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## In Utero Endangerment and Public Health: Prosecution vs. Treatment

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## COMMENTS

### IN UTERO ENDANGERMENT AND PUBLIC HEALTH: PROSECUTION VS. TREATMENT

#### INTRODUCTION

“Of the four million women who give birth each year, some 820,000 smoke cigarettes, 760,000 drink alcohol, and 500,000 use illicit drugs during pregnancy,”<sup>1</sup> according to the American Public Health Association. Approximately ten percent of children who are born are exposed to some form of controlled substance.<sup>2</sup> Most often, that substance is crack cocaine.<sup>3</sup> At the end of the year 2000, there were approximately four million children who were exposed to some form of controlled substance while in utero.<sup>4</sup> “Alcohol, cocaine, heroin, marijuana, PCP, prescription sedatives and tranquilizers have all been implicated in studies of maternal drug use and fetal harm.”<sup>5</sup> In a recent study of 120 pregnant women questioned about their drug of choice, thirty-six percent named methamphetamine,<sup>6</sup> thirty-four

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1. Joseph A. Caliafano, Jr., *Substance Abuse and Addiction –The Need to Know*, AM. J. PUB. HEALTH EDITORIALS (1998), at <http://www.apha.org/journal/editorials/edjan8.htm> (last visited Feb. 17, 2001).

2. Antoinette Clarke, *Fins, Pins, Chips, & Chins: A Reasoned Approach to the Problem of Drug Use During Pregnancy*, 29 SETON HALL L. REV. 634, 635 (1998).

3. *Id.* Researchers estimate that this figure is closer to fifteen to twenty percent in urban areas. *Id.*

4. *Id.*

5. JAMES A. INCIARDI, HILARY L. SURRATT, & CHRISTINE A. SAUM, COCAINE-EXPOSED INFANTS SOCIAL, LEGAL AND PUBLIC HEALTH ISSUES 14 (1997) [hereinafter INCIARDI].

6. Marilyn Kalfus, *Speed Is the Drug of Choice Among Pregnant Women*, ORANGE COUNTY REGISTER, Aug. 28, 1996, available at KNIGHT-RIDDER/TRIBUNE NEWS SERVICE p828K5247, at 2.

percent named heroin, eleven percent named cocaine, nine percent named marijuana, seven percent named alcohol and three percent named other drugs.<sup>7</sup> In the 1980s, a crack-cocaine epidemic exploded in the U.S., concentrated heavily in the low-income black communities.<sup>8</sup> Next, the media began to present the public with reports of a baby like no other, "the crack baby."<sup>9</sup> Drug abuse and pregnancy is a cloudy problem without a clear solution. During its 2001 term, the United States Supreme Court agreed to review a decision made by the Fourth Circuit Court of Appeals.<sup>10</sup> The Fourth Circuit decision allows mandatory drug testing for pregnant women.<sup>11</sup> In addition, based on other legal precedent, if such tests are positive for illicit drugs, subsequent criminal prosecution will ensue. The main problem with criminal prosecution may be the lack of consideration held by the legal system for the public health issues that surround the mother and for her forthcoming child.

This Comment discusses the legal precedent on this issue to date, including a brief history of the first person prosecuted under a felony-child endangerment statute in *Reyes v. Superior Court*,<sup>12</sup> as well as the first instance of a woman convicted for delivery of a controlled substance by way of the umbilical cord as determined in *Johnson v. State*.<sup>13</sup> Next, there is a discussion of the various statutes that have been utilized in numerous states for additional means of prosecution, such as the "abuse and neglect statute." The Comment continues with an analysis of the case that set the standard of prosecution through child endangerment, *Whitner v. State*.<sup>14</sup> Finally, this Comment provides a discussion of *Ferguson v. City of Charleston*,<sup>15</sup> the most recent decision by the United States Supreme Court regarding mandatory drug testing.

This Comment continues by outlining the major public health issues surrounding in utero endangerment through the use of illicit drugs while pregnant, ranging from economics to treatment options. Additionally, it addresses the fact that mental health and other social issues, such as poverty, abuse and alcoholism,

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Methamphetamine abuse in Southern California has become an epidemic that is sending twice as many users to the emergency rooms . . . . Doctors say that methamphetamine constricts the mother's blood vessels, cutting off nutrients to the fetus. A meth binge also can bring on constrictions that separate the placenta from the wall of the uterus prematurely and push the baby out weeks too soon.

*Id.*

7. *Id.* at 1.

8. Enid Logan, *The Wrong Race, Committing Crime, Doing Drugs, and Maladjusted for Motherhood: The Nation's Fury Over "Crack Babies"*, 26 SOCIAL JUSTICE 115, available at 1999 WL 25869921, at 2.

9. *Id.* ("For the most part, the women targeted by the courts and the media have been black, poor, and addicted to crack cocaine.")

10. *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999), *vacated*, No. 99-936, 2001 WL 273220 (U.S. 2001).

11. *See generally id.*

12. 141 Cal. Rptr. 912 (Ct. App. 1977).

13. 578 So.2d 419 (Fla. App. Cir. 1991), *vacated by* 602 So.2d 1288 (Fla. 1992).

14. 492 S.E.2d 777 (S.C. 1997) *rehearing denied* (Nov. 19, 1997).

15. 186 F.3d 469 (4th Cir. 1999), *vacated*, No. 99-936, 2001 WL 273220 (U.S. 2001).

are possibly more influential on the ultimately born "crack" babies than the drugs themselves. The Comment concludes with a discussion of the subsequent ramifications of criminal prosecution in the public health arena, including the consequences of lack of treatment.

## I. THE LEGAL PRECEDENTS

### A. *Prosecution: Case Law History and State Statutes*

A recent book written on the social, legal and public health issues of cocaine-exposed infants found that the questions surrounding prenatal maternal conduct and the subsequent rights of the fetus have endured as legal issues for more than 100 years.<sup>16</sup> Historically, "civil actions involving fetal rights emerged as early as 1884 when a pregnant woman fell on a defective highway, resulting in the premature birth and eventual death of her fetus. . . . The woman was convicted of wrongful death and negligence, which was eventually overturned."<sup>17</sup> In an attempt to reduce the number of infants exposed to illegal drugs, many states began to prosecute women for prenatal drug use. In the mid-1980s, the emergence of cocaine gave rise to state prosecutions.<sup>18</sup> "Since 1985, at least 240 women from more than thirty-five states have been prosecuted for using illegal drugs during their pregnancy."<sup>19</sup> Prosecutors have used innovative applications of existing laws, charging pregnant substance abusers under statutes of "child abuse, neglect, vehicular homicide, encouraging the delinquency of a minor, involuntary manslaughter, drug trafficking, failure to provide child support and assault with a deadly weapon."<sup>20</sup>

*Reyes v. Superior Court*<sup>21</sup> was one of the first cases in which a woman was prosecuted for using drugs during her pregnancy. The prosecution was based on California's felony child endangerment statute.<sup>22</sup> On October 31, 1977, Margaret

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16. INCIARDI, *supra* note 5, at 62.

17. *Id.* The United States Supreme Court overturned the decision on the basis that the fetus could not be considered a legal person. *Id.*

18. *Id.* (stating that "the public's increasing awareness of the issue, the conservative political climate, and drug control strategies that emphasized personal responsibility resulted in the development of public policies aimed at punishing, rather than treating, women who violated so-called fetal rights and exposed their unborn infants to cocaine").

19. Nancy Kubasek, *The Case Against Prosecutions for Prenatal Drug Use*, 8 TEX. J. WOMEN & L. 167, 167 (1999).

20. Logan, *supra* note 8, at 5 ("Due to successful lobbying of the ACLU and medical, health and women's organizations, no state has passed laws that make prenatal substance abuse an independent crime."). Criminal "[p]rosecution is not the only method states have employed in an attempt to reach women who put their unborn children at risk by using drugs." See Clarke, *supra* note 2, at 636 ("State officials have also used child custody statutes—which provide for the temporary and permanent removal of children abused or neglected by their parents.").

21. 141 Cal. Rptr. 912 (Ct. App. 1977).

22. *Id.* at 912. See also Kubasek, *supra* note 19, at 168; INCIARDI, *supra* note 5, at 64. The state attempted to prosecute Ms. Reyes under child endangerment laws, but the conviction was later overturned, at the appellate level, on the grounds that the endangerment statute was never intended by the legislature to apply to fetuses. *Reyes*, 141 Cal. Rptr. at 913.

Velasquez Reyes gave birth to twin boys who both were addicted to heroin and suffered withdrawal.<sup>23</sup> Reyes was charged under California's child endangerment statute, California Penal Code section 273(a).<sup>24</sup> The Court found both that the word "child" as quoted in the California statute was not intended to pertain to an unborn child and that Ms. Reyes did not do anything to endanger the health of her children after their birth.<sup>25</sup>

In abuse and neglect prosecutions as seen in *Reyes*, the principal issues are: a) whether the fetus is considered a "child" in the tradition of state child abuse-neglect laws and b) whether prenatal conduct can be considered an appropriate criterion for the determination of applying abuse and neglect sanctions.<sup>26</sup> In addition, some jurisdictions must also demonstrate that abuse-neglect laws are intended to apply to both maternal and third party behavior.<sup>27</sup>

Criminal prosecutions, separate from the child abuse and neglect statutes, have been advanced using statutes that prosecute women for conduct that results in the injury or death of their fetuses or newborns. These statutes include delivery or distribution of controlled substances to minors and involuntary manslaughter.<sup>28</sup> There have been various legislative efforts to include prenatal drug use in child abuse or neglect statute definitions.<sup>29</sup> Massachusetts has passed a statute that criminalizes prenatal drug use.<sup>30</sup> Wisconsin and Ohio have attempted similar legislation, but neither has been successful.<sup>31</sup> The most commonly used drug

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23. *Reyes*, 141 Cal. Rptr. at 912-13.

24. *Id.* The court found that the word "child" as used "was not intended to refer to an unborn child and that petitioner's prenatal conduct does not constitute felonious child endangering within contemplation of the statute." *Id.* The California Penal Code provision states that

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 child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding 1 year, or in the state prison for not less than one year . . . .

