

1991

CRIMINAL SANCTIONS FOR DRUG ABUSE DURING PREGNANCY: THE ANTITHESIS OF FETAL HEALTH

Robert T. Holland

Follow this and additional works at: https://digitalcommons.nyls.edu/journal_of_human_rights



Part of the [Law Commons](#)

Recommended Citation

Holland, Robert T. (1991) "CRIMINAL SANCTIONS FOR DRUG ABUSE DURING PREGNANCY: THE ANTITHESIS OF FETAL HEALTH," *NYLS Journal of Human Rights*: Vol. 8 : Iss. 2 , Article 5.
Available at: https://digitalcommons.nyls.edu/journal_of_human_rights/vol8/iss2/5

This Notes and Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of Human Rights by an authorized editor of DigitalCommons@NYLS.

CRIMINAL SANCTIONS FOR DRUG ABUSE DURING PREGNANCY: THE ANTITHESIS OF FETAL HEALTH

Two recent cases have brought to the public's attention a growing trend in criminal law — the imposition of criminal sanctions against pregnant women whose drug abuse during pregnancy has resulted in the injury or death of their fetuses or newborns.¹ In 1988, Brenda Vaughn pleaded guilty in Washington D.C. to forgery charges. As a first offender she could have received probation, but because she was pregnant and drug tests showed evidence of cocaine use, the judge sent her to jail until her due date, saying he wanted to protect the fetus.² And on August 25, 1989, Jennifer Johnson was sentenced to one year in a rehabilitation program and fourteen years probation following her conviction in Florida stemming from her drug abuse during pregnancy.³ Increasing public awareness of the proliferation of drug abuse and its resultant problems has drawn a wide base of support for public action on drug abuse.⁴ Coupled with the fact that the most innocent and vulnerable victims, the developing fetuses, are at considerable risk as a result of their mothers' addictions, many jurisdictions are addressing the problem of drug abuse during pregnancy with criminal sanctions.⁵ While this evidences an awareness

1. *United States v. Vaughn*, Crim. No. F2172-88B (Super. Ct., D.C., June 24, 1988); *State v. Johnson*, 89-890 CFA (Cir. Ct. Seminole Co., 1989).

2. Lewin, *When Courts Take Charge of the Unborn*, N.Y. Times, Jan. 9, 1989, at A1, col. 1 (the baby was born healthy); Sachs, *Here Come the Pregnancy Police*, TIME, May 22, 1989, at 104.

3. Sherman, *Keeping Babies Free of Drugs*, Nat'l L. J., Oct. 16, 1989, at 1, col.

4. Ms. Johnson was charged with child abuse after her twins tested positive for cocaine at birth. She was acquitted of the child abuse charges, because Florida law does not consider a fetus to be a child. But she was convicted of delivering a controlled substance to a minor, based upon the sixty to ninety seconds during the birth when the babies were out of the birth canal and the umbilical cords were still attached. N.Y. Daily News, Aug. 11, 1989, at A23, col. 2 (misnaming the defendant, but quoting the assistant state's attorney who prosecuted the case). The Daily News article detailed charges against a pregnant Connecticut woman who was charged with "risk of injury to a minor" after she swallowed a quarter-ounce of cocaine as she was about to be arrested. *Id.*

4. See *infra* note 109 and accompanying text.

5. For examples of sanctions being imposed in various jurisdictions, see the sources cited *supra* note 1 (Florida and Washington, D.C.); *supra* note 3 (Connecticut, South Carolina, and Massachusetts), *infra* note 108 (Illinois); *infra* notes 100-108 (New York). The aforementioned sources all deal with judicial responses to the problem; for a

of the problem, it also indicates an insensitivity and lack of understanding of the causes underlying maternal drug abuse.

This Note will show that criminal sanctions are the least effective way to deal with maternal substance abuse, and will focus on the issue of illicit drug abuse by pregnant women.⁶ Part I will discuss the existence of a state interest in the fetus, as defined by the abortion cases. Part II will discuss the problems inherent in using the abortion-defined state interest in the context of fetal abuse statutes. Part III will consider the effects of fetal abuse statutes on a woman's rights, and the problems which arise in such a situation. Part IV will discuss the issue of a woman's right to privacy, equal protection and due process considerations, and the implications of state control of a pregnant woman's behavior during her nine months of pregnancy. Finally, this Note will conclude that the imposition of criminal sanctions is the wrong approach to an unfortunate situation, that less intrusive approaches will be more successful, and that all interests concerned will be better served by intervention and treatment programs which are more cognizant of all the factors giving rise to the problem. The appropriate response to maternal drug abuse is to focus on education, intervention, and rehabilitation, not retribution.

I. THE STATE'S INTEREST IN THE FETUS, AS DEFINED BY THE ABORTION CASES

The landmark case of *Roe v. Wade*,⁷ defines and limits the existence of a legitimate state interest in protecting the potential human life. When the state seeks to control the conduct of a pregnant woman for

discussion of legislative responses, see *infra* notes 116-29 and accompanying text.

6. The use of licit drugs, such as alcohol or tobacco, present problems similar in effect, but this Note will not deal with the abuse of these substances. Both substances are legal, and highly regulated, insofar as there are laws limiting a person's right to use either substance. Alcohol abuse during pregnancy can result in Fetal Alcohol Syndrome (FAS), and the dangers of smoking during pregnancy has compelled the Surgeon General of the United States to require warnings to be printed on cigarette packages warning of the dangers of smoking during pregnancy. Notwithstanding these facts, the vast majority of criminal cases brought against women for substance abuse during pregnancy involves illicit drugs, a less socially-acceptable addiction, and a behavior more amenable to the imposition of criminal sanctions, in the view of fetal abuse law advocates. Moreover, the use of illegal drugs, especially those taken intravenously, puts the pregnant mother, and thus her fetus, at risk of contracting the Acquired Immune Deficiency Syndrome (AIDS) virus.

7. 410 U.S. 113 (1973).

the purpose of protecting her fetus, the legitimacy of the state interest in that fetus must be examined.⁸ Of particular concern is the invasion by the state into a very personal aspect of a woman's existence, whether such invasion is legitimate and in the best interests of the mother, society, and fetus.

The plaintiff in *Roe* challenged a Texas statute which criminalized abortion, except where necessary to save the life of the mother.⁹ In deciding the case, the United States Supreme Court was faced with the challenge of resolving the inherent conflict between two competing interests, the privacy interests of the pregnant women seeking to terminate their pregnancies and the interest of the individual states in prohibiting consensual abortions.¹⁰ In the Court's determination, the decision to undergo an abortion was the exercise of a constitutionally protected right, grounded in the right to privacy.¹¹ The Court, while declining to "resolve the difficult question of when life begins,"¹² found that a fetus is not entitled to the fourteenth amendment protections accorded a "person."¹³ Nevertheless, the Court determined that the state does have a legitimate interest in protecting the potential life of the fetus.¹⁴

In acknowledging the existence of a legitimate state interest, the Court declared that the constitutional right to abortion,¹⁵ while a fundamental right,¹⁶ was "inherently different"¹⁷ from previously declared fundamental rights such as marital intimacy, contraception, and procreation.¹⁸ The right to have an abortion, the Court found, is in direct conflict with another interest, that of the state to protect potential life. It was from this acknowledgement that the viability issue, the point where the state's interest arises, emanated.¹⁹ The Court held that a

8. *Id.* at 154.

9. *Id.* at 117-18 n.1.

10. *Id.* at 148-56.

11. *Id.* at 153.

12. *Id.* at 159.

13. *Id.* at 158.

14. *Id.* at 162.

15. The Court concluded that the right of privacy, which is founded in the fourteenth amendment's concept of personal liberty, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

16. See *infra* note 150 and accompanying text.

17. *Roe*, 410 U.S. at 159.

18. *Id.*

19. *Id.* at 163-64.

state's interest does not become "compelling" (important enough so that the state may act to protect its interests) until the point of viability.²⁰ Therefore, the state could not act to prohibit pre-viability abortions for the sole reason of preserving a fetus' potential life.²¹

As the Court stated, the interest of the mother in procuring an abortion and the interest of the state in protecting the potentiality of life "are separate and distinct [and each interest] grows in substantiality as the woman approaches term" ²² But in actuality, it appears that the interest which grows as term approaches is solely the interest of the state, at the expense and to the detriment of the mother's privacy rights.²³ The Court summarized:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the second trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedures in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.²⁴

Thus, in the first time period the pregnant woman's privacy rights are paramount and, the state's interest being non-existent, the state has no right or power to interfere in the exercise of the choice of whether to abort. In the second time period, a legitimate state interest exists, but

20. *Id.* at 164.

21. *Id.* at 164-65. The Supreme Court noted that regulations restricting or limiting a "fundamental right" may be justified only by a "compelling state interest" and that any laws restricting or limiting the fundamental right must be drafted so as to address only the compelling state interest sought to be protected by the laws. *Id.* at 155.

22. *Id.* at 162-63.

23. *See infra* note 25.

24. *Roe*, 410 U.S. at 164-65.

only that of protecting the health of the mother. Since this second time period is pre-viability,²⁵ the state has no constitutionally valid "compelling interest" in protecting the fetus' life. Therefore, the state can only act in a manner which has the health of the mother as its "only legitimate state interest."²⁶ It is only after the point of viability, defined as twenty eight weeks, that the third period exists and the state has a constitutionally compelling interest in protecting the potential life of the fetus.²⁷ Thus, during pregnancy, the woman begins with a period of twelve weeks of complete autonomy, from conception to the end of the first trimester. The second period, of approximately sixteen weeks between the end of the first trimester to the point of viability, the woman's personal autonomy is limited by the state's interest in protecting her health. In the third period of post-viability, her personal autonomy is at its lowest ebb, and the state's interest in either her health or the health of the fetus supersedes her personal autonomy.²⁸

The trimester rule, while subject to criticism,²⁹ has, until the recent decision in *Webster v. Reproductive Health Services*,³⁰ withstood

25. See *supra* notes 17-18 and accompanying text.

26. *Id.*

27. *Roe*, 410 U.S. at 162-65.

28. One commentator argues that this progression *vis-a-vis* a pregnant woman's autonomy makes sense. See Mathieu, *Respecting Liberty and Preventing Harm: Limits of State Intervention in Prenatal Choice*, 8 HARV. J.L. & PUB. POL'Y 19 (1985). Ms. Mathieu argues that a woman has two levels of obligation to a future child; the first arises upon becoming pregnant. *Id.* at 36-37. At this stage, it is argued, the woman owes a duty of care like that owed a stranger, "to refrain from causing harm and, to some extent, to trying to protect or remove the harm." *Id.* The second level arises when the option of abortion has been forsaken, and for this period the woman places herself in a "special relationship with her future child, a relationship that carries certain inherent obligations similar to those of any parent toward his or her child." *Id.* at 37. *Accord In re A.C.*, 533 A.2d 611 (D.C. 1987), *vacated*, 539 A.2d 203 (D.C. 1988) "[A]s a matter of law, the right of a woman to an abortion is different and distinct from her obligations to the fetus once she has decided not to timely terminate her pregnancy." *A.C.*, 533 A.2d at 614 (citing Mathieu, *supra*, at 24 n.16).

29. See generally Justice O'Connor's dissent in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 454 (1983) (O'Connor, J., dissenting) ("The State's interest in maternal health changes as medical technology changes;") and Justice Scalia's concurrence in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Scalia, J., concurring) ("[I]t thus appears that the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade*, must be disassembled door-jamb by door-jamb, . . . no matter how wrong it may be.").

30. 492 U.S. 490 (1989).

legal challenges and provided grounds for striking down a variety of abortion laws. The Supreme Court has applied the bright line test provided by the *Roe* Court's viability standard to strike down laws such as those giving fathers the right to veto abortions,³¹ exposing doctors to criminal sanctions for erroneous determinations as to viability,³² requiring any post-first trimester abortion to be performed in a hospital,³³ and requiring physicians to utilize techniques in third trimester abortions which provide the best opportunity for the fetus to be aborted alive.³⁴ In *Webster*, the Supreme Court took a major step in extending the state interest prior to the point of viability as defined by *Roe*. The Missouri law at issue, enacted in 1986, provided that tests were required to determine if the fetus was viable:

[The law] creates what is essentially a presumption of viability at twenty weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion. It also directs the physician's determination as to viability by specifying consideration, if feasible, of gestational age, fetal weight, and lung capacity.³⁵

Chief Justice Rehnquist, joined by Justices White and Kennedy, found that the test required by the second part of the statute "permissibly furthers the State's interest in protecting potential human life"³⁶ Because this statute allows testing and procedures whose goal is to protect potential human life prior to the twenty eighth week, its designation of the twentieth week as the point at which the state's interest becomes compelling called into question its constitutionality. Based upon this fact, it had been attacked as a clear violation of the standard established by *Roe v. Wade*.³⁷ The plurality's decision to uphold the statute on this point was predicated on their "throw[ing] out *Roe*'s trimester

31. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

32. *Colautti v. Franklin*, 439 U.S. 379 (1979).

33. *City of Akron*, 462 U.S. at 416.

34. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

35. *Webster v. Reproductive Health Services*, 492 U.S. 490, 515. (1989).

36. *Id.* at 519-20.

