

NOTES

The Use of Cocaine By Pregnant Women: Child Abuse or Choice?

I. Introduction

The question of how to properly define the sphere of a pregnant woman's autonomy is a familiar one. The Supreme Court's decisions in *Roe v. Wade*¹ and *Planned Parenthood v. Casey*² appear to have centered the debate around the pregnant woman's ability to legally terminate her pregnancy as encompassed in a constitutional right to privacy.³ In recent years, however, a new twist has emerged. In an effort to protect the unborn child, prosecutors in many states have pressed charges against women who took drugs while pregnant.⁴ Such women have been charged with a wide range of offenses from child abuse and neglect to delivery of a controlled substance to a minor, and with mixed results. A diverse group of interests are challenging these prosecutions on constitutional and medical grounds.⁵ Many states, however, argue that they possess a constitutional and justified interest in the health and welfare of an unborn child, especially a fetus that is viable outside the womb.⁶

This Note will consider the propriety of these recent efforts by the states. Part II of this Note will consider the effects of cocaine on the unborn child. Part III will discuss the methods employed by the states in their efforts to protect the unborn child from exposure to cocaine in utero. In particular, attempts to prosecute under state statutes proscribing child abuse and the delivery of a controlled substance to a minor will be examined. Part IV will address and respond to the concerns most often expressed about such prosecutions. These include the possible harmful deterrent effects, slippery slope fears, constitutional arguments, and judicial activism concerns. Part V concludes that the recent efforts attempting to protect the unborn child are not only

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

2. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

3. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing the privacy right of married couples to use contraception and explaining the origin of this right); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the right to use contraception to unmarried individuals).

4. See, e.g., *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992); *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977); *State v. Carter*, 602 So. 2d 995 (Fla. Dist. Ct. App. 1992); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991), *app. denied*, 471 N.W.2d 619 (Mich. Ct. App. 1991).

5. See Barbara Kantrowitz et al., *The Pregnancy Police*, NEWSWEEK, Apr. 29, 1991, at 52 (discussing objections to legislation that regulates a pregnant woman's behavior by the National Organization of Women and the American Civil Liberties Union); see generally Michelle D. Mills, Comment: *Fetal Abuse Prosecutions: The Triumph of Reaction Over Reason*, 47 DEPAUL L. REV. 989 (1998); Dawn Johnsen, *Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L. J. 569, 579 (1992).

6. See generally James Freeman, *Prenatal Substance Abuse: Texas, Texans and Future Texans Can't Afford It*, 37 S. TEX. L. REV. 539 (1996).

appropriate, but constitutional as well. States have a legitimate, compelling and constitutional interest in the health of a viable fetus. As medical knowledge increases, the deleterious effects of maternal drug abuse will become only more apparent.⁷ It is time for states to cease tolerating this behavior.

II. The Effects

All too often, women who are pregnant abuse drugs. It is estimated that as many as eleven percent of pregnant women have used an illegal drug during pregnancy, and of those women, seventy-five percent have used cocaine.⁸ As a result, approximately 375,000 babies each year begin their life addicted to an illicit drug.⁹ According to some accounts, more than 500,000 cocaine-exposed infants will be born each year in the United States by the year 2000.¹⁰ The effect of such behavior on the unborn is devastating and oftentimes leads to serious and permanent health consequences.¹¹ It also may result in the death of the fetus. Nevertheless, the abuse of cocaine by pregnant women is becoming more common among both urban and suburban populations. Up to forty-five percent of women cared for at urban teaching hospitals took cocaine during their pregnancies and in a recent study six percent of the infants born at a private suburban hospital had traces of cocaine in their system.¹²

The maternal use of cocaine is associated with major alterations in fetal brain structure which results in neurologic, cognitive and behavioral malfunctions.¹³ The most common health problem found in infants of cocaine-abusing mothers is a brain abnormality called microcephaly, in which the intrauterine brain growth of the fetus is

7. See, e.g., Joseph J. Volpe, M.D., *Effects of Cocaine Use on the Fetus*, 327 NEW ENG. J. MED. 399 (1992); Ira J. Chasnoff et al., *Cocaine Use in Pregnancy*, 313 NEW ENG. J. MED. 666 (1985).

8. See Report of the American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663 (Nov. 28, 1990); See, e.g., *State v. Kruzicki*, 541 N.W.2d 482, 495 (Wis. Ct. App. 1995) (citing statistics from Milwaukee County, Wisconsin, where 10% to 15% of babies are born to mothers who used cocaine during pregnancy); Lisa J. Keyes, Comment, *Rethinking the Aim of the "War on Drugs": States' Roles in Preventing Substance Abuse by Pregnant Women*, 1992 WIS. L. REV. 197, 201 (1992) (nationwide studies indicate that approximately 11% of all babies born test positive for illicit drugs).

9. Margaret P. Spencer, *Prosecutorial Immunity: The Response to Prenatal Drug Use*, 25 CONN. L. REV. 393 (1993) (citing a study by the National Association of Perinatal Addiction Research and Education).

10. See *id.* at 394 (claiming that the number of cocaine-exposed newborns each year may be between 500,000 and 4,000,000).

11. Cocaine ingested by the mother travels through the umbilical cord and across the placenta barrier to the fetus. Once the fetal tissue absorbs the cocaine, it does not immediately recirculate it to the mother's bloodstream. The cocaine metabolites are trapped within the fetus, where the child may receive ten or more rushes with every "hit" by the mother. See Ira Chasnoff, *Perinatal Effects of Cocaine*, CONTEMP. OB/GYN, May 1987, at 162; Sue Miller, *Moms: No "Safe" Time for Cocaine Health: Recent Research has Found that Just One Hit of Cocaine Taken by a Pregnant Woman Can Do Irreparable Damage to Her Fetus*, L.A. TIMES, Nov. 28, 1989, at 1 (discussing how physiological response from a single dose of cocaine may cause devastating injury).

12. Volpe, *supra* note 7, at 399. For the purposes of this note, the effect of cocaine use on the fetus will be explored. Obviously, the abuse of alcohol can have dire health repercussions for the fetus and newborn infant. Fetal alcohol syndrome, for example, is the leading known cause of mental retardation. See, *Facts About FAS/FAE* (visited Feb. 20, 1999) <<http://www.taconic.net/seminars/fas-a.html>>. Furthermore, marijuana and other drugs can obviously harm the fetus as well. The prosecutions of women who used drugs while pregnant, however, usually involve the use of cocaine. The prevalence of cocaine in modern maternity wards, as well as its very damaging effects on the fetus, warrant a brief review of its physical ramifications.