*Id.* (quoting CAL. PENAL CODE § 273(a) (West 1999)); Kubasek, *supra* note 19, at 168.

25. See *Reyes*, 141 Cal. Rptr. at 912-13 (stating that the language of the statute was not intended to apply to prenatal conduct and that to commit the offense defined by the statute, the offender must be a person "having the care or custody of a child"). This requirement according to the court presupposes the existence of a living child susceptible to care or custody. *Id.* at 914.

26. INCIARDI, *supra* note 5, at 65.

27. *Id.* In addition to prosecution in California, prosecutors in Colorado, Connecticut, Florida, Indiana, Michigan, Ohio, South Carolina, Texas, and Wyoming have used versions of abuse-neglect laws to convict women who used drugs during their pregnancy. *Id.* Most convictions have been overturned by appellate courts, holding "that child abuse laws are not intended to apply to fetuses or prenatal conduct." *Id.*

28. Carol Jean Sovinski, *The Criminalization of Maternal Substance Abuse: A Quick Fix to a Complex Problem*, 25 PEPP. L. REV. 107, 122 (1997).

29. Kubasek, *supra* note 19, at 173.

30. See MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1990) (requiring employees of a healthcare institution to report infants believed to be drug-dependent at birth). See also *Commonwealth v. Pelligrini*, 608 N.E.2d 717, 720-22 (Mass. 1993) (ruling that defendant, Pelligrini, could be charged for neglect, instead of possession of cocaine).

31. See S.B. 82, 119th Gen. Assembly Reg. Sess. (Ohio 1991) (making it a felony for a woman to use drugs while pregnant when that use would result in a child's being addicted at birth); WIS. STAT. ANN. § 48.01 (West 1999) (attempting to regulate prenatal conduct through protective custody). See also

statute is "delivery or distribution of an unlawful substance to a minor."<sup>32</sup> This type of statute was the basis for the first criminal conviction of a mother for conduct that caused prenatal injury.<sup>33</sup> On July 13, 1989, Florida Judge O. H. Deaton, in Seminole County, convicted Jennifer Clarise Johnson for delivering illegal drugs to her fetus through the umbilical cord.<sup>34</sup> The court stated in this case, "since Ms. Johnson chose to use cocaine, become pregnant, and bring the pregnancy full term, she was criminally responsible for her actions."<sup>35</sup> Johnson received a fifteen-year sentence, including fourteen years of probation, strict supervision, mandatory drug treatment, random drug testing and mandatory educational training.<sup>36</sup> She was further prohibited from consuming alcohol, socializing with anyone who possessed drugs, and going to a bar without first receiving consent.<sup>37</sup> Additionally, the court ruled that if Ms. Johnson "ever intended to become pregnant again, she must inform her probation officer and enroll in an intensive 'judicially approved' prenatal care program."<sup>38</sup> After an intermediate court of appeals affirmed the lower court's decision, the Florida Supreme Court vacated the decision.<sup>39</sup> Justice Harding stated that in his opinion the legislative history of the Florida statute did 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.<sup>40</sup> Interestingly, Ms. Johnson had tried to get treatment for her drug addiction "but was turned away because she was pregnant[,] . . . and ironically she was later ordered to complete drug treatment as part of her pregnancy."<sup>41</sup>

Prosecutions under child endangerment statutes are not very successful in convicting women for ingesting controlled substances. The *Sheriff v. Encoe* case is a prime example of a state's failure in attempting to prosecute a woman under a child endangerment statute.<sup>42</sup> The issue in this case was whether a statute criminalizing child endangerment applied to a mother's prenatal substance abuse.<sup>43</sup> This issue of endangering a fetus while ingesting a controlled substance is

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Kubasek, *supra* note 19, at 173.

32. See Sovinski, *supra* note 28, at 125.

33. *Id.*

34. See *id.* at 126. See also generally *Johnson v. State*, 578 So.2d 419 (Fla. App. Cir. 1991), *vacated by* 602 So.2d 1288 (Fla. 1992). For purposes of the Florida statute, the court held that a child is a person after birth, but not before the umbilical cord is severed. Sovinski, *supra* note 28, at 126. See also FLA. STAT. ANN. § 893.13(1)(c)(1) (West 1994).

35. Sovinski, *supra* note 28, at 126.

36. Logan, *supra* note 8, at 5.

37. *Id.*

38. *Id.*

39. See *Johnson*, 578 So.2d at 602.

40. See *Johnson v. State*, 602 So.2d 1288, 1290 (Fla. 1992) (stating that criminal prosecution of mothers like Johnson will undermine Florida's express policy of "keeping families intact" and could destroy the family by incarcerating the child's mother when alternative measures could protect the child and stabilize the family).

41. INCIARDI, *supra* note 5, at 84.

42. See generally *Sheriff v. Encoe*, 885 P.2d 596 (Nev. 1994).

43. *Id.* at 597.

identical to the *Johnson* case, but the statute used for conviction was different.<sup>44</sup> The court concluded that prosecution of a mother for delivery of a controlled substance through her umbilical cord was a strained and unforeseen application of the statute.<sup>45</sup>

More recently, South Dakota and Wisconsin have enacted legislation that specifically targets pregnant drug abusers.<sup>46</sup> South Dakota's amended law now includes in the definition of an abused or neglected child, one who is "subjected prenatally to abusive use of alcohol or any illegal controlled substance."<sup>47</sup> Wisconsin's law provides that an adult pregnant woman may be taken into state custody "if there is substantial risk that the physical health of the unborn child will be seriously affected or endangered due to the woman's lack of self-control in the use of alcoholic beverages, controlled substances or controlled substance analogs, exhibited to a severe degree."<sup>48</sup> This survey of various case law and statutes helps to set the stage for the cases of *Whitner* and *Ferguson* that ignited this controversy, sending the issue to the United States Supreme Court.

*B. Whitner v. State*<sup>49</sup>

South Carolina has refused to follow many of the state cases listed above and has read into its child neglect and endangerment statute that a fetus falls within the meaning of a "person" for purposes of conviction.<sup>50</sup> In *Whitner v. State*, the Supreme Court of South Carolina reversed a lower court decision, which stated a mother could not be found guilty of criminal child neglect for causing her baby to be born with cocaine metabolites in its system.<sup>51</sup> In this case, the mother ingested crack cocaine during her third trimester of pregnancy.<sup>52</sup> Justice Toal concluded that "the South Carolina case law and the plain language of its child neglect statute supported the charges of criminal child neglect in the case."<sup>53</sup>

The court also extended the meaning of the term "child" in the State's child abuse statute to include viable fetuses. The Supreme Court of South Carolina held that the definition of a "child" is a person under the age of eighteen, which includes a fetus in the context of the criminal child neglect and endangerment statute.<sup>54</sup> In the case, Ms. Whitner made two main arguments. First, she argued

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44. Compare *id.* (attempting to use a child endangerment statute to convict for ingesting a controlled substance) with *Johnson*, 578 So.2d at 602 (using a delivery or distribution of an unlawful substance to a minor statute for conviction).

45. *Encoe*, 885 P.2d at 598.

46. Christine M. Bulger, *In the Best Interest of the Child? Race and Class Discrimination in Prenatal Drug Use Prosecutions*, 19 B.C. THIRD WORLD L.J. 709, 716 (1999).

47. See S.D. CODIFIED LAWS § 26-8A-2(9) (Michie 1998). See also Bulger, *supra* note 46, at 716.

48. See WIS. STAT. § 48.193(1)(c)-(d) (1998). See also Bulger, *supra* note 46, at 716.

49. 492 S.E.2d 777 (S.C. 1997).

50. *Id.*

51. *Id.* at 777.

52. *Id.* at 779.

53. See generally *id.*

54. *Id.* at 780. See also Bulger, *supra* note 46, at 717.

that the court lacked subject matter jurisdiction because South Carolina's child neglect statute was not intended to encompass a viable fetus.<sup>55</sup> Second, Ms. Whitner pointed to several bills introduced into the legislature concerning the criminalization of substance abuse by pregnant women.<sup>56</sup> She argued that these bills proved that the original statute, as written, was not intended to encompass viable fetuses.<sup>57</sup> The court rejected the arguments, stating "the rules of construction demand that the legislature's subsequent acts cast no light on the intent of the legislature which enacted the statute being construed."<sup>58</sup> Ms. Whitner finally argued that she was denied fair notice and that her right to privacy was violated.<sup>59</sup> As to fair notice, the court disagreed with her argument, stating that it had interpreted "child" to include viable fetus<sup>60</sup> and that it is common knowledge that cocaine is harmful to a child.<sup>61</sup> As to her claim to privacy, the court stated that there does not exist a fundamental right to abuse cocaine and, therefore, no right of privacy was violated.<sup>62</sup> However, in his dissent, Justice Moore argued that the majority did ignore legislative intent and that such a broad reading of the statute could lead to prosecuting women for "failing to take prenatal vitamins, smoking, drinking, and more acts that are not in and of themselves criminal."<sup>63</sup>

### C. *Ferguson v. City of Charleston*<sup>64</sup>

After its grant of certiorari, many of the headlines across the nation read like the one in the *Austin American Statesman*: "[T]he Supreme Court agreed on Monday February 29th of 2000 to hear and decide the issue of whether public hospitals and police can work together to arrest pregnant women who have used cocaine."<sup>65</sup> Currently, South Carolina is the only state to criminally convict mothers of child abuse if their babies are born with a trace of illegal drugs in their

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55. *Whitner*, 492 S.E.2d at 781. See also Kubasek, *supra* note 19, at 171.

56. *Whitner*, 492 S.E.2d at 781. See also Kubasek, *supra* note 19, at 171.

