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PROSECUTION FOR MATERNAL SUBSTANCE ABUSE: SHORTCOMINGS OF A PUNITIVE APPROACH

On July 2, 1989, Josephine Pellegrini gave birth to her son, Nathan, at Brockton Hospital.¹ Tests performed on the infant at the time of his birth revealed the presence of cocaine in his urine.² No evidence, however, proved that the child suffered any injury as a result of his exposure to cocaine. In September of 1989, a Massachusetts Grand Jury indicted Ms. Pellegrini for the crime of distributing cocaine to a person under the age of eighteen, in violation of M.G.L. c. 94C, § 32F.³ The alleged recipient of the drug was her unborn child. The Commonwealth claimed that Ms. Pellegrini "delivered" cocaine to her unborn child when she used the drug two days⁴ before the birth of her son and that the cocaine was transferred from her to the fetus through the placenta.⁵ Ms. Pellegrini's indictment is the first of two similar Massachusetts cases in little more than a year.⁶

The Commonwealth asserted that the statutory prohibition of M.G.L. c. 94C, § 32F(b) encompasses the *in utero* transfer of cocaine from a mother to her fetus.⁷ In turn, Ms. Pellegrini contended that: (1) section 32F does not apply to the ingestion of cocaine by a pregnant woman; (2) the application of this statute to her alleged conduct violated her fundamental right to due process; (3) judicial extension of the statute to the facts and circumstances of her case would violate the separation of powers between the legislative and judicial branches of government; and (4) the prosecution violated her right to privacy under the state and federal constitutions.⁸ On October 15, 1990, the indictment against Ms. Pellegrini was dismissed.⁹

¹ Commonwealth v. Pellegrini, No. 87970, slip op. at 2 (Sup. Ct. Plymouth County, Mass., Oct. 15, 1990).

² *Id.*

³ Tom Coakley, *Judge Rejects Charge That Woman Gave Drugs To Her Unborn Child*, BOSTON GLOBE, Oct 17, 1990, at A1, A15.

⁴ Michelle D. Wilkins, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1414 (1990) (citing *Mother Charged With Exposing Fetus to Cocaine*, BOSTON GLOBE, Aug. 22, 1989, Metro/Region, at 1).

⁵ Pellegrini, No. 87970, slip op. at 2.

⁶ Coakley, *supra* note 3.

⁷ "Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute, or dispense a controlled substance in Class B of section thirty-one to a person under the age of eighteen shall be punished by a term of imprisonment in the state prison for not less than three or more than fifteen years. . . ." MASS. GEN. LAWS ANN. ch. 94C § 32F(b) (West 1992).

⁸ Pellegrini, No. 87970, slip op. at 1.

⁹ *Id.* at 16. On Friday, February 26, 1993, the Massachusetts Supreme Judicial Court (SJC) unanimously reinstated the cocaine possession indictment against Ms. Pel-

The prosecution of Ms. Pellegrini is noteworthy because it is one of a growing number of criminal prosecutions against mothers for causing harm to their unborn children. The "fetal-maternal rights" debate raises the arguments for and against recognizing the right of society to protect the unborn fetus from harm caused by their mother's behavior during pregnancy. Advocates of judicial action against mothers who expose their unborn children to drugs contend that, as unborn children are increasingly at risk from maternal abuse, society is obligated to protect those children. They view the fetus as an entity with separate legal rights, requiring protection from women who are unable to meet reasonable standards of conduct.¹⁰ Since society guards children through child

legrini. See *Commonwealth v. Pellegrini*, No. P-5962, 1993 Mass. LEXIS 77 (Feb. 26, 1993). Though Ms. Pellegrini was originally indicted for unlawful distribution of a Class B substance in violation of MASS. GEN. L. CH. 94C, § 32, Plymouth District Attorney William O'Malley elected to appeal a possession charge, which is a lesser included offense of the original indictment. *Id.* at *2. O'Malley explained that the distribution charge was more legally complex and was the focus of vigorous opposition from women's abortion rights and civil liberties organizations. See Doris Sue Wong, *SJC Says Mother May Be Tried For Traces of Cocaine in Baby*, BOSTON GLOBE, Feb. 27, 1993, at A17.

This is the first SJC ruling on the issue of whether a woman, whose newborn tests positive for cocaine, may be brought to trial on drug possession charges. In reinstating the drug possession charge against Ms. Pellegrini, the SJC ruled that Judge DelVecchio had violated article 30 of the Massachusetts Declaration of Rights which essentially provides for separation of powers among the branches of state government. See *Pellegrini*, No. P-5962, at *4-*10. The court stated that "A decision to *nolle prosequi* a criminal case rests with the executive branch of the government and, absent a legal basis, cannot be entered over the Commonwealth's objection." *Id.* at *5. This case does not fall within any of the exceptions, allowing a judge to dismiss an indictment over the prosecutor's objections. *Id.* at *7.

In addition to finding that the pretrial dismissal of the indictment against Ms. Pellegrini was improper, the SJC ruled that Ms. Pellegrini could not assert a right to privacy over her child's medical records. *Id.* at *12. The court stated that "To exclude medical or hospital records of [a] child on a privacy claim could be adverse to the child's best interests." *Id.* The court did note, however, that they were not ruling on whether a newborn's urinalysis revealing traces of cocaine is sufficient evidence to support a conviction of the mother for possession of a controlled substance. *Id.* at *9. In fact, the court noted that numerous other jurisdictions have ruled that, absent other evidence, "the mere presence of a controlled substance in a person's own body will not constitute possession within the meaning of criminal statutes." *Id.*

The SJC opinion does not change Judge DelVecchio's analysis of whether a mother may be convicted for giving birth to a substance exposed baby. Instead, the opinion is limited to holding that, absent certain defects in the indictment, a court may not dismiss a charge before the Commonwealth has had the opportunity to present their case. Though the SJC did not address whether the Commonwealth's evidence against Ms. Pellegrini is sufficient to withstand a conviction, the decision does open the door for a conviction on remand.

¹⁰ John Robertson, *At Issue: Fetal Abuse, Should We Recognize it as a Crime?*,

abuse and neglect laws, it should also protect unborn children against maternal prenatal abuse.¹¹ As one commentator suggests, "[t]he evolution and strength of child abuse laws lays the foundation for intrusion into private family matters for protecting the fetus from deliberate and conscious harmful acts."¹² Advocates of fetal rights contend that there is little logic in distinguishing the precise time of injury, as ultimately, the child is injured.¹³ Prosecutors claim that criminal sanctions will deter drug abuse by and encourage treatment of pregnant women.¹⁴ In essence, advocates of intervention claim that the urgent need to protect unborn children from harm caused by their mothers outweighs any arguments against such measures.

There are several reasons for this new trend of prosecution. The "war on drugs" has sensitized society to the dangers of drug abuse to individual abusers and society as a whole.¹⁵ In particular, the media has focused on the detrimental prenatal effects of a mother's substance abuse while pregnant. Moreover, as the medical community learns more about the long- and short-term effects of substance abuse on the fetus, society develops an increasingly punitive attitude towards the mother who is responsible.¹⁶ Along with the growing national awareness of the problems associated with drug abuse, prosecutors are becoming frustrated with the growing number of drug exposed babies and the knowledge that these children may continue to be at risk from one or both of their parents.¹⁷ In addition, as medical technology advances to a level where the fetus is visually accessible through ultrasound and able to be medically treated while *in utero*, society increasingly perceives the fetus as an entity separate from its mother and in need of legal protection.¹⁸ Thus, the emotional and scientific impact of modern technology is being used to justify the suppression of women's civil rights in the name of fetal well-being.

Many of the increasing number of babies exposed to harmful substances before birth will rely on social welfare and public health systems for their support and special health care needs. These systems are unable to cope with

A.B.A. J., August 1989 at 38. See also Sam S. Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1230 (1987).

¹¹ Balisy, *supra* note 10, at 1226.

¹² Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 99 (1984) quoted in Balisy, *supra* note 10, at 1226.

¹³ Balisy, *supra* note 10, at 1228.

¹⁴ Tamar Lewin, *Drug Use in Pregnancy: New Issue for the Courts*, N.Y. TIMES, Feb. 5, 1990, at A14.

¹⁵ Shona B. Glink, *The Prosecution of Maternal Fetal Abuse: Is it the Answer?*, 1991 U. ILL. L. REV. 533, 537 n.30 (1991).

¹⁶ *Id.*

¹⁷ Lewin, *supra* note 14, at A14.

¹⁸ Molly McNulty, *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, 289 (1987-88).

such an increased responsibility.¹⁹ This resource gap has led to some frustration, reflected in judicial action,²⁰ including increased attempts to prosecute these mothers under existing criminal statutes. Moreover, advocates of judicial intervention have recently proposed legislative amendments aimed specifically at criminalizing substance abuse by pregnant women.²¹ Since 1986, approximately sixty women throughout the United States have been charged with using drugs while pregnant, thereby causing harm to their unborn fetuses.²² Currently, prosecution is limited to substance abuse; however, the door is open to prosecuting all activity that may have detrimental effects on the healthy development of the fetus.

Although the alleged rationale for criminal prosecution of women who abuse drugs during pregnancy — the protection of the unborn — is noble, the means are constitutionally and socially unacceptable. These prosecutions threaten women's constitutional rights to privacy, personal autonomy, and reproductive freedom. In addition, the status and role of women in today's society is undermined as it becomes increasingly apparent that women of childbearing years are not treated legally or socially as equals. Carried to its logical extreme, the notion that women are responsible for the well-being of their fetuses may be used to prohibit women from partaking in any activity which is potentially harmful to their unborn children. If women are required to behave in the best interests of their fetuses they may, in fact, be criminally liable for failing to act. For example, women may be required to eat an optimally nutritious diet, take vitamins, and see their physician regularly for check-ups, then prosecuted if they fail to do so. Perhaps all fertile women of childbearing years will be expected to maintain their bodies in perfect conception and carrying form.²³ Although these are extreme and unlikely scenarios, policymakers must have some sense of the dangerous trends they may establish.

The problem of drug exposed babies certainly warrants concern. The question is, however, whether criminal sanctions imposed upon the substance abusing mother is a morally and legally correct answer. Should a pregnant woman's moral responsibility to act in her unborn child's best interests be

¹⁹ See discussion *infra*.

²⁰ Washington, D.C. Superior Court Judge Peter Wolf ordered a first time offender convicted of forgery to be locked up until after the birth of her baby because she tested positive for cocaine use. Judge Wolf stated, "She apparently is an addictive personality and I'll be darned if I'm going to have a baby born that way." See Kenneth Jost, *Mother v. Child*, A.B.A. J. April 1989, at 84, 88.

²¹ See Glink, *supra* note 15, at 538.

²² Amy Dockser Marcus and Amy Stevens, *Fetal Drug-Delivery Case is Overturned*, WALL ST. J., April 3, 1991, at B6.