13. Volpe, *supra* note 7, at 399.

retarded as evidenced by a smaller than normal fetal brain circumference.¹⁴ Microcephaly is associated with lower intelligence quotients.¹⁵ Destructive lesions may also form on the brain of a fetus exposed to cocaine. In a recent study of a selected group of seven infants with abnormalities associated with intrauterine exposure to cocaine, three of the seven infants had brain clefts and collections of neurons in cerebral white matter due to the severe impairment of neuronal migration, and two of the three also had optic-nerve hypoplasia and were blind.¹⁶ The remaining four infants had destructive brain lesions.¹⁷

Furthermore, the risk of sudden infant death syndrome in infants exposed to cocaine is three to seven times higher than normal: "Both clinical and laboratory data suggest that the regulation of respiration and arousal is impaired in infants exposed to cocaine and that such impairment could presage the occurrence of the sudden infant death syndrome."¹⁸ A study by Joseph Volpe, M.D., concludes that cocaine use by pregnant women is "associated with an increased incidence of prematurity, intrauterine growth retardation, and microcephaly. In addition, there is now evidence of teratogenic¹⁹ effects on several aspects of brain development. . . . Cocaine also leads to destructive lesions in the brain of the fetus."²⁰

Many other studies reaffirm these findings. For example, in a study of 17,466 pregnancies in the University of Illinois Perinatal Network, the risk of intrauterine growth retardation, prematurity, and other adverse effects was high among pregnant women who used cocaine.²¹ During a study at the University of California at San Francisco, the outcomes of pregnancies complicated by cocaine abuse were compared to those of a matched control group selected from a general obstetric population. The study observed a statistically significant increase in the incidence of premature separation of the placenta, low birth weight infants, preterm deliveries, and the incidence of fetal distress requiring cesarean section.²² A study at Northwestern University School of Medicine found that cocaine-exposed infants had lower birth weight, shorter gestation and a smaller head circumference than infants in a control group.²³

Unfortunately, the negative consequences of maternal cocaine abuse often do not end after the birth of the child.²⁴ The dysfunctional development of children born addicted to cocaine has given rise to what some have called a "biologic underclass" of

14. *Id.* at 400.

15. See Anastasia Toufexis, *Innocent Victims: Damaged by the Drugs Their Mothers Took, Crack Kids Will Face Social and Educational Hurdles and Must Count on Society's Compassion*, TIME, May 13, 1991, at 57 (reporting that studies indicate that smaller head circumferences have been associated with lower intelligence quotient scores).

16. Volpe, *supra* note 7 at 401.

17. *Id.*

18. *Id.* at 404.

19. Teratogenic effects are defined as those effects "causing abnormal fetal development." Stedman's Medical Dictionary 1563 (25th ed. 1990).

20. Volpe, *supra* note 7 at 404.

21. *Id.* at 400.

22. H.R. Cohen, J.R. Green, W.R. Crombleholme, *Peripartum Cocaine Use: Estimating Risk of Adverse Pregnancy Outcome*, 35 INTERNATIONAL JOURNAL OF GYNECOLOGY AND OBSTETRICS at 51 (1991).

23. See Ira Chasnoff et al., *Cocaine and Pregnancy: Clinical and Toxicological Implications for the Neonate*, 35 CLINICAL CHEMISTRY at 1276-1278 (1989).

24. Toufexis, *supra* note 15.

"crack kids."²⁵ These children must engage the usual challenges of childhood with an innate handicap and are likely to require numerous state services to meet their special medical, educational and emotional needs.²⁶ As they develop, these children are easily distracted, exhibit passive behavior, experience visual-perception problems and encounter difficulties with fine motor skills.²⁷ J. Harold Nickens, M.D., Chairman of the D.C. Chapter of the American Society of Addiction Medicine, states that such children are likely to experience the same dysphoria, thought and mood disorders experienced by any recovering addict, but without the knowledge or support that is necessary for them to stay sober.²⁸

The long term behavior problems, developmental disabilities, learning disabilities and central nervous system problems that can result from maternal cocaine abuse will most certainly have a negative effect on the child's educational and social development.²⁹ Moreover, beyond the social and psychological problems that may persist in a cocaine-exposed child are the more obvious physical deformities. Malformations of the skull, eyes, central nervous system, genitals, urinary tract and kidneys are just some of the horrors that can result when mothers ingest cocaine during pregnancy.³⁰

The medical evidence is incontrovertible. The use of cocaine during pregnancy hurts not only the mother but the unborn child as well. A single "hit" of cocaine taken by a pregnant woman may be enough to cause permanent defects or even kill her fetus.³¹ Many states have become cognizant of this tragedy and have taken steps to fight maternal drug use. Among the more controversial methods employed by the states in this effort include the prosecution of women who took drugs while pregnant.

III. The Methods

As the medical evidence demonstrates, the protection of the unborn child from maternal drug abuse has become a necessity. The ideal solution is for an expectant mother with a substance abuse problem to immediately cease use of the drug, voluntarily admit herself into a treatment center and obtain the proper prenatal care she and her baby need. Unfortunately, with approximately 375,000 children being born with cocaine in their systems each year, the reality is that many mothers have failed to adequately protect their babies.³² This is where the states have felt a need to intervene.

Protection of the unborn child by states could come from any of the three branches of government.³³ The state legislatures could pass laws that explicitly criminalized the use of cocaine by pregnant women, thereby attaching an additional penalty on top of those already in place for cocaine use and possession. Without such statutes, the judicial branch could take an active role by broadly interpreting current child abuse or delivery of a controlled substance statutes to encompass maternal co-

25. *Id.* at 57.

26. Judy Howard, *Chronic Drug Users as Parents*, 43 HASTINGS L.J. 645, 648 (1992).

27. Alcohol and Other Drug-Related Birth Defects, NCADD Fact Sheet (National Council on Alcoholism and Drug Dependence, Inc., New York, N.Y.), Feb. 1994, at 2.

28. See Courtland Milloy, *A Time Bomb in Cocaine Babies*, WASH. POST, Sept. 17, 1989, at B03.

29. *Id.*

30. Shona B. Glink, Note, *The Prosecution of Maternal Fetal Abuse: Is This the Answer?*, 1991 U. ILL. L. REV. 533.

31. See Miller, *supra* note 11.

32. See Spencer, *supra* note 9.

33. The three branches of government are the legislative, executive and judicial.

caine abuse.³⁴ In light of the medical evidence, it is surprising that neither of these branches have taken an active role. Instead, the state executive branches are actively and sometimes creatively prosecuting women who abuse cocaine while pregnant.³⁵ This is in response to growing public support of criminal penalties for this type of behavior.³⁶

Since 1985, at least 200 women in thirty states have been criminally prosecuted based upon their use of drugs while pregnant.³⁷ Until 1997, however, every state supreme court that reviewed these convictions overturned them.³⁸ Past prosecutions and current attempted prosecutions have for the most part fallen under one of two general types of criminal statutes. First, statutes that proscribe the delivery of a controlled substance to a minor have been applied to maternal drug abuse. Second, state prosecutors are attempting to hold mothers who use drugs while pregnant liable under child abuse statutes. Each of these two methods will be addressed below.