57. *Whitner*, 492 S.E.2d at 781; Donna Casto, *Whitner v. South Carolina: Prosecution for Child Abuse Extends into the Womb*, 48 S.C. L. REV. 657, 658 (1997) (citing *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997)). "*Whitner* went further in urging that an interpretation of the statute to include viable fetuses would be contrary to legislative intent." See Casto, *supra* (italics added). The court specifically stated in its opinion that "we do not see any rational basis for finding a viable fetus is not a 'person' in the present context." *Whitner*, 492 S.E.2d at 780. A fetus has reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person. *Id.* See also S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1985).

58. *Whitner*, 492 S.E.2d at 780-81.

59. *Id.* at 785. See also Kubasek, *supra* note 19, at 172.

60. *Whitner*, 492 S.E.2d at 777, 780 (stating that the court had no difficulty in concluding that a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person).

61. *Whitner*, 492 S.E.2d at 785. See also Kubasek, *supra* note 19, at 172.

62. *Whitner*, 492 S.E.2d at 786.

63. See Casto, *supra* note 57, at 659. Justice Moore also argued, in his dissent, that there is an inequity of women being immune from prosecution for the first twenty-four weeks of gestation. *Id.*

64. 186 F.3d 469 (4th Cir. 1999), *vacated*, No. 99-936, 2001 WL 273220 (U.S. 2001).

65. David G. Savage, *Supreme Court to Hear Cocaine Mothers Case*, AUSTIN AM.-STATESMAN, Feb. 29, 2000, A3.



systems.<sup>66</sup> This policy was implemented under the auspices of a South Carolina law, which states that a woman who ingests cocaine after the twenty-fourth week of pregnancy is guilty of the crime of distributing a controlled substance to a minor.<sup>67</sup> Currently, at least thirteen states require that public hospitals test women "suspected" of drug abuse, and many times the testing procedure takes place without a woman's consent.<sup>68</sup> The results obtained are reported to social services or to the police.<sup>69</sup>

*Ferguson* arose from a public hospital's decade-long practice of performing non-consensual drug testing of all pregnant women seeking prenatal care.<sup>70</sup> The policy was that when certain indicia of cocaine are present,<sup>71</sup> urine screening should be performed.<sup>72</sup> Nine African-American women and one white woman brought this suit against the City of Charleston alleging various constitutional violations.<sup>73</sup> The Fourth Circuit rejected their claims and ruled in favor of the City.<sup>74</sup> The policy was intended to encourage pregnant women "whose urine tested positive for cocaine use to obtain substance abuse counseling."<sup>75</sup> This sounds favorable, but the question becomes: Is this really what happens when there is a positive toxicology screening for these 'suspected' women? There are a variety of public health issues that encompass the decision in *Ferguson*, the most significant of which is the safety and health of mother and fetus.

As many journalists have noted, the purported encouragement for counseling is not at all what in fact takes place. For example, *The Detroit News* reported that because of this policy, women did not have the chance to obtain treatment, and instead, "were arrested right out of their beds, some still bleeding, weak and in pain from having just given birth."<sup>76</sup> Lynn Paltrow, a trial attorney and the director of the National Advocates for Pregnant Women, stated that there

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66. *Id.*

67. *Ferguson*, 186 F.3d at 474.

68. *Logan*, *supra* note 8, at 7.

69. *Id.*

70. Kary Moss, *Drug-test Policy Needs Court Review*, DETROIT NEWS, June 2, 2000, at 1.

71. *Ferguson*, 186 F.3d at 474. The court identifies the following indicia of the presence of cocaine during pregnancy:

1) Separation of the placenta from the uterine wall; 2) intrauterine fetal death; 3) no prenatal care; 4) late prenatal care (beginning after 24 weeks); 5) incomplete prenatal care; 6) pre-term labor without obvious cause; 7) a history of cocaine use; 8) unexplained birth defects; or 9) intrauterine growth retardation without obvious cause.

*Id.* When a patient tested positive, the test result was reported to CCPD or a representative of the Solicitor's Office and the patient was arrested for distributing cocaine to a minor. *Id.* In early 1990, the policy was amended so that a patient who tested positive for cocaine use was given a choice between being arrested or receiving drug treatment. *Id.* Positive test patients were not forwarded to the CCPD and the patient was not arrested, unless she tested positive for cocaine use a second time or failed to comply with treatment obligations. *Id.*

72. *Id.*

73. *See generally Ferguson*, 186 F.3d at 474.

74. *Id.*

75. *Id.*

76. Moss, *supra* note 70.

was absolutely no treatment available for these women.<sup>77</sup> There was not a program in the entire state when this policy went into effect.<sup>78</sup> Further, not a single medical organization or child advocacy organization defended the policy because it did not do anything to help women or children.<sup>79</sup> In an opinion released March 21, 2001, the United States Supreme Court reversed the Fourth Circuit's holding which allowed women who have certain "suspect signs" be mandatorily drug tested.<sup>80</sup> Justice Stevens states in his opinion that a review of the Charleston Hospital policy reveals that the purpose of the searches is "ultimately indistinguishable from the general interest of crime control."<sup>81</sup> Additionally, he states that there is a legitimate goal of the program, but the immediate objective of searches served only to generate a threat of law enforcement.<sup>82</sup> The Justices do not address any of the public health issues, but these statements clearly indicate that law enforcement and punishment are not the only things that must be considered.

The American Public Health Association filed an amicus curiae brief in this case.<sup>83</sup> This is an important point because its 1990 policy statement adopted the view that the use of illicit addictive drugs by pregnant women is a public health problem.<sup>84</sup> The statement recommends that "no punitive measures be taken against pregnant women who are users of illegal drugs when no other illegal acts . . . have been committed."<sup>85</sup> However, South Carolina officials state that they will find a way to continue the policy, no matter how the Court rules.<sup>86</sup> This statement is very poignant considering the most recent Supreme Court decision.

## II. THE PUBLIC HEALTH ISSUES

### A. Economics

There is a significant burden in the cost and delivery of health care to support drug-addicted babies. According to Nancy Kubasek, writing in the *Texas Journal on Women and the Law*, "the federal government has calculated that the average cost of an infant exposed to illegal drugs as a fetus is about one million dollars."<sup>87</sup> Many times, hospital charges for infants exposed to illicit drugs are up to four times greater than drug-free infants.<sup>88</sup> A recent study found that the

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77. *Nightline: How Far Can You Go to Protect an Unborn Child* (ABC television broadcast, Sept. 27, 2000) (transcript on file with the TULSA LAW JOURNAL)[hereinafter *Nightline*].

78. *Id.*

79. *Id.*

80. *Ferguson v. City of Charleston*, No. 99-936, 2001 WL 273220 (U.S. 2001).

81. *Id.*

82. *Id.*

83. Brief of Amicus Curiae American Pub. Health Ass'n, *Ferguson v. State*, 186 F.3d 469 (4th Cir. 1999), *cert. granted*, 68 USLW 3391 (U.S. Feb. 28, 2000) (No. 99-936).

84. *Johnson v. State*, 578 So.2d 419, 419 (Fla. App. Cir. 1991).

85. *Id.*

86. *Nightline*, *supra* note 77.

87. Kubasek, *supra* note 19.

88. Caliafano, *supra* note 1.

average cost of neonatal care for a drug-exposed infant was \$5,500 compared to \$1,400 for non-exposed infants.<sup>89</sup> When these children enter school with slight deficits in intelligence and language ability, the costs of special education are as much as \$342 million a year, according to a study by Brown University Researchers.<sup>90</sup> Due to cocaine-related receptive-language impairments, as many as 80,550 children need extra help in school at a cost that could be as much as \$352 million each year.<sup>91</sup> Other hospital-related costs are involved with providing services to "boarder babies" (infants who are born to substance abusing mothers and abandoned at a hospital).<sup>92</sup>

While it is true that these babies burden our system with costs of hospitalization and special services, there is an even stronger long-range economic burden by choosing to incarcerate these women instead of treating them.<sup>93</sup> There will be a significant increase on the workload of local child protective agencies without a concurrent increase in their funds.<sup>94</sup> Extensions of the various state statutes to include viable fetuses may increase the number of children for whom the state is responsible, thus requiring further increases in funding.<sup>95</sup>

Additionally, significant costs are associated with failure to provide treatment and prevention.<sup>96</sup> According to the American Public Health Association, U.S. taxpayers pay up to \$276 billion per year for expenditures on "medical care, law enforcement, motor vehicle accidents, lost productivity and incarceration."<sup>97</sup> These costs do not include the ones mentioned above for foster care and social services.<sup>98</sup> "Treatment has been convincingly demonstrated to be more effective than law enforcement and incarceration in reducing the demand for illicit drugs, yet, in 1998, 66.6% of the \$16.18 billion federal drug control budget was allocated for supply reduction activities and only 33.4% for demand

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89. ADDICTION AND PREGNANCY EMPOWERING RECOVERY THROUGH PEER COUNSELING 25 (Barry R. Sherman et. al. eds., 1998) [hereinafter *ADDICTION*].

90. Felice Freyer, *Cocaine Does Not Ruin Babies, But May Cause Subtle Damage That Can Be Overcome*, Oct. 22, 1998, available at Knight-Ridder/Tribune Service, n295 p1022k3766, at 1 (stating that "[t]he report is the first to quantify the effect of prenatal cocaine use on society as well as point[] to ways of dealing with it" and that "[c]ocaine does not leave children hopelessly ruined as once feared, but appears to cause subtler damage that can be overcome with extra help").

91. See *id.* at 2.

92. See *ADDICTION*, *supra* note 89.

93. See Casto, *supra* note 57, at 667.

94. See *id.* ("[C]hild protection agencies are strained to the point where they are unable to ensure their wards' safety."). See Wendy Chavkin, Machel Harris Allen, & Michelle Oberman, *Drug Abuse and Pregnancy: Some Questions on Public Policy, Clinical Management, and Maternal and Fetal Rights*, 18 BIRTH 107, 111 (1991) [hereinafter Chavkin] (stating that "[s]hortages of foster homes has led to the warehousing of children in overcrowded and dangerous shelters[,] that "[n]ationally, the foster care system is a state of crisis" and that "[t]his crisis is the result of a precipitous rise in the number of reports of abuse").