²³ In *International Union, et. al. v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991), the Supreme Court ruled that an employer's policy barring all women, except those whose infertility was medically documented, from jobs involving actual and potential lead exposure was facially discriminatory against women. The Supreme Court ruling reversed two lower court decisions granting summary judgment for the employer.

reflected in a simultaneous legal responsibility? Those who advocate legal intervention claim that when a woman chooses to carry a child to term, she waives certain rights that others are afforded.²⁴ A strong opposing argument asserts that women should not be forced to defend their prenatal care choices, particularly because the United States Constitution protects every individual's rights to privacy, liberty, and personal autonomy.²⁵ Currently, this argument appears to carry the most weight, as few women are actually convicted for these violations.²⁶

Numerous articles and notes have investigated the recent trend of prosecuting women who abuse drugs during pregnancy.²⁷ These articles, however, employ no uniform analytical approach to discuss the multiplicity of issues relating to this broad topic. Some commentators argue that prosecuting such women is simply bad social policy.²⁸ Others contend that, not only are maternal fetal abuse prosecutions bad social policy, the use of new or existing statutes as a basis for such prosecutions is unconstitutional. Constitutional arguments are based on the prohibition on vagueness,²⁹ the requirement of notice,³⁰

²⁴ See Glink, *supra* note 15, at 564 (Once a woman decides to not abort her fetus, she has a legal and moral duty to protect her fetus from harm.); McNulty, *supra* note 18, at 292 (With the decision to not abort, the woman has a legal and moral duty to bring the child into the world as healthy as reasonably possible. The woman, thereby, waives her right to autonomy.). See also Balisy, *supra* note 10, at 1226.

²⁵ See discussion in Section III.

²⁶ Jennifer Johnson is the only woman to date convicted for delivering drugs to her child under a drug trafficking statute. Only a handful of women have been convicted under child abuse laws. Lewin, *supra* note 14.

²⁷ My motivation for writing this Note is because the topic is an important issue for women and society, especially in light of the increasing conservatism of the judiciary. Historically, women's right to privacy and personal autonomy are tenuous. It is crucial for women to speak out to protect their rights, thereby educating the public and preventing complacency. Until all women are assured the right to control personal decisions regarding their bodies, articles discussing such issues remain current and important.

²⁸ Laurie Rubenstein, *Prosecuting Maternal Substance Abusers: An Unjustified and Ineffective Policy*, 9 YALE L & POL'Y REV. 130 (1991) (Prosecuting women who give birth to substance-exposed babies is unjust and ineffective policy. The alleged goal of motivating pregnant women to seek drug treatment is not achieved by such prosecutions and may, in fact, be hindered.); and Doretta Massardo McGinnis, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505 (1990) (the criminal justice system is ill-suited to deal with the problem of substance abuse by pregnant women).

²⁹ See McNulty, *supra* note 18 (explaining that no statute could be written in a "sufficiently concrete manner to give adequate notice of what conduct is prohibited or required"). *Id.* at 310.

³⁰ See McGinnis, *supra* note 28 (explaining that the use of existing statutes in such prosecutions is contrary to the legislative intent: "This unforeseeable classification of certain acts as [criminal] offenses is a violation of the constitutional requirements of notice and fair warning."). *Id.* at 509.

the right to privacy and personal autonomy,³¹ the Equal Protection Clause,³² and the Eighth Amendment's proscription against cruel and unusual punishment.³³ Still others suggest that statutes could be narrowly drafted to withstand constitutional scrutiny.³⁴ Several commentators argue from the perspective of fetal rights to suggest that the rights of the fetus control, thus women should be held accountable for behavior which jeopardizes the health of the unborn fetus.³⁵

In addition to analyzing the social and constitutional ramifications of prosecuting women for maternal substance abuse, many authors comment on the

³¹ The most commonly presented argument against such prosecutions is that they violate a woman's constitutional rights to privacy and personal autonomy. The interests of the state and the unborn fetus do not outweigh the woman's right to make her own decisions concerning her body. See Wilkins, *supra* note 4; McNulty, *supra* note 18; McGinnis, *supra* note 28.

³² See McNulty, *supra* note 18 (Explaining that prosecuting only the mother for maternal substance abuse unfairly burdens women. Fathers are not held to the same standard of care. "In fact, men can have a powerful effect on fetal development, and therefore nondiscriminatory efforts to improve fetal health would focus on both sexes."). *Id.* at 317.

³³ See Dawn Marie Korver, *The Constitutionality of Punishing Pregnant Substance Abusers Under Drug Trafficking Laws: The Criminalization of a Bodily Function*, 32 B.C. L. REV. 629 (1991) (explaining that addiction is a "status" and that punishing pregnant substance abusers is tantamount to punishing them for their status as pregnant addicts). See also McGinnis, *supra* note 28 ("Recent prosecutions of women who were pregnant drug addicts have been criticized for essentially punishing a status, the coexistence of two statuses (pregnancy and drug addiction) that alone would be unpunishable and undeserving of punishment."). *Id.* at 520.

³⁴ See Glink, *supra* note 15 (States may adopt narrowly tailored statutes which expressly criminalize maternal substance abuse. Such statutes should be used in a limited fashion so as to protect the rights of all parties involved. Glink actually proposes a model statute.). See Lee A. Schott, *The Pamela Rea Stewart Case and Fetal Harm: Prosecution or Prevention?*, 11 HARV. WOMEN'S L.J. 227 (1988), for a discussion of the Stewart case in which Judge Amos proposed three conditions to assure that laws which treat women differently adequately protect women's interests. See also Louise B. Wright, *Fetus v. Mother: Criminal Liability for Maternal Substance Abuse During Pregnancy*, 36 WAYNE L. REV. 1286 (1990) (states may draft constitutional statutes criminalizing maternal substance abuse during pregnancy; however, such statutes would be counterproductive and destructive to the mother/child relationship).

³⁵ See Barbara Shelley, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 DICK. L. REV. 691 (1988) (The state must protect the fetus against maternal substance abuse. The protection afforded the fetus under civil law against its parent's and third party tortfeasors and under criminal law against third parties should extend to criminal actions against the mother for harm caused while the fetus was *in utero*.). See also Dawn E. Johnson, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy and Equal Protection* 95 YALE L.J. 599 (1986) (the fetus's rights outweigh those of the mother to engage in criminal activity while pregnant).

peripheral issues. Some commentators analyze the different statutes used to prosecute these women and the effectiveness of such criminal actions.³⁶ A few authors discuss the history of the legal protection afforded to the fetus, both civilly and criminally, against third parties and the mother.³⁷ Most commentators who caution against the use of criminal actions against women who abuse drugs during pregnancy stress that other solutions such as greater access to comprehensive prenatal care, education, and drug treatment would more effectively address the problem of the increasing rate of substance-exposed babies.³⁸

This Note examines the problems with holding pregnant substance abusers criminally accountable for the resulting harm to their fetuses. Section I describes the tremendous problem of maternal substance abuse and the effects on the unborn. Section II discusses the history and development of both civil and criminal fetal protection laws. Section III explores the constitutional issues pertaining to the use of existing laws and the creation of new laws to prosecute maternal substance abusers. Section IV demonstrates that the prosecution of maternal substance abusers is both unjust and ineffective. This Note concludes with the recommendation that society would do better to focus scarce resources on education, drug treatment, and prenatal care instead of attacking a symptom of the larger problem of maternal and societal substance abuse.³⁹

I. THE PROBLEM OF MATERNAL SUBSTANCE ABUSE

Cocaine dependency is on the rise in women of childbearing years.⁴⁰ A 1990 telephone survey estimated that about 554,400 to 739,200 infants a year are born exposed to one or more illicit drugs.⁴¹ In a survey of thirty-six United

³⁶ Women have been prosecuted under drug delivery statutes (see *State v. Johnson*, No. 89-890-CFA (Seminole County, Fla. July 13, 1989); *California v. Stewart*, No. M508197, slip. op. (Cal. Mun. Ct. Feb. 23, 1987); Pellegrini, No. 87970), child neglect and abuse statutes (see *Stewart*, No. M508197 and *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (1977)), and involuntary manslaughter statutes (see discussion of *Melanie Green*, *infra* note 86).

³⁷ See Kristen Barrett, *Prosecuting Pregnant Addicts for Dealings to the Unborn*, 33 ARIZ. L. REV. 221 (1991); Mary M. Kocsis, *Pregnant Women Abusing Drugs: A Medical-Legal Dilemma*, 37 MED. TRIAL TECH. Q. 496 (1991); McNulty, *supra* note 18.

³⁸ See Wilkins, *supra* note 4; McNulty, *supra* note 18; Schott, *supra* note 34.

³⁹ The scope of this Note is limited to a discussion of the constitutional and social ramifications of prosecuting women who give birth to substance exposed babies. Another important aspect of this topic concerns the ways in which the abortion debate and *Roe v. Wade* affect the arguments for and against such prosecutions. Although the status of women's right to abortion is a significant consideration of whether the state should prosecute for fetal abuse, those issues are beyond the scope of this Note.

⁴⁰ Korver, *supra* note 33, at 643.

⁴¹ Dr. Ira Chasnoff, *Drugs, Alcohol, Pregnancy and the Neonate: Pay Now or Pay Later*, 266 JAMA 1567, 1567-68 (Sept. 18, 1991) (citing D.S. Gomby & P.H. Shiono,

States hospitals, the National Association for Prenatal Addiction Research and Education ("NAPARE") concluded that approximately eleven percent of women who gave birth per year used a dangerous substance during pregnancy.⁴² Clearly, the problem of drug exposed babies is growing at an alarming rate. Moreover, it is a national problem affecting babies throughout the country, not only in metropolitan areas.⁴³

The short- and long-term effects on children who are exposed to harmful substances prenatally are numerous and severe. According to Dr. Ira Chasnoff, President of NAPARE and Director of the Prenatal Center for Chemical Dependence, the medical effects of illegal substances on perinatal development are devastating.⁴⁴ Dr. Chasnoff contends that drug exposed infants suffer from prenatal strokes, brain damage, seizures, premature birth, and retarded growth.⁴⁵ Other studies show that fetuses exposed to drugs while *in utero* are subject to a "higher incidence of miscarriage, . . . low birth weight, abnormally small head and brain development, deformities of the genital organs and urinary tract, and other birth defects."⁴⁶ After birth, these children are irritable, extremely sensitive to noise and external stimuli, and unpredictably moody.⁴⁷ They have irregular sleeping and eating patterns, often suffer from diarrhea, and experience increased heart and respiratory rates.⁴⁸ In addition, they "exhibit lack of coordination, developmental retardation, and visual problems."⁴⁹ Drug exposed infants are also at an increased risk of sudden infant death syndrome.⁵⁰

A two year follow up study conducted by NAPARE of 236 two year olds who were exposed to dangerous substances prenatally indicated that these children scored poorly on developmental tests, had measurably less ability to concentrate, and were less able than non-exposed children to interact with others and cope with unstructured environments.⁵¹ These children also experienced increased difficulty in forming bonds with others.⁵² The staggering number of children born exposed to harmful substances and the tremendous detrimental

Estimating the Number of Substance-Exposed Infants, 1 THE FUTURE OF CHILDREN 17 (1991)).

