *Stanley* concerned the constitutionality of a Georgia law prohibiting persons from "knowingly hav[ing] possession of . . . obscene matter." *Id.* at 558 (citation omitted). While conducting a lawful search of the petitioner's home for bookmaking contraband, the police inadvertently discovered sexually explicit films. *Id.* Petitioner was convicted under the state statute. *Id.* at 559. Declaring that the first amendment prohibits the state from telling a person, within the privacy of the home, what materials he may read or watch, the Court held that the first and fourteenth amendments forbid the criminalization of the private possession of obscene materials. *Id.* at 568. *But see* Osborne v. Ohio, 110 S. Ct. 1691 (1990) (holding that the private possession of photographs constituting child pornography, although not obscene, is not constitutionally protected); New York v. Ferber, 458 U.S. 747 (1982) (holding that pornography involving children is not protected by the first amendment, and the state has greater flexibility in regulating it than other obscenity or adult pornography).

[215] 392 U.S. 1, 8-9 (1968). In *Terry*, a Cleveland detective on a beat he had patrolled for many years observed petitioner and two other individuals engaged in what the officer estimated to be "casing" a local jewelry store. *Id.* at 5-6. After approaching the suspects and asking their names, the officer patted down petitioner's clothing and discovered a pistol in petitioner's overcoat pocket. *Id.* at 7. Petitioner was subsequently charged with carrying a concealed weapon. *Id.* at 7-8. The Court held that the revolver seized from the petitioner was properly admitted into evidence at trial because the "pat down" search leading to the weapon's seizure was reasonable under the fourth amendment. *Id.* at 30. Although the Court acknowledged that the fourth amendment does apply to stop and frisk procedures, it determined that a pat down search is reasonable where the officer has prior articulable suspicion warranting a belief that his safety or the safety of others may be threatened. *Id.* at 27.

[216] 389 U.S. 347, 350 (1967). Katz was convicted for transmitting wagering information by telephone across state lines in violation of a federal statute. *Id.* at 348 (citation omitted). At trial, the government introduced evidence in the form of Katz's conversations recorded via an electronic listening device attached to a telephone booth from which the petitioner was suspected to have conducted illegal activity. *Id.* The appellate court affirmed Katz's conviction, ruling that there had been no fourth amendment violation because there was "no physical entrance into the area occupied by [petitioner]." *Id.* at 348-49. The Supreme Court reversed, concluding that the government's activity violated Katz's expectation of privacy and, therefore, his fourth amendment rights. *Id.* at 353. In determining the appropriate scope of fourth amendment protections, Justice Stewart, writing for the majority, noted that "the Fourth Amendment protects people, not places." *Id.* at 351.

[217] 116 U.S. 616 (1886). Boyd was convicted of violating a customs statute for failing to pay the duty on 35 cases of imported plate glass. *Id.* at 617 (citation omitted). At trial, the government introduced invoices the district attorney had compelled Boyd to produce in conjunction with separate forfeiture proceedings. *Id.* at 618. Boyd objected

States,[218] and in the first section of the fourteenth amendment in *Meyer v. Nebraska*.[219]

As early as 1942, the United States Supreme Court recognized that reproduction is a fundamental right.[220] In *Skinner v. Oklahoma*,[221] the Court invalidated a state statute providing for the sterilization of persons twice convicted of felonies involving moral turpitude, characterizing the right to procreate as "one of the basic civil rights of

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to the use of the invoices on the basis that the compulsory production of the documents violated the fourth and fifth amendments. *Id.* The Court agreed with the petitioner, stating that the scope of fourth and fifth amendments protection included not only physical invasions of a defendant's property, but also orders forcing a defendant to produce incriminating papers. *Id.* at 622. The Court noted that unreasonableness is present where the "forcible and compulsory extortion of a man's own testimony or of his private papers [is] to be used as evidence to convict him of a crime or to forfeit his goods." *Id.* at 630. *But see* Braswell v. United States, 487 U.S. 99 (1988) (discussing the development of the fifth amendment jurisprudence leading to the overruling of *Boyd*).

[218] 277 U.S. 438, 478-79 (1928) (Brandeis, J. dissenting) (wiretapping is an unjustifiable governmental intrusion upon the privacy of the individual in violation of the fourth amendment; the use of evidence so obtained in a criminal proceeding violates the fifth amendment). In *Olmstead*, the Supreme Court confined its hearing to the question of whether the use in evidence of incriminating telephone conversations voluntarily conducted by the accused, intercepted by means of secret wiretapping by a government agent, violated the fourth and fifth amendments to the United States Constitution. *Id.* at 439. The majority, per Chief Justice Taft, held that the use of the conversations in evidence did not compel the accused to be a witness against himself in violation of the fifth amendment. *Id.* at 462. Additionally, the majority held that the obtaining of the evidence and its use at trial did not violate the fourth amendment. *Id.* at 466. Chief Justice Taft explained that the wiretapping did not amount to a search or seizure within the confines of the fourth amendment because the tapping connections were made in the basement of a large office building on public streets, and no trespass was committed upon any of defendant's property. *Id.* at 464-66.

[219] 262 U.S. 390, 399 (1923). *Meyer* involved a Nebraska foreign language act forbidding public, private, and parochial schools to instruct in any language except English to any student who had not reached and successfully completed the eighth grade. *Id.* at 397 (citation omitted). The Court held that it is "within the liberty of the [Fourteenth] Amendment" for parents to engage a teacher to instruct their children in a language other than English. *Id.* at 400. *See also* Pierce v. Society of the Sisters, 268 U.S. 510 (1925) (Oregon statute compelling public school attendance found in violation of the fourteenth amendment as an unreasonable interference with the liberty of parents to direct the upbringing and education of children under their control).

[220] Skinner v Oklahoma, 316 U.S. 535 (1942).

[221] *Id.*

man."[222] In *Griswold*, and its progeny,[223] the Court made clear that the right to make decisions affecting reproduction is rooted in a fundamental right of privacy. *Griswold* involved a Connecticut statute under which a physician was convicted for counselling a married couple as to the means of preventing conception and for prescribing a contraceptive device.[224] In striking down the statute, the *Griswold* Court stated that the right of "marital privacy" is one falling within the penumbra of those fundamental privacy rights guaranteed by the Bill of Rights.[225]

Subsequently, in *Eisenstadt v. Baird*,[226] the issue of reproductive rights was addressed in terms of the individual's right to privacy.[227] The *Eisenstadt* Court invalidated a regulation, justified as a health measure, which made contraceptives less available to unmarried persons than to married couples.[228] Writing for the majority, Justice Brennan

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[222] *Id.* at 541. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 1339 (1978) [hereinafter TRIBE] ("[T]he Court in *Skinner* was moved to recognize the fundamental personal character of a right to reproductive autonomy in part because of fear about the invidious and potentially genocidal way in which governmental control over reproductive matters might be exercised if the choice of whether or when to beget a child were to be transferred from the individual to the state."). *Id.*

[223] *See supra* note 211 (discussing the invalidity of an anti-contraceptive statute); Eisenstadt v Baird, 405 U.S. 438 (1972) (Massachusetts statute effectively authorizing the distribution of contraceptives only to married persons violates equal protection and right to privacy); Roe v. Wade, 410 U.S. 113 (1973) (constitutional right to abortion in first trimester); Cleveland Bd. of Educ. v. Lafeur, 414 U.S. 632, 640 (1974) (restrictive maternity leave regulations infringed upon employees rights to privacy in matters of childbearing); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (Missouri statute imposing stringent regulations on the availability of abortion upheld); Rust v. Sullivan, 111 S. Ct. 1 (1991) (U.S. Dept. of Health & Human Services regulation prohibiting, *inter alia*, abortion counseling at facilities receiving government funding upheld).