A. Delivery of a Controlled Substance to a Minor

In the absence of a law that specifically criminalized maternal drug abuse, state prosecutors have creatively charged women who use drugs while pregnant with the delivery of a controlled substance to a minor. Prosecutions in such cases are not based on an argument that a fetus is a person, and thus a minor, and that the mother transferred cocaine to her unborn child via the umbilical cord. Rather, prosecutors focused on the approximately one minute after birth but before the umbilical cord is cut. At this point, the child is now fully born and thus a person under the Fourteenth Amendment entitled to the full and equal protection of the laws.³⁹ At the same time, however, the child is still attached to his or her mother and possibly receiving cocaine from the mother's bloodstream.⁴⁰

Arguably the most famous case of this kind is *Johnson v. State*.⁴¹ Jennifer Clarice Johnson was convicted in the Circuit Court of Seminole County, Florida, of delivering a controlled substance to her baby through the umbilical cord after birth. Johnson admitted to smoking marijuana and crack cocaine three to four times every-other-day throughout the duration of her pregnancy. Her daughter was subsequently born addicted to cocaine. Two years earlier, in a previous pregnancy, Johnson admitted to smoking crack cocaine during her pregnancy, and that child was born with traces of cocaine in his system as well. The state of Florida argued that the passage of cocaine

34. See, e.g., *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

35. See, e.g., *Johnson*, 602 So. 2d 1288.

36. Mark Curriden, *Holding Mom Accountable*, A.B.A. J., March 1990, at 50 (citing a survey by the Atlanta Constitution finding that 71 percent of the 1500 people polled favored criminal penalties for pregnant women whose illegal drug use injures their babies).

37. Lynn Smith, *Punish or Protect?*, L.A. Times, Sept. 3, 1996, at E1; Sarah Letitia Kowalski, *Looking for a Solution: Determining Fetal Status for Prenatal Drug Abuse Prosecutions*, 38 SANTA CLARA L. REV. 1255 (1998).

38. See, e.g., cases cited *supra* note 4.

39. The Fourteenth Amendment reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

40. See Chasnoff, *supra* note 11.

41. *Johnson*, 602 So. 2d 1288.

through the umbilical cord during the approximately one minute after birth before the cord is cut violated the statutory prohibition against the adult delivery of a controlled substance to a minor.⁴² The Florida Supreme Court, however, held that the legislative history of the statute did not show a manifest intent to use the word "delivery" in the context of criminally prosecuting mothers for the delivery of a controlled substance to a minor by way of the umbilical cord.⁴³

Similarly, in *Sheriff of Washoe County v. Encoe*,⁴⁴ the defendant was charged with delivery of a controlled substance to her newborn child after urine samples from the infant following birth tested positive for amphetamines and methamphetamines. The Nevada Supreme Court concluded, as did the court in *Johnson*, that the Nevada legislature never intended to include the action of the defendant under the delivery statute:

To interpret this section to cover a mother's ingestion of illegal substances prior to the birth of her child would be a radical incursion upon existing law. A person may not be punished for a crime unless her acts fall clearly within the language of the statute. The specific language of [the Nevada child-endangerment statute] does not allow the strained construction advanced by the state.⁴⁵

This prosecutorial strategy again failed in *State v. Gray*.⁴⁶ In this case, an Ohio woman was originally indicted for child endangerment based on her use of cocaine during the last trimester of her pregnancy. After the charge was dismissed by the trial court, the state of Ohio argued that Gray breached her duty of care to the child by delivering cocaine during the brief moment after birth but before the umbilical cord was cut. The Ohio Supreme Court, however, held that the Ohio General Assembly did not intend to criminalize the passage of controlled substances through the umbilical cord.

In case after case, this method of protecting the unborn child and punishing the cocaine-abusing expectant mother has failed.⁴⁷ In fact, through 1998, no state supreme court has ever upheld a conviction of this kind. While clever, this method of concentrating on the brief minute between birth and the cutting of the umbilical cord seems to stretch legislative intent more than the courts will allow. Another strategy, however, has achieved slightly more success.

42. Section 893.13(1)(c)(1), Florida Statutes (1989) provides as follows: Except as authorized by this chapter, it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years, or to use or hire a person under the age of 18 years as an agent or employee in the sale or delivery of such a substance, or to use such person to assist in avoiding detection or apprehension for a violation of this chapter. Any person who violates this provision with respect to: 1) A controlled substance . . . is guilty of a felony of the first degree

43. *Johnson*, 602 So. 2d at 1296.

44. *Sheriff of Washoe County v. Encoe*, 885 P.2d 596 (Nev. 1994).

45. *Id.* at 598.

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

47. See, e.g., *State v. Luster*, 419 S.E.2d 32, 34 (Ga. Ct. App. 1988) (holding that statute proscribing delivering and distributing cocaine did not encompass transmission of cocaine metabolites to a fetus occurring when a pregnant mother ingests cocaine because the child was not a person within the meaning of the statute at the time transfer took place); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991) (holding that use of cocaine by pregnant woman is not the type of conduct that legislature intended to be prosecuted under delivery of cocaine statute).

B. Child Abuse

Instead of charging women who used drugs while pregnant with delivery of a controlled substance to a minor, other state prosecutors have charged such women with behavior which falls within their state's child abuse and neglect statutes. These cases involve the challenge for the prosecutor of convincing the court that an unborn child falls within the definition of "child" in the state's child protection statutes. Although this strategy has experienced more success than relying on delivery statutes, these attempts have largely failed as well.

*Reyes v. Superior Court*⁴⁸ is one of the earliest prosecutions for maternal drug abuse based on a child endangerment statute. In this case, a pregnant woman who continued to take heroin despite warnings by medical professionals was charged with felony child endangerment. Her twin sons were born addicted to heroin and suffered withdrawal symptoms.⁴⁹ The case was ultimately dismissed by the appellate court, however, when it concluded that the endangerment statute did not protect a fetus. The court reasoned that unborn children were not "children" for purposes of the statute.⁵⁰

Subsequent attempts along these lines have usually concluded in the same manner. For example, in *State ex rel. Angela M.W. v. Kruzicki*,⁵¹ the doctor of the petitioner confirmed his suspicions when routine blood tests revealed that Angela was using cocaine during her pregnancy. Soon after these findings, the Waukesha County Department of Health and Social Services filed a petition alleging that the thirty-six week old viable fetus was a child in need of protective services.⁵² The County also filed a motion requesting the Court to detain the unborn child under section 48.19(1)(c) of the Wisconsin Statutes.⁵³ This order recognized that the detention of the unborn child would by necessity result in the detention of the unborn child's mother.