95. Casto, *supra* note 57, at 667 ("At the very least, it is likely that the increased work load without a concomitant increase of staff will result in less than adequate investigations in even the most deserving cases.").

96. Hortensia Amaro, *An Expensive Policy: The Impact of Inadequate Funding for Substance Abuse Treatment*, 89 AM. J. PUB. HEALTH 657 (1999), available at 1999 WL 17397127.

97. *Id.*

98. *Id.*

reduction activities.”<sup>99</sup> During the fiscal year 2000 budget, Substance Abuse and Mental Health Services Administration included administering only fifty-five million dollars in treatment expansion grants and thirty million dollars in block grants.<sup>100</sup> This represents “only three percent of the total federal drug related activities budget,”<sup>101</sup> whereas providing treatment to all who need it could save more than \$150 billion over the next fifteen years.<sup>102</sup>

### B. *The Real Problem*

Most research on the physiological effects of cocaine or crack on a fetus indicates that several physical health problems are produced. For example, early research in the mid-1980s found several harmful effects attributed to prenatal cocaine exposure including:

[p]lacental abruption (detachment of the placenta from the uterine wall), *placenta previa* (location of the placenta in front of the birth canal), growth retardation in the uterus, sudden infant death syndrome (SIDS), withdrawal symptoms, cerebral infarctions (death of brain tissue due to loss of blood supply), low birth weight, physical malformations, microcephaly (small head circumference), genitourinary tract malformations . . . and [d]isturbances of [both] feeding and sleep.<sup>103</sup>

The question most asked of the foregoing findings concerns their reliability, since it is difficult to ascertain the exact source of these physiological effects.<sup>104</sup> The effects of cocaine and other drugs are difficult to identify for three main reasons: “1) the drug is so rapidly metabolized that urine tests even a few hours after last use may not show its presence, 2) cocaine users are likely to also use multiple other drugs, and 3) the high probability that pregnant users will receive little or no prenatal care.”<sup>105</sup>

As researchers continue to study this area, they “draw attention to the little

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99. See *id.* The total federal drug control budget was increased to \$17.9 billion in the fiscal year of 1999 and is expected to reach \$17.8 billion for fiscal year 2000, but the proportions dedicated to demand reduction will be only slightly increased. *Id.*

100. *Id.*

101. See Amaro, *supra* note 96, at 658.

102. See *id.*

103. INCIARDI, *supra* note 5, at 22. (“Many studies frequently characterized these effects as irreversible and suggested that no amount of special attention or educational programs would ever be able to turn these cocaine-exposed infants into well-functioning or adjusted children.”).

104. *Id.*

105. *Id.* at 15.

In addition to fetal health concerns, substance abuse of all types has a general deleterious effect on the health of the user, and many such problems appear to be more significant for women than men. Part of the explanation is simply physiology: Compared to men, women have a smaller average body weight, less body water per pound, and more body fat per pound. Thus, a water-soluble substance, such as alcohol or cocaine, will result in higher blood or plasma drug level for women even if the dosage and body size are constant . . .

*Id.* Furthermore, the liver is the organ that breaks down poisons, “such as alcohol and other drugs-taken into the body, and the female sex hormone estrogen apparently has an adverse effect on liver functioning.” *Id.*

noticed reality: by itself, cocaine does not do devastating harm to a fetus."<sup>106</sup> According to this new generation of research, the effects of crack/cocaine are "mild and subtle and hard to separate from the effects of the impoverished environments in which many of these children grow up."<sup>107</sup>

Cocaine use is a marker for a certain kind of lifestyle that not only includes other drugs, but also includes kids growing up in a high-risk environment – with exposure to poverty, stress, violence, and poor parenting.<sup>108</sup> Unfortunately, cocaine makes an easy target: it is simpler to blame the addict than to confront poverty.<sup>109</sup> Complicating this issue is the fact that addicts tend to use more than one drug; the one most commonly combined with cocaine is alcohol.<sup>110</sup> However, according to Dr. Ira Chasnoff, one of the first researchers in this area, "if you identify the drug-using woman early in pregnancy, you can get her into treatment and prevent all of the medical complications in which the fetus may experience."<sup>111</sup>

Research indicates that "[c]ocaine-exposed babies seem to have IQ scores [which are] about three points lower than those of their peers."<sup>112</sup> This difference is also "seen in children exposed to comparable amounts of alcohol."<sup>113</sup> Some studies indicate that for children growing up in a fairly 'typical household' a three point IQ difference will be unlikely to affect them.<sup>114</sup> However, for a child growing up in a "stress-filled, violent, impoverished home, three points can mean the difference between normal and abnormal."<sup>115</sup> Cocaine is a lifestyle that includes other drugs.<sup>116</sup> Therefore, the triple jeopardy results consist of not only the cocaine, but also other drugs, and a high-risk environment.<sup>117</sup> Infants exposed to cocaine are not subject to any proven set of defects, however, the effects of prenatal exposure to nicotine and alcohol is proven and well documented.<sup>118</sup> For example, a leading journalist for the *Detroit News* reported that a leading cause of mental retardation and birth defects in the United States is fetal alcohol syndrome

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106. Felice Freyer, *A New Look at 'Crack' Babies Experts: Give Addicted Mothers Treatment, Not Jail*, PROV. J. AO1 (1998). See also *Nightline*, *supra* note 77.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Nightline*, *supra* note 77.

112. Freyer, *supra* note 106, at AO2.

113. *Id.* at AO3.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. INCIARDI, *supra* note 5, at 30.

Information about the detrimental impact of alcohol and tobacco may be more available to greater numbers of women due to the warning labels on cigarettes, beer, wine, and hard liquor. However, admonitions about the use of these substances during pregnancy are often undermined by the fact that alcohol and tobacco are both legal drugs, and many women falsely equate legality with safety.

(FAS).<sup>119</sup> FAS effects include “dysmorphogenises (the development of ill-shaped or malformed body structures), growth abnormalities, and cognitive and language deficits.”<sup>120</sup>

Moreover, little research has been conducted to examine the relative effects of different drugs used singly or simultaneously during pregnancy.<sup>121</sup> There are, however, some studies that have found “fetal growth detriments greater when cocaine is used in a combination with other drugs.”<sup>122</sup> In a nationwide study conducted between late 1992 and mid 1993, thirty-two percent of those using at least one illicit drug during pregnancy were also found to have used both alcohol and cigarettes.<sup>123</sup> Most substance-abusing women have unique traits that should be considered including, but not limited to: a potentially harmful lifestyle, demographic characteristics, and a substandard socio-economic status.<sup>124</sup>

Consequently, the use of illicit drugs such as cocaine, heroin, and marijuana is significantly more common among welfare recipients than among the general population.<sup>125</sup> These women usually were two-and-one-half times more likely to delay prenatal care or not receive care at all.<sup>126</sup> They were also “sixty percent more likely to demonstrate inadequate weight gain during pregnancy.”<sup>127</sup> The National Maternal and Infant Health Survey found that “infants from welfare families were two thirds more likely to die during the first year of life as opposed to infants from non-welfare families.”<sup>128</sup>

The latest research shows that cocaine alone does not affect the health of these infants but that cocaine, along with being a welfare recipient and living an adverse lifestyle, does affect their health.<sup>129</sup> In fact, “[p]oor children are at [a] higher-than-average risk for health and nutrition problems, which may negatively affect their physical and cognitive development.”<sup>130</sup> Dr. Chasnoff states that “the key factor [in] predicting long-term intellectual development in the child, is whether the mother continues to use drugs after pregnancy, not during

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119. *Id.*

120. *Id.* (“Cigarette smoking during pregnancy has also been associated with prenatal complications, low birth weight, and impairment in language and cognitive development.”).

121. INCIARDI, *supra* note 5, at 31.

122. *Id.*

123. DIV. OF EPIDEMIOLOGY AND PREVENTION RESEARCH, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, NATIONAL PREGNANCY AND HEALTH SURVEY, DRUG ABUSE AMONG WOMEN DELIVERING LIVEBIRTHS:1992, at 11 (1996).

124. INCIARDI, *supra* note 5, at 31.

125. Hearing on the Impact of Substance Abuse on Welfare Programs Before the Subcomm. On Human Resources, Comm. On Ways & Means, 103rd Congress, (Testimony by Nicholas Zill, Ph.D., Vice-Pres., Child and Family Study Area) *Substance Abuse in Welfare Families* (Oct. 28, 1997), available at 1997 WL 14152692, at 2.

126. *Id.* at 3.

127. *Id.*

128. *Id.*

129. See generally INCIARDI, *supra* note 5, at 35.

130. *Id.* (“[S]ome experts fear that children exposed to drugs in utero, are in effect, addicts who face a lifetime of recovery.”). Their brains will never forget cocaine, and exposure to any psychoactive, mood-altering substance later in life is certain to have negative effects. Clarke, *supra* note 2, at 640.

pregnancy.”<sup>131</sup> In sum, because the issues of maternal and fetal health are embedded within the public health, as opposed to the judicial arena, the American public must address its social policies and not its legal ones to prevent harm to the mother and child.<sup>132</sup>

### C. Treatment

The Institute of Medicine defines public health as a “coordinated effort at the local, state, and federal levels whose mission is fulfilling society’s interest in assuring conditions in which people can be healthy.”<sup>133</sup> However, the fight against prenatal drug use in the United States has not focused on coordination of resources to insure health conditions, such as rehabilitation.<sup>134</sup> The three most fundamental concepts of public health in this nation are prevention, protection, and promotion. Therefore, it stands to reason that any person or organization minimally concerned with public health, especially with healthy children, should advocate treatment, instead of criminal prosecution and imprisonment of pregnant substance abusers.

