NEW YORK LAW SCHOOL

NYLS Law Review

Volume 36 | Issue 1 Article 32

January 1991

Addicted Mothers, Drug-Exposed Babies: The Unprecedented Prosecution of Mothers Under Drug-Trafficking Statutes

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ADDICTED MOTHERS, DRUG-EXPOSED BABIES: THE UNPRECEDENTED PROSECUTION OF MOTHERS UNDER DRUG-TRAFFICKING STATUTES

I. INTRODUCTION

It is estimated by the National Association of Perinatal Addiction Research and Education (NAPARE) that eleven percent of women use drugs during pregnancy, resulting in 375,000 births of drug-exposed infants annually.[1] As frightening as these statistics are, the individual accounts of the pervasive problem of pregnant drug abusers are even more profound:

> The thing that most disturbed me about what I saw as these people came out of the doorway was that three of the women - who were arrested when police found **90** vials of crack hidden in a teddy bear in their house - were **pregnant**. Visibly pregnant. How could they be poisoning themselves and their babies with drugs? It was something I had read about, inner-city drug addicts who gave birth to drug-addicted babies, but I had never seen them. I had never looked into the eyes of someone so delirious by drugs that they were **laughing** as they were being taken away by police.[2]

The devastating effects of drug exposure on babies are well documented.[3] Since the mid-1980s, state prosecutors have been prosecuting "an increasing number of women under unprecedented interpretations of child abuse and drug trafficking statutes."[4]

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1. *See* Janet R. Fink, *Effects of Crack and Cocaine Upon Infants: A Brief Review of the Literature*, CHILDREN'S LEGAL RTS. J., Fall 1989, at 2. This study was based on an August 1988 survey of thirty-six hospitals across the country. *Id.*

2. Laurie Ford, student log entry, submitted to New York University Professor Richard Petrow, describing the student's experiences while an intern at Channel 12, (Oct. 18, 1990) (on file with the *New York Law School Law Review*).

3. *See* Amy S. Oro & Suzanne D. Dixon, *Perinatal Cocaine and Methamphetamine Exposure: Maternal and Neonatal Correlates*, 111 J. PEDIATRICS 571, 574 (1987) (detailing behavioral disturbances in infants exposed to narcotics and cocaine, including tremors, irritability, abnormal sleep patterns, and poor feeding); Ira J. Chasnoff et al., *Temporal Patterns of Cocaine Use in Pregnancy*, 261 JAMA 1741, 1744 (1989) (stating that cocaine-exposed children manifest serious neuro-behavioral deficits, possibly affecting long-term development).

4. *The President's National Drug Abuse Strategy: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 101st Cong.,

In July 1989, Jennifer Johnson, then a twenty-three-year-old crack addict, became the first woman in the country to be convicted of making an in-utero drug delivery to her baby.[5] The Florida District Court of Appeals upheld the conviction in April 1991.[6] On July 23, 1992, however, the Supreme Court of Florida unanimously reversed Jennifer Johnson's conviction.[7] Nevertheless, the trial court's analysis demonstrates how lower courts across the country have applied drug-trafficking statutes unconstitutionally to mothers of newborn infants.[8] The Florida prosecutor relied on a state statute that criminalizes the delivery of drugs to a minor.[9] This statute, which carries a possible thirty-year sentence,[10] traditionally has been used against adult drug pushers.[11] The prosecutor based the *Johnson* case on the theory that Ms. Johnson

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2d Sess. 1 (1990) [hereinafter *ACLU Testimony*] (testimony of attorney Lynn Paltrow, speaking on behalf of the American Civil Liberties Union).

5. *See* Record, State v. Johnson, No. 89-890-CFA (Fla. Cir. Ct. July 13, 1989), *aff'd*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), *rev'd*, 602 So. 2d 1288 (Fla. 1992); *see also* Jan Hoffman, *Pregnant, Addicted—and Guilty?*, N.Y. TIMES, Aug. 19, 1990, § 6 (Magazine), at 34, 35 (providing an overview of other prosecutions of drug-addicted mothers); Tamar Lewin, *Court in Florida Backs Guilt for Drug Delivery by Umbilical Cord*, N.Y. TIMES, Apr. 20, 1991, § 1, at 6 (discussing the court's decision to uphold Johnson's conviction).