[224] Griswold v. Connecticut, 381 U.S. 479, 480 (1965) (citations omitted).

[225] *Id.* at 485-86. Justice Douglas, delivering the majority opinion, commented:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees .... Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

Id.

[226] 405 U.S. 438 (1972).

[227] *Id.*

[228] *Id.* at 452-53.

stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[229] The *Eisenstadt* decision, therefore, singled out as decisive, from among the fundamental rights discussed in *Griswold*, the element of reproductive autonomy.[230]

In 1973, the right of privacy recognized in earlier cases was extended to a woman's decision whether to abort her pregnancy.[231] In striking down a Texas statute that criminalized abortion, the Court, in *Roe v. Wade*,[232] held that the right of personal privacy—whether found in the fourteenth amendment's concept of personal liberty and restrictions upon state action, or in the ninth amendment's reservation of rights to the people—is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[233]

Thus, it is firmly established that issues related to procreation implicate an individual's fundamental privacy and liberty interests. The Supreme Court's historical recognition of a parent's freedom of choice in matters relating to the care, custody, education, management, and nurturing children as a fundamental privacy or liberty interest is also clear.[234] When the government attempts to limit such fundamental rights, courts must engage in an examination of whether the regulation impermissibly infringes upon constitutional liberties; specifically, the court must consider the nature and importance of the rights at stake, the significance of the state's interest involved, and how narrowly the regulation has been tailored to accomplish the state's purposes.[235]

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[229] *Id.* at 453 (emphasis in original).

[230] *See* Tribe, *supra* note 222, at 1339. That the question of reproductive autonomy lay at the heart of the contraception cases was made clear several years later when the Supreme Court, in Carey v. Population Services International, 431 U.S. 678 (1977), invalidated a state ban on the distribution of non-prescription contraceptives. *See id.*

[231] Roe v. Wade, 410 U.S. 113, 153 (1973); Doe v. Bolton, 410 U.S. 179 (1973). For a discussion of *Roe*, see *supra* notes 105-11 and accompanying text.

[232] 410 U.S. at 113.

[233] *Id.* at 153.

[234] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 753 (1982); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968), *reh'g denied*, 391 U.S. 971 (1968); Prince v. Massachusetts, 321 U.S. 158, 165-166 (1944), *reh'g denied*, 321 U.S. 804 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-536 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[235] *See* Maryland v. Craig, 110 S. Ct. 3157, 3162-64 (1990); Lassiter v. Department of Social Serv., 452 U.S. 18, 27 (1981); Carey v. Population Serv. Int'l, 431 U.S. 687, 686 (1977); *Roe*, 410 U.S. at 156; Griswold v. Connecticut, 381 U.S. 687, 686 (1965); NAACP

An example of the Supreme Court's use of this analysis to balance fundamental privacy rights against a legitimate state interest, and to limit the scope of state regulation so as to address only that interest can be seen in *Roe v. Wade*.[236] In that case the Court structured the contours of the state regulation to meet only the compelling and medically justified state interest.[237] Similarly, because procreation and child rearing involve fundamental privacy rights, state regulations and policies requiring the testing of pregnant women and their newborns may withstand constitutional challenge only upon an examination of the fundamental rights infringed upon, the significance of the state's interest involved, and the narrowness of the regulation at issue.

Notwithstanding the fundamental right of parents in the rearing of their children, the Supreme Court has historically upheld the state's interest in the protection of children.[238] Moreover, government interference with the liberty of a parent to rear, nurture, and manage a child has been grounded both upon the state's general police power to protect and promote public welfare, and upon the doctrine of *parens patriae*.[239] Consequently, courts have repeatedly upheld state statutes restricting a parent's control by, for example, requiring that children attend school,[240] regulating the employment of children,[241] enacting child abuse and neglect laws,[242] and protecting child witnesses in criminal proceedings.[243]

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v. Alabama, 377 U.S. 288, 307 (1964).

[236] 410 U.S. 113 (1973). For a further discussion of *Roe*, see *supra* notes 105-11 and accompanying text.

[237] *Roe*, 410 U.S. at 153-54.

[238] *See* Osborne v. Ohio, 110 S. Ct. 1691 (1990); New York v. Ferber, 458 U.S. 747 (1982); *Ginsberg*, 390 U.S. at 629; *Prince*, 321 U.S. at 158.

[239] *Parens patriae* which literally means "parent of the country," traditionally refers to the role of the state as sovereign and guardian of persons under a legal disability to act for themselves, such as children or the insane. Santosky v. Kramer, 455 U.S. 745, 766 (1982); West Virginia v. Chas Pfizer & Co. 440 F.2d 1079, 1088 (1971), *cert. denied*, 404 U.S. 871 (1971); Prince v. Massachusetts, 321 U.S. 158, 166, 169 (1944), *reh'g denied*, 321 U.S. 804 (1944).

[240] State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901).

[241] *Prince*, 321 U.S. at 165-66; Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913).

[242] Santosky v. Kramer, 455 U.S. 745, 745 (1982); Lassiter v. Department of Social Serv., 452 U.S. 18 (1981).

[243] Maryland v. Craig, 110 S. Ct. 3157 (1990).

In *Prince v. Massachusetts*,[244] decided in 1944, the Supreme Court upheld a statute prohibiting adults from allowing children to sell literature on a public street in the face of first amendment freedom of religion and fourteenth amendment parental rights claims.[245] Mrs. Prince, a Jehovah's Witness, was convicted for allowing a child to distribute the "Watch Tower" and other religious material on a sidewalk at 8:45 in the evening.[246] Pointing to both the state's police power and its role as *parens patriae*, the court explained that the state held a wide range of power limiting parental freedom so that children may be both "safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[247] The *Prince* Court reasoned that a state's authority over matters involving children is broader than its authority in similar matters involving adults.[248]

The state's interest in requiring that drug tests be performed on pregnant women and their newborns is the protection of the child through early diagnosis and treatment of *in utero* drug exposure.[249] The medical justification for testing the mother for drugs during her pregnancy, or immediately prior to delivery, is that it allows the physician to anticipate medical problems which might arise during pregnancy, labor, or birth, and enables the physician to treat the mother and the fetus or newborn.[250] As it relates to the protection of the newborn, however, testing of the mother following delivery is generally employed merely to confirm a positive test result for the baby.[251] Testing the mother at that time is therefore a less compelling mechanism for

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[244] 321 U.S. 158 (1944).

[245] *Id.* at 164.

[246] *Id.* at 159-60.

[247] *Id.* at 165.

[248] *Id.* at 168. *See also* New York v. Ferber, 458 U.S. 747, 756-57 (1982); Ginsberg v. New York, 390 U.S. 629, 638-640 (1968). The Court then went on to reject the appellant's contentions that the Massachusetts statute was not necessary to protect children from any clear and present danger and that in proscribing such activity, even in the presence of an adult, the law was unreasonably broad. Prince v. Massachusetts, 321 U.S. 158, 167-70 (1944), *reh'g denied*, 321 U.S. 804 (1944). The Court found that the public streets afford dangers to children, all of which are not forestalled by the presence of an adult, and that the Massachusetts statute was necessary to accomplish a legitimate objective. *Id.*

[249] *See* Larson, *supra* note 10, at 3-4.