Most experts will agree that fetuses and pregnant women are not under healthy conditions in prison.<sup>135</sup> Women in prison “face conditions hazardous to fetal health, including overcrowding, poor nutrition, and exposure to . . . contagious disease.”<sup>136</sup> Additionally, “[p]rison health facilities generally provide little or no prenatal care.”<sup>137</sup> For incarcerated mothers with drug histories, the sudden cessation of their drug supply could bring about physiological changes that may ultimately endanger both the mother and the child.<sup>138</sup>

The American Medical Association and the American Public Health Association are two organizations leading the way to oppose the prosecution of pregnant women who use drugs. The American Medical Association, in a published paper on the subject, stated:

The current policy of prosecuting women who use drugs during pregnancy is irrational because it does not further the state’s purpose of preventing harm to infants. . . . Drug addiction is an illness, which like any illness, is not due simply to a failure of individual willpower.<sup>139</sup>

Problems with the treatment options include the lack of adequate treatment services. “The demand for drug treatment uniquely designed for pregnant women

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131. *Nightline*, *supra* note 77.

132. *See generally id.*

133. OHIO STATE DEPARTMENT OF PUBLIC HEALTH, *What is Public Health*, at [http://www.odh.state.oh.us/About/public\\_hlth.htm](http://www.odh.state.oh.us/About/public_hlth.htm) (last modified April 14, 2000).

134. *See generally* INCIARDI, *supra* note 5, at 63.

135. *See generally* Logan, *supra* note 8, at 15.

136. *Id.*

137. *Id.* at 16.

138. *Id.*

139. *Id.* at 17.

far exceeds the supply.”<sup>140</sup> Many of the treatment facilities that are available do not meet women’s needs because they were originally designed for men.<sup>141</sup> “A 1989 study of ninety-five percent of the drug treatment programs in New York City found that fifty-four percent refused to treat any pregnant women.”<sup>142</sup> Additionally, a nationwide survey revealed that two-thirds of the hospitals there is not a place for pregnant women.<sup>143</sup> For example, in the early 1990s, a Boston hospital reported “over three hundred women having babies at the facility used cocaine, [however], the city of Boston possessed approximately thirty residential treatment slots available for pregnant cocaine addicts.”<sup>144</sup>

Coupled with the lack of treatment facilities available to pregnant women is the problem that these treatment facilities are not equipped to deal with the needs of these women. “Women are alienated because few addiction programs provide prenatal or obstetrical care, and many are designed primarily to serve men.”<sup>145</sup> Many female addicts turned to drugs “because they were sexually abused or raped as children.”<sup>146</sup> In addition, an estimated “eighty to ninety percent of female alcoholics and drug addicts have been victims of rape or incest.”<sup>147</sup> Thus, a drug program that does not focus on these special issues facing pregnant substance abusers will most likely fail, especially since the rates of relapse and withdrawal are high.<sup>148</sup>

Yet, another problem to the much-needed treatment approach is the lack of Medicaid and other ancillary services for successful treatment.<sup>149</sup> “As of October 1998, thirty-seven states had expanded the eligibility level for pregnant women and infants above the [previous] federal mandate.”<sup>150</sup> However, most of this

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140. Sovinski, *supra* note 28, at 133.

141. INCIARDI, *supra* note 5, at 16.

142. Sovinski, *supra* note 28, at 133. (“Of the 26 residential treatment programs in New York City, only two accept pregnant women and allow them to keep their children.”). See Chavkin, *supra* note 94 (“Two other programs accept pregnant women under the condition that they relinquish their children to foster care. Many of the outpatient drug-free programs mix pregnant women in with men and nonpregnant women without addressing the specific needs and vulnerability of pregnancy.”).

143. Sovinski, *supra* note 28, at 133.

144. *Id.* Additionally, there are sixty women waiting for beds in one California residential program. *Id.* Although San Francisco had 700 drug-exposed babies in 1989, it began to develop its first residential treatment center for pregnant women only late that year, and the center accommodated only 15 women at a time. *Id.* A recent United States General Accounting Office Report suggests that physicians frequently ignore substance abuse symptoms in pregnant women or make referrals to treat. *Id.*

145. See Logan, *supra* note 8, at 14.

146. *Id.*

147. *Id.* at 16.

148. *Id.*

149. See generally Embry M. Howell, et al., Identifying Pregnant Substance Abusers and Studying Their Treatment Using Birth Certificate’s, Medicaid Claims, and State Substance Abuse Treatment Data, 30 J. DRUG ISSUES 6 (2000), available at 2000 WL 20172254.

150. *Id.*

Historically, substance abuse services have been considered to be under the purview of state substance abuse agencies. As abuse of illicit drugs continued to increase and treatment options expanded, concurrent with an expansion in Medicaid eligibility for pregnant women, states began to cover some substance abuse treatment services for pregnant and parenting



nation's Medicaid programs do not "offer extensive coverage of substance abuse treatment during pregnancy."<sup>151</sup>

Additionally, women require a broader range of medical and psychological assistance such as help with childcare and services that are "aimed at reducing the extreme isolation typical of women drug users."<sup>152</sup> Every dollar in prevention saves five times that in treatment and other costs to society.<sup>153</sup> As a result, additional drug-prevention efforts are essential.<sup>154</sup> "Preventative methods could help addicts before they become pregnant or rehabilitate them while pregnant."<sup>155</sup> Prevention is the key, as "incarceration does not directly address the problem of addiction."<sup>156</sup>

One state has recognized the benefits of treatment and rehabilitation. Oregon has been termed as taking a "progressive approach" to the treatment.<sup>157</sup> Katherine Jones of the *Willamette Law Review* uses a quote in an article that pierces the core of the drug addiction debate: "it is an addicted woman who becomes pregnant, not a pregnant woman who becomes addicted."<sup>158</sup> Oregon's legislature recognizes that a woman is controlled by her addiction and, therefore, treats drug and alcohol dependence as an illness rather than a crime.<sup>159</sup> The Oregon legislature has adopted treatment and education programs instead of punitive approaches for these addicted mothers.<sup>160</sup> In 1989, after a study discovered that 700 infants born in Oregon within that year were affected by drugs and alcohol, the Oregon legislature "adopted a benchmark goal to reduce the number of pregnant women who use substances that may harm unborn children."<sup>161</sup> By the next year, the Oregon Task Force on Pregnancy and Substance Abuse was formed.<sup>162</sup> The findings of the Task Force were

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women under existing Medicaid-mandated and optional services.

*Id.*

151. *Id.*

152. INCIARDI, *supra* note 5, at 16. *See also* Sovinski, *supra* note 28, at 136.

[Since] few drug treatment centers can accommodate children . . . [and since] [s]tatistics indicate that most pregnant addicts affected by criminal sanctions already have children[,] . . . the only option is to place these children in foster care or to forego treatment. A 1986 study found that the main reason why drug addicted women failed to seek treatment is the lack of child care."

*Id.*

153. Freyer, *supra* note 106.

154. *See generally id.*

155. Casto, *supra* note 57, at 665.

156. *Id.*

157. Kathryn T. Jones, *Prenatal Substance Abuse: Oregon's Progressive Approach to Treatment and Child Protection Can Support Children, Women, and Families*, 35 WILLAMETTE L. REV. 797, 797 (1999).

158. *Id.*

159. *Id.* at 799.

160. *See generally id.*

161. *Id.* at 801.

162. *Id.*

overwhelmingly in favor of treatment.<sup>163</sup> Those findings revealed that “[t]he unavoidable costs incurred to provide services possibly throughout their lives, to children born affected by drugs and alcohol will quickly surpass the costs of providing treatment before the children are damaged.”<sup>164</sup> While it is interesting to note that “mandatory drug testing is in place within this state, any positive toxicology screens are not admissible for criminal prosecution.”<sup>165</sup> The Oregon legislature clearly favors a drug treatment approach over punitive measures:

[A]ddiction treatment can reduce the number and duration of relapses, minimize related problems such as crime and poor overall health, reduce the impact of parental addiction on children, and improve the individual’s ability to function in daily life. Successful treatment programs focus on women’s individualized needs, provide the tools necessary for mothers to overcome addictions and build healthy homes, and allow women to retain custody of their children<sup>166</sup>

The Oklahoma legislature includes members who believe treatment may be the best option for addicted women who are pregnant. For example, as recently as February of 2000, Representative Russ Roach from Tulsa authored House Bill 2487 that would encourage prenatal care and treatment for pregnant women who are substance abusers.<sup>167</sup> According to the Bill, “if a pregnant woman failed to [obtain] treatment or refused to accept treatment, she could be charged with a misdemeanor.”<sup>168</sup> This “measure also would require treatment programs, that [receive] state funds to provide treatment for pregnant women.”<sup>169</sup> By adding this requirement to the bill, much of the concern for lack of adequate treatment would be addressed.

Additionally, there have been other studies of various types of alternative treatment options that are proving very effective in treating the pregnant addict. For example, “[a]cupuncture is an appropriate entry-level treatment because it is convenient, relaxing, and independent of any diagnosis or treatment plan.”<sup>170</sup> A wide range of patients, who have varied psychological states and who use a variety of drugs, are candidates for this treatment.<sup>171</sup> There is mounting evidence of the effectiveness of this treatment for drug detoxification.<sup>172</sup>

Another treatment method implemented and studied for effectiveness is the SISTERS project.<sup>173</sup> The purpose of the project is to establish “a comprehensive paraprofessional case management program for substance-abusing pregnant and

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163. See generally Jones, *supra* note 157.

164. *Id.* at 802.

165. *Id.*

166. *Id.* at 809. Oregon now has ten publicly-funded treatment programs that provide specific services to women with children. *Id.*

167. Opinion, *How To Help Bill Is Step in Right Direction*, TULSA WORLD, Feb. 25, 2000, at 18.

168. *Id.*

169. *Id.*

170. ADDICTION, *supra* note 89, at 41.

171. *Id.*

172. *Id.* at 42.