6. *See* Johnson v. State, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), *rev'd*, 602 So. 2d 1288 (Fla. 1992).

7. *See Johnson*, 602 So. 2d at 1288.

8. *See* Record, *Johnson* (No. 89-890-CFA).

9. The Florida statute provides, in relevant part, that

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

FLA. STAT. ch. 893.13(1)(c)(1) (1989).

10. *Id.* ch. 893.13(1)(c).

11. *See, e.g.*, Gelsey v. State, 565 So. 2d 876 (Fla. Dist. Ct. App. 1990) (affirming a conviction for delivery of a controlled substance where the defendant met with officers and exchanged crack and cash for powdered cocaine); Roberts v. State, 557 So. 2d 685 (Fla. Dist. Ct. App. 1990) (affirming a conviction for delivery of cocaine where the defendant sold cocaine to an undercover officer); Newman v. State, 522 So. 2d 71 (Fla. Dist. Ct. App. 1988) (affirming a conviction for cocaine trafficking where the purchaser sampled cocaine, even though cocaine and money were not yet exchanged); *see also* Wendy Chavkin, *Help, Don't Jail, Addicted Mothers*, N.Y. TIMES, July 18, 1989, at A21 (discussing Florida's use of felony drug charges against pregnant women with drug problems).

delivered a cocaine metabolite through the infant's umbilical cord during the sixty-second period after the child was born but before the cord was severed.[12]

In two similar Michigan cases, Lynn Ellen Bremer and Cheryl Cox were charged with delivering drugs to their unborn fetuses, but their charges were dismissed.[13] If the women had been convicted, they would have faced minimum jail terms of one year and maximum terms of twenty years.[14]

Part II of this note presents a brief background of the cases involving criminal prosecutions of drug-addicted women who have exposed their babies to drugs, along with an overview of recent attempts by state legislatures to pass legislation in this area. Part III of this note discusses constitutional issues relating to the criminal prosecution of drug-addicted women under drug-trafficking statutes, including the novel application of existing state drug laws to women who give birth to drug-exposed babies.

Part III of this note argues that the use of drug-delivery statutes[15] to punish the mothers of drug-exposed babies violates the mothers' due process right to fair notice under the Fourteenth Amendment,[16] the mothers' fundamental right to privacy,[17] and the mothers' right to autonomy in reproductive decision making.[18] This part also argues that

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12. *See* Record at 6, *Johnson* (No. 89-890-CFA); *see also* Brief for Appellant at 1, Johnson v. State, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991) (No. 89-1765) (on file with the *New York Law School Law Review*) [hereinafter Johnson's Initial Brief] (summarizing the prosecution's legal theory); Dorothy E. Roberts, *Drug-Addicted Women Who Have Babies*, TRIAL, Apr. 1990, at 56 (providing an overview of the constitutional issues regarding the prosecution of drug-addicted women who have drug-exposed babies).

13. *See* People v. Bremer, No. 90-32227-FH (Mich. Cir. Ct. Jan. 31, 1991), *appeal denied*, 483 N.W.2d 371 (Mich. 1992); People v. Cox, No. 90-53545-FH (Mich. Cir. Ct. July 9, 1990), *aff'd*, No. 131-999 (Mich. Ct. App. Feb. 28, 1992).

14. The Michigan statute provides in relevant part:

> Except as authorized by this article, a person shall not manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance . . . . (2) A person who violates this section as to: (a) A controlled substance . . . (iv) [w]hich is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 1 year nor more than 20 years . . . .

MICH. COMP. LAWS § 333.7401 (1989).

15. *See, e.g.*, FLA. STAT. ch. 893.13(1)(c) (1989); MICH. COMP. LAWS § 333.7401 (1989) (prohibiting the delivery of drugs to a minor).

16. *See* U.S. CONST. amend. XIV, § 1 (providing, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law").