⁴² Susan LaCroix, *Birth of a Bad Idea: Jailing Mothers for Drug Abuse*, THE NATION, May 1, 1989, at 585.

⁴³ Delores Kong, *The Newborn Victims of Drugs*, BOSTON GLOBE, Oct. 3, 1989, at A1, A25.

⁴⁴ Dr. Ira Chasnoff, *Prenatal Effects of Cocaine*, CONTEMPORARY OB/GYN, May 1987, at 163 quoted in Glink, *supra* note 15, at 541; Kocsis, *supra* note 37, at 508-09.

⁴⁵ Jane E. Brody, *Widespread Abuse of Drugs by Pregnant Women is Found*, N.Y. TIMES, Aug. 30, 1988, at A1, C13.

⁴⁶ Wilkins, *supra* note 4, at 1402.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1403

⁵¹ *Id.*

⁵² *Id.*

effects they suffer from is a significant problem which must be addressed.

II. HISTORY OF FETAL PROTECTION LAWS

Courts have increasingly recognized that the fetus is a separate legal entity entitled to protection under the law. Several judicial decisions of the past century indicate a trend towards increased intervention and personal accountability for harm caused to a fetus. Today, every jurisdiction recognizes the validity of a civil cause of action against a third party on behalf of a child, who is born alive, for injuries caused prenatally.⁶³ In addition, courts in several jurisdictions hold that a mother may be civilly liable to her fetus for conduct which results in injury to it. Several jurisdictions have also recently upheld criminal indictments against mothers for ingesting dangerous illegal substances during pregnancy, thereby causing harm to their fetuses.⁶⁴

A. Third Party Liability

Historically, courts were reluctant to recognize the fetus as a separate legal identity.⁶⁵ In fact, prior to the middle of the century no cause of action was available for prenatal injury. In *Dietrich v. Inhabitants of Northampton*,⁶⁶ the Massachusetts Supreme Judicial Court denied a cause of action against a third party for prenatal injuries to a fetus whose mother slipped and fell on a public highway. Justice Holmes, writing for the Court, concluded that the fetus did not have a separate legal status apart from its mother and that any action taken would have to be in a suit by the mother. The fetus was denied a cause of action because any damages to it were too remote to allow recovery.⁶⁷ Thus, the Court concluded that a fetus has no judicial existence apart from its mother, and consequently, may not be regarded as a separate, distinct and individual entity with legal rights.⁶⁸ As there could be no duty owed to a person not in existence at the time of the injury, all such actions on behalf of a fetus were denied.

The *Dietrich* rule prevailed until 1946, when the United States District Court for the District of Columbia decided for the first time in *Bonbrest v. Kotz*⁶⁹ that a suit could be brought on behalf of a fetus for injuries suffered

⁶³ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 55, at 368 (5th ed. 1984).

⁶⁴ See discussion *infra*.

⁶⁵ *Roe v. Wade*, 410 U.S. 113, 161-62 (1973) ("[T]he law has been reluctant to endorse any theory that life . . . begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth . . . [T]he unborn have never been recognized in the law as persons in the whole sense.").

⁶⁶ 138 Mass. 14 (1884).

⁶⁷ *Id.* at 17.

⁶⁸ *Id.* at 16.

⁶⁹ 65 F. Supp. 138 (D.D.C. 1946).

prenatally if the fetus was viable at the time of the injury. The Court allowed the cause of action for injuries sustained as a result of a physician's negligence during delivery because the fetus was both viable at the time of injury and subsequently born alive.⁶⁰ In so ruling, the Court reasoned that a viable fetus is capable of extra-uterine life and, therefore, is no longer truly "part" of the mother.⁶¹ The *Bonbrest* court concluded that denying a right of recovery against the tortfeasor would force the child to bear the burden of an injury caused by the fault of another.⁶² *Bonbrest* paved the way for the expansion of fetal rights in tort law by recognizing that the fetus has a right to redress for many harms sustained while *in utero*.⁶³

As the notion that the fetus has rights separate from its mother gains recognition, some jurisdictions have relaxed the viability and born alive requirements of *Bonbrest*. In *Smith v. Brennan*,⁶⁴ the Supreme Court of New Jersey allowed an infant to recover for prenatal injuries sustained as a result of an automobile accident caused by a third-party's negligence. The *Smith* court ruled that whether viable or not at the time of injury, the child, who was born with deformed legs and feet, had a "right to begin life with a sound mind and body."⁶⁵ If another's wrongful conduct interferes with that right and there is competent proof of a causal connection between the wrongful act and the harm suffered, an injured fetus, subsequently born alive, should not be denied recovery. The Court concluded that viability should not be a determinant for recovery because the "viability distinction has no relevance to the injustice of denying recovery for harm which can be proven to have resulted from the wrongful act of another."⁶⁶ Although the Court denied the viability requirement, causation and live birth were necessary for recovery.

In *Keeler v. Superior Court*⁶⁷ a California court, relying on the live birth requirement, denied a homicide indictment against a man who caused the death of a fetus. In *Keeler*, a man shoved his knee into his wife's abdomen, intentionally trying to kill the fetus because he learned that the child was not his own. The child was stillborn with a severely fractured skull. Medical evidence indicated that the fetus was viable at the time of injury. The *Keeler* court determined that, although the fetus was viable at the time of the attack, it was not a "human being" as the term was used in the state's homicide statute.⁶⁸ The Court noted that the common law at the time the statute was

⁶⁰ *Id.* at 140.

⁶¹ *Id.*

⁶² *Id.* at 141.

⁶³ See Barrett, *supra* note 37, at 223.

⁶⁴ 157 A.2d 497 (N.J. 1960).

⁶⁵ *Id.* at 503.

⁶⁶ *Id.* at 504.

⁶⁷ 87 Cal. Rptr. 481 (1970).

⁶⁸ CAL. PENAL CODE § 187 (West 1987) provides in pertinent part: "Murder is the unlawful killing of a human being; with malice aforethought."

enacted did not include a fetus as a human being.⁶⁹ Therefore, when the legislature passed the statute in 1850, it did not intend to include the crime of feticide within its scope. The Court further reasoned that, because the legislature had never amended the state's homicide statute to include the murder of a fetus, they intended to exclude the killing of an unborn fetus from within the statute's ambit.⁷⁰ This rule remains the majority view in the United States judicial system.⁷¹

In *Commonwealth v. Cass*,⁷² the Court allowed a man to be indicted for homicide for causing the death of a fetus, thereby negating the live birth requirement. The defendant was charged under a Massachusetts vehicular homicide statute for running into an eight and one half month pregnant woman, causing the death of her fetus. The Court reasoned that medical science can accurately determine whether the defendant's conduct caused the resulting death and whether the fetus was alive at the time of the incident. Thus, the Court ruled that any infliction of prenatal injury causing harm, or even death, before or after the fetus is born, may give rise to a cause of action. The decision was not applied to this case but, instead, was intended to serve as a prospective rule of law. This ruling potentially allows an individual to be held liable for prenatal injuries to a child who, regardless of the injury, would not have survived. The decision is also indicative of the increasing recognition of fetal rights.

B. Civil Maternal Liability

With the growing recognition of fetal rights, the mother and the fetus are increasingly perceived as separate and often antagonistic legal entities. In *Grodin v. Grodin*,⁷³ a Michigan court held that a child could sue his mother for taking tetracycline during her pregnancy, causing discoloration of the child's teeth, because a mother may be liable to her child for interfering with the child's legal right to be born with a "sound mind and body."⁷⁴ Thus, a child's mother must bear the same liability as a third party for conduct resulting in injury to her fetus. The California Court of Appeals in *Curlender v. Bio-Science Laboratories*⁷⁵ similarly upheld the right of a child to sue its parents for prenatal injury by suggesting that if the parents were aware that their

⁶⁹ *Keeler*, 87 Cal. Rptr. at 486.

⁷⁰ *Id.* at 488. The California legislature did eventually amend the state's homicide statute to include fetuses. The statute declares that murder is the "unlawful and malicious killing of a human being, or a fetus." STATS. 1970, ch. 1311, § 1.

Although fetuses are expressly included within the statute today, it is questionable whether the legislature intended this statute to apply to maternal substance abuse. This is discussed *infra*, notes 126-137.

⁷¹ Barrett, *supra* note 37, at 228.

⁷² 467 N.E.2d 1324 (Mass. 1984).

⁷³ 301 N.W.2d 869 (Mich. 1980).

⁷⁴ *Id.* at 870 (citing *Smith v. Brennan*, 157 A.2d 497, 503 (1960)).

⁷⁵ 165 Cal. Rptr. 477 (1980).

child would be born with Tay-Sachs disease but continued with the pregnancy regardless, the child could have maintained a suit against them for the pain and misery suffered from the disease.⁷⁶

Not all courts have been so willing to hold the mother liable for causing prenatal injuries to her fetus. In *Stallman v. Younquist*,⁷⁷ a fetus was injured in an automobile accident negligently caused by the mother. The Supreme Court of Illinois distinguished between actions by a mother and those of a third party tortfeasor.⁷⁸ The Court addressed the *Grodin* decision and concluded that it was a legal fiction to treat a fetus as a separate legal entity with hostile rights assertable against its mother.⁷⁹ The Court further noted that a maternal requirement to "effectuate the best prenatal environment possible" would infringe upon the mother's constitutional rights to privacy and personal autonomy and would strain the relationship between the mother and child by making them legal adversaries from the moment of conception.⁸⁰ The view that the fetus has rights "which are superior to those of the mother is . . . and cannot be the law."⁸¹ To hold a mother so liable would subject her to culpability for a whole host of actions, as everything a mother does affects her fetus.⁸²

C. Criminal Maternal Liability

Courts have been particularly reluctant to hold mothers criminally liable under traditional statutes for actions causing prenatal harm to their children. No state has passed a statute specifically criminalizing a pregnant woman's drug abuse which results in injury to her fetus. But, with the increased concern for the effects that a mother's substance abuse has on her fetus, the legislature and judiciary are acting to change this. California, Florida, Illinois, Louisiana, Minnesota, Rhode Island, and Arizona have passed or amended their criminal statutes to protect the fetus as a separate legal entity, though the protection tends to be limited.⁸³ The more common approach manipulates

⁷⁶ *Id.* at 488.

⁷⁷ 531 N.E.2d 355 (Ill. 1988).

⁷⁸ The Court noted that

the relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant. No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world.

Id. at 360.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 359.

⁸² *Id.* at 360.