173. See generally *id.*

post-partum women.”<sup>174</sup> Peer counseling, which is the main premise of the program, cultivates trust among its participants.<sup>175</sup> It is also non-threatening to the patient and is cost-effective.<sup>176</sup> “The SISTERS [project] encourage[s] feelings of self-efficacy in their clients,” and the journey to recovery includes “empowerment, social reintegration, occupational attainment and the establishment of healthy relationships with others.”<sup>177</sup> Most importantly, there has been marked success in the SISTERS program. “The results of various analyses [showed] . . . successful intervention . . . [through] improved parenting and demonstrated positive sobriety outcomes.”<sup>178</sup> Peer counselors are also able to “act as successful role models by demonstrating that recovery is possible.”<sup>179</sup>

Some of these alternative programs are also rather controversial. For example, the Anaheim C.R.A.C.K. program offers cash to drug-addicted women who can prove that they have been sterilized or given long-term contraception.<sup>180</sup> As of July 1999, fifty-seven women, who altogether have been pregnant 423 times, have been paid in California.<sup>181</sup> This program, first introduced in Anaheim, has spread to the Chicago area.<sup>182</sup> It is completely voluntary and up to the particular client whether to choose permanent or long-term birth control.<sup>183</sup> Those opposed to the program, such as the ACLU and Planned Parenthood, have stated: “Coercing women into sterilization by exploiting the condition of their addiction is just plain wrong.”<sup>184</sup> Additionally, it appears to “focus on minority communities, where drug treatment and health services are lacking.”<sup>185</sup> Whatever treatment method is chosen, it is clear that there are some that work. Public health officials should focus on those that work and develop them further, thereby deterring criminal prosecution as an option.

#### D. *The Complexity of Addiction*

According to Dr. Barry Lester, a professor of psychiatry and human behavior at Brown University School of Medicine, society’s view of pregnant women with a drug addiction is the main challenge facing such women.<sup>186</sup> The current view taken by the majority of the population is that drug addiction is a

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174. *Id.* at 43.

175. *Id.*

176. *ADDICTION*, *supra* note 89, at 52.

177. *Id.* at 53.

178. *Id.* at 165.

179. *Id.* at 167.

180. Lisa Donovan and Sue E. Christian, *Program Hopes to Sell Addicts on Birth Control \$200 for Proof of Sterilization*, CHICAGO TRIBUNE, July 23, 1999, at 1.

181. *Id.*

182. *Id.*

183. *Id.* at 5.

184. *Id.*

185. *Id.*

186. Barry Lester, *Drug-addicted Mothers Need Treatment, Not Punishment*, ALCOHOLISM & DRUG ABUSE WEEKLY, March 20, 2000, at 2.

criminal behavior rather than a mental health behavior and a mental health problem.<sup>187</sup> According to Dr. Lester, substance abuse by pregnant women is a mental health problem that needs treatment and prevention much as do any other health problems such as hypertension or diabetes.<sup>188</sup> In fact, according to Lester, treatment works for drug addictions as well as it does for other medical conditions.<sup>189</sup> "We can no more abandon an addict at the first sign of relapse than we would abandon a hypertensive for forgetting to take blood pressure medication, the first step is to treat both the drug user and the societal stigma associated with drug use."<sup>190</sup>

Criminal sanctions are very unlikely to deter pregnant substance abusers. As the American Medical Association has stated: "[I]t is clear that addiction is not simply the product of a failure of individual willpower but rather caused by complex hereditary, environmental and social factors."<sup>191</sup> Therefore, the goal of deterrence is not served by punishing a person for substance abuse and subsequently ignoring the impaired capacity of these individuals to make rational decisions regarding their drug use.<sup>192</sup> The National Association for Prenatal Addiction Research and Education points out "these women are addicts who become pregnant, not pregnant women who decide to use drugs[,]... [consequently,] their substance abuse is best addressed through treatment and not punishment."<sup>193</sup> According to one woman who specifically experienced such addiction, "I had an illness that I could not get rid of by myself. . . . [I]t seemed like the drug was more powerful than me."<sup>194</sup> Health experts agree that drug and alcohol addictions in women have also been linked with low self-esteem, domestic abuse, a history of sexual abuse, and a chaotic lifestyle.<sup>195</sup>

Consequently, "the United States Supreme Court has ruled that addiction is an illness and not willful, criminal behavior."<sup>196</sup> Many female substance abusers have a history of "violence and sexual, physical, and psychological

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187. *Id.*

188. *Id.* According to Lester, children also bear the stigma. *Id.* Despite mounting research to the contrary, we still have the image of the infant exposed to cocaine as a brain-damaged baby born prematurely, trembling and screaming through withdrawal. *Id.* These infants, according to popular beliefs, are destined to fail in school and in life, and become a self-fulfilling prophecy: If society expects these children to fail, they will fail. *Id.*

189. *Id.*

190. *Id.* Without that, the chances of recovery for the drug-addicted mother or the drug-exposed baby are unlikely to improve. *Id.*

191. Sovinski, *supra* note 28, at 128.

192. *Johnson v. State*, 602 So.2d 1288, 1296 (Fla. 1992) (stating that punishment is simply not an effective way of curing a dependency or preventing future substance abuse and that taking harmful substances such as cocaine is not meant to harm the fetus but to satisfy an acute psychological and physical need for that particular substance).

193. Sovinski, *supra* note 28, at 128.

194. *Nightline*, *supra* note 77.

195. INCIARDI, *supra* note 5, at 31. In addition, cocaine-using women tend to suffer from poor nutrition and overall health, a greater exposure to violence, and poor or unsanitary living conditions with greater risk of infections than other women. *Id.*

196. *Id.* at 83.

victimization[,] . . . therefore they may turn to substance abuse as a form of coping in order to escape the harsh reality of their daily lives."<sup>197</sup> Additionally, "women who experience a multitude of stressors . . . as well as mental and physical health problems are at risk for substance abuse."<sup>198</sup> Women who are codependent on highly addictive illicit drugs often engage in dangerous activities, such as prostitution, to support their habit.<sup>199</sup> These actions suggest that the use of such drugs is not a conscious choice, but is driven by the addiction.<sup>200</sup> "For that reason alone, women should not be unfairly prosecuted . . . ."<sup>201</sup>

### III. CONSEQUENCES OF CRIMINALIZATION

#### A. *Slippery Slope of Fetal Rights*

The emergence of fetal rights as a topic for social and legal debate has been attributed by many to the civil rights movement of the 1960s, when "civil rights activists were able to secure legal recognition for people who had been denied their fundamental rights under the law."<sup>202</sup> However, "more than one hundred years ago, Justice Oliver Wendell Holmes declared that 'the unborn child was inseparable from the mother.'"<sup>203</sup> The concept of "fetal rights" gained a stronger foothold in the 1970s with the decision in *Roe v. Wade*.<sup>204</sup> In that opinion, the Court asserted "the state's compelling interest in the life of the unborn fetus."<sup>205</sup>

"The maternal-fetal conflict is the center of the debate between women's rights advocates and fetal rights advocates."<sup>206</sup> The debate hinges on "whether the state's interest can be interpreted to extend beyond the scope of abortion."<sup>207</sup> There have been major advances in biomedical technology in the last forty years, and these improvements have led to a greater understanding of fetal development.<sup>208</sup> These developments, however, have returned to the old notion of the mother as a "vessel" who provides a host environment for the fetus now

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197. *ADDICTION*, *supra* note 89, at 13.

198. *Id.* at 14.

199. *Id.*

200. *Id.*

201. *Id.* at 21.

202. *INCIARDI*, *supra* note 5, at 77-78.

203. Clarke, *supra* note 2, at 642. ("Current trends in legislation and prosecution seem to be leaning toward conferring upon the fetus a plethora of rights, privileges, and immunities afforded to personhood.").

204. 410 U.S. 113 (1973). *See also* *INCIARDI*, *supra* note 5, at 78.

205. *INCIARDI*, *supra* note 5, at 78 ("Many interested parties viewed this judgment as recognition of the separate interest of the fetus, which heretofore had not been acknowledged.").

206. Clarke, *supra* note 2, at 647.

207. *Id.* The "women's rights advocates hold the view that any rights a fetus may have are simply not compelling enough to override the pregnant woman's clear and uncontested constitutional rights in making decisions about her pregnant body." *Id.* In contrast, fetal rights advocates interpret *Roe* broadly, and find in the Court's language an implication that the state's interest in potential life begins at conception, not just upon viability. *Id.*

208. Logan, *supra* note 8, at 20.

envisioned as a "second patient."<sup>209</sup>

"Fetal rights proponents argue that fetuses have a fundamental right to be born with a sound mind and body,"<sup>210</sup> and yet, they are the same proponents of criminal prosecution for pregnant addicts.<sup>211</sup> These proponents fail to address the real issues of harm that exist when a fetus is ultimately born into poverty and other socially inadequate circumstances.<sup>212</sup> The same level of outrage felt by many social activists that drug-addicted women do not have health insurance, or that children will be born into roach-infested housing does not overcome the outrage expressed by fetal rights proponents.<sup>213</sup> Fetal rights advocates have also ignored male behavior and their corresponding duty of care "despite the fact that a partner or spouse's drug abuse may itself contribute to neonatal mortality, low birth weight, learning disabilities, and abnormal newborn behavior."<sup>214</sup>

The court's decision in *Whitner v. State*<sup>215</sup> has had an effect on abortions in South Carolina. The Supreme Court has long allowed medically necessary abortions in the third trimester.<sup>216</sup> However, in South Carolina, these late-term abortions seem to be inconsistent with the child abuse statutes as interpreted under *Whitner*.<sup>217</sup> One must consider how "treatment of a viable fetus as a 'person' who is protected by civil and criminal laws [can] be reconciled with a statute that allows the fetus to be put to death under certain circumstances."<sup>218</sup> According to Catherine Weiss, a director of the Reproductive Freedom Project of the ACLU, numerous issues could be affected if a fetus is declared a legal person.<sup>219</sup> Ms. Weiss believes that if an unborn child is declared a person, not only will the legal rights of the pregnant woman erode, but also the woman and her baby will potentially become legal adversaries.<sup>220</sup>

According to Gloria Banks, a specialist in the legal aspects of reproductive technologies<sup>221</sup> the "rights of pregnant women are being diminished, and the rights of a two-cell entity increased."<sup>222</sup> The status of the fetus may be changed by potential changes in the ideological make-up of the Supreme Court. The newly

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209. *Id.*

210. INCIARDI, *supra* note 5, at 78.

211. *Id.*

212. *Id.*

213. Logan, *supra* note 8, at 22. ("Fetal rights advocates have not campaigned for the building of day care centers in low-income communities, to increase the availability of prenatal care to poor mothers, or to expand eligibility for the WIC food vouchers program.").