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

18. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing the right to privacy in the marital relationship).

using these state statutes to prosecute drug-addicted pregnant women amounts to ex post facto legislation.[19] Last, this part asserts that the application of the existing state criminal laws to addicted mothers runs afoul of the constitutional requirements of evidentiary support in criminal prosecutions,[20] the guarantees of equal protection under the law,[21] and the protections against cruel and unusual punishment.[22]

Part IV of this note examines whether any of the traditional justifications of criminal punishment are applicable, because "[n]o questions of criminal justice are more fundamental than the bases for imposing criminal punishment."[23] A review of the different theories demonstrates that rehabilitation is the most plausible justification for imposing criminal sanctions.[24]

Part V of this note concludes that rehabilitation should be provided not as a justification for, but in place of, criminal penalties. This section argues that drug-treatment programs designed to meet the needs of pregnant women must be made available, accessible, and affordable. According to the drug-treatment programs that combine medical and therapeutic treatment in the form of obstetric, pediatric, and postpartum gynecologic care, positive results have been reported.[25]

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19. *See* U.S. CONST. art. I, § 10, cl. 1 (providing that "[n]o State shall . . . pass any . . . ex post facto Law").

20. *See* Thompson v. City of Louisville, 362 U.S. 199, 206 (1960) (finding that a criminal conviction "totally devoid of evidentiary support" is unconstitutional under the Due Process Clause of the Fourteenth Amendment).

21. *See* U.S. CONST. amend. XIV, § 1 (providing that "[n]o state shall deny to any person within its jurisdiction the equal protection of the laws").

22. *See* U.S. CONST. amend. VIII (providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

23. Kent Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of* Powell v. Texas, 69 COLUM. L. REV. 927, 927 (1969).

24. *See infra* notes 228-29 and accompanying text.

25. *See Born Hooked: Confronting the Impact of Perinatal Substance Abuse: Hearing Before the Select Comm. on Children, Youth, and Families*, 101st Cong., 1st Sess. 118 (1989) [hereinafter *Chavkin Testimony*] (statement of Wendy Chavkin, M.D., M.P.H., Rockefeller Fellow, Columbia University School of Public Health, mentioning three successful drug-treatment programs: The Perinatal Addiction Center at Northwestern Hospital in Chicago, The Family Care Center at Jefferson Hospital in Philadelphia, and The Program for Pregnant Addicts and Addicted Mothers at Metropolitan Hospital in New York City).

II. THE RECENT TREND IN CRIMINAL PROSECUTIONS AND LEGISLATIVE ENACTMENTS

A. *The Prosecutions*

The first widely publicized criminal prosecution of a mother for using drugs during pregnancy was a California case, *State v. Stewart*.[26] Pamela Rae Stewart, an alleged abuser of "street drugs," was prosecuted on the grounds of criminal child abuse after giving birth to a severely brain-damaged son who died six weeks after birth.[27] The trial court dismissed the charges because California's criminal child-abuse statute was designed to punish those who failed to provide necessary clothing, food, shelter, and financial child support.[28] The statute was not intended to impose punishment on women for their prenatal misconduct.[29] The statutory definition of "child" was amended to include fetuses so that fathers would be required to pay their share of pregnancy expenses if they abandoned their pregnant wives.[30]

Pamela Rae Stewart became the first of a significant number of pregnant women in the United States to be charged with criminal child neglect, abuse, or endangerment.[31] Although one appellate court has

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26. No. M508197 (San Diego, Cal. Mun. Ct. Feb. 26, 1987); *see also* Rorie Sherman, *Keeping Babies Free of Drugs*, NAT'L L.J., Oct. 16, 1989, at 1 (stating that there has been one conviction for using drugs while pregnant).

27. *See Stewart*, No. M508197, slip op. at 3; *see also* Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994 (1988) (arguing that Stewart allegedly abused the fetus by disregarding a physicians advice to discontinue amphetamine use during her pregnancy, to abstain from sexual intercourse because she had *placenta previa*, and to seek immediate medical attention if she began to hemorrhage).

28. *See Stewart*, No. M508197, slip op. at 9-11.

29. *See id.* at 10-11.

30. In 1925, in order to impose a further burden upon the father rather than an additional burden on the mother, CAL. PENAL CODE § 270 (Deering 1925) was amended to provide that the word "child" included a child conceived but not yet born. *Stewart*, No. M508197, slip op. at 7-8. Indeed, the 1925 amendment left the father solely responsible and imposed an obligation upon the mother only if the father was dead or incapacitated. *Id.* at 7. In 1974, the legislature amended the statute again to apply to both parents. *Id.* at 8. The legislature's intent in the second amendment was to make both mother and father equally liable for failing to support their child. *Id.*; *see also* Marcia Chambers, *Dead Baby's Mother Faces Criminal Charges on Acts in Pregnancy*, N.Y. TIMES, Oct. 9, 1986, at A22 (stating that the statute "generally applies to situations in which pregnant women seek support from husbands who had deserted them").