Relying heavily on legislative history, the Wisconsin Supreme Court refused to include a viable fetus within the definition of "child" as read in the statute.⁵⁴ The court stated: "Our search to ascertain and carry out the legislature's intent results in the conclusion that the legislature did not intend to include fetus within the definition of

48. *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977).

49. *Id.*

50. *Id.*

51. *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1995).

52. *Id.* The Wisconsin Children's Code, section 48.13(10) states:

The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and whose parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child.

Wis. STAT. SEC. 48.13 (1993).

53. The Wisconsin Children's Code, section 48.19(1)(c) states:

(1) A child may be taken into custody under any of the following: . . . (c) An order of the judge if made upon a showing satisfactory to the judge that the welfare of the child demands that the child be immediately removed from his or her present custody.

Wis. STAT. SEC. 48.19 (1993).

54. The Wisconsin Children's Code, section 48.02(2) defines "child" as

a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal or any civil law or municipal ordinance, 'child' does not include a person who has attained 17 years of age.

Wis. STAT. SEC. 48.02 (1993).

'child.' . . . Despite ample opportunity, the legislature has not expressly provided that a fetus is a 'child' under the Code."⁵⁵ The court was ill at ease filling this legislative void on such a controversial issue.⁵⁶

Relying on child abuse statutes did result in a few successes.⁵⁷ For example, in 1980 the Michigan Court of Appeals held that a newborn suffering from narcotics withdrawal symptoms due to prenatal maternal drug abuse was "neglected" under Michigan law.⁵⁸ In 1985, the New York Family Court held that persons under the Family Court Act included unborn children who are neglected as the result of maternal conduct.⁵⁹ Furthermore, the Court of Common Pleas of Ohio held in 1986 that a mother's use of heroin close to a baby's birth created a substantial risk to the health of the child and constituted child abuse under Ohio law.⁶⁰

Almost always, however, this strategy failed.⁶¹ Despite the overwhelming evidence that maternal cocaine abuse severely harms the unborn child, very few courts felt comfortable treading in such unsettled waters. In fact, until 1997, every state supreme court that addressed this issue rejected the child abuse argument. This all changed in the landmark case of *Whitner v. State*,⁶² in which the South Carolina Supreme Court was presented with the issue of whether a viable fetus is a "person" covered by the state's child abuse laws.⁶³

In *Whitner*, Cornelia Whitner pled guilty to criminal child neglect for causing her baby to be born with cocaine metabolites in its system as a result of the mother's ingestion of crack cocaine during the third trimester of her pregnancy. She was sentenced to eight years in prison. The statute in question was the South Carolina Children's Code, section 20-7-50, and the issue was whether the word "child" as used in that statute includes viable fetuses. The statute provides:

Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in section 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.⁶⁴

If a viable fetus is a child, then it is clear that *Whitner* is liable under the statute

55. *Angela*, at 740.

56. *Id.*

57. *See, eg.*, *In re Solomon L.*, 190 Cal. App. 3d 1106, 1111 (Cal. Ct. App. 1987) (holding that a mother's use of drugs during pregnancy was neglect for purposes of termination action); *In re Ruiz*, 500 N.E.2d 935, 939 (Ohio Misc. 2nd 1986) (holding that a viable fetus is a child within the meaning of the child abuse statute).

58. *In re Baby X*, 293 N.W.2d 736 (Mich. Ct. App. 1980).

59. *In re Smith*, 492 N.Y.S.2d 331 (N.Y. Fam. Ct. 1985).

60. *In re Ruiz*, 500 N.E.2d 935 (Ohio Misc. 2nd 1986).

61. *See, eg.*, *In re Appeal in Pima County Juvenile Severance Action*, 905 P.2d 555 (Ariz. Ct. App. 1995); *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995); *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977); *In re Valerie D.*, 613 A.2d 748 (Conn. 1992); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993).

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

63. *Id.* at 779.

64. S.C. CODE ANN. SEC. 20-7-50 (Law. Co-op. 1985). After this case arose, the statute was amended to change the classification from misdemeanor to felony. 1993 Act. No. 184, Sec. 55 (effective January 1, 1994).

since her ingesting crack cocaine certainly endangered or was likely to endanger the life, health or comfort of her viable fetus. Despite the decisions from other state courts holding that maternal drug abuse does not give rise to criminal liability, the intrepid court in this case upheld Whitner's conviction, finding that a viable fetus is a "person" covered by South Carolina's child-abuse laws.⁶⁵ The question that remains is whether this decision will influence future courts, or simply become an anomaly in fetal abuse jurisprudence.

IV. The Concerns

The maternal use of cocaine can result in severe and permanent health consequences for the unborn child. This much is clear. The proper means of protecting the fetus, however, is far from settled. Whether to hold women who abuse drugs while pregnant accountable for their behavior, and if so, how, is a matter of contentious debate. Most states have decided that, while not the ideal result, criminal prosecutions for maternal drug abuse are the just and proper approach. This method generally receives widespread public support.⁶⁶ On the other side, many interest groups, health organizations and others vehemently oppose criminal sanctions in these cases.⁶⁷ Those who espouse this position generally have one or more of the following four concerns.

The first concern, and the only one ultimately concerned with the welfare of the unborn child, is the *harmful deterrent* argument. Many believe that prosecuting maternal drug abuse will have the effect of deterring pregnant women with a substance abuse problem from obtaining adequate prenatal care, thus hurting the fetus more in the long run. The second concern is a classic *slippery slope* argument. After all, many argue, if a woman is criminally liable for the use of cocaine during pregnancy, where does the law draw the line? Is a pregnant woman criminally liable for drinking, smoking or not eating well? Exercising? Not exercising? Third, many wonder about the compatibility of these prosecutions and the Supreme Court's decisions in the abortion arena.⁶⁸ These *constitutional* concerns involve the scope of a pregnant woman's right to privacy. The fourth argument is a *judicial activism* concern. Many believe that protection of the unborn child from maternal drug abuse should come from the legislature in the form of an express statute to that effect, not from the courts stretching the definitions of "child" beyond legislative intent.