[250] *Id.*

[251] *Id.* The problem with drug use testing is that urine tests identify only recent drug use. *Id.* For example, such tests can only identify cocaine use in the past two to five days; habitual drug use cannot be identified by a test. *Id.*

identifying and treating at-risk infants.

Because the identification of drug-exposed newborns may be achieved by testing the infant, statutes and policies which require mothers to submit samples of their urine or blood for testing are unlikely to withstand challenge as the least intrusive means available for addressing governmental concern.[252] This is not to suggest that testing a sample of the child's body fluid does not also implicate fundamental rights of the mother. As previously discussed, freedom of personal choice in matters related to child rearing is a fundamental privacy and liberty interest.[253] It is presumed that parents possess maturity, capacity for good judgment, and natural affection for their child, and that, consequently, they will act in the child's best interest when making decisions regarding their child's medical care.[254] Thus, the rule is well established that a physician may not perform a surgical procedure upon a minor without the parent's consent or the consent of one acting *in loco parentis*.[255] While screening the newborn also implicates the mother's privacy rights, it does not involve her bodily invasion and is, therefore, a less intrusive alternative to achieve the state's goal of identifying and treating newborns at risk. Moreover, a mother's expectation of privacy in her child's body is arguably diminished, in view of the potential conflict between the interest of the parent and that of the child.[256]

C. THE FOURTH AMENDMENT AND INFORMED CONSENT

The doctrine of informed consent finds its roots in the fourth amendment's proscription against unreasonable searches and

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[252] *See supra* note 149 (discussing the physical signs of drug dependency that may be exhibited by drug-exposed newborns).

[253] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (overly restrictive maternity leave regulations penalize women for exercising their fundamental right to have children and thus violate the fourteenth amendment); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

[254] Parham v. J. R., 442 U.S. 584, 602 (1979); *In re* Hofbauer, 47 N.Y.2d 648, 419 N.Y.S.2d 936, 393 N.E.2d 1009 (1979).

[255] *In re* Hudson, 126 P.2d 765, 771-75 (Wash. 1942); Moss, *supra*, note 154, at 1409; *see also* Annotation, *Power of Court or Other Public Agency to Order Medical Treatment for Child over Parental Objections Not Based on Religious Grounds*, 97 A.L.R.3d 421 (1980).

[256] *See* Robin-Vergeer, *supra* note 152, at 788.

seizures,[257] as well as the general right to privacy inherent in the Constitution.[258] This doctrine states that "no medical procedure may be performed without a patient's consent, obtained after explanation of the nature of the treatment, substantial risks and alternative therapies."[259] True consent necessarily implicates a patient's voluntary and informed decision where the patient knowledgeably weighs the options attendant to the medical procedure.[260] Moreover, fourth amendment rights include the right to be free from unreasonable intrusion into one's body, known as the right to bodily integrity.[261] Thus, the fourth amendment and the doctrine of informed consent constitute another basis for a constitutional challenge to mandatory drug testing.

The fourth amendment to the United States Constitution "guarantees the privacy, dignity and security of persons against certain arbitrary and invasive" actions by government officials or by those acting at their direction.[262] Unlike the fifth and sixth amendments, the fourth amendment "does not confine its protection to either criminal or civil actions."[263] A discussion of whether mandatory drug testing implicates fourth amendment rights must first address whether such testing involves governmental action. Where testing is compelled by statute or agency regulation, or when it is conducted by doctors employed by a public hospital, the answer is clearly yes. However, when testing is performed by private physicians in private hospitals, and when no law mandates

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[257] For the full text of the fourth amendment, see *supra* note 154.

[258] Connolly & Marshall, *supra* note 156, at 40; Robin-Vergeer, *supra* note 152, at 789-790.

[259] In re Conroy, 98 N.J. 321, 333, 486 A.2d 1209, 1222 (1985) (quoting Cantor, *A Patient's Decision to Decline Life Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 237 (1973)).

[260] Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *see also* N.Y. PUBLIC HEALTH LAW §§ 2803-c, 2805-d (McKinney 1985 & Supp. 1991). *But see* Kozup v. Georgetown Univ., Nos. 89-7124, 897125, 906 F.2d 783 (D.C. Cir. July 3, 1990) (Text in WESTLAW) (holding that the statement in *Canterbury* was *dictum* and that the rule in the District of Columbia is that a doctor may defend against a battery claim by proving the patient's consent to treatment even if the consent was not fully informed).

[261] *See generally* Winston v. Lee, 470 U.S. 753 (1985); Schmerber v California, 384 U.S. 757 (1966); Tribe, *supra* note 222, at 1332. For the full text of the fourth amendment, see *supra* note 154.

[262] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 613-14 (1989).

[263] *Id.* at 641 (Marshall, J., dissenting).

such testing, the answer is less clear.[264]

In *Blum v. Yaretsky*,[265] and in *Rendell-Baker v. Kohn*,[266] the Court rejected the contention that the conduct of a private hospital and a private school constituted "state action," thereby implicating the plaintiffs' fourteenth amendment due process rights, merely because the institutions received government funding.[267] Furthermore, in *Blum*, the Court stated that the government can only be held responsible for a private decision when it has exercised "coercive power or has provided such significant encouragement, either overt or covert, that the choice must . . . be deemed to be that of the government."[268] Thus, the argument has been advanced that, in the absence of a statute compelling testing, when testing is performed by private physicians in private hospitals—even in private hospitals which receive government funding—such conduct does not fall within the fourth amendment's strictures.[269]

Nevertheless, the Supreme Court's decision in *Skinner v. Railway Labor Executives' Association*[270] may suggest the contrary conclusion. In *Skinner*, the Court found that regulations of the Federal Railway Administration (FRA) authorizing, but not mandating, drug testing by private railways of their employees did constitute governmental action within the fourth amendment.[271] The *Skinner* Court noted that drug

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[264] *Id.* at 614; Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

[265] *Blum*, 457 U.S. at 991.

[266] *Blum*, 457 U.S. 830 (1982).

[267] *See Blum*, 457 U.S. at 1003-05 (receipt of medical funds by a private nursing home did not establish state action, triggering fourteenth amendment due process protections); *Rendell-Baker*, 457 U.S. at 837-39. In *Rendell-Baker*, the Court was faced with the question of whether a private school for troubled youth "acted under color of state law" in discharging several of its faculty members. *Id.* at 831. The institution received almost all of its funding from the state and federal government, and, as a result, was subject to a various state regulations. *Id.* at 832-33. After their discharge from the school, the faculty members brought suit in federal court, alleging that their firing violated a number of constitutional rights. *Id.* at 835. The Court, per Justice Burger, held that the school's decisions could not be characterized as state action. *Id.* at 843. The Court posited that the extent of state funding did "not make the discharge decision acts of the State" because "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Id.* at 840-41.

[268] *Blum*, 457 U.S. at 1004.

[269] Larson, *supra* note 10, at 4.

[270] 489 U.S. 602 (1989).