31. *See, e.g.*, State v. Gethers, No. 89-4454 CF10A (Fla. Cir. Ct. Nov. 6, 1989) (refusing to charge a woman, who gave birth to a cocaine baby, with aggravated child

upheld the application of a criminal child-abuse or endangerment statute against a pregnant woman who used drugs,[32] that case was recently reversed.[33] Because a number of courts have held that a fetus is not a legal person for purposes of the child-abuse statutes,[34] prosecutors have focused instead on drug-trafficking statutes.[35]

Hence, several recent prosecutions against addicted mothers included charges of delivering drugs to a minor.[36] In one such case, Jennifer

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abuse because the court ruled that a fetus is not a legal person for purposes of the child-abuse statute), *aff'd*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991); People v. Morabito, 580 N.Y.S.2d 843 (N.Y. Mun. Ct. 1992) (dismissing an endangering the welfare of a child charge under N.Y. PENAL LAW § 260.10 (1) (McKinney 1989), and holding that the statute does not apply to unborn children); State v. Gray, 584 N.E.2d 710, 714 (Ohio 1992) (holding that Ohio's child-endangerment statute, OHIO REV. CODE ANN. § 2919.22 (A) (Anderson 1989), does not apply to a mother's substance abuse during pregnancy); State v. Andrews, No. JU 68459 (Ohio C.P. June 19, 1989) (dismissing child-endangerment charges because the court refused to include fetus within the definition of child).

32. In Kentucky, a thirty-three-year-old woman was convicted of criminal child abuse in the second degree after giving birth to a six-pound boy who allegedly suffered from "neonatal abstinence syndrome." Kentucky v. Welch, No. 90-CR-06 (Ky. Cir. Ct. Mar. 15, 1990), *aff'd in part, rev'd in part*, No. 90-CA-1189-MR (Ky. Ct. App. 1992) (reversing the criminal child-abuse conviction but affirming the two possession convictions).

33. *See* Kentucky v. Welch, No. 90-CA-1189-MR (Ky. Ct. App. 1992); *see also* Milo Geyelin & Junda Woo, *Law: Conviction of Woman Who Took Drugs While Pregnant Is Reversed*, WALL ST. J., Feb. 11, 1992, at B7 (reporting that the reversal is believed to be the first by an appeals court); Lynn M. Paltrow, Criminal Prosecutions Against Pregnant Women 16 (Apr. 1992) (report on file with the ACLU Reproductive Freedom Project) (discussing the *Welch* decision in which the court refused to expand the child-abuse statute to a woman who took drugs while pregnant).

34. *See supra* note 31 and accompanying text.

35. *See* Chavkin, *supra* note 11, at A21.

36. *See, e.g.*, State v. Luster, 419 S.E.2d 32 (Ga. Ct. App.) (unanimously affirming the dismissal of drug-delivery charges and agreeing with the trial court's determination that the statute failed to give notice of the crime charged), *cert. denied*, 1992 Ga. LEXIS 467; Florida v. Jerez, No. 90-0075-CF-F (Fla. Cir. Ct. July 31, 1990) (reducing drug-delivery charges from a first degree to a second-degree felony and dropping child-abuse charges after Jerez pled guilty; Jerez was sentenced to three-and-a-half-years imprisonment); State v. Carter, No. 89-6274 (Fla. Cir. Ct. July 23, 1990), *aff'd*, 602 So. 2d 995 (Fla. Dist. Ct. App. 1992) (charging Carter with delivery of a controlled substance after her baby tested positive for cocaine); State v. Black, No. 89-5325 (Fla. Cir. Ct. Jan. 3, 1990) (pleading no contest, Black was the first Florida woman to be sent to jail for delivering cocaine to a baby through the umbilical cord); State v. Hudson, No. K88-3435-CFA (Fla. Cir. Ct. July 26, 1989) (dropping charges of child endangerment and of delivering cocaine to a minor, after Hudson pled guilty to possessing cocaine).