⁸³ See Barrett, *supra* note 37, at 231. See also Shelley, *supra* note 35, at 701-02. The statutes now specify that a person may be liable under them for causing harm to an unborn fetus. Most only afford the fetus protection if the conduct of the defendant

existing criminal statutes to permit prosecutions against the mother of a substance exposed baby. Several prosecutions have rested on child abuse and neglect statutes⁸⁴ and drug delivery statutes.⁸⁵ In Illinois, one woman was prosecuted under an involuntary manslaughter statute.⁸⁶

The case of *Reyes v. Superior Court*⁸⁷ provides an early example of an attempt by a prosecutor to use a child abuse statute to indict a woman who abused drugs during her pregnancy. Margaret Reyes was charged under a

results in the death of the fetus. These states have not passed new legislation specifically protecting the fetus from drug abuse by its mother.

The California Penal Code provides in pertinent part, "Murder is the unlawful killing of a human being, or fetus, with malice aforethought." CAL. PENAL CODE § 187(a) (West 1987).

The Florida Penal Code provides: "The willful killing of an unborn quick child, by an injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter . . ." FLA. STAT. ANN. § 782.09 (West 1976).

The Illinois Penal Code provides that "a person commits the offense of feticide who causes the death of a fetus . . ." ILL. REV. STAT. ch. 38 § 9-1.1(a) (West Supp. 1987).

The Louisiana Penal Code provides that a "person includes a human being from the moment of fertilization and implantation . . ." LA. REV. STAT. ANN. § 14.2(7) (West 1986). The Louisiana Supreme Court ruled that this broad definition of the word "person" was not intended by the legislature to include feticide.

MINN. STAT. §§ 609.2661-2663 (West 1987) includes murder of the unborn child. Several other Minnesota statutes protect the unborn; however none of them include acts committed against the unborn by its mother.

The Rhode Island Penal Code provides that, "The willful killing of an unborn quick child . . . [shall be] deemed manslaughter." R.I. GEN. LAWS § 11-23-5 (Michie 1981).

The Arizona Supreme Court has determined that the term "person" in the Arizona wrongful death statute, ARIZ. REV. STATS. ANN. § 12-611 (1985), includes fetuses.

⁸⁴ *In re Baby X*, 293 N.W.2d 736 (Mich. 1980). The Court allowed a drug exposed infant to be temporarily taken from the mother resulting from neglect proceedings pursuant to M.C.L.A. § 712A.2(b)(1) (West 1968). The judge stated that prenatal neglect was probative of future neglect, thus temporary custody was justified until the mother's fitness was proven.

California v. Stewart, No. M508197. Pamela Stewart was charged with criminal child neglect under CAL. PENAL CODE § 270 (West 1988) for failure to follow her doctor's instructions during pregnancy. Stewart gave birth to a child who was brain dead. The Court dismissed the charge ruling that the statute was inapplicable.

⁸⁵ For example, Jennifer Johnson was convicted under both Florida's drug trafficking statute, FLA. STAT. ANN. § 893.13(1)(a)(1) (West 1976), and under Florida's child abuse statute, FLA. STAT. ANN. § 827.04 (West 1976). See *Johnson*, No. 89-890-CFA.

⁸⁶ In May of 1989, Melanie Green became the first woman charged with manslaughter under ILL. REV. STAT. ch. 56 ½, para. 1407 (West 1987) for the death of her baby resulting from prenatal maternal cocaine abuse. An Illinois Grand Jury refused to prosecute. *Mother Charged After Her Baby Dies of Cocaine*, N.Y. TIMES, May 10, 1989, at A18; See also McGinnis, *supra* note 28.

⁸⁷ 141 Cal. Rptr. 912 (1977).

California child endangering statute⁸⁸ because her twins were born addicted to heroin. The California Court of Appeals concluded that the legislature did not intend the statute to apply to conduct causing prenatal injury and therefore, the statute excluded the care and custody of unborn children from its scope. The Court applied the "strict scrutiny" standard to conclude that if the legislature had intended to include prenatal harm within the scope of the statute, it would have expressly done so.⁸⁹

The prosecution and subsequent conviction of Jennifer Clarise Johnson is noteworthy for being the first and only conviction to date of a woman for causing injury to her fetus by abusing substances during pregnancy.⁹⁰ Ms. Johnson was convicted under Florida's drug trafficking statute.⁹¹ The prosecutor claimed that Ms. Johnson delivered cocaine to her infant through the umbilical cord during the time immediately following birth but before the cord was cut.⁹² Thus, cocaine was delivered to a child, not a fetus. The Florida court accepted this analysis and held that the term "delivery," as used in the statute, includes the passage of cocaine through the umbilical cord.⁹³ The Court further held that a child who is born but whose umbilical cord has not yet been severed is a "person" within the scope of the law.⁹⁴ Ms. Johnson was sentenced to fifteen years on probation.⁹⁵ This has been the only successful strategy for obtaining a criminal conviction against a mother for causing prenatal harm to her child.⁹⁶ Those who oppose prosecutions such as Ms. Johnson's contend that application of drug trafficking statutes in such a way is merely a legal maneuver designed to circumvent the constitutional dilemma of applying existing statutes to maternal behavior.⁹⁷ It is, however, evidence of the extent to which courts will currently go to protect the unborn.

⁸⁸ CAL. PENAL CODE § 273(a) (West 1988) provides in pertinent part, "any person, who under circumstances or conditions likely to produce great bodily harm or death, . . . having the care or custody of any child, . . . willfully causes or permits such a child to be placed in such situation that its person or health is endangered, is punishable by imprisonment"

⁸⁹ Reyes, 141 Cal. Rptr. at 914-15.

⁹⁰ Johnson, No. 89-890-CFA. See also Korver, *supra* note 33, at 630.

⁹¹ FLA. STAT. ANN. § 893.13(1)(c)(1) (West 1976). The law states, "Except as authorized by this chapter, it is unlawful for any person over the age of eighteen years to deliver any controlled substance to a person under the age of eighteen years."

⁹² Johnson, No. 89-890-CFA. See also Korver, *supra* note 33, at 630.

⁹³ "I am convinced and find that the term 'delivery' includes the passage of cocaine . . . from the body of a mother into the body of her child through the umbilical cord after birth occurs." Johnson, No. 89-890-CFA.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Recently, a Michigan court ruled that Kimberly Hardy could not be tried on drug trafficking charges for delivering cocaine to her child via the umbilical cord. See Marcus & Stevens, *supra* note 22.

⁹⁷ See Barrett, *supra* note 37, at 236.

III. CONSTITUTIONAL LIMITS ON STATE REGULATION OF A PREGNANT WOMAN'S BEHAVIOR

A. *The Use of Existing Laws*

There is substantial authority for the proposition that the use of existing statutes to prosecute a mother for conduct resulting in harm to her fetus is unconstitutional.⁹⁸ Most courts have ruled that neither child abuse and neglect statutes nor drug trafficking statutes were drafted to include crimes by a mother against her fetus. Most jurisdictions realize that child abuse and neglect laws were intended to criminalize conduct causing injury to a living child and that drug trafficking laws were aimed at drug dealers, not pregnant mothers.

Constitutionally, courts may apply existing laws to the conduct of a pregnant woman only when there is a clear showing that the legislature intended to include such conduct within the scope of the statute. Applying existing statutes without a clear legislative mandate violates the doctrine of separation of powers. By expanding the scope of statutes to include conduct not originally intended, the judiciary acts as a legislative body in violation of Article I of the United States Constitution. Lynn Paltrow of the American Civil Liberties Union's Reproductive Freedom Project criticizes the practice of manipulating a statute to prohibit socially undesirable behavior, thereby coercing moral choices through the legal process.⁹⁹ Opponents of criminalizing a pregnant woman's behavior contend that, not only is the use of existing statutes unconstitutional, but it is merely an attempt at a "quick fix" to a tremendous problem as well.¹⁰⁰

B. *Creating New Laws to Criminalize a Mother's Conduct While Pregnant*

No state has passed a statute specifically criminalizing maternal substance abuse. Such legislation would be unlike other criminal statutes because it may criminalize behavior which would not be prosecuted if conducted by a non-pregnant woman.¹⁰¹ In addition, there is a general reluctance to protect fetal rights at the expense of maternal rights.¹⁰² Moreover, many courts recognize that *Roe v. Wade* holds that the Constitution provides women's reproductive rights with the highest possible protection.¹⁰³ Thus, even a narrowly drafted statute that only punishes women who intentionally, knowingly, or willfully create a substantial risk of harm to their fetuses would violate the woman's

⁹⁸ See Pellegrini, No. 87970; California v. Stewart, No. M508197; Reyes v. Superior Court, 141 Cal. Rptr..

⁹⁹ Eileen McNamara, *Fetal Endangerment Cases on the Rise*, BOSTON GLOBE, Oct. 3, 1989, at A1, A11.

¹⁰⁰ Schott, *supra* note 34, at 239. See also Glink, *supra* note 15, at 558.

¹⁰¹ See Barrett, *supra* note 37, at 233.

¹⁰² *Id.* at 234.

¹⁰³ *Roe*, 410 U.S. at 152-53.

constitutional rights to privacy, liberty, and personal autonomy. In addition, such statutes would violate the constitutional prohibition of vagueness, guarantee of equal protection, and prohibition against punishing status crimes.¹⁰⁴ A practical problem of fetal protection statutes is that they would be overbroad, making every action of pregnant women potentially criminal. In essence, the daily activities of pregnant women would be subject to judicial scrutiny.¹⁰⁵

1. Right to Liberty

Although the federal Constitution does not explicitly mention a right to privacy, the United States Supreme Court has recognized that a right to personal privacy does exist under the Constitution.¹⁰⁶ The Supreme Court in *Roe v. Wade* held that the right to privacy is included in the "liberty" protected by the Due Process Clause of the Fourteenth Amendment.¹⁰⁷ Courts have also held that the right to privacy includes a right to bodily integrity and personal autonomy.¹⁰⁸ In essence, this constitutional guarantee allows an individual to make personal choices relating to their own body without interference from the government. Any regulation which would dictate a woman's behavior while pregnant constitutes a deprivation of that woman's right to make choices relating to her personhood, thereby violating her right to privacy and personal autonomy.¹⁰⁹

¹⁰⁴ See discussion *infra*, notes 126-52.

¹⁰⁵ Carried to their logical extreme, fetal protection statutes may affect the daily activities of all pregnant, and possibly all fertile, women. Women could be held criminally liable for creating a risk to their fetuses by smoking, drinking alcohol, driving without a seat belt or working in a hazardous environment. Many ordinary things that a pregnant woman does in her daily life may pose a potential risk to her fetus. Clearly, she should not be subject to criminal prosecution for any resulting injury.

¹⁰⁶ *Roe*, 410 U.S. at 152.

¹⁰⁷ *Id.* The Fourteenth Amendment of the United States Constitution states in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of the law." U.S. CONST. amend XIV, § 1.

¹⁰⁸ See Wilkins, *supra* note 4, at 1421.

¹⁰⁹ It is argued that, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court ruled that illegal activity is not protected by the right to privacy. The Court held that there existed no fundamental right to homosexual sodomy. However, the Court did affirm that the guarantee of liberty protects the rights to family, marriage and procreation.