[271] *Id.* at 615.

testing by railroads in reliance upon the FRA regulation was not "primarily the result of private initiatives."[272] According to the Court, the government had encouraged, endorsed, and participated in such conduct.[273] The Court explained that the regulation: (1) prohibited railroads from divesting themselves of the testing authority by contract and superseded collective bargaining agreements; (2) provided for the FRA to receive some of the railroads' biological samples and test results; and (3) authorized the removal of an employee who refused to submit to such tests from specified jobs.[274]

Notwithstanding the medical justification for testing women and their newborns for controlled substances, it might be argued that the government has encouraged, endorsed, and participated in such testing. Indeed, child protective statutes require medical and hospital personnel to report suspected child maltreatment under pain of criminal or civil sanction; positive toxicology reports are provided to governmental agencies for use in civil and sometime criminal proceedings; and persons making such reports are granted immunity from civil liability.[275] Therefore, some degree of governmental action is in fact involved.

We turn next to whether testing of the blood, urine, or other bodily secretions of a mother and her newborn constitutes a "reasonable search" under fourth amendment analysis. In *Schmerber v. California*,[276] the Court recognized that the withdrawal of blood for analysis of its alcohol content constituted a fourth amendment search.[277] The Court explained that the physical intrusion in the form of penetration beneath the skin infringes upon the individual's expectation of privacy.[278] Later, in *Skinner*, the Court noted that "[t]he ensuing chemical analysis of the sample to obtain physiological data is

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[272] *Id.*

[273] *Id.* at 615-16.

[274] *Id.* at 615.

[275] See *supra* notes 155-66 and accompanying text.

[276] 384 U.S. 757 (1966). In *Schmerber*, the Court considered, *inter alia*, a fourth amendment challenge to the use of blood test results, obtained over the objections of the individual, in a drunk driving conviction. *Id.* at 758-59. After finding that such blood tests are subject to the protections of the fourth amendment, a majority of the Court held that the facts and circumstances surrounding the particular warrantless extraction of blood in the case at issue satisfied the constitutional requirement of reasonableness. *Id.* at 771.

[277] *Id.* at 767-68.

[278] *Id.* at 769-70. *See also* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

a further invasion . . . ."[279] While testing urine or stool samples does not involve surgical intrusion, the *Skinner* Court determined that the chemical analysis of these body secretions similarly reveals personal physiological data.[280] Moreover, the Court found that the process by which such samples are collected, which may involve monitoring by others, itself implicates privacy interests.[281] The *Skinner* Court further opined that the limitation upon the individual's freedom of movement, which also may be necessary in order to secure the sample, involves yet another intrusion.[282] Clearly, therefore, such drug testing of women and newborns constitutes a fourth amendment search.

The "reasonableness" of such an intrusion is dependent upon a case-by-case balancing of the individual's interest against societal interest in conducting the procedure.[283] In *Schmerber* and *Winston v. Lee*,[284] the court identified several factors to be considered in weighing the reasonableness of a bodily intrusion.[285] A crucial factor was found to be "the extent to which the procedure may threaten the safety or health of the individual."[286] A second factor is the extent of the intrusion upon the individual's dignity.[287] In other words, does the intrusion, as found in *Rochin v. California*,[288] shock the conscience.

Clearly, toxicological testing of a woman's or of a newborn's blood, urine or stool for the presence of controlled substances does not involve a life or health threatening procedure. In *Winston* the Court was concerned with the removal of a bullet lodged in a suspect's collarbone where there was conflicting evidence as to the medical risks inherent in the proposed surgery.[289] To the contrary, the testing of urine or stool involves no surgical intrusion. Furthermore, as was noted in *Schmerber*, *Winston*, and more recently in *Skinner*, the intrusion occasioned by a

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[279] *Skinner*, 489 U.S. at 616.

[280] *Id.* at 616-17.

[281] *Id.* at 617.

[282] *Id.* at 618.

[283] *Id.* at 619; Winston v. Lee, 470 U.S. 753, 760 (1985).

[284] *Winston*, 470 U.S. at 753 (surgical removal of bullet from the chest of an attempted robbery suspect violates the fourth amendment).

[285] *See id.* at 761-65; Schmerber v. California, 384 U.S. 757, 771-73 (1966).

[286] *Winston*, 470 U.S. at 761; *Schmerber*, 384 U.S. at 771.

[287] *Winston*, 470 U.S. at 761.

[288] 342 U.S. 165, 172, 174 (1952) (forcible pumping of a suspect's stomach for evidence of crime was "brutal and offensive to human dignity").

[289] Winston v. Lee, 470 U.S. 753, 753-54 (1985).

blood test is not significant since such tests are now common-place, the quantity of blood extracted is minimal, and the procedure usually "involves virtually no risks, trauma or pain."[290]

A third factor is whether there exists a clear necessity or justification for the intrusion.[291] The fourth factor, articulated in *Schmerber* and *Winston*, is the need for probable cause.[292] In *Schmerber*, the Court stated, "in the absence of a clear indication that in fact such evidence will be found, [the individual's interest in dignity and privacy] require law officers to suffer the risk that such evidence may disappear unless there is an immediate search."[293] The *Schmerber* Court found that the police officer's observations of the defendant at the scene of an automobile accident, and later at the hospital, established sufficient probable cause for the defendant's arrest for driving while intoxicated.[294] The Court found no necessity for a warrant prior to requiring that the respondent submit to a blood test, explaining that the human body's natural process of eliminating alcohol threatened the destruction of the evidence.[295] Similarly, the risk of destruction of evidence of drug use may justify the absence of judicial authorization.[296]

However, two recent Supreme Court decisions addressing the issue of drug testing appear to have begun to erode this "individualized suspicion" requirement. In *Skinner*, and in *National Treasury Employees Union v. Von Raab*,[297] the Court, although recognizing that the collection and testing of urine for drug screening of employees

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[290] *See* Schmerber v. California, 384 U.S. 757, 771 (1966). *See also Winston*, 470 U.S. at 764.

[291] *Winston*, 470 U.S. at 765. In *Winston*, the Court rejected the state's contention that it needed to retrieve from the defendant a bullet in order to establish that he was the robber who had confronted a shopkeeper. *Id.* at 765-66. The Court reasoned that the very circumstances relied upon to demonstrate probable cause—belief that the bullet would be found in Lee—also tended to vitiate the need for such evidence. *Id.* On the other hand, the Court in Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 618-19 (1989), and in National Treasury Employees Union v. Von Raab, 489 U.S. 656, (1989), relied upon the government's "special needs," beyond its normal law enforcement needs, to justify drug testing of federal employees in certain "safety-sensitive" jobs, absent individualized suspicion. *See Von Raab*, 489 U.S. at 665; *Skinner*, 489 U.S. at 628-29.

[292] *Winston*, 410 U.S. at 767; *Schmerber*, 384 U.S. at 774.

[293] *Schmerber*, 384 U.S. at 770.

[294] *Id.* at 768-70.

[295] *Id.* at 770.

[296] Larson, *supra* note 10, at 4; *see also* Tribe, *supra* note 222, at 1332.