Since August 1989, approximately thirty to forty South Carolina women who took drugs during their pregnancies have been charged with distributing drugs to a minor. *See* People v. Bremer, No. 90-32227FH (Mich. Cir. Ct. Jan. 31, 1991), *appeal denied*, 483

Johnson gave birth to two babies in a three-year period, and both babies tested positive for cocaine.[37] Florida Circuit Judge O.H. Eaton, Jr., found "that the term 'delivery' includes the passage of cocaine or [a] derivative of it from the body of a mother into the body of her child through the umbilical cord after birth occurs."[38] Johnson was convicted and sentenced to fifteen-years probation.[39] For the probation period, the court ordered her to participate in a one-year strictly supervised rehabilitation program, educational and vocational training, and monthly random drug testing.[40] In addition, the court required Johnson to agree to enroll in an intensive prenatal care program in the event that she became pregnant again.[41]

In another case, defendant Kimberly Hardy was arrested on drug-delivery charges shortly after giving birth to her son, Areanis.[42] According to an interview with Ms. Hardy,[43] the baby was six-weeks premature. The doctors, suspecting Hardy's drug abuse, tested the baby's urine. After the test results proved the presence of cocaine, doctors at Muskegon General Hospital in Michigan notified the County Department

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N.W.2d 371 (Mich. 1992); People v. Cox, No. 90-53545-FH (Mich. Cir. Ct. July 9, 1990), *aff'd*, No. 131999 (Mich. Ct. App. Feb. 28, 1992); *see also* Commonwealth v. Pellegrini, No. 87970 (Mass. Super. Ct. Oct. 15, 1990) (dismissing charges against the first woman in Massachusetts to be charged under the state's drug-trafficking statute for distributing cocaine to a newborn baby); People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App.) (unanimously ruling that Michigan did not intend its statute prohibiting delivery of cocaine to children to apply to pregnant drug users), *appeal denied*, 471 N.W.2d 619 (Mich. 1991); State v. Inzar, Nos. 90-CRS6960, 90-CRS6961 (N.C. Super. Ct. April 9, 1991) (dismissing charges of delivering a controlled substance to a minor and of assault with a deadly weapon), *appeal dismissed*, No. 91-16SC778 (N.C. Ct. App. Aug. 30, 1991).

37. *See* Johnson v. State, 578 So. 2d 419, 419 (Fla. Dist. Ct. App. 1991), *rev'd*, 602 So. 2d 1288 (Fla. 1992).

38. Record at 366, State v. Johnson, No. 89-890-CFA (Fla. Cir. Ct. July 13, 1989), *aff'd*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), *rev'd*, 602 So. 2d 1288 (Fla. 1992).

39. *See* Mark Curriden, *Holding Mom Accountable*, A.B.A. J., Mar. 1990, at 50, 51 (stating that Johnson could have received up to a thirty-year prison term).

40. *Id.*

41. *Id.*

42. *See* People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App.) (unanimously ruling that Michigan did not intend its statute prohibiting delivery of cocaine to children to apply to pregnant drug users), *appeal denied*, 471 N.W.2d 619 (Mich. 1991); *see also* Isabel Wilkerson, *Woman Cleared After Drug Use in Pregnancy*, N.Y. TIMES, Apr. 3, 1991, at A15 (stating that Kimberly's behavior did not constitute a criminal delivery of drugs).

43. *See 60 Minutes: Kim Hardy May Go to Prison* (CBS television broadcast, Nov. 18, 1990) [hereinafter *60 Minutes*] (transcript on file at *New York Law School Law Review*).

of Social Services.[44] Describing her arrest in an interview, Hardy stated that "[i]t was a nightmare. I was booked, fingerprinted, had my picture taken. I was shackled for God-knows-whatever reasons and it was all strange to me because I'd never been in any kind of trouble like that before."[45]

Lynn Bremer, another Michigan woman who faced charges of delivery of drugs to a minor, was reported to the police by her doctor.[46] In an interview, Bremer said that she felt compelled to tell her doctor of her drug problem because she was concerned about the health of her baby.[47] Her doctor reported her to the local police after she failed to stay off drugs.[48] In South Carolina, women have been reported to the authorities by hospital doctors after giving birth to drug-exposed babies.[49] In these cases, the names of women who test positive for cocaine are turned over to the police. The police arrive shortly after the delivery, handcuff the women, and take them to jail.[50]