Moreover, the distinction between legal and illegal maternal activity is insufficient to uphold prosecution of women who expose their fetuses to harmful substances. Most importantly, the rights of privacy and personal autonomy are violated when the state deprives a woman of the right to control her life during pregnancy. These rights are strong enough to sustain drug use by a pregnant woman. Further, illegal acts are illegal regardless of the actor's reproductive status. Pregnant women who commit drug related crimes may be prosecuted regardless of their pregnant condition. To prosecute such behavior only when the woman is pregnant creates equal protection and Eighth Amendment problems as discussed *infra*. See McGinnis, *supra* note 28, at 519.

Although the Supreme Court has not defined the outer limits of the right to privacy, several decisions illuminate the interests that are protected. In *Griswold v. Connecticut*,¹¹⁰ an early modern era case, the Supreme Court ruled that the right of married couples to use contraceptives is protected by the "zones of privacy" created by the Bill of Rights.¹¹¹ The Court extended that right to unmarried individuals a few years later in *Eisenstadt v. Baird*.¹¹² The *Eisenstadt* court explained that "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹¹³

The right to privacy of *Griswold* and *Eisenstadt* was dramatically extended to the abortion context in *Roe v. Wade*,¹¹⁴ where the Supreme Court ruled that the interests of a woman to decide whether to terminate her pregnancy outweigh any countervailing state interests, at least during the first trimester. In *Webster v. Reproductive Health Services*,¹¹⁵ the Supreme Court overruled the trimester framework of *Roe*. The *Webster* court, however, did not address the right to privacy ruling of *Roe*. The Supreme Court has further broadened the right of privacy to include the right of parents to direct the upbringing of their children,¹¹⁶ the right to marriage and procreation,¹¹⁷ the right to familial living arrangements,¹¹⁸ and the right to refuse medical treatment.¹¹⁹ These

¹¹⁰ 381 U.S. 479 (1965).

¹¹¹ *Id.* at 485. The Court noted that "the specific guarantees of the Bill of Rights have penumbras, formed by emanations from those guarantees to help give them life and substance." *Id.* at 484. Such peripheral rights are necessary to guarantee the express rights. Thus, although conservatives argue that the concept of strict construction prohibits the finding of a right to privacy, the *Griswold* court suggested that, although the rights of privacy and personal autonomy are not expressly stated, their "existence [are] necessary in making the guarantee fully meaningful." *Id.* at 483. Thus, these rights are deemed fundamental. Given *Griswold*, the strict construction argument simply does not justify the inclusion of maternal abuse in existing neglect or drug trafficking statutes.

¹¹² 405 U.S. 438 (1972).

¹¹³ *Id.* at 453-54.

¹¹⁴ 410 U.S. 113 (1973).

¹¹⁵ 492 U.S. 490 (1989).

¹¹⁶ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Court struck down a statute requiring children to attend public, rather than private schools. The Court concluded that the "liberty of parents . . . to direct the upbringing and education of their children . . . [is protected]." *Id.* at 534-35.

¹¹⁷ *Skinner v. Oklahoma*, 316 U.S. 534 (1942). The Court struck down a statute requiring sterilization of certain convicted felons. The Court stated that "marriage and procreation are fundamental to the very existence . . . of the race." *Id.* at 541.

¹¹⁸ *Moore v. East City of Cleveland*, 431 U.S. 494 (1977). The Court struck down a zoning ordinance which allowed only members of a single family to live together.

¹¹⁹ *Public Health Trust v. Wons*, 541 So.2d 96 (Fla. 1989). In determining that the right to refuse a life saving blood transfusion was constitutionally protected, the Court found a "deeply imbedded belief, rooted in our constitutional traditions, that an indi-

cases indicate that there exist certain areas of life in which the right to privacy prohibits government interference. The right of a woman to choose what to do with her body when pregnant should be accorded the same protection. A woman's moral and personal obligation to act in the best interest of herself and her unborn fetus should not be coerced by the state through intrusive regulation.

The Supreme Court has defined the substantive rights protected by the Due Process Clause as fundamental rights. In *Roe*, the Supreme Court ruled that, when a fundamental right is implicated, the intrusion must be subject to strict judicial scrutiny.¹²⁰ Under this standard, any limit on a fundamental right must both serve a compelling state interest and be narrowly tailored to further that objective.¹²¹ In effect, the standard weighs the benefit of the regulation against its intrusiveness. Thus, any statute which is deemed to intrude upon a woman's right to privacy or personal autonomy must withstand the "strict scrutiny" test in order to be upheld as constitutional.

The strict scrutiny standard applied by Judge Suzanne DelVecchio in the *Pellegrini* case resulted in the dismissal of the charges against Ms. Pellegrini. Judge DelVecchio declared that the prosecution implicated Ms. Pellegrini's rights to privacy, personal autonomy, and reproductive freedom. Since the right to privacy and the strict scrutiny standard of *Roe v. Wade* have been accepted as an integral part of Massachusetts law,¹²² even if M.G.L. c. 94C § 32F(b) were intended to apply to the ingestion of drugs by a pregnant woman, its application in the present case was suspect.¹²³ In applying the strict scrutiny standard, Judge DelVecchio determined that no sufficiently compelling state interest existed, as there was no evidence that the child suffered any injury from his exposure to cocaine. Even if a compelling state interest did exist, the means of prosecution was not narrowly tailored to the objective it served.¹²⁴ "The Commonwealth can develop an alternative means to effectuate its purpose, one which does not interfere with a woman's right to privacy or destroy the fundamental relationship between a mother and her child, as this prosecution threatens."¹²⁵ This same analysis should apply to any attempt to prosecute a woman for exposing her unborn fetus to illegal substances.

vidual has a fundamental right to be left alone so that he [or she] is free to lead his [or her] private life according to his [or her] own beliefs free from unreasonable government interference." *Id.* at 98. Several other decisions have affirmed the right to refuse medical treatment even if the consequences are harmful or fatal. *See In re Farrell*, 529 A.2d 404 (N.J. 1987) (a mother with a terminal illness may have a respirator removed); and *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (a person has the right to refuse medical treatment).

¹²⁰ *Roe*, 410 U.S. at 155.

¹²¹ *Id.*

¹²² *Id.* at 6.

¹²³ *Pellegrini*, No. 87970 at 4.

¹²⁴ *Id.* at 8.

¹²⁵ *Id.*

2. The Due Process Clause

The Due Process Clause of the Fourteenth Amendment prohibits any state action which results in the deprivation of life, liberty, or property without due process of law.¹²⁶ "The first essential of due process is fair warning of the act which is made punishable as a crime."¹²⁷ To satisfy this constitutional requirement, a criminal statute must define the punishable offense in a manner sufficiently concrete to give adequate notice to society of what conduct is being proscribed.¹²⁸ In *United States v. Harris*,¹²⁹ the Supreme Court held that a statute must be "clear enough to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."¹³⁰ In *Keeler v. Superior Court*,¹³¹ the Court noted that "unforeseeable judicial enlargement of an existing statute . . . violates the [due process] requirement of fair warning."¹³² The Court reasoned that the power to define crimes lies only with the legislature and that judicially created offenses, by applying unusual meaning to existing statutes, violate the notice requirement of the Due Process Clause.¹³³

In *Pellegrini*, Judge DelVecchio cited the fair notice requirement of the Due Process Clause as a further reason to not interpret M.G.L. § 32F to encompass the *in utero* transfer of cocaine. Judge DelVecchio ruled that "strict construction of penal statutes is necessary to ensure fairness to the defendant and to avoid unconstitutional application of statutes."¹³⁴ Judge DelVecchio explained that a person may not be punished for a crime unless their conduct falls clearly within the language of the statute at issue.¹³⁵ As M.G.L. § 32F had never been interpreted to apply to the *in utero* transfer of cocaine from a mother to her fetus, Judge DelVecchio concluded that neither the statutory language nor the statutory history permitted the strained construction necessary to convict Ms. Pellegrini.¹³⁶

This same reasoning should apply to any use of existing statutes to prosecute the ingestion of drugs by a pregnant woman. As no reasonable reading of

¹²⁶ U.S. CONST. amend. XIV, § 1.

¹²⁷ *Keeler v. Superior Court*, 87 Cal. Rptr. 481, 490 (1970).

¹²⁸ See McNulty, *supra* note 18, at 310 n.215 for a discussion of cases.

¹²⁹ 347 U.S. 612 (1954).

¹³⁰ *Id.* at 617. See also *Connally v. General Construction Co.*, 269 U.S. 385 (1926) (a statute violates the Due Process Clause of the Fourteenth Amendment when its terms are so vague that men of common intelligence must necessarily guess at its meaning).

¹³¹ 87 Cal. Rptr. 481.

¹³² *Id.* at 490 (quoting *Bouie v. City of Columbia*, 378 U.S. 347 (1964)).

¹³³ As discussed above such judicial action would also violate the constitutional requirement of separation of powers.

¹³⁴ *Pellegrini*, No. 87970 at 9 (citing *Commonwealth v. Cass*, 467 N.E.2d 1324 (1984)).

¹³⁵ *Id.* at 9-10 (citing *Commonwealth v. Corbett*, 307 Mass. 7, 8 (1940)).

¹³⁶ *Id.* at 10.

existing statutes warrants the conclusion that such statutes are meant to proscribe a mother's prenatal care decisions, their use to prosecute maternal substance abuse would violate the Due Process Clause. To find otherwise is to allow an individual to be prosecuted for conduct which that person had no way of knowing was criminal under existing statutes.¹³⁷ Moreover, to allow the extension of existing child abuse, child neglect, and drug trafficking statutes not intended to cover maternal conduct is to give prosecutors unlimited discretion to determine what behavior they will treat as criminal. The Due Process Clause prohibits such discretion by requiring that laws be drafted by the legislature and clearly conveyed to the public.

3. Equal Protection Guarantee

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law."¹³⁸ The standard of review for equal protection cases is essentially the same as that for due process violations, although the level of scrutiny is not quite as strict. In essence, courts require that any unequal treatment must serve an important government interest and be substantially related to that objective.¹³⁹ The judiciary has not relied on the Equal Protection Clause as the sole justification for dismissing an action against a mother for abusing drugs during pregnancy.¹⁴⁰ This principle is, however, related to the issue of maternal liability and serves to strengthen the constitutional invalidation of these claims.

Requiring pregnant women to adhere to an increased standard of care would violate the equal protection clause. Such a requirement would treat pregnant women differently from both men and non-pregnant women. When pregnant, women would no longer have the right to make their own decisions. Instead, they would be legally required to always act in the best interest of the fetus. This requirement would have a substantial impact on every pregnant woman's life, as virtually all behavior of a pregnant woman may affect her unborn fetus. The man who fathered that fetus, however, is not subject to any such legal requirements. In effect, "by regulating women as if their lives were defined solely by their reproductive capacity, the state perpetrates a system of sex discrimination that is based on the biological differences between the sexes, thus depriving women of their constitutional right to the equal protec-

¹³⁷ Arguably, with the prosecution of Jennifer Johnson, those who live in Florida are now on notice that using drugs during pregnancy is conduct which may be prosecuted.