[297] 489 U.S. 656 (1989).

constituted a search under the fourth amendment, upheld such testing in the absence of "individualized suspicion" on the basis of the government's special needs.[298] In *Skinner*, the Court held that the government's interest in regulating the conduct of certain railroad employees to ensure railway safety presented "special needs" beyond the needs of normal law enforcement, justifying departure from the usual warrant and probable cause requirements.[299] Writing for the Court,

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[298] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989); *Von Raab*, 489 U.S. at 665. Ordinarily a search, even a search which may be carried out without a warrant, must be based upon probable cause to believe that a violation of law has occurred. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973). Where the government action has a substantially less intrusive impact on privacy, falling short of a full scale search, the Court has relaxed the probable cause standard to require some "individualized suspicion." *Id.* Thus, for example, in Terry v. Ohio, 392 U.S. 1 (1968), the Court held that where a police officer reasonably suspects that a person is engaging in criminal conduct and is armed, the officer may conduct a limited search of the person's outer clothing. *Id.* at 30. While some searches were upheld in the absence of individualized suspicion, they appear to have involved routine and non-intrusive encounters conducted pursuant to regulatory programs. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (upholding a brief interrogative stop at a border checkpoint in order to ascertain immigration status); Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967) (finding routine annual inspection by City housing department not unreasonable). Thereafter, in New Jersey v. T.L.O., 469 U.S. 325 (1985), the Supreme Court invoked the "special needs" exception in upholding the search of a student's property by school officials. *Id.* at 332. The "special needs" exception was then employed by the court in O'Connor v. Ortega, 480 U.S. 709 (1987) (work-related searches of employees' desks), and in Griffin v. Wisconsin, 483 U.S. 868 (1987) (search of probationer's home based upon reasonable grounds). *See Skinner*, 489 U.S. at 638-39 nn.1 & 2 (Marshall, J. dissenting).

[299] *Skinner*, 489 U.S. at 620. In *Skinner*, labor organizations challenged FRA regulations relating to drug testing of certain railroad workers. *Id.* at 602-03. Subpart C of the regulation, entitled "Post Accident Toxicology Testing" is mandatory. *See* 49 C.F.R. § 219.201 (1988). It requires that following certain major accidents, private railroads arrange for obtaining blood and urine samples from employees who were involved in the accident. *Id.* The railroad is required to ship the samples to the FRA laboratory for analyses. *Id.* Employees are notified of tests results and given an opportunity to respond. *Id.* Those who refuse to provide samples are precluded from performing certain jobs but are entitled to a hearing concerning their refusal. *Id.* § 219.213.

Subpart D, entitled "Authorization to Test for Cause", is permissive. *Id.* § 219.301. It permits railroads to require that covered employees submit to breath or urine tests in certain circumstances not addressed by Subpart C. *Id.* Breath or urine tests may be ordered (1) after a reportable accident or incident, when a supervisor has a "reasonable suspicion" that an employee's behavior contributed to the occurrence or severity of the accident or incident or (2) in the event of specific rule violations including excessive speeding or noncompliance with a signal. *Id.* § 219.301. Breath testing may be required when a supervisor has a "reasonable suspicion" that an employee is under the influence

Justice Kennedy found that employees covered by FRA testing regulations were engaged in "safety-sensitive tasks" and that the regulations were promulgated "to prevent accidents and casualties in railroad operations," rather than to "assist in the prosecution of employees."[300] Accordingly, the Court held that under the circumstances presented, "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by [even] a requirement of individualized suspicion, a search may be reasonable despite the absence of suspicion."[301] In this regard, Justice Kennedy noted that not only did procedures for obtaining breath, urine, and blood samples for testing present a minimal physical intrusion,[302] but also the "expectation of privacy" of covered employees was diminished by reason of their employment in a highly regulated, safety-sensitive industry.[303]

In *Von Raab*, a federal employees union sought to enjoin a drug-screening program implemented by the United States Customs Service.[304] The program required urinalysis tests of customs employees who sought a transfer or promotion to positions involving drug interdiction and of employees who carry firearms or who handle

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of alcohol based upon specific personal observations concerning the employee's appearance, behavior, speech or body odor. *Id.* A urine test may be required only if two supervisors make the appropriate determination, and when the suspicion relates to drug use, one of the supervisors must have received training in detecting signs of drug intoxication. *Id.* If tests results are to be used in disciplinary proceedings, the employee must be given the opportunity for testing at an independent medical facility. *Id.* § 219.303(c). Refusal to provide a blood sample creates a presumption of impairment in the absence of contrary evidence. *Id.* § 219.303. As in Subpart C the regulations set forth procedures for collecting samples and they require that they be "analyzed by a method that is reliable within known tolerances." *Id.* § 219.307(b).

[300] *Skinner*, 489 U.S. at 620-621 (citations omitted). The Court relied upon earlier decisions in which it similarly had balanced what it termed the government's "special needs" against the practicality of the warrant and probable cause requirements. *Id.* at 332 (citing *Griffin*, 483 U.S. at 873 (search of a probationer's home); *T.L.O.*, 469 U.S. at 337-42 (search of student's property by school officials); *Ortega*, 480 U.S. at 721-25 (work related searches of employee's desks and offices); New York v. Burger, 482 U.S. 691, 699-703 (1983) (search of premises of certain highly regulated businesses); Bell v. Wolfish, 441 U.S. 520, 558-60 (1979) (body cavity search of prison inmate)).

[301] *Skinner*, 489 U.S. at 624.

[302] *Id.* at 624-25.

[303] *Id.* at 627-28.

[304] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 657 (1989).

"classified" material.[305] Justice Kennedy, also writing for this majority, found that the government "has a compelling interest" in ensuring that front-line interdiction personnel charged with protecting the integrity of our nation's borders and customs personnel who carry firearms are physically fit, exercise sound judgment, and are of unimpeachable integrity.[306] Balancing national security needs against what the Court determined to be the employee's diminished expectation of privacy due to the nature of the work involved, the majority concluded that the testing of the customs employees in the absence of individualized suspicion was reasonable.[307]

In reaching its conclusions in *Skinner* and in *Von Raab*, the Court appears to have applied a waiver theory. In *Skinner* it found that the "expectations of privacy" of railway employees covered by the regulation were "diminished" by reason of their participation in "safety-sensitive" positions that have "long been a principal focus of regulatory concern."[308] Moreover, in *Von Raab* the Court noted that customs employees covered by the drug screening program were in "sensitive

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[305] *Id* at 661. The United States Customs program provided for drug screening through urinalysis. *Id.* Final selection of an employee for a position is contingent upon successful drug screening. *Id.* As a measure against adulteration of specimens, "a monitor of the same sex remains outside of a partition or bathroom to listen for the normal sounds of urination." *Id.* Positive tests are confirmed using gas chromatography/mass spectrometry. *Id.* at 662. The confirmed positive result is reviewed by a medical officer and evaluated along with the employee's medical history and other relevant biomedical information. *Id.* Employees who failed to offer a satisfactory explanation for positive test results were subject to dismissal. *Id.* at 663. Test results could not, however, be disclosed to any other agency or prosecutor without the employee's approval. *Id.*

[306] *Id.* at 670. While joining in the majority opinion in *Skinner*, Justice Scalia dissented from the majority opinion in *Von Raab*. *Id.* at 680 (Scalia, J., dissenting). The Justice stated that in *Skinner*, a demonstrated frequency of drug use by the targeted class and the demonstrated connection between such use and grave harm made testing a reasonable means of protecting society. *Id.* at 682 (Scalia, J., dissenting). Justice Scalia found, however, that in *Von Raab* not only did the Customs Service admit that it was largely drug-free, but the connection between whatever drug use might exist and serious social harm was entirely speculative. *Id.* at 684 (Scalia, J., dissenting).

[307] *Id.* at 667-72, 679.