The prosecution of women in an effort to protect newborns is not limited solely to cocaine addicts. In the fall of 1989, twenty-nine-year-old Diane Pfannensteil, who was pregnant, went to a Wyoming hospital for treatment of injuries inflicted by her husband.[51] The local police tested the alcohol level in her bloodstream and then arrested her as she waited in the emergency room.[52] Pfannensteil was charged under the state's criminal child-abuse statute for endangering her fetus,[53] but the court dismissed the charges after finding no probable cause.[54]

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44. Hoffman, *supra* note 5, at 34.

45. *60 Minutes*, *supra* note 43, at 9.

46. *Id.* at 10.

47. *See id.*

48. *Id.*

49. *See ACLU Testimony*, *supra* note 4, at 5-6.

50. *See id.* at 6.

51. Ellen Goodman, *Being Pregnant, Addicted: It's a Crime*, CHI. TRIB., Feb. 11, 1990, § 5, at 12.

52. *Id.*

53. *See* State's Reply to Defendant's Motion to Dismiss for Insufficiency of Criminal Complaint at 2-4, State v. Pfannensteil, No. 1-90-8CRC (Albany, Wyo. County Ct. Feb. 6, 1990).

54. *See* State v. Pfannensteil, No. 1-90-8CRC (Albany, Wyo. County Ct. Feb. 6, 1990); *see also* State v. Stewart, No. M508197, slip. op. at 10-11 (San Diego, Cal. Mun. Ct. Feb. 26, 1987) (recognizing that CAL. PENAL CODE § 270 (West 1988) only applies under certain circumstances); *Case Against Pregnant Woman Is Dismissed*, N.Y. TIMES, Feb. 3, 1990, at A10 (stating that mother did not pass cocaine to her son in a way "that constituted criminal delivery of drugs").

In May 1989, Melanie Green, a twenty-four-year-old Illinois woman, became the first woman in the country to be charged with involuntary manslaughter for the death of a two-day-old infant allegedly killed as a result of the mother's drug use during pregnancy.[55] An autopsy revealed that oxygen deprivation, linked to cocaine exposure late in pregnancy, caused the death.[56] In Illinois, involuntary manslaughter is a felony that is punishable by two to five years in prison.[57] The charges against Melanie Green were dropped, however, when a grand jury refused to indict her.[58]

B. *State Legislation*

The most common trend for state legislatures is to amend their existing civil child-neglect laws to prohibit drug use during pregnancy. States such as Illinois,[59] Florida,[60] and Minnesota[61] have enacted such laws. In 1990, Virginia amended its felony-abuse and child-neglect statute to criminalize the act of a parent or guardian who causes "serious injury," which is defined, inter alia, as the "forced ingestion of dangerous substances."[62]

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55. *See* People v. Green, No. 89-CF-642 (Winnebago County., Ill. Cir. Ct. filed May 8, 1989); *see also* John Robertson & Lynn Paltrow, *'Fetal Abuse': Should We Recognize It As a Crime?*, 75 A.B.A. J., Aug. 1989, at 38 (presenting opposing views about whether fetal abuse should be recognized as a crime).

56. *See Mother Charged After Her Baby Dies of Cocaine*, N.Y. TIMES, May 10, 1989, at A18. Green was also charged with delivery of a controlled substance to a minor. *Id.*

57. *See* ILL. REV. STAT. ch. 38, para. 9-3 (1991) (involuntary manslaughter statute); ILL. REV. STAT. ch. 38, para. 1005-8-1 (1991) (sentencing statute).

58. Paltrow, *supra* note 33, at 15.

59. *See* Illinois Juvenile Court Act, ILL. REV. STAT. ch. 37, para. 802-3, § 2-3 (1)(c) (1989) (defining "neglected or abused minor" as "any newborn infant whose blood or urine contains any amount of a controlled substance . . . or a metabolite of a controlled substance").