37. *Id.* at 515.

framework."³⁸ The plurality, while acknowledging *stare decisis* as a cornerstone of the American judicial system, noted the Court's history of reconsidering earlier decisions which had proven "unsound in principle and unworkable in practice,"³⁹ and declared that "the *Roe* trimester framework falls into this category."⁴⁰

The plurality cited Justice White's opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*⁴¹ wherein Justice White claimed the trimester framework of *Roe* had rendered the Court the "ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States."⁴² The plurality also noted the district court's finding that while twenty three and one-half to twenty four weeks of gestation is the earliest point where a reasonable possibility of viability exists it was also found that there may be a four week margin of error in estimating gestational age "which supports testing at twenty weeks."⁴³

As another justification for abandoning the trimester rule of *Roe*,

38. *Id.* at 541 (Blackmun, J., dissenting).

39. *Id.* at 518.

40. *Id.*

41. 476 U.S. 747 (1986).

42. *Webster*, 492 U.S. at 519.

43. *Id.* at 516. While the state may have an interest in a fetus as early as the 20th week, there are limits to what medical testing can disclose at that point of development. See Kolata, *Doctor's Tools Limited in Testing Fetal Vulnerability*, N.Y. Times, July 4, 1989, § 1, at 10, col. 5 (the limiting factor in determining whether a premature baby will live is the maturity of the lungs; but before the twenty third or twenty fourth weeks, a fetus' lungs are too underdeveloped to support life. Dr. Robert Sefalo, professor of obstetrics and gynecology and director of the Maternal-Fetal Medicine Division of the University of North Carolina School of Medicine, is quoted as saying that at twenty weeks of gestation "the lung test is not useful," and that doctors usually do not look at lung development until thirty two weeks of gestation). Further clouding this issue of viability in the drug abuse during pregnancy context is the consideration that the drug abuse itself appears to retard intrauterine development, so the result may be a fetus whose gestational age may suggest viability, under either *Webster* or *Roe* limits, but whose developmental age is much lower than its gestational age. See generally Chouteau, *Effects of Cocaine Abuse on Birth Weight and Gestational Age*, 72 OBSTET. & GYNECOL. 351 (1988) (cocaine abuse during pregnancy appears to be a significant predictor of low birth weight and early gestational age); Mitchell, *Ultrasonic Growth Parameters in Fetuses of Mothers with Primary Addiction to Cocaine*, 159 AM. J. OBSTET. & GYNECOL. 1104 (1988) ("[A]ddicted fetuses more frequently exhibit intrauterine growth retardation patterns.").

the plurality in *Webster* cited two dissenting opinions in *Thornburgh*⁴⁴ and stated "we do not see why the state's interest in protecting human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."⁴⁵

While the *Webster* decision did not explicitly overrule *Roe v. Wade*,⁴⁶ it has opened the door to further restrictions on abortion by state legislatures inclined to limit *Roe*. In explicitly rejecting the trimester framework, the Supreme Court implicitly stated its belief that the state interest could be declared compelling at any point of development, and echoed the increasingly prevalent theory that life begins at the instant of conception.⁴⁷ And if one accepts the proposition that life begins at conception, the issues of fetal rights, fetal abuse statutes, and intervention into the life and activities of a pregnant woman will surely become more compelling. Accepting the premise that the state has an interest in protecting the developing fetus in the context of maternal substance abuse, the issue of viability from the abortion cases may be interpreted as providing a justification for intervening in the behavior of the pregnant woman in order to protect her fetus. But, as will be explained below,⁴⁸ such an interpretation is not valid, and not effective in promoting fetal health.

II. THE PROBLEMS INHERENT IN APPLYING STATE INTERESTS IN THE FETUS AS DEFINED BY THE ABORTION CASES IN THE FETAL ABUSE CONTEXT

While *Roe v. Wade*⁴⁹ defines the timetable under which the

44. Justice White, dissenting, wrote "[t]he State's interest, if compelling after viability, is equally compelling before viability." *Thornburgh*, 476 U.S. at 795 (White, J., dissenting) (footnote omitted); Justice O'Connor, also dissenting, wrote "[t]he State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy.'" *Id.* at 828 (O'Connor, J., dissenting) (citing *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting)).

45. *Webster*, 492 U.S. at 519.

46. "This case therefore affords us no occasion to revisit the holding of *Roe* . . . and we leave it undisturbed." *Id.* at 521.

47. *Id.* at 514-22; see also *Roe v. Wade*, 410 U.S. 113, 161-62, 164-65 (1973) (articulated trimester system).

48. See *infra* notes 60-66 and accompanying text.

49. See *supra* notes 19-21 and accompanying text.

state's interest increases in the life of the unborn, it has been argued that the trimester framework has no application outside of the limited context of non-therapeutic abortions.⁵⁰ As one commentator has noted: "[i]n the fetal abuse context, the state's interests are not preservation of the mother's health and the protection of potential life against [abortion], but the enhancement of the born child's quality of life through protection of the fetus from reckless or negligent harm."⁵¹

The problem with applying the abortion concepts of viability and compelling state interests to drug abuse during pregnancy is that the interests involved in abortion and fetal protection are very different.⁵² *Roe* and its progeny establish only the point up to which the woman's privacy rights are offset by a countervailing state interest sufficient to

50. Note, *Maternal Rights and Fetal Wrongs: The Case against the Criminalization of Fetal Abuse*, 101 HARV. L. REV. 994, 997 (1988) [hereinafter Note, *Maternal Rights*]; Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1220 (1987) [hereinafter Note, *Maternal Substance Abuse*].

51. See Note, *Maternal Rights*, *supra* note 50, at 997.

52. See Field, *Controlling the Woman to Protect the Fetus*, 17 LAW MED. & HEALTH CARE 114, 123-24 (Summer 1989) ("[t]he different . . . interest[s] explain why the trimester system that applies to abortion has no application to controls on the mother-to-be."); Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 15 (1987) (In the medical treatment context, "[i]nocation of *Roe* as an authority for disregarding a woman's objection to surgery demands a serious distortion of that landmark case."); Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 612 (1986) ("[t]he 'state purpose' is not to preserve the life of the fetus against the pregnant woman's will, but to prescribe a woman's behavior during her *wanted* pregnancy.") (emphasis in original); Mathieu, *supra* note 27, at 32 ("A pregnant woman's obligation to act for the sake of her future child is independent of her right to get an abortion."); Rush, *Prenatal Caretaking: Limits of State Intervention With and Without Roe*, 39 U. FLA. L. REV. 55, 64 (1987) ("With the tenor of the *Roe* opinion, concerned simply with determining if and when the fetus could be destroyed, it is difficult to ascribe to the *Roe* opinion a state interest in the fetus' quality of life."); Note, *Maternal Rights*, *supra* note 50, at 997 (The state's interest is not the "protection of potential life against [abortion], but the enhancement of the born child's quality of life . . ."); Note, *Maternal Substance Abuse*, *supra* note 50, at 1220 (stating that "[R]oe may be inapposite."). But see Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97, 115 (1985) (The *Roe* court's "use of the term 'potential life' can be read to connote only the state's interest in assuring that the unborn of today will be born and live a healthy life tomorrow.").

deny her the right to obtain a non-therapeutic abortion,⁵³ and that at no earlier point than viability can the state act in a manner which benefits the fetus.⁵⁴ The crux of the abortion cases, therefore, is the state's interest in the fetus which will not be born, if not for state intervention. The stated goal of advocates of fetal abuse sanctions, on the other hand, does not concern itself at all with the right to abortion; rather the goal is healthy birth.⁵⁵ Clearly, the latter interest is stronger, in most instances, for all parties involved.⁵⁶

The abortion issue is one which is politically charged, and involves deep moral, ethical, and religious beliefs.⁵⁷ The issue of children being born healthy, and in a position to lead productive and fulfilling lives encompasses these same beliefs, and also gives rise to substantial economic considerations.⁵⁸ Senator Pete Wilson of California has stated in Congress that 375,000 babies are born to substance abusing mothers annually,⁵⁹ and that the cost of providing care to those babies exceeds \$13 billion per year.⁶⁰ Obviously, the short-term costs are astronomical, but when long-term costs of treatment and support of these damaged children is considered, the cost soars even further.⁶¹

53. *Roe* had established the twenty eighth week as the point the state could act to protect the fetus, and *Webster* upheld a Missouri statute moving the point back to the 20th week. See *supra* notes 21 and 33 and accompanying text.

54. See *supra* notes 21-24, 33, 36, 40-42, and accompanying text.

55. See *supra* notes 50 and 52 and *infra* note 117 and accompanying text.

56. See Parness, *supra* note 52, at 98 (the goal is to ensure that "the unborn will have the chance to live a whole or unimpaired life after birth.")

57. See *Roe v. Wade*, 410 U.S. 113, 141-63 (1973) (for a discussion of the positions of various *amici* on the abortion issue); Justice Scalia's concurrence in *Webster*, "[w]e can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us . . . to follow the popular will." *Webster v. Reproductive Health Services*, 492 U.S. 490, 533-37 (1989) (Scalia, J., concurring).

58. See Note, *Maternal Rights*, *supra* note 50, at 1121-22.

59. 135 CONG. REC. S9320 (daily ed. Aug. 1, 1989) (statements of Sen. Wilson).

60. *Id.* Representative George Miller, (D., California), estimates that from 1988 to 1991 one million drug-exposed babies will have been born, requiring \$20,000 to \$100,000 each in intensive medical care just in infancy. Diesenhouse, *Drug Treatment is Scarcer Than Ever for Women*, N.Y. Times, Jan. 7, 1990, at E26, col. 6.

61. For example, drug abuse during pregnancy has been associated with an increase in the number of children placed in foster care. It is estimated that for the period from June 1987 to June 1990, there will have been a 28.6% increase in the number of children in foster care. Landa, *Crack's Sad Harvest: Kids in Foster Care*, N.Y. Daily News, Feb. 5, 1990, at A11, col. 1. According to the American Public Welfare

In the context of narcotics use during pregnancy, the evidence is compelling that *in utero* exposure has wide ranging and long lasting effects on the fetus and child - with some results being low birth weight, poor neurological and physical development, and socialization problems.⁶² Based upon the evidence of the effects of drug abuse on fetal development, the problem implicit in applying *Roe's* trimester or viability standards becomes evident, and reliance on abortion defined standards proves insupportable. Even under *Webster's* interpretation of

Association's nationwide survey of child welfare agencies, New York and California account for 30% and 25%, respectively, of that projected increase. *Id.* According to Douglas Besharov, resident scholar with the American Enterprise Institute in Washington, D.C., who undertook this study with the American Public Welfare Association, "[s]ince these kids are going to grow up to be future New Yorkers, it does not bode well for our community life. . . . We're looking at a further drag on mental health and social service resources in the city at a time when we can least afford it." *Id.*; see also Blakeslee, *Crack's Toll on Infants Found to be Emotional Devastation*, N.Y. Times, Sept. 17, 1989, at A1, col. 2 and A26, col. 3 (reporting studies by Dr. Ira Chasnoff, Director of the Perinatal Center for Chemical Dependence at Northwestern University School of Medicine in Chicago and Dr. Judith Howard, Director of the Suspected Child Abuse and Neglect Team at the University of California at Los Angeles, which indicate that as these infants reach school age, intervention will be necessary, since "[g]ood school and home environments are crucial for these children They will need lots of structure and individual attention."). For comprehensive discussions of the effect of parental substance abuse on children's development, see Howard, *The Development of Young Children of Substance-Abusing Parents: Insights from Seven Years of Intervention and Research*, ZERO TO THREE, June 1989, at 8 and NATIONAL ASSOCIATION FOR PERINATAL ADDICTION RESEARCH AND EDUCATION [NAPARE], NEWS, (press release dated Sept. 17, 1989) (detailing Dr. Ira Chasnoff's speech to NAPARE's National Training Forum on Drugs, Alcohol, Pregnancy, and Prevention, delivered Sept. 19, 1989 in Miami, Florida).

62. See generally Bingol, *Teratogenicity of Cocaine in Humans*, 110 J. PEDIATRICS 93 (1987) (reduced birthweight, increased stillbirth rate related to abruptio placentae, and a higher malformation rate); Goldin, *Cocaine Abuse in Pregnancy*, 262 J. A.M.A. 771 (Aug. 11, 1989) (low birth weight and poor neurological development); Howard, *Cocaine and its Effects on the Newborn*, 31 DEV. MED. CHILD NEUROL. 255 (1989) (infants' behavior is deviant, poor attention span, and rapid shifts between irritability and lethargy); Schnoll, *Substance Abuse*, 261 J. A.M.A. 2890 (May 19, 1989) (low birth weight, genitourinary malformations, and intrauterine strokes, if cocaine ingested shortly before term); Telsey, *Cocaine Exposure in a Term Neonate: Necrotizing Enterocolitis as a Complication*, 27 CLINICAL PEDIATRICS 547 (1988) (spontaneous abortions, preterm labor, cerebral infarctions, and neurobehavioral and neurophysiologic abnormalities); Wachtsman, *What Happens to Babies Exposed to Phencyclidine (PCP) In Utero?*, 15 AM. J. DRUG & ALCOHOL ABUSE 31 (1989) (babies exposed to PCP were shown to have temperament and sleep problems, as well as small stature).

the state's interest (albeit only in preserving potential life of the fetus) as compelling at a point as early as twenty weeks of gestation,⁶³ significant harm will have been done within those twenty weeks, so the imposition of criminal sanctions would serve little preventative function and appear to be solely vindictive.⁶⁴ Also, if a woman is faced with criminal sanctions, she will likely be less inclined to seek prenatal care, which will further endanger her fetus' chances for healthy development in the womb and a productive life.⁶⁵

As long as abortion remains an option for women, the imposition of sanctions, or threat of sanctions for fetal abuse during pregnancy raises serious concerns. Arguably, a pregnant woman could abuse drugs during the early part of her pregnancy and then, if the threat of sanctions is realized, or implemented, the woman could avail herself of the abortion option, and theoretically remove herself from the criminal justice system. The perverse result of this would be the abortion of fetuses which have sustained substantial damage due to maternal addiction, as well as the abortion of fetuses with minimal damage due to infrequent drug abuse by the pregnant mother.⁶⁶ This horrific situation, although hypothetical, is

63. *Webster v. Reproductive Health Services*, 492 U.S. 490, 518-19 (1989).