214. *Id.*

215. See generally *Whitner v. State*, 492 S.E.2d 777 (1997), rehearing denied (Nov. 17, 1997).

216. Casto, *supra* note 57, at 668.

217. *Id.*

218. *Id.* (stating that *Whitner* leaves the legality of third trimester abortions in some question).

219. See generally Vincent J. Schodolski, *When Exactly do Human Cells Become a Person? Science Reshapes the Struggle over Abortion and the Legal Status of the Unborn*, CHICAGO TRIBUNE, May 10, 2000, at 1.

220. *Id.* at 2.

221. Gloria Banks is an associate professor of law at Widener University in Harrisburg, PA. *Id.*

222. *Id.*

elected President, George W. Bush, is expected to have opportunities to make Supreme Court Justice appointments. The continued efforts to expand the definition of personhood make it possible to overturn *Roe v. Wade*,<sup>223</sup> because the Supreme Court, in that decision, did not decide the definition of personhood, but that fetuses were not covered by the Fourteenth Amendment, which guarantees all citizens equal rights under the law.<sup>224</sup> Therefore, the goal of some is to define personhood as beginning at the moment an egg is fertilized, and in turn to extend all legal rights of a fully developed human to a cluster of cells.<sup>225</sup> According to a survey by the ACLU, thirty-nine states and the District of Columbia have criminal statutes that provide legal penalties for harm done to an unborn child, usually relating to murder, homicide, and permitting civil wrongful death suits.<sup>226</sup> "Most states define a fetus as a human being only when it could survive outside the womb, however two states, Louisiana and South Dakota, have defined it as beginning with fertilization."<sup>227</sup>

### B. *Lack of Treatment – The Consequences*

Opponents of intervention through criminal prosecution fear that this kind of action will do more harm than good.<sup>228</sup> The opponents state that the "fear of facing criminal charges will deter pregnant women from seeking prenatal care."<sup>229</sup> For example, the *Whitmer* decision "places doctors and nurses in a policing role that undermines the trust and confidentiality that is necessary to ensure a patient's free disclosure and proper medical care."<sup>230</sup> If *Ferguson v. City of Charleston*<sup>231</sup> had not been vacated, medical professionals would continue to be forced to report drug use by pregnant women as child abuse, and subsequently health care professionals would ultimately be placed in an adversarial relationship with their patients."<sup>232</sup> As early as 1977, in the *Reyes v. Superior Court*<sup>233</sup> case, it was evident that prenatal care was as important, if not more so, than the possibility of a drug addicted baby.<sup>234</sup> According to the facts of *Reyes*, a public health nurse warned Ms. Reyes that if she continued to use heroin and failed to seek prenatal care, the

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223. See generally *id.* at 3 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

224. *Id.*

225. Schodolski, *supra* note 219, at 3.

226. *Id.* at 5.

227. *Id.* at 5-6 ("The consequences of these laws are far greater than the American public realizes. If the fetus is a separate person and the mother can be held responsible for whatever she does, then what?").

228. Sovinski, *supra* note 28, at 109.

229. *Id.*

230. Casto, *supra* note 57, at 669.

231. *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999), *vacated*, No. 99-936, 2001 WL 273220 (U.S. 2001).

232. Casto, *supra* note 57, at 670 ("Taking the matter a step further, would the risk of self-incrimination that arises when a woman admits to drug use require health care professionals to read a pregnant addict her Miranda rights before discussing pregnancy?").

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

234. *Id.*

health of the unborn child would be endangered.<sup>235</sup> This is significant because the nurse did not warn her only about the effects of the drugs, but also about the importance of prenatal medical treatment.

Many healthcare experts agree that failure to receive prenatal care is extremely harmful to both the mother and the fetus. “[F]ewer women seeking prenatal care [results in hindering a healthcare provider in his/her ability] to counsel women about the importance of treatment and abstaining from drug use.”<sup>236</sup> For many women, “the lack of adequate prenatal care is more detrimental to the health of the developing fetus than is the mother’s use of drugs during pregnancy.”<sup>237</sup> A 1985 Florida report concerning the effects of the lack of prenatal care indicates that it is “safer for a child to be born to a drug abusing, anemic, or diabetic mother who visits the doctor throughout her pregnancy than to be born to a normal woman who does not.”<sup>238</sup> Therefore, criminal prosecution of pregnant substance abusers may cause potential harm to the fetus by discouraging women from seeking prenatal care.<sup>239</sup> Some state courts, such as the Nevada Supreme Court, have recognized the need for pregnant women to obtain treatment and the possibility that prosecuting women will deter such treatment.<sup>240</sup> In the *Encoe* case, the Nevada Supreme Court stated in its opinion that it rejected the argument that such prosecution would deter unlawful drug use.<sup>241</sup> Medical evidence indicates that if a woman receives adequate prenatal care and/or curtails her drug consumption, the developmental outcome of a cocaine-exposed infant can be significantly improved.<sup>242</sup>

### C. Prenatal Duty of Care – A Pandora’s Box

If we begin interpreting statutes regarding child endangerment to include all viable fetuses, as was the case in *Whitner v. State*, it could lead to prosecution of parents for acts that are legal but might endanger the child’s well-being, including smoking or the consumption of alcohol.<sup>243</sup> For example, what about alcohol? It is legal to consume it. Furthermore, “two-thirds of all pregnant women do not know they are pregnant until after the fourth week of pregnancy, [yet] birth defects resulting from harmful alcohol exposure occur during the first 8-12 weeks of pregnancy.”<sup>244</sup> Should women who drink and who are not aware of their pregnant status be prosecuted and convicted of a crime? “Exposure to alcohol and

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235. *Id.*

236. Casto, *supra* note 57, at 670.

237. Sovinski, *supra* note 28, at 130.

238. *Id.* at 131.

239. *Id.* at 109.

240. *Sheriff v. Encoe*, 885 P.2d 596, 599 (Nev. 1994).

241. *Id.*

242. Logan, *supra* note 8, at 15. Many women will avoid seeking the treatment they need, if they realize that a positive urine screen could result in their children being placed in foster care. *Id.*

243. Casto, *supra* note 57, at 658.

244. U.S. Government Printing Office, *Alcohol and Other Drug-Related Birth Defects Awareness Week*, Morbidity & Mortality Wkl. Rep. 381 (2000) [hereinafter *Alcohol*].



cigarettes has been determined to have an equal or greater detrimental impact on the infant than exposure to cocaine.”<sup>245</sup>

Pregnant alcoholic women<sup>246</sup> risk the health of their offspring in multiple ways. First, exposure to alcohol during gestation leads to Fetal Alcohol Syndrome (FAS),<sup>247</sup> which may cause growth retardation, craniofacial dysmorphism, and central nervous system dysfunction.<sup>248</sup> Further, FAS is the most commonly identified cause of mental retardation.<sup>249</sup> Alcohol consumption during pregnancy has been associated with an “increased risk of second-trimester abortion and a fifty-percent increase in infant mortality.”<sup>250</sup> Additionally, “withdrawal may occur within the first twelve hours of life, [and] short-term barbiturate therapy is sometimes necessary to control the symptoms.”<sup>251</sup> Secondly, the physical consequences of alcoholism in the fetus may increase the effects of prenatal exposure.<sup>252</sup> Third, genetic vulnerability to alcoholism may increase the effect on the fetus to such exposure in utero.<sup>253</sup> Finally, the lifestyle, of an alcoholic parent may lead to negative consequences for the fetus, the pregnancy, and the developing child.<sup>254</sup> With all of this information, it is unclear how a Wisconsin court could dismiss charges of attempted murder against a woman who drank heavily during her ninth month of pregnancy.<sup>255</sup> According to prosecutors, she drank to the point of getting “drunk;” however, because her baby was born sickly

245. INCIARDI, *supra* note 5, at 30.

246. *Alcohol*, *supra* note 244.

Recent statistics from the National Household Survey of Drug Abuse find that one in fifty pregnant women binge drink (consume five or more drinks in 1 day), resulting in approximately 80,000 alcohol-exposed pregnancies per year, and that one in eight childbearing-aged women binge drink, potentially exposing an additional number of fetuses during the early first trimester before pregnancy recognition.

*Id.*

247. Cynthia Larkby & Nancy Day, *The Effect of Prenatal Alcohol Exposure*, ALCOHOL HEALTH & RESEARCH WORLD, Summer 1997, at 192 [hereinafter *Prenatal Alcohol Exposure*].

To meet the clinical case definition, the child must have symptoms in each of the following three categories: 1) growth deficiency in both the prenatal and postnatal periods; 2) abnormalities in facial and skull structure, including eye openings, alterations in nose and forehead structure, an absent or elongated groove between the upper lip and the nose and 3) CNS deficits, such as mental retardation and behavioral problems.

*Id.* at 193.

248. Jeffrey C. King, *Symposium, Substance Abuse in Pregnancy a Bigger Problem Than You Think*, 102 POSTGRADUATE MEDICINE 139 (1997), available at 1997 WL 9104736 (stating that the cardiac and genitourinary systems may also be affected).

249. See *id.* at 140. See also *Prenatal Alcohol Exposure*, *supra* note 247, at 199 (stating that the “degree of mental retardation deficit varies”). One study reported that “the IQ scores of FAS patients ranged from 29 (severely retarded) to 120 (high average).” *Id.* This study reported “that the daily consumption of 1 ½ ounces of absolute alcohol was associated with an average decrease of five points in the child’s IQ score at age 4.” *Id.* Additionally, “behavior problems also have been reported among offspring prenatally exposed to alcohol but without FAS.” *Id.* at 200.

250. *Prenatal Alcohol Exposure*, *supra* note 247, at 200.

251. *Id.*

252. *Id.* at 192.