[308] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 627-28, 633 (1989). *But see id.* at 635-55 (Marshall, J., dissenting) (Justice Marshall's dissent in *Skinner* rejects the contention that railroad workers have a diminished expectation of privacy either by participating in an industry which is regulated pervasively to ensure safety or by undergoing periodic, job-required, fitness examinations. The Justice argues that, under traditional fourth amendment analysis, the full-scale search authorized by the regulation can be justified only by probable cause.).

positions" and that because successful performance of their duties depends uniquely upon their fitness, the covered employees "reasonably should expect effective inquiry into their fitness and probity."[309] Thus, in *Skinner* and in *Von Raab*, the majority concluded that in the "highly regulated," "safety-sensitive" positions involved, the employees' expectations of privacy in the performance of an excretory function is minimal, and therefore outweighed by the government's overwhelming interest in insuring public safety.[310] Thus, the majority opinions in these two cases may be read as limiting drug testing on the basis of an implied waiver to employees performing safety-sensitive jobs.

It cannot reasonably be argued that pregnant women have implicitly consented to similar testing in the absence of probable cause or individual suspicion by virtue of their performance of "safety-sensitive" public jobs.[311] While the *Skinner* and *Von Raab* decisions and "public safety" drug testing cases following them[312] certainly do not advance the position of those opposed to postpartum drug screening of women, they do not sound a death knell. Because of a woman's strong expectation of privacy in her own bodily functions, and the existence of alternative means for effectuating the state's interest in the protection of children, the decisions in *Skinner* and *Von Raab* may reasonably be read to hold that, in the absence of a fourth amendment waiver, such testing must be based upon some degree of reasonable suspicion. Even in *Skinner*, the regulations at issue required that the employee have been involved in a major accident, or that a supervisor have a "reasonable suspicion" that the employee's conduct contributed to a reportable accident, or that a supervisor had a "reasonable suspicion" based upon

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[309] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989).

[310] *Skinner*, 489 U.S. at 627-33; *Von Raab*, 489 U.S. at 665, 772, 680.

[311] *See* Robin-Vergeer, *supra* note 152, at 793-94; Moss, *supra* note 154, at 1406. *But see Von Raab*, 489 U.S. at 680, 685 (Scalia, J. dissenting) (Justice Scalia argued that the logical implication of the majority's holding was that anyone who endangers others by using drugs or alcohol may be subjected to testing in the absence of reasonable suspicion. The list of such users, according to Justice Scalia, would include automobile drivers, operators of potentially dangerous equipment, construction workers, and school crossing guards.).

[312] *See* American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884 (D.C. Cir 1989), *cert. denied*, 110 S. Ct. 1960 (1990) (testing of Department of Transportation employees); Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir.), *cert. denied*, 110 S. Ct. 865 (1990) (testing of Department of Justice employees with top secret security clearance); National Treasury Employees Union v. Yeutter, 918 F.2d 968 (1990) (drug testing by United States Department of Agriculture of certain motor vehicle operators).

his or her observations that an employee was intoxicated.[313]

Women's rights advocates may argue, therefore, that absent reasonable suspicion, the doctrine of informed consent and the fourth amendment require that a woman be informed of the medical risks of drug screening and that she voluntarily, unequivocally, and intelligently consent to such screening before a sample of her body fluid may be tested.[314] They may also suggest that doctors have an ethical duty to do more than merely alert women to the attendant medical risks accompanying screening; physicians should also be required to appraise them of the legal risks, especially when substantial legal consequences may result from the procedures.[315] Thus, the practice of many hospitals in relying upon a general consent form[316] or in conditioning admission to the hospital upon the mother's execution of a specific waiver, may not meet the requirements of the fourth amendment and the doctrine of informed consent. A general consent does not address the presumed responsibility of doctors to specifically tell patients of the consequences of the specific medical treatment at issue. Furthermore, conditioning admission to the hospital upon execution of a specific waiver may be coercive since pregnant women must enter hospitals in order to receive adequate medical care for themselves and their newborns.[317]

Several writers suggest that in the face of a woman's refusal to consent to such a test upon either herself or her infant, a court order should be obtained,[318] and that absent emergency situations,[319] failure to do so should subject the person administering the test to a civil action

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[313] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 626-27 (1989). In the case of suspected impairment by drugs, two supervisors had to agree and one of the supervisors must have had special training in detecting the signs of drug intoxication. *Id.* (citation omitted).

[314] Larson, *supra* note 10, at 4; Moss, *supra* note 154, at 1408.

[315] Larson, *supra* note 10, at 4.

[316] The forms, generally executed upon admission to a hospital, usually indicate that the patient consents to any test necessary for good medical care. *See* Larson *supra* note 10, at 4-5.

[317] English, *supra* note 190, at 4.

[318] *See id*; Pregnant Women Newsletter, *supra* note 191, at 2-3.

[319] An exception to informed consent occurs in the case of a medical emergency or when testing is necessary for diagnosis and treatment. *See* N.Y. PUB. HEALTH LAW § 2805(b) (McKinney 1991); *see also* Shinn v. St. James Mercy Hosp., 675 F.Supp. 94 (W.D.N.Y. 1987), *aff'd without op.* 847 F.2d 836 (2d Cir. 1988).

for battery.[320]

D. REPORTING: CONFIDENTIALITY AND PRIVILEGE

The right to "privacy" and the principle that a physician will not inflict harm form the foundations of the physician-client privilege.[321] It follows therefore that medical records should remain confidential.[322] In *Whalen v. Roe*[323] the Supreme Court recognized that a patient's "interest in the nondisclosure of private information and also the patient's interest in making important decisions independently" encompasses the right to nondisclosure of medical history.[324] In *Whalen*, however, the Court determined that disclosing to a central registry the names of patients for whom certain controlled substances had been prescribed was a "reasonable exercise of New York's broad police powers."[325] The Court determined that New York's vital interest in controlling the illegal distribution of dangerous drugs supported the reporting law.[326]

Women's advocates argue that the reporting of positive toxicology results to child welfare and law enforcement agencies violates a woman's due process rights because the child abuse reporting statutes were never intended to apply to prenatal conduct. However, post partum testing has been justified as medically necessary for diagnosis and treatment of at risk newborns. By enacting child abuse laws, Congress and state legislatures have determined that preservation of the physician-patient privilege and of the physician's duty to maintain the confidentiality of patient records must give way when the protection of children is at issue. "It is axiomatic that a child cannot be protected until his or her need for protection is discovered and reported."[327] Consequently, state courts have upheld child abuse reporting statutes notwithstanding privacy and

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[320] Marshall & Connolly, *supra* note 156, at 40 (citations omitted).

[321] Whalen v. Roe, 429 U.S. 589, 600 (1977).

[322] Jansen, *Do No Harm*, 1 ANNALS OF INT'L MED. 48, 48 (1978); Moss, *supra* note 154, at 1410-11.

[323] 429 U.S. at 589.

[324] *Id.* at 600. *But see* United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3rd Cir. 1980) (upholding disclosure of employee medical records pursuant to the Occupational Safety and Health Act of 1970).

[325] *Whalen*, 429 U.S. at 598.

[326] *Id.*

[327] Louis & Rubnke, *Legislating Child Protection*, 1 SETON HALL LEGIS. J. 16, 23 (1975).

other constitutional claims.[328]

E. SUMMARY REMOVAL AND FINDINGS OF NEGLECT BASED UPON A POSITIVE TOXICOLOGY IN AN INFANT

Perhaps realizing the constitutional problems inherent in relying solely upon prenatal conduct, courts now generally require more than a positive toxicology in the newborn as a basis for a neglect finding and for temporary or permanent removal of a newborn from the mother's care. While constitutional issues are raised by reporting requirements and by testing statutes and practices, it is the decision to remove a child from the mother's abode that generates the most vexing constitutional issues. Specifically, can the fact that an infant is born drug-addicted or drug-exposed, without more, justify the temporary or permanent removal of a child under existing constitutional standards? Several cases in Michigan, California, and New York have grappled with the question, apparently concluding that more than just a finding of a positive toxicology is necessary for removal, regardless of the amount of time involved.