64. In *Robinson v. California*, 370 U.S. 660 (1962), the Court struck down a statute which made the mere status of being an addict a crime, finding that the statute violated the eighth and fourteenth amendments as cruel and unusual punishment. *Id.* at 667. In his concurring opinion, Justice Douglas wrote, "[w]e would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." *Id.* at 678 (Douglas, J., concurring). While drug abuse during pregnancy is admittedly not a "status" as contemplated by *Robinson*, the underlying causes are the same; thus Justice Douglas' observations should still be considered. See generally Chavkin, *Help, Don't Jail, Addicted Mothers*, N.Y. Times, July 18, 1989, § 1, at 21, col. 2. For a discussion of the effects of alcohol consumption during pregnancy on the fetus, see Rosenthal, *When a Pregnant Woman Drinks*, N.Y. Times, Feb. 4, 1990, § 6 (Magazine), at 30 (the fetus experiences physical malformations from heavy drinking in the first trimester and growth retardation from drinking in the third trimester, brain damage can occur at any time).

65. See *infra* notes 244, 247, 249-50, and accompanying text.

66. Illinois State Senator Richard Kelly, an abortion opponent, while believing a child should have a right to take some sort of civil action against its mother for injuries due to illegal drug use during pregnancy, will not introduce a bill to that effect out of fear that such a law would lead to more abortions. Marcotte, *Crime and Pregnancy*, A.B.A. J. 14 (Aug. 1989). Senator Kelly's concern over the effect of a civil cause of action gives rise to another issue which has been pointed to as a justification for criminal sanctions for drug abuse during pregnancy. Several commentators note that prenatal harm is now recognized as a legitimate tort cause of action against either the mother or

a real possibility. The pregnant mother would face a choice between her own liberty and the life of her fetus. Any state intervention which could conceivably lead a woman to choose an abortion has, as the above hypothetical situation indicates, put the pregnant mother and her fetus in an "adversarial position"⁶⁷ which can hardly be characterized as beneficial to the development, birth, and rearing of healthy children.⁶⁸

One aspect of the Court's decision in *Webster*⁶⁹ which substantially broadened *Roe*'s possible application outside the context of abortions was the *Webster* Court's refusal to invalidate the preamble of the Missouri abortion law at issue.⁷⁰ The Missouri court of appeals had invalidated the preamble,⁷¹ relying on *Roe* and its progeny, which had established that "a state may not adopt one theory of when life begins to justify its regulation of abortions."⁷² The United States Supreme Court in *Webster* decided that the court of appeals "misconceived" the meaning of dicta in *City of Akron v. Akron Center for Reproductive Health*,⁷³ and

a third party, see, e.g., Mathieu, *supra* note 28, at 24-28; Parness, *supra* note 52, at 161-62; Rush, *supra* note 52, at 61-4, Note, *Maternal Substance Abuse*, *supra* note 50, at 1236-37. These commentators, in effect, argue that criminal sanctions are a logical adjunct to this civil liability. Nevertheless, it is the author's contention that the existence of a civil remedy cannot justify the imposition of criminal sanctions for several reasons. First, while the threat of civil liability to a mother may be enough to dissuade her from engaging in behavior which is potentially harmful to her fetus, more importantly it is not likely to compel her to avoid prenatal care in an attempt to avoid detection and the imposition of criminal sanctions. See *infra* notes 237-48 and accompanying text. Second, the threat of civil liability is probably not a viable deterrent to many women because, as one commentator noted, "[i]t seems unlikely that such suits would be brought in the first place absent availability of liability insurance." Note, *The Fetal Rights Controversy: A Resurfacing of Sex Discrimination in the Guise of Fetal Protection*, 57 UMKC L. REV. 261, 264 n.16 (1989) [hereinafter Note, *Fetal Rights Controversy*]. If women are not obtaining medical care, one major reason is likely to be the lack of medical insurance, and if one cannot afford medical insurance, it is unlikely one can afford, or would obtain, liability insurance.

67. See Field, *supra* note 52, at 124-25; Johnsen, *supra* note 52, at 613; Note, *Maternal Rights*, *supra* note 50, at 1009.

68. See sources and material cited *supra* note 66.

69. 492 U.S. 490 (1989).

70. *Id.* at 506-07.

71. *Reproductive Health Services v. Webster*, 851 F.2d 1071, 1076-77 (8th Cir. 1988), *rev'd sub nom.*, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

72. *Id.* at 1075, (quoting *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 444 (1983)).

73. 462 U.S. 416, 444 (1983).

mistakenly interpreted the meaning of the preamble as expressing a "value judgment" favoring childbirth over abortion.⁷⁴ Because the Supreme Court reasoned the meaning of the preamble had not been "applied to restrict the activities of the appellees in some concrete way,"⁷⁵ the Court saw no need to pass judgment on the constitutionality of the preamble.⁷⁶ This implicit acceptance of the Missouri preamble has already found adherents. First, in a divorce proceeding, a state appellate judge in Tennessee found that seven frozen embryos, fertilized in anticipation of *in vitro* fertilization prior to the divorce proceedings, were "children," as opposed to property, and awarded "custody" to the mother.⁷⁷ Secondly, in Pasco, Florida, a county court judge refused a woman's request for a postponement of her sixty day jail sentence so she could first obtain an abortion.⁷⁸ The judge was quoted as saying "[d]o you want a continuance so you can murder your baby, is that it?"⁷⁹ While the Florida judge's reasons for the denial are not clear, this quote implies the denial was more the result of a personal opinion on the subject of abortion, and possibly on the question of when life begins.

This second example also raises the specter of another major effect of *Webster*, whereby the plurality redefined the nature of the privacy interest in abortion. The Court declared the right to obtain an abortion to be a "liberty interest protected by the Due Process Clause,"⁸⁰ as opposed to a "fundamental right" or "limited constitutional right" as established by *Akron* and *Roe*.⁸¹ In redefining the abortion right as a "liberty interest" the Court applied a more lenient "permissibly furthers"

74. *Webster*, 492 U.S. at 506-07.

75. *Id.*

76. *Id.*

77. The woman wanted the embryos to continue her attempts to become pregnant; the man opposed that use, and preferred the embryos be destroyed. *Davis v. Davis*, No. E-14496 (Tenn. App. 1989) (LEXIS, States library, Tenn. file). The judge specifically referred to the *Webster* decision, stating that the application of *Roe* and *Webster* is limited to abortion cases, and claimed that life begins at conception and found the seven frozen embryos to be human beings. *Id.* at 30-32.

78. *Court Rejects Plea for Abortion Before Jail*, N.Y. Times, Oct. 29, 1989, at A3, col. 6 (Judge Dan C. Rasmussen of Pasco County Court).

79. *Id.* The defendant had asked for the continuance because she was afraid she may get out of jail too late for a safe abortion. *Id.* After the defendant pleaded financial inability to care for a baby, the judge suggested she carry it to term and put it up for adoption. *Id.*

80. *Webster*, 492 U.S. at 520.

81. *Id.*

standard rather than the stricter standard imposed by *Roe* and its progeny, which required a statute to be "narrowly drawn to address only the legitimate state interest."⁸² The *Webster* standard requires only that a statute be "reasonably designed" to address the legitimate state interest.⁸³ By redesignating the privacy interest to a liberty interest, the Court was able to apply a less strict standard by which to evaluate the "fit" between the statute at issue and the state interest it addresses, and in effect uphold a statute where the "fit" is not as snug as the more strict standard of scrutiny would require.

What the reasoning in *Webster* illustrates, in a large sense, is the Court's narrow perception of a woman's privacy rights, particularly in the reproductive sphere, and a significant retrenchment in the direction of limiting a woman's privacy rights in reproduction. Justice Blackmun characterized it as an "implicit invitation to every state to enact more and more restrictive abortion laws, and to assert their interest in potential life as of the moment of conception."⁸⁴ The decision, although rendered in the abortion context, provides ample grounds for considering and speculating on the Supreme Court's possible interpretation of fetal abuse statutes, because the *Webster* treatment, of both the issues of viability and when life begins, addresses due process and equal protection issues which give rise to special considerations when the issue of criminal sanctions for drug abuse during pregnancy is raised.

III. THE EFFECTS OF FETAL RIGHTS ON THE RIGHTS OF PREGNANT WOMEN

The Supreme Court has never explicitly accorded the protections and rights provided a "person" under the fourteenth amendment to a fetus.⁸⁵ Clearly, were a fetus considered a person in the abortion

82. *Id.* at 519. The Court declared the Missouri law to be "reasonably designed" to address a legitimate state interest in controlling abortions. *Id.* at 521. This test is similar to the "rational relation" test that Chief Justice Rehnquist advocated in his dissenting opinion in *Roe v. Wade*, 410 U.S. 113, 171, 173 (1973) (Rehnquist, J., dissenting).

83. *Webster*, 492 U.S. at 520-21.

84. *Webster*, 492 U.S. at 556 (Blackmun, J., dissenting).

85. *Roe*, 410 U.S. at 158. After noting various laws allowing a live born child an action sounding in tort for prenatal injuries, allowing the parents of a stillborn child to maintain a wrongful death action arising from prenatal injuries, and an unborn child's legal right to inherit property, the *Roe* Court went on to say that "the unborn have never been recognized as persons in the whole sense." *Id.* at 161-62.

context, a veritable Pandora's Box would be opened, because the liberty interests of the two entities, ideally in harmony, could in reality be in opposition. The *Roe* Court, probably cognizant of this fact even in defining the point where a state's interest becomes compelling, declined to declare a viable fetus a person.⁸⁶

Webster v. Reproductive Health Services did not explicitly address the issue of "personhood" for the fetus,⁸⁷ but rather changed the time frame within which the state could interpose its interests and prohibit the mother from obtaining an abortion.⁸⁸ Advocates for fetal rights, aware of the damage drug abuse inflicts on the fetus, suggest that when quality of life, as opposed to abortion, is at issue, a fetus should be granted full legal protection, and not merely post-viability.⁸⁹ Proponents rely on the ability of the state to intervene after birth with child abuse and neglect proceedings to argue for the extension of the doctrine of *parens patriae*⁹⁰ into the womb. Also, support for fetal rights is claimed to exist in the line of cases which allow parties to force caesarean surgery on pregnant women against their will,⁹¹ and other forced medical treatment, such as

86. *Id.* at 158.

87. The preamble to the Missouri law in question explicitly addressed the personhood issue: it "sets forth 'findings' by the Missouri legislature that '[t]he life of each human being begins at conception,' and that '[u]nborn children have protectable interests in life, health, and well-being.'" *Webster*, 492 U.S. at 504 (citing MO. REV. STAT. §§ 1.205.1(1),(2) (1986)).

88. *Id.* at 518-19.

89. See generally Mathieu, *supra* note 28, at 37 (a future child has important interests which must be weighed against the mother's interests); Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1, 66 (1984) (state intervention should be authorized throughout the vulnerable period, including pre-viability); Parness, *supra* note 52, at 114 ("[T]he states retain the option of according dignity to the unborn at every stage of development."); Note, *Maternal Substance Abuse*, *supra* note 50, at 1226-27 (advocating intervention throughout pregnancy either by using existing child abuse statutes or drafting new laws specifically tailored for that purpose).

90. *Parens patriae* "[r]efers traditionally to [the] role of [the] state as guardian of persons under legal disability It is a concept of standing utilized to protect these quasi-sovereign interests such as health, comfort and welfare of the people." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). The fact that this definition uses the words "person" and "people" has not stopped several courts from extending the doctrine into the womb, notwithstanding the fact that a fetus has never been declared to be a "person." See *supra* notes 77, 86-88.

91. *In re A.C.*, 533 A.2d 611 (D.C. 1987), *vacated*, 539 A.2d 203 (D.C. 1988) (terminally ill woman forced to undergo emergency caesarean section; both she and the child died); see also *Jefferson v. Griffin Spalding County Hospital*, 247 Ga. 86, 274 S.E.2d 457 (1981) (temporary custody of *in utero* fetus granted to State Department of

blood transfusions.⁹² Such invasive procedures, in addition to increasing the risk of harm to the pregnant woman, raise constitutional issues of privacy, bodily integrity and freedom of religion, to mention a few.⁹³

Similarly, the imposition of criminal sanctions for fetal abuse raises several constitutional issues, such as privacy, bodily integrity, and cruel and unusual punishment.⁹⁴ There are two means by which sanctions are or could be imposed, and both have constitutional implications. The first means, and the one most often applied due to the lack of development and enactment of specifically tailored statutes, is the application of present child abuse statutes. The second means is the enactment of specifically tailored laws dealing specifically with drug abuse during pregnancy.