A. The Harmful Deterrent Argument

One of the most common arguments in opposition to maternal drug abuse prosecutions is that such action by the state will ultimately result in less women receiving the appropriate prenatal care so crucial to a healthy pregnancy. In fear of getting caught using illegal drugs while pregnant, such women may avoid seeing a doctor, not

65. *Whitner*, 492 S.E.2d at 779. Under the South Carolina Children's Code, "child" means a "person under the age of eighteen." S.C. CODE ANN. SEC. 20-7-30(1) (Law. Co-op. 1985).

66. Curriden, *supra* note 36.

67. See, e.g., Report of the American Medical Association Board of Trustees, Helene M. Cole, M.D., *Legal Interventions During Pregnancy: Court-Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663 (Nov. 28, 1990); Veronique Mistiaen, *Legal Haze: Is Drug-Use During Pregnancy Child Abuse?*, CHI. TRIB., Oct. 11, 1992, Womanews at 1 (citing the positions of the American Academy of Pediatrics, the March of Dimes Birth Defects Foundation, and the National Council on Alcoholism and Drug Dependence, all opposing criminal sanctions in such cases in favor of appropriate and accessible treatment).

68. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

receive necessary treatment or medicine, decide to give birth at home or even abort the child.⁶⁹ As a result, both the expectant mother and unborn child will suffer.

This argument has proven quite influential. For example, a report by the United States General Accounting Office described fear of prosecution and loss of custody as a "barrier to treatment" for pregnant women addicted to drugs.⁷⁰ Similarly, the American Medical Association's Board of Trustees has written: "Criminal penalties may exacerbate the harm done to fetal health by deterring pregnant substance abusers from obtaining help or care from either the health or public welfare professions, the very people who are best able to prevent future abuse."⁷¹ With such considerations in mind, the American Medical Association's Board of Trustees advocates for the appropriate rehabilitative treatment of pregnant substance abusers and opposes the imposition of criminal sanctions against such women.⁷² Other leading health organizations, including the American Academy of Pediatrics, the March of Dimes Birth Defects Foundation and the National Council on Alcoholism and Drug Dependence also oppose criminal sanctions in favor of appropriate and accessible treatment.⁷³

The position of the California Medical Association effectively summarizes this argument:

While unhealthy behavior cannot be condoned, to bring criminal charges against a pregnant woman for activities which may be harmful to her fetus is inappropriate. Such prosecution is counterproductive to the public interest as it may discourage a woman from seeking prenatal care or dissuade her from providing accurate information to health care providers out of fear of self-incrimination. This failure to seek proper care or to withhold vital information concerning her health could increase the risks to herself and her baby.⁷⁴

This argument was crucial in many unsuccessful prosecutions of cocaine-abusing mothers. For example, the Supreme Court of Florida in *Johnson* stated: "By imposing criminal sanctions, women may turn away from seeking prenatal care for fear of being discovered, undermining the interests of the state in protecting potential human life."⁷⁵ The court also expressed the concern that prosecuting "pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."⁷⁶

Despite the prevalence of these concerns, they do not warrant states turning a blind eye at the use of hard drugs such as cocaine by pregnant women. Determining

69. See e.g., Rush, *Prenatal Care Taking: Limits of State Intervention With and Without Roe*, 39 UNIV. FLA. L. REV. 55, 68 (1986) (noting that a woman would "opt out" of any criminal regulation by terminating the pregnancy through abortion); see also *State v. Gerthers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991) (referring to Comment, *A Response to "Cocaine Babies"-Amendment of Florida Child Abuse & Neglect Laws to Encompass Infants Born Drug Dependant*, 15 FLA. ST. U. L. REV. 865, 881 (1987)).

70. Sarah Letitia Kowalski, Comment, *Looking For a Solution: Determining Fetal Status For Prenatal Drug Abuse Prosecutions*, 38 SANTA CLARA L. REV. 1255, 1259 (1998) (citing U.S. GEN. ACCOUNTING OFFICE, *DRUG EXPOSED INFANTS: A GENERATION AT RISK* (1990)).

71. *Johnson v. State*, 602 So. 2d 1288, 1296 (Fla. 1992).

72. *Id.*

73. See Mistiaen, *supra* note 67.

74. *Johnson*, 602 So. 2d at 1296.

75. *Id.* (quoting *Commonwealth v. Pellegrini*, Plymouth No. 87970 (Mass. Sup. Ct. Oct. 15, 1990)).

76. *Id.*

the deterrent effect of such laws is probably impossible to accurately calculate. Therefore, one cannot know for sure whether the negative deterrent effects outweigh the positive deterrent effects. This is all speculation. What is certain, however, is the terribly harmful effects of maternal drug abuse.⁷⁷

The ingestion of cocaine by a one-month old child as a result of maternal negligence reasonably appears to constitute child abuse or neglect. This behavior is nearly identical to maternal cocaine use during the ninth month of pregnancy. The only difference to the child is the means by which the drug enters his or her bloodstream. This minor difference does not justify criminalizing the behavior in the former instance and relegating it to a matter of choice for the mother in the later. The reason why the law punishes a mother who gives cocaine to her child one month after he or she is born is the same reason why the law should punish a mother who ingests cocaine one month before her child is born. Both are clear examples of child abuse.

The harmful deterrent argument could also apply against the enforcement of *all* child abuse statutes. Child abuse laws could deter a father who severely beats his baby boy, possibly resulting in bruises, broken bones or damaged internal organs, from taking his child to the hospital for treatment. Just as an expectant mother might arguably choose to give birth at home to avoid prosecution for maternal child abuse, so too might the father avoid the hospital in fear of getting caught abusing his son. In this case, however, the difference between the father and expectant mother is that the mother is in labor. Such exigent circumstances (including the pain of childbirth) might actually mitigate the fears of potential prosecution. In other words, the possible harmful deterrent effects of all child abuse laws may in fact affect post-birth more than pre-birth abuse in some cases.

Furthermore, current laws proscribing cocaine use in general may deter any woman, pregnant or not, from seeing a doctor. If a routine blood test may uncover evidence of criminal activity, a person with a substance abuse problem may fear that a health care professional will report them to the police.⁷⁸ It is likely that many individuals with cocaine addictions are avoiding necessary medical attention. Current laws proscribing cocaine, however, still apply to them.

The argument against prosecuting drug abuse by pregnant mothers that relies on the possible harmful deterrent effects also ignores the other justifications for criminal punishment. Deterrence is not the only reason to punish behavior that society deems harmful. Other classic rationales for criminal punishment are retribution, rehabilitation and incapacitation.⁷⁹ The woman who uses cocaine while pregnant and gives birth to a cocaine-addicted baby that will suffer a lifetime of physical, social and psychological abnormalities simply deserves punishment. Just as the father who beats his baby boy deserves punishment, so too would such a woman. While in custody, she will be without drugs, may consider the consequences of her actions, and hopefully will take advantage of whatever counseling services the system provides.