One of the earliest cases holding that prenatal drug use by a mother could constitute neglect under a child protective statute is *In re Baby X*.[329] The infant, Baby X, was born on March 30, 1977; within twenty-four hours of birth, the baby began exhibiting symptoms of drug withdrawal.[330] The Michigan court affirmed a finding by the probate court that the symptomology provided sufficient evidence of neglect to

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[328] *See* Forest Hills Early Learning Center, Inc. v. Lukhard, 661 F. Supp. 300 (E.D. Va. 1987), *rev'd. on other grounds*, 846 F.2d 260, *cert. denied*, 488 U.S. 1029 (1989) (mandatory child abuse reporting statute did not violate first amendment right to the free exercise of religion); Pesce v. J. Sterling Morton High School, 830 F.2d 789 (7th Cir. 1987) (Illinois child abuse reporting statute did not violate school psychotherapist's right of privacy); People v. Stockton Pregnancy Control Medical Clinic, Inc., 203 Cal. App. 3d 225, 249 Cal. Rptr. 762 (1988) (reporting statute did not violate minor's privacy rights concerning her sexual experience and medical condition); People v. Cavaiani, 172 Mich. App. 706, 432 N.W.2d 409 (1988), *appeal denied*, 432 Mich. 852 (1989) (upholding statute requiring psychologists and family therapists to report suspected child abuse). *See also* Federal Drug Abuse Office and Treatment Act of 1972, 42 U.S.C. § 290dd-3(e) (1988) (amended in 1986 to create an exception to patient record confidentiality in cases involving child maltreatment; 42 U.S.C. § 290dd no longer prohibits drug rehabilitation programs from disclosing patient records in connection with "reporting under state law of incidents of suspected child abuse and neglect to the appropriate state or local authorities.").

[329] 97 Mich. App. 111, 293 N.W.2d 736 (1980).

[330] *Id.* at 111-12, 293 N.W.2d at 736.

warrant temporary removal of the child from the mother's care.[331] The mother appealed, arguing that her prenatal conduct could not constitute neglect.[332] The Michigan court of appeals first noted that it was not required to reach the question of whether a "child" under the Michigan child protective statute[333] included an unborn person since the agency had filed its petition following the birth. Instead, the appellate court framed the issue before it as "whether a mother's prenatal behavior is relevant to a determination of a living child's neglect."[334] The Michigan court acknowledged that under *Roe v. Wade* there was no recognition of a fetus as a person, and that the Michigan courts had only accorded rights to a fetus in limited circumstances such as wrongful death and dram shop cases.[335] Stating that a child has a legal right to begin life with a sound mind and body, the Michigan court concluded that it would be in the child's best interest to examine all prenatal conduct bearing on that right.[336] Accordingly, the court held that a child born with drug withdrawal symptoms as a consequence of prenatal drug use could properly be considered a neglected child warranting temporary removal.[337]

In January of 1990, the Court of Appeals of California decided *In re Troy D.*,[338] addressing the question of whether prenatal drug use alone

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[331] *Id.* at 112, 293 N.W.2d at 737.

[332] *Id.*

[333] MICH. COMP. LAWS ANN. § 712A.2 (West Supp. 1991).

[334] *In re* Baby X., 97 Mich. App. 111, 113, 293 N.W.2d 736, 738 (1980).

[335] *Id.* at 113-14, 293 N.W.2d at 739 (citations omitted). In this regard, the court cited *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971) (wrongful death action permitted for death of eight month old fetus); *Womack v. Buchhorn*, 384 Mich. 718, 187 N.W.2d 218 (1971) (action permitted on behalf of an eight-year-old child for prenatal brain injuries received during the fourth month of its mother's pregnancy); *La Blue v. Specker*, 358 Mich. 558, 100 N.W.2d 445 (1960) (dram shop action permitted on behalf of a child who was not born at the time of the father's death).

[336] *Baby X*, 97 Mich. at 114, 293 N.W.2d at 738-39 (citing *Womack*, 384 Mich. at 725, 187 N.W.2d at 218). The court thereafter noted that the probate court had jurisdiction where circumstances "establish or seriously threaten neglect." *Id.* at 114, 293 N.W.2d at 739 (quoting MICH. COMP LAWS ANN. § 712A.2 (West Supp. 1991)). The court concluded that since it previously had held that prior treatment of one child would support neglect allegations as to another, prenatal treatment similarly could be considered probative of a child's neglect. *Id.*

[337] *Id.* The court specifically did not reach the question of whether such prenatal conduct alone could warrant permanently depriving a mother of custody. *See id.*

[338] 215 Cal. App. 3d 889, 263 Cal. Rptr. 869 (Cal. Ct. App. 1989).

was *prima facie* evidence of neglect.[339] The infant, Troy D, was born prematurely on February 10, 1988; a testing of the urine of both the infant and his mother, performed immediately following the child's birth, revealed the presence of amphetamines and opiates.[340] Six days later, the San Diego County Department of Social Services filed a petition to declare Troy a dependent of the state under former section 300(a) of California's Welfare Institutions Code.[341] Following a hearing, the juvenile court concluded that Troy D was a dependent child, placed him in the temporary custody of his grandmother, and ordered that the parents submit to psychological evaluation and participate in parenting classes and a drug rehabilitation program, which included drug testing.[342]

On appeal, the mother argued, *inter alia*, that (1) the juvenile court lacked jurisdiction because the petition alleged conduct with respect to a fetus; (2) the evidence before the hearing court was insufficient to support a finding of dependency; and (3) Troy's medical records were improperly introduced into evidence over her objection.[343] The California Court of Appeals rejected the mother's first argument, reasoning that the petition was filed after Troy's birth and that it sought the protection of a living child, not a fetus.[344] Moreover, the court noted that section 355.1(a) of the California Welfare and Institutions Code created a legal presumption that Troy, who was born under the influence of a dangerous drug—a "detrimental condition" within the

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[339] *Id.*

[340] *Id.* at 890, 263 Cal. Rptr. at 870.

[341] *Id.* at 891, 263 Cal. Rptr. at 871. Section 300(a) of the California Welfare Institutions Code provided:

> Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:
> (a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising care or control, or has no parent, guardian, or custodian actually exercising care or control.

CAL. WELF. & INST. CODE § 300(a) (West 1984) (current version at CAL. WELF. & INST. CODE § 300 (West Supp. 1991)).

[342] *In re* Troy D., 215 Cal. App. 3d 889, 891, 263 Cal. Rptr. 869, 871 (Cal. Ct. App. 1989).

[343] *Id.* at 890-94, 263 Cal. Rptr. at 871-74.