An early application of a standard child abuse statute was in 1977 in *Reyes v. Superior Court of San Bernadino County*.⁹⁵ In *Reyes*, the court issued a preemptory writ of prohibition against prosecuting the defendant who, against advice of a nurse, had continued to use heroin and avoid prenatal care through her pregnancy.⁹⁶ She subsequently gave birth to addicted twins.⁹⁷ The court reasoned that the statute as written applied only to living children "susceptible to care and custody," and that the legislature had intended to exclude the unborn from the statute by

Human Resources, along with authority to approve caesarean section if necessary); see also Field, *supra* note 52 at 117-18, (discussing *In re A.C.*, as well as other cases where caesarean sections were performed on women who objected due to fear, preference for natural childbirth, or religious reasons).

92. See generally *Raleigh-Fitkin Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964) (the court appointed a guardian for the fetus, with power to consent to blood transfusions, because the mother, a Jehovah's Witness, had refused such treatment on religious grounds). For a comprehensive discussion of medical intervention to treat a fetus during pregnancy, see Gallagher, *supra* note 52.

93. Field, *supra* note 52 at 118 n.38 (citing Bowes and Selg st d, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 59 OBSTET. AND GYNECOL. 209-211, (July 1981)). Aside from a paternalistic motive, it is difficult to reconcile those cases allowing forced medical treatment upon a woman with those which forbid the state from pumping a criminal suspect's stomach or removing a bullet from a suspect's body for evidence. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952) (one's bodily integrity right outweighs state interest in pumping stomach of suspect for evidence); *Winston v. Lee*, 470 U.S. 753 (1985) (one's bodily integrity precludes operation to remove bullet from suspect's body).

94. See *supra* notes 87-88, and accompanying text.

95. 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977).

96. *Id.* at 216, 141 Cal. Rptr. at 912-13.

97. *Id.*, 141 Cal. Rptr. at 913.

virtue of the legislature's treatment of the unborn in other statutes.⁹⁸ A similar situation in California occurred in 1985.⁹⁹ Pamela Rae Stewart had been warned that she had a problem pregnancy, and was told by her doctor to stop taking drugs and to stop having intercourse.¹⁰⁰ She continued to take drugs and engage in intercourse, and her son was born with severe brain damage and died six weeks later.¹⁰¹ She was not charged with child abuse, as was the defendant in *Reyes*, but rather with violating a statute which prohibited a parent from wilfully omitting, among other things, medical attention or other remedial care for a child.¹⁰² And while this statute specifically included unborn children in its definition of a child,¹⁰³ the court dismissed the charges on the grounds that "it was not intended to apply to a mother's refusal to obey doctor's orders."¹⁰⁴

The results of these two California cases exemplify the problems such prosecutions present, even in jurisdictions where legislatures have seemingly responded to judicial actions. Other decisions indicate a wide diversity of opinion on the propriety of applying child abuse statutes to prenatal abuse. In 1985, a New York Family Court in *Matter of Smith*¹⁰⁵ found an unborn child to be a person within the meaning of New York's Family Court Act,¹⁰⁶ and that the child, by virtue of the prenatal abuse, was a neglected child.¹⁰⁷ In this case, as in Pamela Rae Stewart's, there was a pattern of substance abuse (alcohol) and a failure to heed suggestions to stop drinking during pregnancy.¹⁰⁸ Furthermore, this woman had a previous child placed in foster care and had been ordered to enter a residential alcohol abuse treatment program.¹⁰⁹ She

98. *Id.* at 218, 141 Cal. Rptr. at 914. The charges were dismissed Feb. 26, 1987. L.A. Times, Feb. 27, 1987, § 1, at 3, col. 3.

99. *California v. Stewart*, No. M508197 (Municipal Ct. San Diego Co., Feb. 26, 1987).

100. Field, *supra* note 52, at 118.

101. For a discussion of this case, see *supra* note 52, at 118. See also Note, *Maternal Substance Abuse*, *supra* note 50, at 1209.

102. Cal. Penal Code § 270 (West 1988).

103. *Id.* See also Field, *supra* note 52, at 127 n.40.

104. *Id.* at 118.

105. 128 Misc. 2d 976, 980, 492 N.Y.S.2d 331, 334-35 (Fam. Ct. 1985).

106. N.Y. Fam. Ct. Act § 1012 (McKinney 1988).

107. *Smith*, 128 Misc. 2d at 980, 492 N.Y.S.2d at 334.

108. *Id.* at 976-77, 492 N.Y.S.2d at 332.

109. *Id.* at 976, 492 N.Y.S.2d at 332.

failed to comply with the court order and admitted consuming approximately ten drinks per day on an average of three or four days per week.¹¹⁰

The result in *Smith* was rejected in 1988 in *Matter of Fletcher*,¹¹¹ another New York Family Court proceeding. Here the newborn tested positive for cocaine and proceedings were commenced to find the child a neglected child.¹¹² The court granted the mother's motion to dismiss, finding the petitioner (Social Services) had failed to state a cause of action.¹¹³ While not deciding the case on the merits, the judge commented on the practice of applying child abuse statutes to women who are still pregnant.¹¹⁴ After noting that a pregnant woman is protected by constitutional rights of privacy and bodily integrity, the judge wrote, in rejecting the applicability of the Family Court Act to prenatal conduct:

I see no authority for the State to regulate women's bodies just because they are pregnant. By becoming pregnant, women do not waive the constitutional protections afforded to other citizens. To carry . . . the argument to its logical extension, the State would be able to supersede a mother's custody right to her child if she smoked cigarettes during her pregnancy, or ate junk food . . . The list of potential intrusions is long and constitute [sic] entirely unacceptable violations of the bodily integrity of women¹¹⁵

As these California and New York cases demonstrate, a successful prosecution under existing child abuse statutes is not a certainty, although the two New York cases indicate that past conduct and behavior may well be a significant factor in determining how courts will look upon the

110. *Id.* at 977, 492 N.Y.S.2d at 332.

111. 141 Misc. 2d 333, 533 N.Y.S.2d 241 (Fam. Ct. 1988).

112. *Id.*

113. *Id.* at 338, 533 N.Y.S.2d at 243-44.

114. *Id.*

115. *Id.* at 337, 533 N.Y.S.2d at 243. Similar concern for the mother's privacy rights was a reason cited for the grand jury's refusal to indict Melanie Green, a Rockford, Illinois woman charged with involuntary manslaughter in the death of her two day old daughter. Doctors had said Green's use of cocaine prior to giving birth caused the baby's brain damage. *Id.* Wilkerson, *Jury in Illinois Refuses to Charge Mother in Drug Death of Newborn*, N.Y. Times, May 27, 1989, § 1, at 10, col. 5.

situation.

Not satisfied with the success of applying existing statutes, advocates of fetal rights are resorting to the second option, that of drafting new statutes dealing specifically with sanctions for pregnant women who damage their fetuses. With the widespread proliferation of drugs in society, and the increasing public awareness of the costs of drug abuse, public sentiment seems to be strongly against drug use and abuse.¹¹⁶ Public officials, courts, and legislators are responding to this public sentiment, most often with criminal sanctions, the least expensive, but also least effective, means possible.¹¹⁷

Commentators who advocate the enactment of new statutes¹¹⁸ generally interpret the *Roe* Court's use of the term "potential life"¹¹⁹ as establishing a state interest "in assuring that the unborn of today will be born and live a healthy life tomorrow."¹²⁰ These commentators, finding present statutes inadequate to provide prevention, deterrence, and punishment, argue that new, specifically drafted statutes are needed to ensure fetal health.¹²¹ Compulsory reporting by health care providers

116. A Gallup poll conducted in 1988 for *Hippocrates* magazine asked whether a woman who smoked or drank alcohol during pregnancy should be held liable for harm done to her fetus. Forty-eight percent of those who responded answered in the affirmative. *Choices of the Heart*, HIPPOCRATES, May/June 1988, at 40. Considering the fact that quite often the addicted are of lower socioeconomic status and members of minorities, the substances are illegal, and the dynamics of addiction are not widely understood, obviously a similar poll on illicit drugs would result in a substantially higher percentage of responses supporting sanctions. In fact, one survey is reported which found that 71% of the 1500 persons polled in fifteen southern states favored criminal penalties for pregnant women who use illegal drugs during pregnancy. See Curriden, *Holding Mom Accountable*, A.B.A. J., Mar. 1990, at 50. Furthermore, this survey found that approximately the same percentage (45%) of persons responded to the same question regarding alcohol and tobacco as was found in the *Hippocrates* poll, *supra*, and that "more women than men were in favor of criminalizing 'fetal abuse.'" Curriden, *supra*, at 51.

117. See *infra* notes 116-131 and accompanying text.

118. See generally Parness, *supra* note 52; Mathieu, *supra* note 28; Myers, *supra* note 89; Note, *Maternal Rights*, *supra* note 50; Note, *Maternal Substance Abuse*, *supra* note 50.

119. 410 U.S. 113, 163 (1973).

120. Parness, *supra* note 52, at 115 (footnote omitted).

121. See generally Parness, *supra* note 52; Mathieu, *supra* note 28; Myers, *supra* note 89; Note, *Maternal Rights*, *supra* note 50; Note, *Maternal Substance Abuse*, *supra* note 50.

is also promoted as a method to deal with this issue.¹²² Despite these sentiments, and evidence of public support for sanctions,¹²³ legislation addressing fetal abuse has not met with much success.¹²⁴

In the summer of 1989 then Senator Pete Wilson of California¹²⁵ introduced a bill entitled the Child Abuse During Pregnancy Prevention Act of 1989 [hereinafter "the Act"].¹²⁶ The purpose of the Act was to provide five \$10 million grants to states to treat drug addicted mothers.¹²⁷ The first two goals set forth in the purpose of the Act¹²⁸ were to apply to those drug abusing women who were "strong enough to seek [rehabilitation] voluntarily," and the third, mandatory rehabilitation, "for others who cannot find the strength to [seek rehabilitation on their own]."¹²⁹ Further, to assist grantee states, the Act planned to "enlist our Nation's health care professionals [through mandatory reporting of suspected drug using mothers]."¹³⁰

The anticipated utilization of health care providers for identifying drug abusing mothers illustrates one significant flaw in this Act. While acknowledging the importance of prevention, the reliance upon providers of health care ignored the facts that drug abusing mothers are not likely to seek prenatal health care,¹³¹ and that those women interested in seeking prenatal care may avoid their doctors to avoid detection.¹³² By

122. See generally Parness, *supra* note 52; Mathieu, *supra* note 28; Myers, *supra* note 89; and Note, *Maternal Rights*, *supra* note 50.

123. See *supra* note 115.

124. See *supra* note 115 and accompanying text.

125. Pete Wilson is currently the Governor of California.

126. S. 1444, 101st Cong., 1st Sess., 135 CONG. REC. 105, S9134 (daily ed. July 31, 1989).

127. The purpose of the Act was to:

- (1) prevent substance abuse by pregnant women;
- (2) prevent, by outreach and intervention during early pregnancy, the continued substance abuse of pregnant women [and the resultant injury to fetuses]; and
- (3) prevent, through the mandatory rehabilitation of women [who have delivered addicted babies] the recurrence [of those mothers giving birth to addicted babies in the future]. . . .

S. 1444, 101st Cong., 1st Sess., 135 CONG. REC. 107, S9320-21 (daily ed. Aug. 2, 1989) [hereinafter *The Act*].

128. *Id.*

129. 135 CONG. REC. S9320 (daily ed. Aug. 1, 1989) (statement of Sen. Wilson).

130. *Id.*

131. See *infra* notes 266-74 and accompanying text.

132. *Id.*

placing primary reliance on preventative measures which will be implemented after detection by health care providers, the doctor-patient relationship is turned into an adversarial relationship which will likely compel many women carrying at-risk fetuses to avoid the medical care the Act realizes is so important. The Act appears to promise education, intervention, and rehabilitation only after detection as a drug abusing mother. Emphasis should instead be placed on education and intervention prior to pregnancy, when the risk to the woman's liberty is less, and the chances for a problem free pregnancy and a healthy baby greater.¹³³

As a requirement of eligibility for a grant under the Act, a state was required to detail plans for "preventive outreach and education and treatment."¹³⁴ But of primary importance was the fact that the grantee state must certify:

- (4) it is a crime in such state to abuse a child, and that such abuse includes giving birth to an infant who is addicted or otherwise injured or impaired by the substance abuse of its mother during pregnancy; [and]
- (5) [that], on a conviction for a violation of the criminal statute described in paragraph (4), the woman so convicted shall be sentenced to a period of 3 years of mandatory rehabilitation in a custodial setting¹³⁵

Coupling the requirement of specific criminal statutes with mandatory reporting by health professionals, the Act was destined to failure. For the reasons discussed in this Note,¹³⁶ any approach similar to one suggested by this Act is doomed to failure, for the simple reason that this approach will drive women at risk away from the necessary prenatal health care.¹³⁷

133. See *infra* notes 244, 246, and 253.

134. The Act, *supra* note 126, at § 3(c)(1)(A).

135. *Id.* at § 3(c)(4)-(5).