Furthermore, prosecuting maternal drug abuse may foster a public ethos in which this behavior is no longer tolerated. Combining the shame a mother would feel using

77. See *supra* notes 8-30 and accompanying text.

78. See e.g., MINN. STAT. ANN. SEC. 626.5561 (West 1998) (describing the types of persons under Minnesota law mandated to report prenatal exposure to controlled substances).

79. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS, 97 (6th ed. 1995).

drugs while pregnant with the possibility of criminal sanctions could result in a powerful positive deterrent effect and may foster a culture in which concern for the unborn child's health is paramount. The harmful effects of pre-birth and post-birth child abuse can be identical. The public's outrage should also be identical toward the different behaviors that cause the harm. A simple analogy may illustrate. A man can break another man's nose by throwing a brick at it or by hitting it with his fist. With the harm equivalent, which behavior is worse? Should one be criminalized and the other a matter of choice?

B. The Slippery Slope Argument

Another commonly expressed concern about the prosecution of maternal drug abuse regards the scope of the definition of "abuse." While the medical evidence clearly demonstrates the deleterious health consequences of maternal cocaine ingestion on the fetus, a myriad of other behaviors the expectant mother may engage in could also possibly harm her unborn child. Some of the behaviors which might hurt a fetus could include failure to obtain adequate prenatal care, smoking, drinking alcoholic beverages, high-impact exercise, poor sleep habits, or even a poor diet. The question concerns a mother's duty of care to her unborn child and its appropriate scope. This concern is echoed by the Ohio appellate court in *State v. Gray*.⁸⁰ The state of Ohio argued that the mother had a duty of care to her child during the time after birth but before the umbilical cord was cut, and that the passage of cocaine to her child through the cord violated that duty. The appellate court, however, concluded that the Ohio legislature did not intend to criminalize this event, and stated: "To construe the statute in this manner would mean that every expectant woman who ingested a substance with the potential of harm to her child, e.g., alcohol or nicotine, would be criminally liable under [the child endangering statute]. We do not believe such a result was intended by the General Assembly."⁸¹

The phrase "slippery slope" was even used by the court in *Sheriff of Washoe County v. Encoe*.⁸² The Nevada Supreme Court, interpreting the Nevada child endangerment statute, overturned the conviction of a woman whose newborn child tested positive for amphetamines. The court argued that holding a woman criminally liable in such cases would be a:

Radical incursion upon existing law . . . to hold otherwise . . . would open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a [large] range of miscellaneous, otherwise legal, toxins . . . [which] if validated, might lead to a 'slippery slope' whereby the law could be construed as covering the full range of a pregnant woman's behavior.⁸³

Opponents of state intervention have utilized this concern to create a scare tactic employed effectively in the mainstream media.⁸⁴ Fear is a strong emotion and hard to argue against, especially when commentators warn of an impending "pregnancy police" out to prosecute women who fail to follow their doctor's orders.⁸⁵ Such dire predic-

80. *State v. Gray*, 1990 WL 125695, *1 (Ohio Ct. App.) (unpublished opinion).

81. *Id.*

82. *Sheriff of Washoe County v. Encoe*, 885 P.2d 596 (Nev. 1994).

83. *Id.* at 598.

84. See Kantrowitz et al., *supra* note 5.

85. *Id.*

tions, however, are unrealistic at best and instead serve to distract the public's growing and justified concern over maternal cocaine abuse.

Slippery slope arguments are, by their nature, suspect:

In virtually every case in which a slippery slope argument is made, the opposing party could with equal formal and linguistic logic also make a slippery slope claim. . . . Slippery slope claims deserve to be viewed skeptically, and the proponent of such a claim must be expected to provide the necessary empirical support.⁸⁶

Those in favor of maternal child abuse prosecutions could make a slippery slope argument as well. One such slippery slope claim could concern a parent's potential liability under *current* child abuse laws for otherwise legal behavior which may harm their children *already born*. Second hand smoke may cause cancer. Is a mother liable for child abuse if she incessantly smokes around her two year old? Is it child abuse if a parent neglects to take their girl to the dentist regularly and as a result she suffers permanent dental problems? At what point does socially acceptable spanking cross over into abuse? What about feeding a child an unhealthy diet? How many snack food dinners constitutes child abuse? These concerns, however, are not effective arguments against the enforcement of all child abuse laws.

Another possible slippery slope argument could concern the health and welfare of the child. If a mother may poison her child with cocaine one month before he or she is born, why not one month after? One could even argue that a parent severely beating their child with a belt (or fist) is a family disciplinary matter beyond the state's regulation.

The point is that slippery slope arguments are inherently dubious and logically apply equally to both sides of an argument. Just as the states do not concern themselves with a family's dietary quality, a state will not bother its already back-logged and overburdened criminal justice system with a pregnant woman's poor sleep habits. The trivial will not be tried, but if such an attempt is made, the judge in this situation should distinguish between truly harmful behaviors (such as maternal cocaine abuse) and acceptable instances of parental discretion. If this is not done, volatile slippery slope fears will react and society will experience the eventual erosion of legitimate child abuse laws.

C. The Constitutional Argument

Attempts to prosecute women for behavior harmful to their fetus raise interesting constitutional questions. A constitutional right to privacy exists which covers a large range of intimate and personal affairs beyond the sphere of permitted governmental intrusion.⁸⁷ Regulations which attempt to encroach upon fundamental rights must be justified by a "compelling state interest" and narrowly tailored to express only the legitimate state interests at stake.⁸⁸ The Supreme Court in *Roe* pronounced that a woman's right to privacy even includes a right to obtain an abortion in some cases.⁸⁹ As a result, numerous commentators believe efforts to hold women liable for maternal

86. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 363, 381-382 (1985).

87. See *supra* note 3.

88. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

89. See *id.*

cocaine ingestion are unconstitutional because such efforts violate a woman's right to privacy.⁹⁰

While the right to an abortion, post-*Roe*, is a fundamental right, the use of illegal drugs such as cocaine does not rise to the level of a protected liberty interest.⁹¹ In addition, no individual, mother or father, has a constitutionally protected liberty interest in placing a child at a substantial risk of physical injury.⁹² There is simply no constitutional right to use cocaine during *any* stage of pregnancy, and statutes proscribing such behavior do not burden a fundamental right. To illustrate, consider the South Carolina Supreme Court's statement in *Whitner*:

Even more importantly, however, we do not think any fundamental right of *Whitner's*- or any right at all, for that matter- is implicated under the present scenario. It strains belief for *Whitner* to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.⁹³

However, it is possible that the enforcement of maternal child abuse statutes may impinge upon a woman's right to privacy. If a fundamental right is involved, a maternal child abuse statute will only survive a constitutional challenge if it is narrowly tailored to serve a compelling state interest.