[344] *Id.* at 891, 263 Cal. Rptr. at 872.

meaning of the code—was a dependent child as defined by section 300(a).[345]

With respect to the mother's contention that disclosure of Troy's medical records violated both the physician-client privilege and California's Medical Information Act,[346] the appeals court found the mother's assertion of these claims to be inappropriate when "[Troy's] and her interests are potentially conflicting."[347] The court further reasoned that the rules of privilege were designed to protect personal relationships where public policy deemed them more important than the need for evidence, and that, under the circumstances, public policy would not be served by allowing the mother to prevent disclosure in this case.[348]

Finally, the court of appeals concluded that the evidence of Troy's positive toxicology, testimony by a pediatrician as to his prematurity and low birth weight, the harmful effects and potential long-term consequences of prenatal exposure to dangerous drugs, and the fact that the parents had lost custody of an older child due to the mother's narcotics usage, were sufficient to warrant a finding of dependency.[349] Specifically, the court pointed out that "the fact that Troy was born under the influence of drugs shows that the drug problem continued."[350] The Court of Appeals in *Troy D*, citing *In re Baby X.*, concluded that prenatal drug use is "probative of future child neglect"

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[345] *Id.* Section 355.1(a) provides:

> Where the Court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor [are] of such a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor, that evidence shall be prima facie evidence that the minor is a person described by subdivision (a), (b), or (d) of Section 300.

CAL. WELF. & INST. CODE § 355.1(a) (West 1984) (current version at CAL. WELF & INST. CODE § 355.1(a) (West Supp. 1991)).

[346] *See* CAL. CIV. CODE §§ 56-59 (West Supp. 1991).

[347] *In re* Troy D., 215 Cal. App. 3d 889, 896, 263 Cal. Rptr. 869, 877 (Cal. Ct. App. 1989).

[348] *Id.* Moreover, the court pointed out that Troy was represented by counsel who had not objected to the admission of his medical records. *Id.*

[349] *Id.* at 897, 263 Cal. Rptr. at 877.

[350] *Id.*

and sufficient to support a petition for neglect.[351] However, the facts of *Troy D*, which included extensive medical testimony as to the infant's actual physical impairment and prior drug use by the mother, may suggest that a positive toxicology alone would not have been sufficient to warrant a finding of dependency under California law.

Several New York cases have dealt with the issue of removal of a newborn—temporarily or permanently—from the custody of the mother based upon the positive toxicology of a newborn. In *In re Fletcher*,[352] a judge of the Family Court of the State of New York found that prenatal drug use alone could not be the basis of a finding of neglect under the New York Family Court Act.[353] There, a child had been born with a positive toxicology for drugs, and the neglect petition and proceedings were based solely on the prenatal conduct of the mother.[354] In *In re Milland*,[355] a judge, acknowledging that the prenatal conduct of the mother was not, by itself, a sufficient basis for a finding of neglect, concluded that neglect was established by the mother's use of alcohol during her pregnancy along with other evidence, including: her admission of continued alcohol consumption despite being warned that such use would harm the fetus, her refusal to enter an alcohol rehabilitation program, the harmful effects that alcohol had on the newborn, and the danger to the child if it were returned to the mother.[356] In *In re Fathima Ashanti K.J.*,[357] the court found that a newborn with positive toxicology was in fact a neglected child.[358] The court stated that "[t]he issues presented are whether an infant born with

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[351] *Id.* at 893-94, 263 Cal. Rptr. at 874 (citation omitted).

[352] 141 Misc. 2d 333, 533 N.Y.S.2d 241 (N.Y. Fam. Ct. 1988).

[353] *Id.* at 336, 533 N.Y.S.2d at 244. NEW YORK FAMILY COURT ACT § 1012(f)(i)(B) (McKinney Supp. 1991) reads, in part:

> "Neglected child" means a child less than eighteen years of age 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 . . . by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions . . . .

Id.

[354] *Fletcher*, 141 Misc. 2d at 334, 533 N.Y.S.2d at 242.

[355] 146 Misc.2d 1, 548 N.Y.S.2d 995 (N.Y. Fam. Ct. 1989).

[356] *Id.* at 3-4, 548 N.Y.S.2d at 996-97.

[357] 147 Misc. 2d 551, 558 N.Y.S.2d 447 (N.Y. Fam. Ct. 1990).

[358] *Id.* at 557, 558 N.Y.S.2d at 453.

a positive toxicology is a child entitled to be protected under the Family Court Act and whether a mother's use of drugs during pregnancy can be the basis of a neglect determination."[359] The finding of neglect by the court indicates that the court considered much more than the positive toxicology of the newborn. In fact, the court considered the testimony of both the mother and father attempting to explain the positive toxicology, and concluded that it was "hardly persuasive."[360] Thus it appears that in this case more than just a positive toxicology was also required for a finding of neglect.

It is clear, however, that a positive toxicology for drug use in a newborn child, coupled with a mother's admission of repeated drug use during her pregnancy and her refusal to enter a drug program are sufficient to withstand a motion to dismiss a neglect petition in New York.[361] In *In re Tyesha C.*,[362] the Appellate Division of the Supreme Court of New York indicated that while such allegations were sufficient to withstand dismissal, an actual finding of neglect would require more, such as the establishment of a relationship between the drug use and harm to the newborn.[363] The Child Welfare Administration of the Human Resources Administration has subsequently clarified its policy with respect to procedures to be undertaken following a report of a positive toxicology of a newborn.[364] The amended policy makes clear that positive toxicology alone cannot be the basis of either a temporary or permanent removal of a child from its mother.[365] Where, however, the mother has admitted to repeated drug use, or where additional facts tend to show drug addiction or dependency, a basis for a request for court intervention can be made out.[366]

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[359] *Id.* at 554, 558 N.Y.S.2d at 449.

[360] *Id.* at 552, 558 N.Y.S.2d at 448. The mother's explanation of the positive toxicology of the child was that her food was contaminated by a gas leak in her apartment. *Id.* She had a history of drug abuse and refused to enter a drug treatment program. *Id.* The father also had a history of drug abuse. *Id.*

[361] *See In re* Stefanel Tyesha C., 157 A.D.2d 322, 556 N.Y.S.2d 280 (N.Y. App. Div. 1990).

[362] *Id.*

[363] *Id.* at 326, 556 N.Y.S.2d at 284.

[364] *See* Memorandum, *supra* note 184.

[365] *See id.*

[366] *See id.*

V. CONCLUSION

The "crack" epidemic of the mid-1980s and 1990s and the resulting rise in the number of drug-exposed and drug-addicted newborns has seen law enforcement, social services agencies and the courts attempting to address societal concerns for protecting these children within the framework of often outdated statutes.

All three of the approaches employed by governmental agencies discussed herein raise significant constitutional issues. The criminal prosecution of mothers who give birth to drug-addicted and drug-exposed infants is the most controversial approach, and raises issues of cruel and unusual punishment and due process. The second approach, involving various means of state intervention during pregnancy, including actions designed to protect a fetus, appears to be growing in popularity. In *Roe v. Wade*, the Supreme Court made clear that a woman's constitutional right to privacy may give way to a state's interest in the protection of a viable fetus. The point at which drug exposure becomes harmful to the fetus and the nature of that harm, however, has yet to be scientifically determined. Both lawmakers and the judiciary, therefore, continue to struggle with identifying the most appropriate time and means of intervention. Moreover, recent scientific discovery that males exposed to drugs or other potentially toxic substances prior to mating have increased incidents of abnormally developed offspring raises even more challenges for state legislatures and the courts with regard to child protection.[367]

Of the three approaches discussed, the third approach, intervention following the child's birth, creates the least problematic constitutional issues. Here too, however, in order to avoid infringement upon a mother's privacy and fourth amendment rights, medical professionals must have some "reasonable suspicion" or "medical necessity" before subjecting the mother of a newborn to drug screening. Moreover, a finding of neglect and a deprivation of the mother's custody, even if temporary, may not be based solely upon her prenatal conduct. While evidence of past conduct is probative, the ultimate determination must be based on a risk, or lack thereof, to the newborn.

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[367] *See supra* note 154.