136. See *infra* notes 249-55 and accompanying text.

137. The Act was sent to the Committee on Labor and Human Relations, 135 CONG. REC. S9134 (daily ed. July 31, 1989), and there has been no action taken on it, according to Ms. Tyler, staff member of Sen. D'Amato, Senator from New York (a co-sponsor of the Act) (telephone conversation with author, March 6, 1990). While the Act met with little success, several important amendments were attached to the Department of Transportation and Related Agencies Appropriation Act of 1990, H.R. 3015, 101st Cong., 1st Sess. (1989), which passed both chambers and was presented to President Bush on November 20, 1989. 135 CONG. REC. H9154 (daily ed. Nov. 20, 1989).

On the state level, eight states presently have statutes pertaining to drug abuse during pregnancy, yet the majority of these statutes address merely remedial state action after birth.¹³⁸ Only Minnesota included its

Amendment no. 727 provided for additional funds for drug programs, 135 CONG. REC. S11973 (daily ed. Sept. 27, 1989); amendment no. 867 provided grants for substance abuse treatment for pregnant and postpartum women and their infants and amendment no. 869 provided for additional funding to training additional professionals to assist in rehabilitating drug addicts, *id.* at S11975. According to an exchange between Senators Kennedy and Harkin, it was stated that \$40 million, at a minimum, will be earmarked for the Model Projects for Pregnant and Postpartum Women Project, to be administered by the Office for Substance Abuse Prevention. *Id.* at S11979 (testimony of Sen. Harkin). These amendments, with minor changes, were part of the appropriations act presented to President Bush on November 20, 1989. Most significantly, these amendments all placed minimal importance on criminal sanctions; in fact, these amendments were lauded because of their acknowledgment that criminal sanctions were the wrong approach to the problem, see comments of Sen. Kohl, "[I] appreciate the good faith efforts . . . to strike a compromise on the amendment dealing with pregnant, substance abusing women. . . . Clearly reflected [in commentators' statements in a Committee hearing] is a concern that promising pregnant women help on the one hand - while threatening them with jail sentences with the other - may not be the best way to encourage people to seek treatment" *Id.* at S11979 (and that the methods these amendments emphasized, such as intervention, education, and treatment, were the best way to deal with the problem); see also Note, *Maternal Rights*, *supra* note 50, at 1011 ("[a]ttaching criminal liability to maternal conduct . . . undermines [the doctor/patient] relationship because it . . . would require doctors to become agents of the criminal justice apparatus, monitoring maternal/fetal relations and reporting disobedient patients").

138. See, 1989 Fla. Sess. Law Serv. ch. 89-345, § 415.5082 (West) (providing an expeditious court procedure by which a relative or other responsible person is appointed a "guardian advocate" for a child likely to require medical care but whose drug-dependent parents are unable to obtain it); 1989 Ill. Legis. Serv. 86-275 (West) (defines newborn with controlled substance in its system neglected.); IND. CODE ANN. § 31-6-4-3.1 (Burns 1987) (a child born with fetal alcohol syndrome or addiction to a controlled substance is deemed a child in need of services); Prenatal Exposure to Certain Controlled Substances, 1989 Minn. Sess. Law ch. 290, Art. 5 (West) ("chemically dependent person" includes pregnant woman who has engaged in habitual or excessive use of certain controlled substances during pregnancy) *Id.* at §1(2)(b)(iii); NEV. REV. STAT. ANN. § 432B.330 (Michie 1989) (child is in need of protection if suffering from congenital drug addiction or fetal alcohol syndrome) *Id.* at 432B.330(1)(b); OKLA. STAT. ANN. tit.10, § 1101 (West 1989) ("deprived child" includes one born addicted to a controlled substance). In 1989, the Rhode Island legislature established a special commission to study the current status of treatment programs available to drug abusing mothers. See ACLU Women's Rights Project, *State Legislation Pertaining to Drug Abuse During Pregnancy*, (Memorandum, Nov. 1989) [hereinafter *ACLU Memorandum*]; UTAH CODE ANN. §62A-4-504 (1989) (mandatory reporting by medical personnel of any child suffering at birth from fetal alcohol syndrome or fetal drug

legislation in a criminal bill, and mandates reporting by a physician who "knows or has reason to believe that a woman is pregnant and has used a controlled substance for a nonmedical purpose during pregnancy."¹³⁹ Since the majority of these statutes were enacted prior to the Supreme Court's decision in *Webster*,¹⁴⁰ one explanation for the decided emphasis on after-born children is the more restrictive state interest as defined by *Roe* and its progeny. A review of legislation introduced after the decision in *Webster* should provide an accurate indication of the individual states' responses to the less restrictive state interest *Webster* provides, but aside from The Child Abuse During Pregnancy Prevention Act of 1989, there are no legislative responses to evaluate.¹⁴¹

The American Civil Liberties Union Women's Rights Project has compiled a list of legislation¹⁴² which contains, in addition to the statutes mentioned above, a summary of recently defeated legislation and pending legislation. Noteworthy statutes that have been defeated include two Illinois statutes, the first providing that persons delivering controlled substances to pregnant women would be subject to twice the maximum prison term,¹⁴³ and the second requiring reporting by doctors and treatment personnel to the appropriate state agency and mandatory participation in treatment programs for pregnant addicts.¹⁴⁴ The former did not pass in the House, the latter died in House committee.¹⁴⁵ The other defeated statutes dealt with drug tests for newborns and treatment program funding.¹⁴⁶ Pending legislation does not evidence any response to *Webster*, because the legislation compiled by the ACLU pertains only to notices warning of the danger of alcohol to pregnant women, adding to the definition of child abuse children born with controlled substances in their systems,¹⁴⁷ and allowing the state to take custody of children born with addiction or with illegal drugs in their

dependency).

139. Prenatal Exposure to Certain Controlled Substances, Art. 5, §5(1) (1989) (codified 1989 Minn. Sess. Law Serv. Ch. 290).

140. 492 U.S. 490 (1989).

141. See *supra* note 137 for a discussion of several amendments drafted by Congress bearing on the issue of drug abuse during pregnancy.

142. ACLU Memorandum, *supra* note 138.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

systems.¹⁴⁸

While the vast majority of the state statutes do not, at this point, impose criminal sanctions on drug addicted women who are pregnant, some may be inclined to do so in the future. But if state legislators evaluate the Congressional response to the Child Abuse During Pregnancy Act of 1989, and the amendments to the appropriations act presented to the President on November 20, 1989,¹⁴⁹ they will likely realize that criminal sanctions, and the resultant adversarial situation that arises therefrom, are not the means by which to ensure that healthy children will be born.

IV. THE PREGNANT WOMAN'S PRIVACY RIGHTS AND THE EFFECTS OF THE IMPOSITION OF FETAL RIGHTS

A pregnant woman's constitutionally mandated right to privacy is a strong bar against the imposition of criminal sanctions for her behavior and actions during pregnancy.¹⁵⁰ The rights of reproductive choice, marriage, procreation, contraception, abortion, and family relationships are all privacy rights protected by the Fourteenth Amendment.¹⁵¹ The Fourteenth Amendment provides, in part, that no state can "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."¹⁵² The mother's right to conduct her life as she feels proper or desirable cannot legitimately be deemed forfeited for the duration of her pregnancy.¹⁵³ The issue of criminal sanctions for behavior during pregnancy gives rise to certain questions: to what extent does or can a physical condition affect one's entitlement to privacy rights, is the right to privacy and autonomy so expansive as to protect any behavior, and finally, because only women can become pregnant, does the issue of

148. *Id.*

149. See *supra* notes 117-27 and accompanying text.

150. See generally *Roe v. Wade*, 410 U.S. 113, 152-55 (1973).

151. Johnsen, *supra* note 52, at 617 n.75. Ms. Johnsen cited Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) ("[T]he framers of the constitution] conferred, as against the Government, the right to be left alone - the most comprehensive of rights and the right most valued by civilized man."). Johnsen, *supra* note 52, at 615 n.2.

152. U.S. CONST. amend. XIV, § 1.

153. But see sources cited at *supra* note 28.

sanctions raise equal protection or due process grounds?¹⁵⁴

A. Gender-Based Discrimination

It has been stated by several commentators that any governmental control over a woman based upon her reproductive capabilities and her exercise of those capabilities is discrimination based on sex, due to the fact that only women can become pregnant.¹⁵⁵ The issue of sex discrimination has long been an issue of debate, which has escalated substantially since the 1960's.¹⁵⁶

As the Supreme Court grappled with the issue of sex discrimination, it often had trouble deciding which level of scrutiny to apply to the challenged statute to determine constitutionality.¹⁵⁷ Early

154. For a discussion of the fact that only women are the targets of fetal abuse statutes, see *infra* note 211.

155. See Field, *supra* note 52, at 122, 124; Note, *Maternal Rights*, *supra* note 50.

156. See Field, *supra* note 52; Note, *Fetal Rights Controversy*, *supra* note 66; Erickson, *Women and the Supreme Court: Anatomy is Density*, 41 BROOKLYN L. REV. 209 (1974). Although women's rights were, arguably, not a consideration when the fourteenth amendment was enacted, women's interests eventually found some degree of protection under the equal protection clause of the fourteenth amendment. G. Gunther, CONSTITUTIONAL LAW 409 (11th ed. 1987); accord Erickson, *supra* (noting the Supreme Court's decision in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), which held that the purpose of the fourteenth amendment was to protect only the newly freed slaves). Early challenges, however, resulted in paternalistic displays of gender discrimination and stereotyping, as evidenced by Justice Bradley's concurring opinion in *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873), where the Supreme Court upheld an Illinois statute which denied women the right to practice law:

[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of life . . .
 . . . [The] paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

Id. at 141. That paternalism extended into the early twentieth century, when the Court again expressed the pervasive view of a woman's place in society. In *Mueller v. Oregon*, 208 U.S. 412 (1908), the Court sustained a state law which provided that women could work no longer than ten hours per day in a laundry or factory. *Id.* at 416. The Court noted, "[It is obvious] that [a] woman's physical structure . . . place[s] her at a disadvantage in the struggle for subsistence" and that "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Id.* at 421.

157. See *infra* notes 159-70 and accompanying text.

equal protection challenges involving women were met with low level scrutiny by the Supreme Court. In *Goesart v. Cleary*,¹⁵⁸ the Court rejected an attack on a Michigan statute which restricted a woman's right to obtain a bartender's license, acknowledging legitimate state interests which could justify the statute, and declared the law a valid exercise of drawing a line "not without a basis in reason."¹⁵⁹ This level of scrutiny illustrates the lowest standard of review, and gives great deference to the legislature.

The deferential approach in equal protection claims was altered somewhat in *Reed v. Reed*,¹⁶⁰ when the Court found that an Idaho statute establishing a preference for men over women as administrators of estates as a matter of convenience was a violation of equal protection. The Court held that there was no rational relationship between the state goal of administrative convenience and the preference utilized to effect that state goal.¹⁶¹ This level of scrutiny requires at the minimum a "rational relationship" between the statute and the problem sought to be remedied, so theoretically the proponent must demonstrate an ability of the statute to address the goal sought to be achieved.¹⁶² The *Reed* decision has been interpreted to mean that administrative convenience is an insufficient state interest to justify a sex-based classification.

Two years after *Reed*, the plurality opinion in *Frontiero v. Richardson*¹⁶³ advocated the use of strict scrutiny of statutes differentiating on the basis of sex.¹⁶⁴ Justice Brennan, writing for the Court, noted "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to

158. 335 U.S. 464 (1948).

159. *Id.* at 467. The state enacted the statute to prohibit women from working as a bartender unless the bar was owned by the woman's father or husband, out of concern that any other situation could result in "moral and social problems." *Id.* at 466. Justice Frankfurter, writing for the Court, noted "the vast changes in the social and legal position of women," but rejected the contention that the law was "an unchivalrous desire of male bartenders . . . to monopolize the calling." *Id.* at 465-67.

160. 404 U.S. 71 (1971).

161. *Id.* at 76-77. "[T]o give a mandatory preference to members of either sex [in choosing administrators of estates to avoid intrafamily controversy] may not lawfully be mandated solely on the basis of sex." *Id.*

162. *Id.* at 468.

163. 411 U.S. 677 (1973).