¹³⁸ U.S. CONST. amend. XIV, § 1.

¹³⁹ *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁴⁰ See discussion *supra* notes 84-97. The cases against Margaret Reyes and Pamela Stewart were dismissed for lack of notice in violation of the Due Process Clause. Judge DelVecchio dismissed the case against Josephine Pellegrini based on the right to privacy of the Fourteenth Amendment. An Illinois Grand Jury refused to indict Melanie Green, citing right to privacy concerns.

tion of the laws."¹⁴¹

4. Eighth Amendment Prohibition of Punishing Status Crimes

The Eighth Amendment prohibits the infliction of cruel and unusual punishment on criminals. In *Robinson v. State of California*,¹⁴² the Supreme Court invalidated a California statute making it an offense for a person to be addicted to the use of narcotics. The Court held that the statute was cruel and unusual, in violation of the Eighth Amendment. The Court focused on the fact that Robinson's crime consisted only of his status as a person suffering from the disease of drug addiction.¹⁴³ Thus, the Court held that a person could not be convicted based on a status or condition without a voluntary and illegal act.¹⁴⁴ The Supreme Court has not granted certiorari to any other such cases concerning status crimes, hence the important policy of *Robinson* remains unchanged.¹⁴⁵ Moreover, in *Linder v. United States*,¹⁴⁶ the Supreme Court ruled that narcotics addicts "are diseased and proper subjects for medical treatment."¹⁴⁷ The *Linder* rule, that narcotics addiction is a condition, when read with the *Robinson* rule, that individuals cannot be punished for a condition, supports the conclusion that criminalizing the abuse of drugs by a pregnant addict is unconstitutional.

The reasoning of *Robinson* rests on the Model Penal Code requirements of *mens rea* and *actus reus* for a criminal act. MPC § 2.01(1) requires that an act be volitional to adhere criminal responsibility because there is little deterrence or rehabilitative value in punishing an involuntary act.¹⁴⁸ In addition, it would be unjust to punish one for an unintended act.¹⁴⁹ Therefore, to prosecute a drug addict for causing fetal harm, the state must prove that the individual was aware that injury would result and affirmatively intended to inflict such harm. Pregnant addicts use drugs because they are either chemically or

¹⁴¹ See McGinnis, *supra* note 28, at 519 n.72 (quoting Johnson, *supra* note 35, at 613).

¹⁴² 370 U.S. 660 (1962).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 666.

¹⁴⁵ In *Powell v. Texas*, 392 U.S. 514 (1968), the Supreme Court upheld the conviction of Powell for being drunk in a public place. The Court distinguished this case from *Robinson* by explaining that Powell was not convicted for being an alcoholic, but instead for being in a public place while drunk. Thus, Powell was not punished for his status as an alcoholic.

¹⁴⁶ 268 U.S. 5 (1925).

¹⁴⁷ *Id.* at 18.

¹⁴⁸ "Courts and commentators frequently justify the concept of *mens rea* . . . [by] principles of deterrence and rehabilitation. The argument is that one who caused harm accidentally rather than intentionally or without an 'evil meaning mind' is both harmless and not in need of reform." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.03 (1987). See also McGinnis, *supra* note 28, at 522.

¹⁴⁹ See McNulty, *supra* note 18, at 304.

physiologically dependent, and not in an effort to harm their unborn fetuses.¹⁵⁰ Thus, punishing addicts for using drugs during pregnancy would be equivalent to punishing them for performing involuntary acts not intended to cause harm.

Punishing a woman for subjecting her fetus to an illegal substance is tantamount to punishing her for having the status of a drug addict. A pregnant woman has no control over the maternal-fetal exchange through the placenta. This act is a non-volitional bodily function which results from the status of being pregnant. In addition, drug use alone is generally not a crime.¹⁵¹ Thus, if an individual cannot be punished for drug addiction or drug use, but a woman *can* be punished for ingesting drugs while pregnant, punishment must be for the status of being pregnant when it coexists with the status of being a drug addict or drug user.¹⁵² Pregnancy, a status, is a necessary element for liability. Drug addiction is a disease and should be treated medically instead of criminally. To treat the illness as a crime amounts to unconstitutional cruel and unusual punishment.

IV. CRIMINAL PROSECUTION OF MATERNAL SUBSTANCE ABUSE IS AN UNJUST AND INEFFECTIVE POLICY

In addition to constitutional defects, the creation or use of statutes which provide for the prosecution of women who abuse drugs while pregnant is poor social policy. Maternal substance abuse is part of a larger problem which cannot, and should not, be addressed through the criminal justice system. Not only is criminal prosecution ineffective, as it attacks the victim instead of the problem, but it serves to mask the real problem and impedes the implementation of a valid solution. Criminal prosecution of maternal behavior allows the government to appear concerned about the growing number of drug exposed babies without spending the money or resources to address the underlying problems. George Annas¹⁵³ stated that "[i]t's a cheap, flashy way to look like you're doing something about a difficult problem when in fact you're not."¹⁵⁴ Dr. Ira Chasnoff states: "[p]utting mothers in jail is a short term, knee jerk reaction that does not help anyone."¹⁵⁵ Sympathy for the plight of drug exposed babies should not justify a policy which is unconstitutional, unfair, and ineffective.

¹⁵⁰ See *Legal Intervention During Pregnancy: Court-Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2667-78 (Nov. 28, 1990) (Board of Trustees Report). See also Wilkins, *supra* note 4, at 1435; McNulty, *supra* note 18, at 304.

¹⁵¹ See McGinnis, *supra* note 28, at 520.

¹⁵² See *id.*

¹⁵³ Professor of Law at Boston University.

¹⁵⁴ *Punishing Pregnant Addicts: Debate, Dismay, No Solution*, N.Y. TIMES, Sept 10, 1989, at E5.

¹⁵⁵ Lewin, *supra* note 14.

A. *Criminalizing Maternal Substance Abuse is Ineffective Policy*

The four goals of punishment are deterrence, incapacitation, rehabilitation or retribution.¹⁵⁶ Prosecuting women for abusing drugs while pregnant will not effectively promote any of the four goals. Criminal sanctions will not deter an addicted mother's use of drugs during pregnancy. Addiction is a result of complex hereditary, environmental, and social factors which cannot be overcome by the threat of criminal sanctions.¹⁵⁷ Addicts do not generally behave as rational people; therefore, criminalizing their actions will not necessarily deter them from continuing their now-illegal behavior. In addition, as pregnant addicts are not deterred by existing drug statutes which criminalize the sale and possession of drugs, it is unrealistic to believe that the threat of further criminal liability will have any impact on their behavior. If concern for her unborn child does not prevent a woman from using drugs during pregnancy, neither will the threat of criminal sanctions.¹⁵⁸ As for those women who are not drug addicts, it is unlikely that they will act in a manner knowingly harmful to their unborn child.¹⁵⁹ If a non-addict does act in a way that is harmful to her fetus, counseling and education are more appropriate than criminal sanctions.¹⁶⁰ Thus, for both addicts and non-addicts, it is unlikely that the threat of prosecution will deter them from abusing harmful substances during pregnancy more than the knowledge that their behavior may harm their fetuses.

The goal of incapacitation is to prevent a criminal from committing any further offenses by incarcerating that person. It is meant to protect society by removing the threat of subsequent criminal activity by the individual. Prosecutors claim that criminalizing drug abuse by pregnant women will protect the unborn fetus. In these cases, however, once the drugs are ingested, the harm is done. Incarcerating the mother cannot prevent the injury already incurred. Moreover, sending the woman to jail will not prevent her from using drugs or solve her drug problem, as it is well known that drugs are readily available in prison.¹⁶¹ Thus, convicting mothers for drug use during pregnancy will not prevent the suffering of the children and will not benefit society. Additionally, the goal of rehabilitation is not served by punishing pregnant addicts. Our criminal justice system is not equipped to rehabilitate criminals, much less drug addicts.¹⁶²

¹⁵⁶ DRESSLER, *supra* note 148, at § 2.03.

¹⁵⁷ 264 JAMA, *supra* note 150, at 2667.

¹⁵⁸ *Id.* at 2668.

¹⁵⁹ *Id.* at 2669.

¹⁶⁰ Due to the lack of education and prenatal care available to pregnant women many are unaware that substance abuse may cause harm to their fetuses. See Wilkins, *supra* note 4, at 1435.

¹⁶¹ See 264 JAMA, *supra* note 150, at 2667.

¹⁶² Treatment of mothers who abuse harmful substances during pregnancy would be more appropriate than imprisonment. However, as discussed *infra* notes 181-201, adequate treatment is unavailable for women, especially when pregnant. See Wilkins,

Retribution is based on the theory of revenge: people are responsible for their actions and must repay society for the injury they cause. Punishment seeks to vindicate society. This goal may be marginally achieved by punishing women whose behavior harms their unborn fetuses. In the context of maternal fetal abuse, however, retribution may not be warranted. Punishing the mothers does nothing to help the injured children.¹⁶³ Moreover, incarceration does not address the underlying problem of the mothers' drug abuse. Thus, the benefits are slight when compared to the potential costs to the babies, the mothers, and society.

B. The Costs of Criminalizing Drug Abuse by Pregnant Women Outweigh the Marginal Benefits

Criminal prosecution of women who abuse drugs during pregnancy actually contributes to the problem by making it less likely that women will seek help.¹⁶⁴ If pregnant women who abuse drugs know that they are subject to prosecution for that conduct, they may avoid seeking treatment or prenatal care for fear that their drug use will be discovered and reported to the authorities.¹⁶⁵ This will likely result in more babies born outside medical facilities or without sufficient medical supervision. Often, drug exposed infants have complicated births and require special medical attention.¹⁶⁶ These babies will suffer further, if they are not given the necessary care.¹⁶⁷ In addition, pregnant women who avoid treatment centers and abstain from drug use on their own may experience withdrawal symptoms which could actually cause further harm to their unborn fetuses.¹⁶⁸ Such judicial intervention will inevitably cause pregnant drug abusers to feel it necessary to abort, conceal their pregnancy, have non-assisted births, or possibly abandon or kill their children out of fear of being discovered.¹⁶⁹ All of these alternatives certainly undermine the states' asserted interest in protecting the unborn. In the end, the children will suffer and the problem will continue.

In addition, criminal prosecution of pregnant women who abuse drugs will inevitably create an adversarial relationship between physicians and pregnant

supra note 4, at 1434.

¹⁶³ Moreover, incarcerating addicts during pregnancy is "only of limited value since a considerable amount of damage could be done to the fetus before a woman even realized she was pregnant." 264 JAMA, *supra* note 150, at 2667.

¹⁶⁴ See Lewin, *supra* note 14 (statement by Lynn Paltrow of the ACLU's Reproductive Freedom Project).

¹⁶⁵ Wilkins, *supra* note 4, at 1435; 264 JAMA, *supra* note 150, at 2669.