253. *Id.*

254. *Id.*

255. John Cloud, *Protecting the Unborn*, TIME, Oct. 9, 2000, at 52.

but is now healthy, the charges were dismissed.<sup>256</sup> This decision is not consistent with the decisions to convict women for drug abuse, when the effects can be more short term than alcohol, and the babies can live healthy productive lives.

There are several obstetric complications that occur among smokers; including intrauterine growth retardation,<sup>257</sup> spontaneous abortions, low-birth-weight infants, and 4,800 prenatal deaths each year.<sup>258</sup> Moreover, premature rupture of membranes caused by smoking results in many pre-term deliveries.<sup>259</sup> The birth weight of newborns of heavy smokers can also be as much as 200 grams less than that of nonsmokers.<sup>260</sup> "In addition, 1,200 to 2,200 cases of sudden infant death syndrome, and a significant number of chronic respiratory illnesses are related to maternal smoking."<sup>261</sup> When a cigarette smoker inhales, thousands of tobacco-derived compounds, many of which are thought to be carcinogenic or otherwise toxic, are pulled inside the body.<sup>262</sup> Three research groups have presented evidence that some of the tobacco compounds enter a woman's cervix, where they may cause cancer or pass into the fetus, subsequently causing the respiratory problems that are known problems in children born to mothers who smoked during pregnancy.<sup>263</sup>

Furthermore, critics argue, "no woman can provide the perfect womb, [and] prosecution for prenatal drug use could possibly open the door to prosecuting women for any variety of activities during their pregnancy . . . ."<sup>264</sup> Lynn Paltrow, of the ACLU, points out that there are many legal behaviors that cause damage to developing babies.<sup>265</sup> In 1980, the Michigan Supreme Court ruled that a woman who had taken prescription drugs could be criminally liable for failing to provide proper prenatal care.<sup>266</sup> Women who "are obese, take aspirin, travel by air, smoke cigarettes, change their cats' litter boxes, eat junk food, have sex, or fail to stay off their feet could all be characterized as fetal abusers."<sup>267</sup> With increased governmental regulation, the duty of care for a pregnant woman seriously undermines women's reproductive autonomy.<sup>268</sup> The Nevada Supreme Court

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256. *Id.*

257. Stephanie J. Ventura, et. al., *Births: Final Data for 1998*, 48 NATIONAL VITAL STATISTICS REPORT (from the Centers for Disease Control and Prevention) March 28, 2000, at 11.

258. *See King, supra* note 248, at 142.

259. *Id.*

260. *Id.*

261. *Id.*

262. John Travis, *Smoke Gets in Your Cervix and Fetus*, SCIENCE NEWS, May 4, 1996, at 282.

263. *Id.* The researchers found in their study, "that compared to nonsmokers' cervical mucus, that of smokers contains a much higher concentration of nitrosamines, carcinogenic derivatives of nicotine that come from tobacco." *Id.*

264. INCIARDI, *supra* note 5, at 83. This may also subject women to any number of regulations that deprive them of their basic constitutional right. *Id.*

265. Logan, *supra* note 8, at 22. Other pregnant women have faced charges for consumption of alcohol, failing to follow doctor's orders, and taking non-prescription valium. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

agreed with this possibility.<sup>269</sup> It stated in the *Encoe* decision that convicting a woman for child endangerment for ingesting a controlled substance while pregnant would "open the flood gates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous otherwise legal, toxins."<sup>270</sup> The Kentucky Supreme Court followed similar reasoning in its opinion when it stated that applying these types of statutes to pregnant women "could have an unlimited scope and create an indefinite number of new crimes."<sup>271</sup>

Now, with reproductive technology blazing the path for a "brave new world," who will decide what reproductive techniques are appropriate for a woman to experiment with when there is a possibility for fetal endangerment? A prime example is multiple births resulting from in-vitro fertilization (IVF).<sup>272</sup> This technique is accomplished by transferring several embryos into a woman's fallopian tubes to improve the probability that at least one will implant; however, many times this results in several implanting.<sup>273</sup> "Unless selective abortion (called fetal reduction) is performed, a pregnancy with multiple fetuses puts the pregnancy at risk for miscarriage. . . . A woman carrying quintuplets has a 50 percent risk of miscarriage."<sup>274</sup> Moreover, if there is not a miscarriage, multiple fetuses put the infants at risk.<sup>275</sup>

Normal pregnancies last about 40 weeks, but multiple pregnancies rarely go full term. Triplets are born around 33.5 weeks and quadruplets after 31 weeks. Because of their prematurity, babies born as multiples often suffer from such problems as blindness, stroke, brain damage, and impaired motor skills. The number of women taking fertility drugs has almost tripled in the last decade, rising from about 1 million to 2.7 million, and the number of multiple births has quadrupled in the last twenty-five years.<sup>276</sup>

According to a report issued by the Hastings Center, if these infants survive their uterine environment, emerging relatively intact, they will have many weeks in the very expensive neonatal intensive care unit and will face an increased risk of child abuse.<sup>277</sup> These numbers and facts raise significant ethical questions. The

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269. *Sheriff v. Encoe*, 885 P.2d 596, 598 (Nev. 1994).

270. *Id.*

271. *Encoe*, 885 P.2d at 596 (citing *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993)). The Kentucky court ruled that the "District Attorney's interpretation of the statutes, 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 - a plainly unconstitutional result that would, among other things render the statute void for vagueness." *Id.*

272. Ordinary fertilization takes place within the uterus. In vitro fertilization takes place in an artificial environment such as a glass. See RONALD MUNSON, *INTERVENTION AND REFLECTION BASIC ISSUES IN MEDICAL ETHICS* 662 (6th ED. 2000).

273. *Id.*

274. *Id.* (stating that a woman carrying quadruplets has a 25 percent chance of miscarriage).

275. *Id.*

276. *Id.* at 663 ("In 1995, 4,973 children were born in groups of three or more. Triplets were most common, but already three sets of sextuplets have been born . . .").

277. Alexandra Morgan Capron, *Punishing Mothers (At Law)*, 28 HASTINGS CTR. REP., Jan. 11, 1998, at 33.

costs of carrying multiple fetuses are personal and social.<sup>278</sup> It is important for our legal system to be fair and just. Why should we allow women who have money for IVF to become pregnant, and then carry them all to term, when there is a great risk to the health of all of the fetuses? Should we insist on selective reduction?<sup>279</sup> Does this correlate with the punitive policies we are making for drug-addicts who, it can be argued, put a fetus at risk through (as many health experts and researchers agree) no fault of their own? Are these issues for the court to decide?

Finally, one of the latest debates in the controversy regarding fetal versus maternal rights parallels the slippery slope of criminalizing women for their actions while pregnant. In Massachusetts, a judge ordered a young woman to jail because she belongs to a religious sect that refuses to take medical treatment.<sup>280</sup> In 1999, Rebecca Corneau delivered a son who died soon after birth.<sup>281</sup> The police and many others believe that he would have lived if a doctor had been present.<sup>282</sup> The court, in an unprecedented step, ruled that as soon as this young woman gives birth, now nine months pregnant for a second time, the state will take custody of the child and the mother will be released.<sup>283</sup> Women's rights and abortion advocates state that this young woman has a fundamental right of freedom concerning her pregnancy.<sup>284</sup> By the mother not seeking treatment, the previously mentioned experts would agree that more harm will come to a child than if the mother were a drug addict and treatment were regular and early in the pregnancy. Not only will the system be burdened with one more child, but also, this baby will potentially have just as many, if not more problems, because of the lack of prenatal treatment. Where will we stop?

#### IV. CONCLUSION

The prosecution of pregnant substance abusers is, without question, a complex issue. Most will agree that the leading issue within this controversy is the health of the fetus and the future child. The child does suffer physiological effects from the use of cocaine – effects that are now being shown to be reversible. However, it is the social effects after their birth that has been proven much more damaging than the drug exposure itself. “It is largely maintained that some, perhaps many, of the children prenatally exposed to cocaine will experience few to no detrimental side effects at all.”<sup>285</sup> Most researchers agree that the postnatal

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278. MUNSON, *supra* note 272, at 663.

279. *Id.*

280. Editorial, *And God Spake unto Rebecca*, THE ECONOMIST, Sept. 16, 2000, at 35.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. INCIARDI, *supra* note 5, at 38. It has proven difficult to separate the prenatal effects of cocaine from other potentially negative influences on the fetus's and growing child's development. *Id.* Longitudinal studies of prenatal cocaine exposure are in their early stages, and many of the long-term outcomes are not yet conclusive. *Id.*

home environment is crucial, since it can serve to either mitigate or magnify the effects of prenatal exposure.<sup>286</sup> Consequently, it is the “non-cognitive outcomes, such as socio-emotional development, parent-child relationships, and peer interactions that come to the forefront.”<sup>287</sup> Creating a fear in pregnant substance abusers will ultimately deter the substance abuser from prenatal help and treatment, rather than the continued use of the drugs.<sup>288</sup> Locking a woman behind bars does not prevent the child from having to face the same conditions that potentially contributed to the mother’s addiction, such as poverty, racism, gender oppression, and sexual violence.<sup>289</sup> Drug-exposed children will require additional state services to meet their special medical, emotional, and educational needs.<sup>290</sup> It is also true, however, that children from environments involving abuse, alcohol, or both also need state services. Social issues are public health issues because they affect the overall well being of a child, and our society as a whole. As Dr. Ira Chasnoff succinctly stated: “When public health law replaces public health, the law indeed is a very blunt instrument and it is not in the best interest of the mother or the child to disrupt families . . . .”<sup>291</sup> As the treatment research has shown, punitive approaches fail to resolve the long-term addiction problems, and instead, foster a chilling effect on those contemplating treatment. Clearly, treatment options are the only way to address the basic premises of public health, as treatment for drug abuse is the only way to foster prevention, protection and promotion of a healthy population.

*Heather Flynn Bell*

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286. *Id.* at 54.

287. *Id.*

288. GARY E. MCCUEN, BORN HOOKED 127 (1991).

289. Logan, *supra* note 8, at 26.

290. Sovinski, *supra* note 28, at 137.

291. *Nightline*, *supra* note 77.