164. *Id.* at 682.

individual responsibility."¹⁶⁵

Nevertheless, the strict scrutiny advocated by Justice Brennan, failed to garner majority support¹⁶⁶ and the Court failed to establish a consensus as to which level of scrutiny to apply to gender-based classifications.¹⁶⁷ In *Kahn v. Shevin*,¹⁶⁸ a state property tax exemption for widows was upheld, under the "rationality test" of *Reed*, because the law was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposed a disproportionately heavy burden."¹⁶⁹ The Court finally articulated the appropriate level of scrutiny for sex-based classifications in *Craig v. Boren*.¹⁷⁰ The test, which has come to be known as the "elevated or intermediate level [of] scrutiny,"¹⁷¹ struck down a law which was justified by the state as an attempt to decrease the incidence of drunken driving by prohibiting the sale of 3.2% beer to males under the age of twenty-one and females under the age of eighteen.¹⁷² The Court found the evidence that young men were more likely to be injured by and arrested for drunken driving to provide too tenuous a justification for the statute, which differentiated between females and males.¹⁷³

In *Michael M. v. Superior Court*,¹⁷⁴ a case which is instructive because it involved a facially discriminatory statute upheld by the Court

165. *Id.* at 686. Justice Brennan explicitly acknowledged the "[n]ation[']s . . . long and unfortunate history of sex discrimination" and agreed with appellants (women challenging a military rule regarding dependency benefits whereby spouses of male service members had automatic entitlement to benefits, while spouses of female service members had to prove dependency) that "classifications based on sex, like classifications based on race, alienage, and national origin, are inherently suspect and must therefore be subjected to strict judicial scrutiny." *Id.* at 688.

166. *Id.* at 719.

167. *Id.* at 725.

168. 416 U.S. 351 (1974).

169. *Id.* at 355.

170. 429 U.S. 190 (1976).

171. *Id.* at 218 (Rehnquist, J., dissenting).

172. *Id.* at 204 (plurality opinion).

173. *Id.* at 199-204. Justice Powell, concurring, wrote that the decision depended on "whether the legislature . . . has adopted a means that bears a 'fair and substantial relation' to this objective." *Id.* at 211. Justice Stevens, in concurrence, found the statute to be "a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket" *Id.* at 212 (Stevens, J. concurring).

174. 450 U.S. 464 (1981).

due in part to a consideration of pregnancy, a California statute which subjected a male of any age to criminal sanctions for engaging in sexual relations with a female under the age of eighteen, but imposed no sanctions on a female for having sexual relations with a male under the age of eighteen, was challenged as violative of the equal protection clause.¹⁷⁵ The justification accepted by the Court for the statute was that the state wanted to prevent illegitimate teenage pregnancies.¹⁷⁶ Justice Rehnquist (now Chief Justice Rehnquist) again refused to designate gender-based discrimination "inherently suspect," and refused to apply strict scrutiny to the statute. He noted that "this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."¹⁷⁷ He went on to state, "Because virtually all of the significant . . . consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct."¹⁷⁸

The standard announced in *Craig* was affirmed in *Mississippi University for Women v. Hogan*.¹⁷⁹ Justice O'Connor, writing the majority, slightly changed the standard of *Craig*, but adhered to its main principles.¹⁸⁰ The test, as Justice O'Connor applied it, had two levels. First, the objective of the statute must be "legitimate and important."¹⁸¹ Second, "a direct, substantial relationship between objective and means" must be present.¹⁸² Justice O'Connor went on to note that "considering both the asserted interest and the relationship between the interest and the methods used by the State . . . the State has fallen far short of establishing the 'exceedingly persuasive justification' needed to sustain the

175. *Id.*

176. *Id.* at 470.

177. *Id.* at 468.

178. *Id.* at 473. Arguably, fetal rights advocates may seize upon this phrase as evidence of the correctness of their goals - the Court explicitly acknowledging the differences between the sexes, *vis-a-vis* reproductive capabilities, and allowing the imposition of criminal sanctions on the party which suffers few of the consequences of her conduct. But the equal protection and due process clauses are not mutually exclusive, and the author's contention is that if an equal protection claim fails, due process protections will provide a substantial barrier to fetal abuse sanctions.

179. 458 U.S. 718 (1982).

180. *Id.* at 719.

181. *Id.* at 724.

182. *Id.*

gender-based classification."¹⁸³ If the two-pronged test articulated by Justice O'Connor in *Hogan* is applied to fetal abuse statutes, it is fairly obvious that the first prong of the test, a legitimate and important state interest, is satisfied. The interest of the state is to deter harm to the potential life. However, the second prong, a direct and substantial relationship between the objective and the means, is not met. Imposing sanctions on a pregnant woman for addictive behavior she cannot control serves little deterrent value, and the effect of sanctions is not likely to result in healthy newborns.¹⁸⁴ But as the result in *Michael M.* indicates, statutes affecting behavior which is unpopular or morally unacceptable might be given greater deference by the Court under a level of scrutiny that is arguably outcome determinative.¹⁸⁵

B. Pregnancy Discrimination in the Employment Context

A consideration of pregnancy discrimination in the employment context is enlightening. Women, like men, have to work. The right to employment which is free of discrimination based upon sex, or pregnancy, or other factors unrelated to job performance is a right which can be considered fundamental.¹⁸⁶

The cases dealing with pregnancy discrimination in the employment field (like reproductive rights) have focused on both due process and equal protection grounds. As one commentator has put it, the due process analysis concentrates on the woman's right to make certain reproductive choices without undue state interference, while the equal protection analysis concentrates on whether the state has treated the sexes

183. *Id.* at 731.

184. *See infra* notes 240-50 and accompanying text.

185. *See supra* notes 150-70 and accompanying text for examples of how the level of scrutiny applied to a particular statute often appears to be related to the competing interests implicated, and how the Court's perception and valuation of those interests will likely dictate the judicial outcome; *see also* *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd other grounds*, 769 F.2d 290 (5th Cir. 1985) (refusing to consider homosexuality to be a suspect classification meriting strict scrutiny; rationality review upheld).

186. *Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632, 639-48 (1974) (state's use of arbitrary cut-off date to terminate pregnant public school teacher violated due process clause of fourteenth amendment); *cf. Automobile Workers v. Johnson Controls*, 111 S. Ct. 1196, 1200-02 (1991) (private employment discrimination on basis of child bearing capacity unlawful under title VII of the Civil Rights Act of 1964).

equally.¹⁸⁷

In *Cleveland Board of Education v. LeFleur*,¹⁸⁸ various school board rules which established mandatory unpaid pregnancy leave for public school teachers were challenged as violative of the due process clause. The school board had attempted to justify the cut off dates as necessary to maintain continuity of classroom instruction.¹⁸⁹ Acknowledging this goal as "a significant and legitimate educational goal,"¹⁹⁰ the Court nonetheless concluded that the arbitrary cut off dates had no rational relationship to the school board's asserted goals.¹⁹¹ Moreover, the Court ruled that the cut off dates violated due process because they created a conclusive presumption that every teacher who was four or five months pregnant was physically unfit to teach, regardless of individual situations, and that the administrative convenience defense "is insufficient to make valid what otherwise is a violation of due process of law."¹⁹²

In *Geduldig v. Aiello*,¹⁹³ at issue was a California disability insurance program for private employees who were temporarily disabled from work by injury or illness not covered by workers' compensation.¹⁹⁴ The program excluded from coverage certain disabilities attributable to pregnancy.¹⁹⁵ Acknowledging that California had a legitimate interest in maintaining the insurance program as instituted, the majority decided the legislature's choice not to insure all

187. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 REV. L. SOC. CHANGE 325, 343 (1984-85).

188. 414 U.S. 632 (1974).

189. *Id.* at 640.

190. *Id.* at 641.

191. *Id.* at 643.

192. *Id.* at 647.

193. 417 U.S. 484 (1974).

194. *Id.* at 486-89.

195. *Id.* at 489. Four women challenged the provisions, and of those four, three had disabilities attributable to abnormal complications during their pregnancies. *Id.* Prior to the district court's ruling on the case, California's Court of Appeals ruled, in a different suit, that the provision did not bar benefits when the medical complications arise during pregnancy. *Id.* at 490. Appellants acquiesced in the state court decision, and the three women who had complications during their pregnancies became entitled to benefits, so the Supreme Court interpreted the issue before it to be exclusively whether the provision invidiously discriminated against the one appellee, and others similarly situated, by not paying benefits for disability arising out of normal pregnancy and childbirth. *Id.* at 491-92.

risks was a legitimate exercise of discretion.¹⁹⁶ The Court further found that the decision not to insure pregnancy was not discrimination based on sex; rather pregnancy was viewed as a "risk" which the state was not required to provide coverage for. The Court noted "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."¹⁹⁷

The view of pregnancy as a "risk" in *Geduldig* was relied upon two years later when employees challenged a similar provision under title VII of the Civil Rights Act of 1964,¹⁹⁸ which proscribes employment discrimination based on sex. At issue in *General Electric Company v. Gilbert*¹⁹⁹ was again a disability plan which covered non job-related accidents.²⁰⁰ After quoting from *Geduldig* at length, the Court stated "[s]ince it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under [Title VII] . . . *Geduldig* is precisely on point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not gender discrimination at all."²⁰¹

Gilbert was overruled by Congress in 1982 when the Pregnancy Discrimination Act²⁰² (hereinafter PDA) amended title VII's definition of sex discrimination to include discrimination based upon pregnancy.²⁰³ But insofar as *Gilbert* was brought under title VII, while *Geduldig* was brought under the equal protection clause, *Geduldig* remains the precedent

196. Citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). Justice Stewart noted a state "[m]ay take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind The legislature may select one phase of one field and apply a remedy there, neglecting the others" *Geduldig*, 417 U.S. at 495 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)).

197. *Id.* at 496-97. "Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other, lawmakers are constitutionally free to [deny coverage for pregnancy] . . . just as with respect to any other physical condition." *Id.* at 496-97 n.20.

198. 42 U.S.C. §§ 2000(e)-(e)(17) (1987).

199. 429 U.S. 125 (1976).

200. *Id.*

201. *Id.* at 136.

202. 42 U.S.C. §2000e(k) (1987). The Act provides: "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, . . . and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes." *Id.*

203. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("[t]he Pregnancy Discrimination Act has now made clear that . . . discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex").

in equal protection, with the PDA providing, at most, persuasive authority.²⁰⁴

Notwithstanding the protections afforded pregnant women by the PDA,²⁰⁵ restrictions on pregnant women's employment do exist, and have survived judicial scrutiny. Employment policies restricting the employment options of pregnant women are classified as fetal vulnerability programs or policies.²⁰⁶ Typically, employers will limit pregnant or fertile women's access to those positions where the employees are required, or likely, to come in contact with a variety of chemicals which are proven or suspected to have a detrimental effect on a developing fetus.²⁰⁷ Among the chemicals common in the workplace and known to affect workers' health are lead, benzene, vinyl chloride, fluorocarbons, mercury and radiation.²⁰⁸

The problem of chemical exposure in the workplace, and an employer's response to the hazard, was at issue in *Wright v. Olin Corporation*.²⁰⁹ After four years of planning, Olin Corporation, in 1978, adopted its "female employment and fetal vulnerability" program,²¹⁰ which created three job classifications for all female employees, and limited their access to certain jobs.²¹¹ Male employees

204. See Johnsen, *supra* note 52, at 621 n.85. For a comprehensive discussion on the issue of pregnancy discrimination in employment, see Williams, *supra* note 187.

205. See *supra* note 202.

206. See Hembecher, *Fetal Protection Policies: Reasonable Protection or Unreasonable Limitations on Female Employees?*, 11 INDUS. REL. L. REV. 32 (1989); Timko, *Exploring the Limits of Legal Duty: A Union's Responsibility with Respect to Fetal Protection Policies*, 23 HARV. J. ON LEGIS. 159 (1986); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L. J. 641 (1981).

207. One estimate stated that at least 100,000 jobs are closed to women by virtue of fetal vulnerability policies. See Williams, *supra* note 206, at 647 n.27. Considering the fact that the source for these numbers is over ten years old, it is logical to assume the number of hazardous jobs has, due to technology, held steady, if not increased.

208. *Id.* at 647-48.

209. 697 F.2d 1172 (4th Cir. 1982).

210. *Id.* at 1182.

211. *Id.* The classes were:

1. restricted jobs - those which involved contact with suspected or known abortifacient or teratogenic agents (all fertile women excluded);
2. controlled jobs - those in which limited contact with harmful chemicals was possible (pregnant women could work in a controlled job only after an individualized evaluation and signing a waiver); and

were warned about lead exposure, but no restrictions on access to any jobs were placed on male employees.²¹² In vacating in part and remanding, the court of appeals rejected the district court's conclusion that the policy did not discriminate against women in violation of Title VII. Olin had argued the program did not violate title VII because the program was not intended to discriminate against women.²¹³ The court of appeals rejected this argument, and ruled that Olin had to prove an affirmative defense to justify the program.²¹⁴ The *Wright* court promulgated a seven part standard which was developed from the business necessity doctrine,²¹⁵ a judicially-created defense to title VII employment discrimination claims.²¹⁶ On remand, Olin was charged

3. unrestricted jobs - those which posed no risk to a pregnant woman or fetus (open to all women).

Id.

212. *Id.*

213. *Id.* at 1176.

214. *Id.* at 1184.

215. The requirements were:

1. The employer must prove that the risk to children is great enough to require women, but not men, to be restricted.
2. The program must be based on independent, objective evidence, and not on a good faith belief in danger.
3. There must be expert evidence to support the need for the program.
4. There needs not be a consensus of opinion, but there must be a considerable body of opinion that a substantial risk exists and that it is limited to female workers.
5. There must be proof of that the risk of harm to women is greater than to men, and the effectiveness of the program constitutes the business necessity defense.
6. The business necessity defense can be rebutted by proof of alternatives which would better protect employees with less disparate impact.
7. If rebutting evidence is accepted, liability is imposed, but whether monetary relief will be justified will depend on amount of "overkill" caused by the program.