The Supreme Court established in *Roe* and *Planned Parenthood v. Casey* that the state has a compelling and legitimate interest in the life of the viable⁹⁴ fetus and the potentiality of that life:

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.⁹⁵

The Court also observed that "(c)ourts sustaining state laws have held that the State's

90. See, e.g., Michelle D. Mills, Comment, *Fetal Abuse Prosecutions: The Triumph of Reaction Over Reason*, 47 DEPAUL L. REV. 989 (1998); Kowalski, *supra* note 37.

91. *State v. Gray*, 584 N.E.2d 710, 714 (Ohio 1992) (Wright, J., dissenting).

92. See, e.g., *Maryland v. Craig*, 497 U.S. 836 (1990) (holding that the state's interest in the psychological and physical well-being of children who were abused outweighed a defendant's 6th Amendment right); *Baltimore City Dept. of Soc. Servs. v. Bouknight*, 493 U.S. 549 (1990) (holding that there is no 5th Amendment privilege against self-incrimination in child abuse case); *Osborn v. Ohio*, 495 U.S. 103 (1990) (holding that the state's interest in safe-guarding children outweighed defendant's 1st Amendment rights).

93. *Whitner v. State*, 492 S.E.2d 777, 786 (S.C. 1997).

94. A viable child is defined as

an unborn child who is capable of independent existence outside his or her mother's womb, even if only in an incubator. In most states a viable unborn child is considered a person under the wrongful death statute, and in some states is considered to be a person under a homicide statute.

BLACK'S LAW DICTIONARY 1084 (6th ed. 1991).

95. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

determination to protect health or prenatal life are dominant and constitutionally justifiable.⁹⁶ In *Casey*, the Court stated that "*Roe* speaks with clarity in establishing not only the woman's liberty but also the State's important and legitimate interest in potential life. That portion of the *Roe* decision has been given too little acknowledgment by the Court in subsequent cases."⁹⁷ Therefore, at the moment the unborn child becomes viable, the state has a compelling interest in his or her health and may proscribe maternal use of cocaine as long as the state's interest is narrowly tailored. This is true even if enforcement of such a statute burdens a fundamental right.⁹⁸ Whether the state's fetal abuse statute is narrowly tailored is highly fact specific and determinable only on a case-by-case basis.

It is important to further consider the Court's statement in *Roe* that "person as used in the Fourteenth Amendment does not include the unborn."⁹⁹ Based on this claim it would seem axiomatic that if an unborn child is not a "person," he or she cannot be a "child" as used in child abuse statutes across the country. Terms like "person," "child" and "fetus," however, are legal terms of art which complicate the matter significantly. For example, a corporation is a "person" under the Fourteenth Amendment.¹⁰⁰

The fact that an unborn child is not a legal "person" does not mean he or she has no legal rights or that the state has no interest in the unborn child's health or welfare. In fact, the rights of a fetus are recognized in other areas of the law. For example, under Wisconsin law, unborn fetuses are protected under property and inheritance law,¹⁰¹ tort law,¹⁰² and criminal law.¹⁰³ In reaching its conclusion, the court in *Whitner* considered the fact that a viable fetus has long been recognized as a person under South Carolina law in regards to its wrongful death statute.¹⁰⁴ The viable fetus injured while still in the womb need not even be born alive for another to maintain a wrongful death cause of action in South Carolina.¹⁰⁵ Also, under South Carolina's murder statute,¹⁰⁶ a viable fetus is again a "person."¹⁰⁷ For example, if a man stabs his pregnant wife in the womb resulting in the death of the unborn child, he is liable for the crime of feticide. The *Whitner* court reasoned that it is grossly inconsistent to construe a viable fetus as a person for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context.¹⁰⁸ The court concluded that it was therefore not only logically consistent, but necessary from a health perspective, to hold that a viable fetus is a "child" within the meaning of South

96. *Id.* at 156.

97. *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992).

98. *See supra* note 90.

99. *Roe*, 410 U.S. at 158.

100. *U.S. v. Amedy*, 24 U.S. 392 (1826).

101. *See Kwaterski v. State Farm*, 148 N.W.2d 107 (Wis. 1967).

102. *Id.*; *see also Vandervelden v. Victoria*, 502 N.W.2d 276 (Wis. Ct. App. 1993).

103. *See State v. Black*, 526 N.W.2d 132 (Wis. 1994); *see also Parness and Prichard, To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257 (1982) (examining six areas of state law that affect the unborn: inheritance, trusts, crimes, torts, birth law and custody).

104. *Whitner v. State*, 492 S.E.2d at 779 (*quoting Hall v. Murphy*, 113 S.E.2d 790, 793 (S.C. 1960)).

105. *See id.* at 780 (*quoting Fowler v. Woodward*, 138 S.E.2d 42, 44 (S.C. 1964)).

106. S.C. CODE ANN. Sec. 16-3-10 (Law. Co-op. 1976).

107. *Whitner*, 492 S.E.2d at 780 (*quoting State v. Home*, 319 S.E.2d 703, 704 (S.C. 1984)).

108. *See id.*

Carolina's child abuse and endangerment statute.¹⁰⁹

D. The Judicial Activism Argument

The final commonly expressed argument against maternal drug abuse prosecutions concerns the proper role of the judiciary. Those with this concern believe that a legislature intent on protecting unborn children from maternal drug abuse should draft a fetal abuse statute expressly to this effect. The statute should clearly state that its use of the word "child" includes viable fetuses. In the absence of such an unambiguous statute, a judge must refrain from interpreting current child abuse laws beyond legislative intent.

For example, the court in *People v. Hardy*¹¹⁰ stated:

The Legislature is an appropriate forum to discuss public policy, as well as the complexity of prenatal drug use, its effect upon an infant, and its criminalization. . . . "A court should not place a tenuous construction on [a] statute to address a problem to which the legislative attention is readily directed and which it can readily resolve if in its judgment it is an appropriate subject of legislation."¹¹¹

Similarly, in *Stallman v. Youngquist*,¹¹² the court stated, "[I]f a legally cognizable duty on the part of pregnant women to their developing fetuses is to be recognized, the decision must come from the legislature only after thorough investigation, study and debate."¹¹³ The Wisconsin Supreme Court has echoed this concern: "We determine that the legislature is in a better position than the courts to gather, weigh, and reconcile the competing policy proposals addressed to this sensitive area of the law."¹¹⁴

When a court approaches a maternal cocaine abuse case from this perspective, the case becomes a simple one of statutory construction. The two primary rules of statutory construction in the criminal context are the rules of strict construction and leniency.¹¹⁵ The application of these rules will almost certainly defeat any attempt to hold pregnant women liable under "delivery" statutes for passing cocaine to their child through the umbilical cord. For example, the *Johnson* court stated that when the language of a statute is susceptible to differing interpretations, the statute must be construed in a way most favorable to the accused.¹¹⁶ The court concluded: "We find that the legislative history does not show a manifest intent to use the word 'delivery' in the context of criminally prosecuting mothers for delivery of a controlled substance to a minor by way of the umbilical cord."¹¹⁷

The statutory construction involved in attempts to prosecute maternal drug abuse under current child abuse statutes revolves around the definition of "child." Lynn Paltrow, the litigation director of the Center for Reproductive Law & Policy in New York, argues that neither the states nor the federal government have made it a crime to

109. See *id.*

110. *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991).