¹⁶⁶ See Wilkins, *supra* note 4, at 1435.

¹⁶⁷ *Id.*

¹⁶⁸ See McNulty, *supra* note 18, at 302. In addition to exposure to the harmful substance, the fetus may suffer further harm from the distress caused by the mothers unsupervised withdrawal.

¹⁶⁹ DEBORAH MATHIEU, PREVENTING PRENATAL HARM: SHOULD THE STATE INTERVENE? 61-88 (Kluwer Academic Publishers) (1991).

women.¹⁷⁰ The physician will be in an awkward position, with conflicting responsibilities to the patient, the fetus, and the authorities. As the physician will be required to report substance abuse to the authorities, either the women will decline treatment or the physician will not identify and treat pregnant substance abusers in order to avoid difficult choices.¹⁷¹ With physicians as enforcement officers, doctors will not ask about drug use and women will conceal important facts.¹⁷² Not only is this result counterproductive to all involved, it also contradicts the medical ideal that the patient's interest should prevail. Women should not feel threatened by their physicians and physicians should not be forced to violate their personal relationships with their patients. Thus, "the use of the courts to resolve these conflicts is almost never warranted."¹⁷³ The problem should be left for the mother and her physician to solve, not to the criminal justice system.

Another concern relating to the criminalization of maternal drug abuse is the scope of the statutes involved. As Judge DelVecchio stated in *Pellegrini*, "the level of state intervention and control over the woman's body required by this prosecution could open the door to many other arbitrary restrictions on a woman's pregnancy."¹⁷⁴ Almost everything that a pregnant woman does affects the health and well-being of her fetus. Will courts stop at criminalizing behavior which is illegal to begin with? It is known that smoking adversely affects the health of the unborn fetus.¹⁷⁵ Similarly, many over-the-counter drugs will cross the placenta and affect fetal health.¹⁷⁶ Exposure to hazardous materials creates an increased risk of spontaneous abortion, premature birth, stillbirth, and birth defects.¹⁷⁷ Will these behaviors eventually be subject to judicial scrutiny as well? Perhaps women will be subject to a positive duty to act in the best interest of their fetuses. These considerations lend to the growing fear that a woman's body is appreciated solely for its reproductive capacity. All fertile women may eventually be required to maintain their bodies in top reproductive condition.

Moreover, punishing mothers who abuse drugs during pregnancy will further victimize the already injured children. Most importantly, these children will be deprived of the essential bond that establishes between a mother and a child. These children will probably be sent into an already overburdened foster care system which is not equipped to deal with drug exposed infants and children. In addition, these prosecutions will likely be applied in a discriminatory

¹⁷⁰ "The imposition of criminal sanctions will force a woman's doctor to play the role of enforcement officer." Glink, *supra* note 15, at 545. See also 264 JAMA, *supra* note 150, at 2666.

¹⁷¹ Glink, *supra* note 15, at 545-46.

¹⁷² *Id.*

¹⁷³ Jost, *supra*, note 20, at 86.

¹⁷⁴ Pellegrini, No. 87970 at 9.

¹⁷⁵ 264 JAMA, *supra* note 150, at 2666.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

manner thereby disproportionately affecting poor minorities.¹⁷⁸ As the poor tend to have less access to prenatal care and education, they are more likely to be affected by maternal substance abuse prosecutions.¹⁷⁹ The poor interact more with government agencies, i.e. welfare, probation officers, and public hospitals, thus the chance that they will be discovered and reported is greater than that of the wealthy, who are able to avoid government subsidized programs.¹⁸⁰ Inevitably, such prosecutions will foster the abuse and neglect which they are intended to remedy.

C. *Proper Treatment is Not Available for Pregnant Addicts*

Most treatment programs will not admit pregnant addicts.¹⁸¹ One major factor is fear of legal liability through malpractice litigation.¹⁸² Pregnant addicts are also considered high risk and drain a disproportionate share of the facilities resources.¹⁸³ Moreover, many treatment facilities lack obstetrical expertise and cannot provide for the special needs of pregnant addicts.¹⁸⁴ Dr. Wendy Chavkin's study of seventy-eight New York City treatment programs revealed that fifty-four percent of the programs denied treatment to pregnant, drug addicted women; sixty-seven percent refused to treat pregnant addicted women on Medicaid; and eighty-seven percent would not admit pregnant women who were addicted to crack and on Medicaid.¹⁸⁵ Of those programs which admit pregnant women, less than one half offered prenatal care and only two provided day care.¹⁸⁶

On a national level, approximately fifty of this country's seven thousand treatment programs provide female patients with child and obstetrical care.¹⁸⁷ The lack of treatment for all women has become so acute in Massachusetts that some women with drug or alcohol problems are sent to jail, even though they have not been charged with a crime.¹⁸⁸ Moreover, waiting lists for pro-

¹⁷⁸ See McGinnis, *supra* note 28, at 531. See also 264 JAMA, *supra* note 150, at 2668.

¹⁷⁹ 264 JAMA, *supra* note 150, at 2668.

¹⁸⁰ See McNulty, *supra* note 18, at 311.

¹⁸¹ See Rubenstein, *supra*, note 28, at 309; Glink, *supra* note 15, at 544; McNulty, *supra* note 18, at 301.

¹⁸² Wilkins, *supra* note 4, at 1437.

¹⁸³ Molly McNulty, *Combating Pregnancy Discrimination in Access to Substance Abuse Treatment for Low Income Women*, 23 CLEARINGHOUSE REV. 21, 22 (1989).

¹⁸⁴ See Wilkins, *supra* note 4, at 1436-37; See also Lewin, *supra* note 14.

¹⁸⁵ See Dr. Wendy Chavkin, *Help, Don't Jail, Addicted Mothers*, N.Y. TIMES, July 18, 1989, at A21. (Letter to the Editor).

¹⁸⁶ *Id.*

¹⁸⁷ Susan Diesenhouse, *Drug Treatment is Scarcer Than Ever for Women*, N.Y. TIMES, Jan. 7, 1990, at A26.

¹⁸⁸ *Id.* "In 1989 more than one hundred women who had not been charged with a crime spent one to thirty days in jail because of the lack of publicly supported treatment for women. Under state law, people who are a danger to themselves or others

grams which do accept pregnant women frequently extend beyond the women's due dates and, therefore, are meaningless for fetal protection.¹⁸⁹ Although prosecutors claim that their goal is to encourage treatment, it is unrealistic since that treatment simply is not available, even if it is desired.¹⁹⁰ As David Mulligan, Massachusetts' Commissioner of Public Health states, "[a]cross the country there is a tremendous need for treatment that responds to a woman's special needs but rehabilitation seems to have taken a second place to law enforcement."¹⁹¹ Clearly, it is unfair to punish women for failing to seek treatment which does not exist.

Most drug treatment programs are founded on a male-centered model despite the fact that approximately half of the estimated nine and one half million drug users are women.¹⁹² This means that, not only is there insufficient treatment, but what is available is largely inappropriate to meet the unique needs of pregnant substance abusers.¹⁹³ Moreover, almost all programs lack child care facilities; thus mothers are forced to choose between giving up their children or foregoing treatment.¹⁹⁴ Such impediments to treatment are unfortunate because pregnancy is an optimal time to motivate women to seek treatment.¹⁹⁵ Women are more likely to be aware of and concerned with their physical health during pregnancy. Though concern for their own health may not deter drug use, the knowledge that they are carrying a child may do so.

Drug treatment programs specifically tailored to the needs of women are essential because women drug addicts are unlike male addicts and require different treatment. Women tend to be less healthy and less educated than male substance abusers.¹⁹⁶ Drug using women receive less emotional and social support from their surroundings and are less likely to be encouraged to enter treatment.¹⁹⁷ Almost seventy percent of female abusers have been severely

may be forced to undergo treatment for substance abuse." However, Massachusetts has only forty beds available for women. If they are full and the woman cannot pay for private care, she may be taken to prison. Moreover, because she is not officially a part of the prison population, she may not attend the prison substance abuse program.

¹⁸⁹ See McNulty, *supra* note 18, at 302 n.172 (citing *More Drug-Exposed Babies Being Born*, SAN DIEGO UNION, Oct. 19, 1986, at A1).

¹⁹⁰ In fact, both Melanie Green and Jennifer Johnson attempted, without success, to enter treatment during their pregnancies. Rubenstein, *supra* note 28, at 150.

¹⁹¹ See Diesenhouse, *supra* note 187.

¹⁹² *Id.*

¹⁹³ See Rubenstein, *supra* note 28, at 147.

¹⁹⁴ See McNulty, *supra* note 18, at 301.

¹⁹⁵ A telephone hotline for pregnant addicts serving seven midwestern states received 2700 phone calls during its first two years in operation. Rubenstein, *supra* note 28, at 150.

¹⁹⁶ *Id.* This is due to women's relative poverty and consequent inability to pay for health care.

¹⁹⁷ *Id.* Studies show that not only do women receive less encouragement to enter treatment than males, but women are likely to face active opposition to such a move. Some claim that society views women addicts as more socially deviant than their male

beaten, usually by husbands or partners.¹⁹⁸ Nineteen percent have been severely beaten as children, fifteen percent have been raped as children, and twenty-one percent have been raped as adults.¹⁹⁹ For these reasons, the physical and mental health of women substance abusers tends to be more fragile than their drug-free counterparts.

In particular, adequate treatment is necessary for pregnant women. As the situation exists today, a pregnant woman who desires treatment, but is not fortunate enough to find an available program, must either continue abusing drugs or abstain from drug use without supervision. Studies suggest that pregnant women who withdraw from drugs without supervision may cause harm to themselves and their unborn fetuses.²⁰⁰ Prosecuting maternal substance abusers creates a situation in which pregnant women who desire treatment truly cannot win. These women are denied drug treatment and then arrested for failing to get help.²⁰¹ This situation is inherently unjust.

V. ALTERNATIVES TO CRIMINAL PROSECUTION

Imposing criminal sanctions on women who abuse drugs during pregnancy fails to address the larger social problem. As discussed earlier, criminal prosecution is ineffective and may actually aggravate the problem it is aimed at preventing, the increasing rate of babies born exposed to drugs. By alienating women and causing them to fear those who can help, the problem only becomes worse. Instead, an effective and common sense solution would provide women with adequate reproductive health services, sex education, prenatal care, and drug treatment, and leave the personal decision making "to the woman — where it belongs."²⁰² Criminalization stands in the way of such alternate solutions by deceiving the public into believing that effective action is being taken. Moreover, criminalization monopolizes federal funds allocated to drug control.²⁰³ Approximately thirty percent of federally allocated funds are

counterparts. In addition, many addicted women have other children. Children add additional stress to women's lives and may impede their ability to enter treatment. As women are generally considered more responsible for their children than are the children's fathers they are less able to leave them to seek treatment. *See id.*

¹⁹⁸ McNulty, *supra* note 18, at 300.