Id. at 1190-92.

216. The business necessity doctrine, generally stated, focuses on whether a facially discriminatory employment policy is necessary to ensure the worker or applicant can perform a given job safely and efficiently. *See, e.g.,* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Burwell v. Eastern Airlines*, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), the Fourth Circuit Court of Appeals held that concern for the health of a pregnant mother or her fetus during the first thirteen weeks of pregnancy did not justify the use of the business necessity defense. *Id.* at 373. The *Wright* court

with the burden of proving that unborn children of pregnant workers faced risks from exposure to toxic hazards in the workplace, that for the safety of fetuses fertile women, but not male workers, must be restricted, and also that the "program of restriction is effective for the purpose."²¹⁷ The claimants would then have the opportunity to rebut Olin's business necessity defense, if possible, by proving that acceptable policies or practices existed to better accomplish the goals of the program.²¹⁸ Therefore, the policy enacted to protect the fetus must not only be effective, but it will be subject to challenge if there is an equally (or more) effective policy which would have a less damaging or intrusive effect upon the pregnant worker.²¹⁹

Two other cases involved fetal vulnerability policies concerning pregnant hospital employee's exposure to X-rays, *Zuniga v. Kleberg County Hospital, Kingsville, Texas* ²²⁰ and *Hayes v. Shelby Memorial Hospital*.²²¹ In both these cases, the programs were premised on concerns for both fetal health and fear of liability for damage to the future child.²²² Both programs were found to be in violation of title VII, the respective courts holding that fear of potential liability did not constitute business necessity²²³ and that the hospitals had not utilized alternative and less discriminatory methods to protect the fetuses.²²⁴

The most recent case involving the problem of chemical exposure in the workplace, and an employer's response to the potential hazard, was at issue in *International Union, UAW v. Johnson Controls*.²²⁵ In 1982 Johnson Controls shifted from a policy of giving warning of the effects of

did not follow *Burwell*, but instead held that under appropriate circumstances an employer could impose otherwise impermissible restrictions that are "reasonably required to protect the health of unborn children of women workers against hazards in the workplace." *Wright*, 697 F.2d at 1189-90 (footnote omitted).

217. *Wright*, 697 F.2d at 1190 (citing *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (footnotes omitted)).

218. *Id.* at 1190-91.

219. *Wright*, 697 F.2d at 1190.

220. 692 F.2d 986 (5th Cir. 1982).

221. 726 F.2d 1543 (11th Cir. 1984).

222. *Zuniga*, 692 F.2d at 988; *Hayes*, 726 F.2d at 1552-53 n.15.

223. *Zuniga*, 692 F.2d at 992; *Hayes*, 726 F.2d at 1552-53 n.15.

224. *Zuniga*, 692 F.2d at 993-94 (leave of absence, in accordance with established policy); *Hayes*, 726 F.2d at 1553-54 (rearrange employees' duties within department to minimize exposure to radiation). For a discussion of fetal protection policies in general and these cases in particular, see Hembacher, *supra* note 206.

225. 111 S. Ct. 1196 (1991).

lead to women who expected to have a child to a policy of broad exclusion.²²⁶ The company excluded women capable of bearing children from jobs that exposed them to lead, in particular battery manufacturing.²²⁷ The only women exempt from the rule were those whose inability to bear children was medically documented.²²⁸ The district court granted summary judgment for the employer and the Seventh Circuit Court of Appeals affirmed, finding, among other things, that the petitioners failed to establish that there was acceptable alternative policy which would protect the fetus.²²⁹

The Supreme Court reversed, holding that the employer's policy was facially discriminatory because the policy classified on the basis of gender and childbearing capacity, rather than fertility alone; thus the business necessity test was inapplicable.²³⁰ The policy required only female employees to produce proof that they were not capable of reproducing, despite evidence of the harmful effect of lead exposure on male reproductive systems. The Court held that the employer's fetal protection policy constitutes sex discrimination forbidden under title VII, unless Johnson Control could establish that sex is a "bona fide occupational qualification."²³¹ The bona fide occupational qualification (BFOQ) defense is narrowly construed, said the Court, and its safety exception is limited to instances in which sex or pregnancy actually interfere with the employee's ability to perform the job.²³² However, the Court held that Johnson Controls did not sufficiently establish the defense in this case. The BFOQ defense is not so broad that it transforms the concern of possible injury to future children into an essential aspect of battery manufacture.²³³

One commentator has summarized the rulings prior to *Johnson Controls* on fetal vulnerability policies, and derived three criteria an employer must establish in order to rebut a presumption of discrimination in a fetal vulnerability program:

1. Through competent scientific evidence, the presence

226. *Id.* at 1199-1200.

227. *Id.* at 1200.

228. *Id.*

229. *International Union, UAW v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989).

230. *Id.* at 1203.

231. *Id.* at 1204.

232. *Id.* at 1207.

233. *Id.*

of a substantial risk of harm from dangerous substances.

2. That the hazards are limited to female employees, which takes into account the danger to the fetus they may be carrying.

3. That there are no less discriminatory alternatives which would eliminate or reduce the risk.²³⁴

As the majority of the recent cases involving discrimination based on sex or pregnancy demonstrate, current standards lend support to the proposition that criminal sanctions for fetal abuse stemming from drug abuse during pregnancy should not pass judicial scrutiny.²³⁵ Since only women are the targets of such laws,²³⁶ applying the standard enunciated by Justice O'Connor in *Mississippi University for Women v. Hogan*,²³⁷

234. Hembacher, *supra* note 206, at 43. For a related view, see *Fetal Rights Controversy*, *supra* note 66, at 273-77.

235. See *supra* notes 155-70 and accompanying text for the historical development of judicial scrutiny applied to gender-based classifications.

236. This fact alone gives rise to an inference of violating the equal protection clause, but as *Michael M.* implies, a court may look to the implications of pregnancy and consider a fetal abuse statute constitutional. See *supra* notes 174-178. But an equal protection claim may still be valid, because there is evidence that the human sperm is also susceptible to damage from chemicals in the workplace, which can result in congenital defects and developmental problems. See Williams, *supra* note 206, at 656-58. Women's rights advocates take note of the fact that men are not subjected to criminal charges, even though their drug use could damage genes or sperm. See Sherman, *supra* note 3, at 28, col. 1. There is a lack of scientific studies on this issue, but one study has been completed on the effects of paternal alcohol consumption on offspring. While this study was conducted on rats, the researchers at Washington University in St. Louis state that based upon their findings that learning disabilities were noted in the rats' offspring, future studies were advisable to study this problem in humans. N.Y. Daily News, Jan. 8, 1990, at B27, col. 3. Even if one invokes the theory behind *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), to argue a legislature's ability to address the problem one step at a time, it is the author's contention that such an argument is not valid to support the imposition of criminal sanctions. *Williamson* held that "[a] legislature may [in addressing the most acute part of the problem] select [that part] and apply [the] remedy there" *Id.* at 489 (emphasis added). *Williamson* allows a remedy to be applied to the most acute part of the problem, but as this Note shows, criminal sanctions cannot legitimately be considered a remedy for the problem of substance abuse during pregnancy. See *infra* notes 237-55 and accompanying text. Therefore, *Williamson* cannot be considered dispositive to this issue.

237. See *supra* notes 169-171 and accompanying text. Under *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), there must be a "direct, substantial relationship between objective and means" *Id.* at 725.

the state would have to establish "exceedingly persuasive justification" to support the statute."²³⁸ Those cases dealing with fetal vulnerability programs universally require that the means utilized to protect the fetus be the least detrimental and have the least adverse impact on the pregnant woman. Even the "reasonably designed" requirement in *Webster v. Reproductive Health Services*²³⁹ would require that a fetal abuse statute "reasonably designed"²⁴⁰ to ensure that fetuses are not further endangered as a result of the statute. In the context of drug abuse during pregnancy, there are a variety of other means to achieve the end of drug-free fetal development, all of which are less invasive, and more likely to succeed.²⁴¹

C. *What Degree of Invasion of Privacy, If Any, Is Acceptable?*

Five interrelated factors have been suggested as central to any governmental attempt to control a pregnant woman's behavior:

1. The magnitude of harm;
2. The value of the interests involved;
3. The probability of harm to the fetus;
4. The probability of harm being avoided or removed; and
5. The proportionality of harm avoided to invasion required.²⁴²

The first factor weighs the harm to the fetus against the harm to the woman if her choice of activity is curtailed.²⁴³ As discussed earlier,²⁴⁴ maternal drug abuse has both immediate and long-term detrimental effects on the developing fetus. Based upon evidence of damage to the fetus, and the existence of a legitimate state interest in

238. *Hogan*, 458 U.S. at 731.

239. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

240. *Id.* at 521.

241. *See infra* notes 247-55 and accompanying text.

242. *See Mathieu, supra* note 28, at 50-54. These factors are cited as justifying the imposition of criminal sanctions for alcohol and drug abuse during pregnancy. *See also Note, Maternal Substance Abuse, supra* note 50, at 1233-34. But the central issue, which both of these commentators fail to address, is that while criminal sanctions, if imposed on one pregnant woman, will result in avoiding or removing the harm to her fetus, countless other fetuses will be endangered when other women, with fetuses at risk, avoid prenatal care out of fear of detection and prosecution.

243. *See Mathieu, supra* note 28, at 50.

244. *See supra* notes 59-60.

protecting and ensuring a fetus' potentiality and quality of life, one must then consider the second factor: the values of the interests involved.²⁴⁵ Assuming a legitimate state interest, that interest must be weighed against the mother's interests.²⁴⁶ The commentator who outlined these factors acknowledged that some interests of the mother are of little or no weight, especially those which result in the fetus being injured.²⁴⁷ While a woman's interest in walking, jogging, carrying groceries, working, or otherwise conducting her life as she chooses involves choices which can be considered fundamental, there is no fundamental right to use illegal drugs.²⁴⁸ Obviously, if the mother's interest is in taking illegal drugs, with no care for the effects, an attempt to control such behavior may be supportable.²⁴⁹

The third and fourth factors are also somewhat interrelated, and will be discussed in tandem. The damage prenatal drug exposure causes is well documented,²⁵⁰ and the problem of drug abuse and addiction by society at large, and among pregnant women in particular, shows no signs of abatement. While detoxification will likely cause the mother temporary discomfort, medical supervision can ameliorate the effects on both the mother and the fetus.²⁵¹ Because removal of the drugs pays immediate benefits to the fetus (and the mother), the fourth factor (the probability of harm being avoided or removed) comes into consideration. As long as detoxification is accomplished under supervision, the removal of harm

245. *Id.*

246. *See infra* notes 221-22 and accompanying text.

247. *See Mathieu, supra* note 28, at 51-52.

248. *See generally* Baker v. Wade, 533 F. Supp. 1121, (N.D. Tex. 1982), *rev'd other grounds*, 769 F.2d 289 (5th Cir. 1985) ("[o]bviously, the right of privacy does not apply to private conduct harmful to the individual participants or to society, such as the use of drugs"); *see also* State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied*, 386 U.S. 917 (1967) (prohibition of use of illegal drugs during religious ceremonies is not a violation of first amendment rights).

249. Baker v. Wade, 533 F. Supp. 1121 (N.D. Tex. 1982).

250. *See supra* note 60.

251. *See generally* Edelin, *Methadone Maintenance in Pregnancy: Consequences to Care and Outcome*, 71 OBSTET. & GYNECOL. 399 (1988) (women in methadone program had more prenatal care); Ryan, *Cocaine Abuse in Pregnancy: Effects on the Fetus and Newborn*, NIDA Research Monograph No. 76, at 280 (1987) (significant differences in birthweight, length, and head circumference between cocaine addicted babies and drug free babies in study); *see also* Angelin, *Pretreatment Characteristics and Treatment Performance of Legally Coerced Versus Voluntary Methadone Maintenance Admissions*, 27 CRIMINOLOGY 537 (1989); Krajewski, *Crack and Cocaine: Current Medical Issues*, 84 TEX. MED. 48 (1988).

from drug consumption can be assured, in most instances, and the harm, both from addiction and detoxification, could be avoided or minimized.²⁵²

The final factor weighs the harm prevented against the interest curtailed, and as discussed above, the interest in consuming illegal drugs is entirely insupportable.²⁵³ Considering the value of preventing the intentional or negligent harming of a fetus, the balance tips clearly on the side of intervention.²⁵⁴ When these five factors are applied to maternal drug abuse, the conclusion is almost unavoidable that state intervention into such situations is warranted. But this does not support any means chosen to address the problem. As the commentator who outlined these five factors noted, "the intervention should involve the least intrusive means available."²⁵⁵ This admonition is the basic tenet of any governmental action inhibiting personal choice or behavior. While there is no right to use illegal drugs,²⁵⁶ constitutional guidelines still dictate the limits on how the state can act to curtail behavior, and especially in the context of drug abuse during pregnancy, interventions less intrusive than criminal sanctions are available, and more likely to succeed.²⁵⁷

The implications of *Geduldig*²⁵⁸ and *Michael M.*²⁵⁹ give rise

252. See, e.g., Chasnoff, *Cocaine Use in Pregnancy: Perinatal Morbidity and Mortality*, 9 NEUROTOXICOLOGY & TERATOLOGY 291 (1987) (infants exposed to cocaine had significant depression of response to environmental stimuli compared to methadone exposed infants); see also Ryan and Edelin, *supra* note 251.