111. *Id.* at 53 (quoting *People v. Gilbert*, 324 N.W.2d 834, 844 (Mich. 1982)).

112. *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988).

113. *Id.* at 361.

114. *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 739 (Wis. 1995).

115. *Johnson v. State*, 602 So.2d 1288, 1290 (Fla. 1992).

116. See *id.*

117. *Id.*

give birth to a substance-addicted baby.¹¹⁸ Therefore, prosecutors have charged mothers in such circumstances under statutes, such as child abuse or endangerment, that were not intended to protect fetuses.¹¹⁹ This concern is echoed in the courts. For example, in ruling against the state in *State of Wisconsin ex rel. Angela M.W.*, the Wisconsin Supreme Court stated:

Because we determine that the legislature did not intend to include a fetus within the Children's Code definition of "child," we reverse the decision of the court of appeals. Although we visit in the facts of this case the daunting social problem of drug use during pregnancy, the essence of this case is one of statutory construction.¹²⁰

While the use of "delivery" statutes to combat maternal cocaine use seems to impermissibly stretch legislative intent, a court can reasonably interpret child abuse statutes to protect unborn children from their cocaine-abusing mothers. As stated above, unborn children are recognized as "persons" with legal rights in many other areas of the law.¹²¹ It is inconsistent to construe a viable fetus as a person for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context. If an unborn child is a "person" in the legal sense, he or she is also certainly a "child" and thus protected by current child abuse statutes.

Those opposed to holding women accountable for maternal cocaine use are often at the same time in favor of a women's right to obtain an abortion and champion the Supreme Court's decisions in *Roe* and *Casey*. These cases, however, are classic examples of judicial activism, prompting Justice Scalia to state in his dissent in *Casey*, "[t]he Imperial Judiciary lives."¹²² It is interesting that those who cry "judicial activism" in the prosecution of maternal drug abuse endorse such activism in the abortion context.

V. Conclusion

In a recent book addressing the issue of maternal drug use, Deborah Mathieu suggests that:

[I]ntervention would have to meet certain fundamental tests before it would be justifiable: (1) The harm to be prevented to the future person is grave and irreversible; (2) the harm to the mother is relatively minor; (3) the intervention involves the least intrusive means available; (4) the intervention will be successful in preventing or at least ameliorating serious prenatal harm; (5) requirements of due process and equal protection of the law are met; and (6) the benefits of adopting this type of state intervention as social policy will greatly outweigh the disbenefits.¹²³

The relatively recent efforts by the states to protect unborn children from their cocaine-abusing mothers and to punish women who engage in such behavior are consistent with this moderate and sensible standard. The harm to the unborn child simply out-

118. See Mistiaen, *supra* note 67.

119. See *id.*

120. 561 N.W.2d at 731-32 (Wis. 1995).

121. See *supra* notes 99-107 and accompanying text.

122. *Planned Parenthood v. Casey*, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting).

123. DEBORAH MATHIEU, PREVENTING PRENATAL HARM: SHOULD THE STATE INTERVENE? 161 (1996).

weighs the concerns expressed. A woman's right to privacy does not include a right to use an illegal drug while pregnant. Slippery slope fears are unrealistic. The positive or negative deterrent effects of fetal abuse laws are unknown, and it is logically consistent to hold that a fetus is a person in both the civil and criminal contexts. The consequences of abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth. Children deserve to begin life clean of any addictions forced upon them by their mothers.¹²⁴

The state has a compelling and legitimate interest in the health of a viable unborn child.¹²⁵ In the absence of a fetal abuse statute, the most realistic and reasonable mechanism in the criminal context to vindicate this interest is through existing child abuse and neglect statutes. Efforts to protect an unborn child and statutes to that effect, however, must ensure the necessary protections against unreasonable or unjustified intervention by the state. Imprudent state intervention will undermine public support for such efforts and ultimately render the state powerless to protect unborn children.

Experience may prove, however, that criminal penalties are unworkable. States should therefore also expand the existing civil remedy of taking temporary custody of children born addicted to a controlled substance. As was attempted in *State of Wisconsin ex rel. Angela M.W.*,¹²⁶ states should place pregnant women using cocaine in protective custody¹²⁷ or commit¹²⁸ them to protect the unborn child. These civil remedies would serve to promote the state's interest in the health of the viable unborn child and ideally provide such women with the necessary treatment and counseling they need.

Regardless of whether a state uses its criminal laws or civil remedies, the health of the unborn child is only truly protected if effective drug treatment programs are readily available to pregnant women while in custody. In many states, treatment is not considered a priority and has taken a back-seat to criminal prosecutions. This approach fails to realize that inpatient treatment is an integral part of an overall state scheme to protect unborn children from the horrors of maternal cocaine abuse. While the mother's behavior deserves punishment, the health of the unborn child is simply more important.

Thousands of expectant mothers today are abusing hard drugs like cocaine. These women and their unborn children are suffering. As part of a culture which does not tolerate such abuse, states must, with a hard head but a soft heart, continue to take action to prevent and punish this behavior. Using cocaine while pregnant is not a choice society can tolerate.

James R. Schueller*

124. In re Baby X, 293 N.W.2d 736, 739 (Mich. Ct. App. 1980) (holding that child has a legal right to begin life with a sound mind and body).

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

126. State ex rel. Angela M.W. v. Kruzicki, 561 N.W.2d 729 (Wis. 1995).

127. BLACK'S LAW DICTIONARY 850 (6th ed. 1991) (defining "protective custody" as "[t]he condition of one who is held under authority of law for his own protection as in the case of . . . a person who because of mental illness or drug addiction may harm himself or others.").

128. BLACK'S LAW DICTIONARY 167 (6th ed. 1991) (defining "civil commitment" as "[a] form of confinement order used in the civil context for those who are mentally ill, incompetent, alcoholic, drug addicted, etc.").

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