¹⁹⁹ *Id.*

²⁰⁰ Withdrawal before the fourteenth week of gestation is not advised because of the risk of spontaneous abortion. Withdrawal is not recommended after thirty-two weeks because it may provoke preterm labor or fetal distress. *See McNulty, supra* note 18, at 301 n.168, 302.

²⁰¹ Not only was Jennifer Johnson denied drug treatment when she sought it, but her requests were used as evidence of her drug abuse at her trial. *See Rubenstein, supra* note 28, at 146.

²⁰² Robertson, *supra* note 10.

²⁰³ Bernard Weinraub, *President Offers Strategy for U.S. on Drug Control*, N.Y. TIMES, Sept. 6, 1989, at A1. President Bush's drug plan allocated nearly seventy percent of federal drug control funds to law enforcement. "In fact, since the Nixon

spent on education, treatment, and support programs. The remaining seventy percent is allocated to enforcement, prosecution, and incarceration.²⁰⁴ Clearly, the government has committed its resources in a way that does not effectively address the problem and may, in fact, prove detrimental to the unborn children that such government initiatives were intended to assist.

The United States has one of the highest infant mortality rates among any industrialized nation.²⁰⁵ An estimated ten babies per one thousand live births died within one year in 1986.²⁰⁶ Although drug exposure contributes to this problem, it is not the sole factor. One study suggested that women who receive late or no prenatal care are three times more likely to have babies born with low birth weight, which is the most significant factor underlying infant mortality.²⁰⁷ Drug exposed babies are only part of the larger problem of the increasing infant mortality rate. Instead of focusing on one facet of this problem, society would do better to adopt a broader solution. Better and earlier prenatal care is essential to solving this tragedy of medically complicated births.

Many women, including substance abusers, do not recognize the importance of prenatal care.²⁰⁸ It is essential that these women be informed of the risks of foregoing prenatal care, not punished for their lack of knowledge. By providing services necessary to all mothers, the problem of maternal drug abuse, as well as medically complicated births resulting from other factors, will be addressed. In contrast, prosecution may deter prenatal care by substance abusing women and others who would otherwise seek it, but fear that they will be punished. Threat of prosecution will only add to the lack of attention given to prenatal care by creating a situation in which medical personnel are feared. Women must be encouraged to seek medical attention during their pregnancy, regardless of their physical or emotional condition.

In addition to a commitment to adequate prenatal care, encouraging drug treatment for all substance abusers, particularly pregnant women, is essential. This approach requires that adequate treatment facilities be available and suitable to treat female drug abusers. Not only will treatment address the societal problem of drug abuse, it will also serve to protect the unborn, thereby facilitating the goal stated by proponents of state intervention. Furthermore, treatment will serve to make women better mothers and, hopefully, prevent future child neglect and abuse problems. Treatment will also assist in the process of putting an end to the cycle of substance abuse. While punishment may hold a certain retributive appeal, it will not diminish the number of drug addicted babies. The only legitimate way to solve the maternal drug abuse

Administration, about 70 percent of Federal anti-drug money has gone to law enforcement." *Id.*

²⁰⁴ Wright, *supra* note 34, at 1314.

²⁰⁵ See McNamara, *supra* note 99, at A11.

²⁰⁶ *Id.*

²⁰⁷ See Schott, *supra* note 34, at 241 (citing *National Health Law Program, The Cost Effectiveness of Prenatal Care*, 19 CLEARINGHOUSE REV. 259, 261 (1985)).

²⁰⁸ *Id.* at 243.

problem is to enable pregnant women to end their addiction.

Instead of creating new laws intended to criminalize substance and other bodily abuses by pregnant women, society should commit legislative resources to prenatal care and drug treatment. In Connecticut, a bill which proposes making drug treatment available for any pregnant woman is pending in the House of Representatives.²⁰⁹ Under this bill, "[g]eneral statutes [would] be amended to provide that the Department of Child and Youth Services shall offer drug treatment for any pregnant woman who is drug dependent . . ."²¹⁰ A model state statute would be based on the philosophies underlying the Connecticut bill. Such a statute would provide all pregnant women with a comprehensive treatment program, including prenatal care, drug treatment and education, parenting classes, access to medical services and other appropriate support services.

An increased commitment to treatment, education, and prenatal care is cost-effective. A study by the National Academy of Sciences estimated that for every dollar spent on prenatal care at least three dollars would be saved in costs for intensive and long term institutional care.²¹¹ The cost of comprehensive prenatal care is estimated at approximately six hundred dollars per baby.²¹² The estimated cost for neonatal intensive care for each low birth weight baby is from ten to fifteen thousand dollars.²¹³ The life time cost for developmentally disabled individuals, including treatment for physical and mental disabilities, is estimated at five hundred thousand dollars to six million dollars.²¹⁴

The costs for treatment will be substantially less than the costs society incurs today. One residential treatment center costs approximately fifty to seventy dollars per day, whereas the cost of foster care alone averages at ninety dollars a day, notwithstanding the medical costs of the impaired children.²¹⁵ Thus, an initial allocation of funds to ensure adequate education and prenatal care for all will significantly diminish the costs to insurance companies, hospitals, and taxpayers, who fund Medicaid, as well as government costs for prosecution, imprisonment, and financial support for dysfunctional families.²¹⁶ In addition, everyone will benefit from the increased productivity of self-supporting taxpayers and an overall healthier population.

VI. CONCLUSION

Advocates of state intervention into a pregnant woman's behavior suggest

²⁰⁹ CT H.B. 6413 (1993).

²¹⁰ *Id.*

²¹¹ Robert Pear, *States Act to Provide Health Care Benefits to Uninsured People*, N.Y. TIMES, Nov. 22, 1987, at A1, 44.

²¹² See Schott, *supra* note 34, at 243.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Rubenstein, *supra* note 28, at 151.

²¹⁶ MATHIEU, *supra* note 169, at 31.

that women are both morally and legally obligated to act in the best interests of their unborn fetuses.²¹⁷ These advocates legally justify intervention by claiming that the state has a compelling interest to protect potential life and secure the fetus' right to be born with a sound mind and body.²¹⁸ They also claim that the state has a financial interest in protecting society from the burden of providing medical and social care for drug-exposed infants.²¹⁹ These interests are said to be sufficiently compelling to satisfy the strict scrutiny standard of *Roe v. Wade*.²²⁰ Advocates of regulation also claim that, unlike the right to abortion, marriage and procreation, the right to use illicit drugs is not a fundamental right, but instead is a crime.²²¹ Thus, a state can certainly restrict a "right" to use illegal drugs when such use poses a threat to the fetus. In essence, advocates of intervention claim that the state's interests in protecting potential human life and limiting the costs of care for drug exposed babies outweigh the rights of the mother and are sufficiently compelling to justify state regulation of maternal behavior.

In addition to the legal justifications for regulation, advocates of intervention suggest that it is good social policy.²²² They argue that, once a woman chooses to carry a child to term, she assumes an obligation to her fetus.²²³ In doing so, the woman loses the freedom to act in ways which adversely affect her fetus.²²⁴ The decision to have a child creates a positive duty in the mother to act in the best interests of the fetus as well as a negative duty to not cause harm to it. Thus, once a woman decides not to seek an abortion (assuming one is available), the woman accepts significant limits on her freedom to protect the child from *in utero* injury.²²⁵ Advocates suggest that this moral duty is so important that the law, may and should, be used as an enforcement mechanism.²²⁶

These views undermine the importance and significance of the rights to privacy and personal autonomy. The Supreme Court decisions from *Griswold* through *Roe* require a presumption towards liberty and privacy.²²⁷ Moreover, the *Roe* court ruled that the word "person" as used in the Fourteenth Amendment does not include the unborn.²²⁸ Many opponents of intervention suggest

²¹⁷ McNulty, *supra* note 18, at 292 (quoting John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 438 (1983)).

²¹⁸ See McNulty, *supra* note 18, at 290-91.

²¹⁹ See Balisy, *supra* note 10, at 1221-23.

²²⁰ 410 U.S. 113 (1973).

²²¹ See Balisy, *supra* note 10, at 1220-21.

²²² *Id.* at 1221.

²²³ See McNulty, *supra* note 18, at 292; Glink, *supra* note 15, at 564.

²²⁴ See Balisy, *supra* note 10, at 1223. See also Barrett, *supra* note 37, at 233.

²²⁵ See McNulty, *supra* note 18, at 292; Glink, *supra* note 15, at 564.

²²⁶ See McNulty, *supra* note 18, at 290.

²²⁷ See *supra* notes 106-21.

²²⁸ *Roe*, 410 U.S. at 157.

that, "the woman's wishes should automatically prevail, whatever the relative risks and benefits to herself and her fetus, because her right as a human being to personal autonomy should be absolute."²²⁹ No state interest is sufficiently compelling to justify interference with a woman's personal decisions relating to the care of herself and her fetus.

On a broader social level, regulation of pregnant women's behavior is paternalistic and unjustifiably damages the image and status of women in our society. Such regulations purvey the image of women as callous and insensitive, willing to jeopardize the health of their unborn children on a whim.²³⁰ By limiting women's fundamental right to control their conduct during pregnancy, the image of women as worthy only for their reproductive capacity is fostered.²³¹ Eventually, women will be viewed as incubators and not as individuals, with the right to control their own lives. Taken to its logical extreme, the alleged goals of intervention may be used to justify requiring women to abstain from smoking, overeating, or working in order to create the best situation for the fetus.

Out of a sense of frustration, prosecutors have instituted a short-term measure of regulating women's behavior during pregnancy which has resulted in constitutionally and socially unsound policy. Instead, society must consider more effective long term goals of improving health care, education, and drug treatment for all who desire and need it. In doing so, the goal of preventing abnormal births and putting an end to the cycle of drug abuse is more realistic. In the end, the cost and effort to institute a policy of education and treatment will be cost effective and socially acceptable. The problem of maternal substance abuse will be addressed without infringing on the rights of women. To date, prosecutors have taken a haphazard approach to the increasing rate of drug exposed births by holding the mothers solely responsible. This approach only erodes women's rights while the underlying problems remain unaddressed. This is extremely unfair as well as ineffective.

While it cannot be denied that women who abuse drugs while pregnant deserve some blame for the effects on their children, that blame should not be translated into legal accountability. These women are often denied access to treatment, and cannot afford or do not understand the importance of prenatal care. The threat of prosecution will only magnify this problem so that women who want help will not seek it because they fear the ramifications. Clearly, state intervention in maternal behavior is unfair and ineffective, as well as violative of our constitutional commitment to liberty, privacy, and personal autonomy. A better approach would provide the woman with the necessary

²²⁹ Frances H. Miller, *Maternal-Fetal Ethical Dilemmas: A Guideline for Physicians*, 10 SEMINARS IN ANESTHESIA 157, 159 (1991).

²³⁰ See Schott, *supra* note 34, at 239.

²³¹ *Id.*

education and medical treatment, and trust her to act in the best interests of herself and her fetus.

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