253. See *supra* note 221-23.

254. See *supra* notes 217-27 and accompanying text.

255. See Mathieu, *supra* note 28, at 54.

256. See *supra* notes 221-23.

257. For example, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 (1974), administrative convenience was rejected as a justification for cut-off of employment of pregnant teachers, the Court stating "administrative convenience is insufficient to make valid what otherwise is a violation of due process of law." What this suggests is that due process requires compelling evidence of the ability of the means chosen to effect the goal sought, and that the easiest means is not automatically constitutional, notwithstanding the fact that it does achieve the goal. See also *infra* note 252. In the context of drug abuse during pregnancy, criminal sanctions are the equivalent of administrative convenience, and not only does this option not achieve the goal of healthy newborns, it will likely defeat the goal. See also the observation of the plurality in *Webster v. Reproductive Health Services*, ("[c]onstitutional concerns are greatest . . . when the State attempts to impose its will by the force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." 492 U.S. 490, 510 (1989) (quoting *Maier v. Roe*, 432 U.S. 464, 476 (1977)).

258. See *supra* notes 180-84 and accompanying text.

to special considerations in the fetal abuse context. The former is noteworthy for the Court's refusal to view discrimination based on pregnancy as sex discrimination, and its classification of pregnancy as a "risk" rather than a gender characteristic.²⁶⁰ But in adopting that theory, the Court was able to uphold the statute at issue as not discrimination based on sex, but rather a permissible differentiation between pregnant people and non-pregnant people.²⁶¹ *Michael M.* is significant in its acknowledgement of the fact that the sexes are not similarly situated in certain situations,²⁶² and therefore statutes which reflect those distinctions are not inherently suspect of violating equal protection. Coupled with the fact that there is no fundamental right to use illegal drugs, there is reason to believe that based upon the foregoing, a statutory approach to rectify prenatal damage caused by the use of illegal drugs may be supportable on equal protection or due process grounds, as "rationally related" to the goal of protecting the developing fetus, especially that fetus which will be carried to term. Nonetheless, several factors militate strongly against the imposition of criminal sanctions.

As stated by one commentator, "There is no compelling state interest that support regulations that will not work. Nor can [criminal sanctions] be seen as the least restrictive alternative for dealing with the problem."²⁶³ Even though this "compelling" standard from *Roe* was altered by *Webster* to a "permissibly furthers" standard,²⁶⁴ the imposition of criminal sanctions is not supportable. Even the "permissibly furthers" standard requires that the challenged statute "further" the legitimate state interest.²⁶⁵

The detection of women who are abusing drugs while pregnant presents real logistical problems. In the absence of "pregnancy police"²⁶⁶ or an Orwellian big brother,²⁶⁷ two highly obnoxious and invasive concepts, this detection is likely to come about as a result of only three occurrences: arrest for an unrelated incident, as in Brenda Vaughn's

259. See *supra* notes 164-68 and accompanying text.

260. *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974).

261. See *Johnsen*, *supra* note 52, at 621.

262. See *supra* notes 167-68 and accompanying text.

263. *Field*, *supra* note 52, at 123.

264. See *supra* note 35 and accompanying text.

265. See *infra* notes 245-55 and accompanying text.

266. See *Sachs*, *supra* note 2.

267. G. ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

situation,²⁶⁸ when the woman delivers the child, or when she goes to the doctor for prenatal care. The Vaughn situation was mere happenstance, not only was she was unlucky enough to be arrested, she was unlucky to face a judge who would incarcerate her to protect her fetus.²⁶⁹ No one can forcefully argue that such a method of enforcing fetal abuse statutes is effective. Another situation where detection is possible (in fact, is most likely) is when the mother delivers the child. At this point, however, the damage is done, the threat of sanctions has clearly not served its purpose, and imposition of sanctions for fetal abuse fail to rise above vindictiveness.²⁷⁰ The final situation where detection is possible is during prenatal care. All parties can agree that this is the most important time for intervention, because it is the most likely situation where a drug addicted or abusing mother will be detected and can be treated to protect her fetus.²⁷¹

But the problem is that the threat of criminal sanctions is likely

268. See *supra* note 1 and accompanying text.

269. The judge who sentenced Brenda Vaughn was quoted as saying "[s]he's apparently an addictive personality, and I'll be darned if I'm going to have a baby born that way." Jost, *Mother Versus Child*, A.B.A. J. 84, 86 (Apr., 1989) (quoting Superior Court Judge Peter Wolf). Some facts on this case merit mention. At the time of her guilty plea, Judge Wolf, "as [he] does with most women drug abusers when they appear before [him]," gave Ms. Vaughn a reprint of a newspaper article on the harm maternal drug abuse can have on the fetus, which she claimed to have read. 117 WASH. L. REP. 441, 447 (Mar. 7, 1989). She was required to undergo drug testing in the time between her plea and sentencing, and the presentence report indicated she had missed two test dates. *Id.* at 447. At the May 24, 1988 sentencing date, upon learning that the defendant had missed two tests, Judge Wolf ordered Ms. Vaughn be tested that day, and the tests showed evidence of cocaine use within the last two to four days. When later that morning she was again brought before the court, she disclosed for the first time that she was six months pregnant. *Id.*

270. See *supra* note 62.

271. See generally Field, *supra* note 52; see also, Diesenhouse, *Punishing Pregnant Addicts: Debate, Dismay, No Solution*, N.Y. Times, Sept. 10, 1989, at E5, col. 6 (quoting James Bopp, General Counsel, National Right to Life Committee), "[o]ur goal is to protect and have babies born that are not drug dependent. Criminal sanctions are unlikely to accomplish that goal We need protective action - testing and treatment rather than punishment." But see comments of Dr. Jan Bays, director of Child Abuse Programs at Emanuel Hospital in Portland, Oregon, "[w]e must up the ante to criminalize or impose reproductive controls on people who are out of control. . . ." *Id.* at col. 2-3, and comments of William C. O'Malley, Prosecutor, Plymouth Co., Mass., "[I]d much rather see this problem dealt with by the more subtle systems of public health, social services, and education. But . . . we've had nothing but failures. . . . It's time to invoke the mechanism of last resort." *Id.* at col. 3-4.

to compel many women to avoid prenatal care, solely to avoid detection.²⁷² This effect best illustrates the futility of criminal sanctions as a method of ensuring fetal health. When one considers the fact that quite often drug abuse is a function of poverty, and that poverty is a major reason for inadequate prenatal health care,²⁷³ it becomes evident that the threat of sanctions will merely result in fewer women seeking prenatal care.²⁷⁴ This fact aptly illustrates the theory of a state goal which claims to be based on the legitimate goal of protecting fetal health, but in reality acts in a manner directly opposite to its aim. The final effect of the threat of criminal sanctions is that a woman may choose abortion when she otherwise would not make that choice, merely to avoid the imposition of criminal sanctions.

These considerations show how the fetal abuse statutes do not, and cannot, "permissibly further" the state goal of protecting fetal health. In actuality, the evidence is overwhelming that the threat of sanctions will really have the opposite effect, and drive from prenatal care those women who need it most.²⁷⁵ For these reasons, while acknowledging a legitimate state interest in protecting the fetus which will be born, criminal sanctions for fetal abuse are ill advised and "neither necessary nor effective in achieving their professed aim of improving the health of the newborn population."²⁷⁶

V. CONCLUSION

There is little argument that society has a legitimate and compelling interest in ensuring that children are born healthy. Such a goal has strong moral and ethical underpinnings, and the economic considerations are also strongly on the side of intervention. Nevertheless,

272. See *supra* notes 244, and 266-74, and accompanying text.

273. "I agree the unborn need protection, but that takes hard work to make pregnancy a healthy condition for all women, including the poor . . . through prenatal care for everyone. . . ." Diesenhouse, *supra* note 271, at col. 6 (quoting George L. Annas, professor of Health Law at Boston University School of Medicine).

274. See *supra* notes 238-245 and accompanying text. See also comments of Molly McNulty, reproductive law expert and a Revlon Fellow at the National Health Law Program in Washington, D.C., "[I] think the long-run consequences of involving criminal law in this problem will be to drive women away from treatment and to further divide the family unit." Curriden, *supra* note 116, at 52.

275. See *supra* note 244.

276. Field, *supra* note 52, at 120.

the evidence is compelling that criminal sanctions are the least effective means of achieving the legitimate state interest. Under the pretense of ensuring fetal health and promoting a quality life, the threat of criminal sanctions defeats, rather than promotes, that goal. As one commentator has stated, "[criminal sanctions] will provide the very antithesis of that which its sponsors seek; healthy babies are not the result of programs or laws which deter prenatal care."²⁷⁷

Criminal sanctions put the mother and fetus in an adversarial relationship, which itself is not conducive to the development of a positive mother-child relationship after birth. But as a more immediate and damaging effect, sanctions will compel women with fetuses at risk to avoid prenatal care. Based upon these observations, it is understandable that the imposition of sanctions has been characterized as "a barbaric approach to deal with someone who is [addicted],"²⁷⁸ and "a short-term, knee-jerk solution."²⁷⁹ From a practical standpoint there are a multitude of more effective, and less expensive alternatives. Educational programs explaining the risks of drug use during pregnancy, specifically targeted to women who need the information, is the logical first step.²⁸⁰ Following up the educational program with increased state and federal funding for prenatal care, will help every child who is to be born to receive proper prenatal care.²⁸¹ And to stop the cycle dead in its tracks, increased

277. Note, *Fetal Rights Controversy*, *supra* note 66, at 287 n.160.

278. Diesenhouse, *supra* note 271, at col. 3 (quoting Eve Paul, Director of Legal Affairs of the Planned Parenthood Federation in New York); *see also supra* note 62.

279. Diesenhouse, *supra* note 271, at col. 3 (quoting Dr. Ira J. Chasnoff, President of NAPARE). Also, "[i]t's a punitive approach that is being taken out of frustration by the legal and medical communities." Sachs, *supra* note 2, at 105 (quoting Dr. Chasnoff). Compare these quotes from Dr. Chasnoff, especially the latter, with the comments cited *supra* note 252.

280. *See* Note, *Maternal Rights*, *supra* note 52, at 1001 ("[t]he abortion cases show that the Constitution puts a value on personal autonomy; the state cannot abridge this autonomy simply because it finds that approach easier than education") *see also supra* note 231.

281. *See* Lewin, *Study Cites Lack in Prenatal Care*, N.Y. Times, Nov. 2, 1989, § 1, at 25, col. 1. The study found that from 1984 to 1986, the years covered by the study, the percentage of women receiving inadequate health care increased. *See also* Kolata, *Less Prenatal Care Urged for Most Healthy Women*, N.Y. Times, Oct. 4, 1989, at A1, col. 3 (discussing a report issued by the United States Public Health Service which recommends that less prenatal care be provided to women whose fetuses are not at risk, and given to women with fetuses at risk, noting that approximately 40% of the nearly 4 million women who give birth each year have no apparent risk factors [smoking, alcohol and/or drug abuse, and lack of medical care] either before or during

funding for drug treatment programs will help women, both before and during pregnancy, to kick habits which endanger both their own lives and the lives of their unborn children.²⁸²

Advocating criminal sanctions as a remedy for prenatal injury resulting from maternal drug abuse clearly implies an awareness of the multitude of societal and personal problems which give rise to this unfortunate situation. But to resort to the easiest perceived remedy, which by nature is the least effective and most damaging to the mother and fetus, is to ignore the underlying causes for the problem and to take the easy way out. Such an approach is not in the best interests of pregnant women, society, or future generations.

Robert Holland

pregnancy. *Id.* at 22, col. 1. Simple mathematics implies that 60% of the women who give birth each year have fetuses at risk. For these women, the panel advocates nutrition services, treatment for drug, alcohol, and nicotine addictions, and help with personal problems which could lead to child abuse. *Id.* Moreover, the panel suggests that pregnancy education be made part of women's education, beginning in adolescence. *Id.*

282. "[In New York City] cocaine abuse among pregnant women has increased 3000 percent over the last ten years." French, *For Pregnant Addicts, a Clinic of Hope*, N.Y. Times, Sept. 29, 1989, at B1, col. 2 (quoting Elizabeth Graham, New York City Assistant Health Commissioner). According to Ms. Graham, in 1988, about 21 out of every 1,000 child-bearing women identified themselves as cocaine abusers. That figure is up from 7 in 1985. *Id.* Dr. Wendy Chavkin surveyed 78 drug treatment programs in New York City, and got disturbing results. 54% of the programs refused treatment to women claiming to be pregnant and addicted, 67% denied treatment to pregnant addicts on Medicaid, and 87% denied treatment to pregnant women on Medicaid addicted specifically to crack. Furthermore, less than half of those programs accepting pregnant women made arrangements for prenatal care and health care, the latter provision demonstrated to be a condition precedent to participation of women in treatment programs. Chavkin, *supra* note 64. See also Diesenhouse, *supra* note 60, at E26, col. 2, ("[a]cross the country there is a tremendous need for treatment that responds to women's special needs but rehabilitation seems to have taken a second place to law enforcement. . . .") (quoting David Mulligan, the Massachusetts Commissioner of Public Health).