60. *See* FLA. STAT. ANN. § 415.503(9) (West 1986) (providing that "harm" to a child's health or welfare may occur when a newborn infant is born with a physical dependency on a controlled substance).

61. *See* MINN. STAT. § 626.556 (Supp. 1989) (defining "neglect" to include "prenatal exposure to a controlled substance . . . used by the mother for a nonmedical purpose").

62. *See* VA. CODE ANN. § 18.2-371.1.A. (Michie Supp. 1991). Two cases in Virginia recently were dismissed, however, under the newly amended statute based on findings that the statute was not intended to apply to fetuses. *See* Commonwealth v. Smith, No. CR-91-05-4381 (Va. Cir. Ct. Sept. 23, 1991); Commonwealth v. Wilcox, No. A-44116-01 (Va. Norfolk Juv. & Dom. Rel. Dist. Ct. Oct. 9, 1991); *see also* Paltrow, *supra* note 33, at 30-31 (stating that the statute makes criminal the causing of serious injury to a child under eighteen years of age).

Other states have sought to institute punitive measures against drug-addicted pregnant women.[63] Two bills, one in Georgia and another in Louisiana, sought to make drug use during pregnancy a felony.[64] Both were defeated.[65] Another bill, in Rhode Island, sought to expand the definition of manslaughter to include the death of a child resulting from drug use by a pregnant woman.[66] It was also defeated.[67]

The dichotomy in state legislative action is evidenced by two bills introduced in Kansas and Michigan. In Kansas, Republican Representative Kerry Patrick introduced a bill that would require convicted female addicts to accept Norplant birth-control inserts, which prevent pregnancies for up to five years.[68] Under the proposed law, the state would pay for the $500 procedure, as well as the removal of the insert, if the women stay off drugs for one year.[69] In Michigan, Democratic Representative Teola Hunter sponsored a bill to exclude "postpartum transfer of a controlled substance by a mother to her child" from the meaning of "delivery" in the state's controlled-substance laws.[70] The Hunter bill cleared the House by a seventy-nine to twenty-two vote[71] and, at the time of publication, was under consideration by the Michigan Senate's Criminal Law and Corrections Committee.[72] State legislatures, as well as state prosecutors, are at odds on how to approach the problems associated with pregnant drug-addicted women.

III. CONSTITUTIONAL ISSUES RELATING TO CRIMINAL PROSECUTION UNDER EXISTING STATE DRUG-DELIVERY STATUTES

Although courts have ruled that a fetus is not a legal person for purposes of the criminal child-abuse and endangerment statutes, state prosecutors are utilizing existing drug-delivery statutes to charge pregnant

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63. *See* Memorandum from Kary L. Moss et al., ACLU Women's Rights Project, to "interested persons," Update of State Legislation Regarding Drug Use During Pregnancy, 1-2 (May 22, 1990) (on file with *New York Law School Law Review*).

64. H.B. 1393, 1990 Sess. (Ga.); H.B. 1621, 1991 Sess. (La.).

65. Moss et al., *supra* note 63, at 2.

66. *See* H.B. 5108, 1991 Sess. (R.I.).

67. Moss et al., *supra* note 63, at 2.

68. *See* James Willwerth, *Should We Take Away Their Kids?; Often the Best Way to Save the Child is to Save the Mother as Well*, TIME, May 13, 1991, at 62, 62.

69. *See id.*

70. *See* H.B. 5241, 86th Leg., 1991 Sess. (Mich.)

71. *See Crackmom' Bill Clears House*, UPI, Nov. 5, 1991, *available in* LEXIS, Nexis Library, UPI File.

72. *See* 1991 Mich. H.B. 5241 (SN), *in* WESTLAW, BILLTRK Database.

women with delivering cocaine metabolites to their newborns.[73] Jennifer Johnson's conviction, as well as the potential convictions of similarly charged women, violates several important constitutional protections.

A. *Right to Fair Notice*

The most flagrant problem with prosecuting drug-addicted women under drug-delivery statutes is the violation of the right to fair notice in the Fourteenth Amendment's Due Process Clause.[74] This right includes the "constitutional requirement of definiteness [that] is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that [her] contemplated conduct is forbidden by the statute."[75] The basic principle of this right is that the language of a criminal statute must provide people with a reasonable understanding of a crime before they can be held criminally responsible for their actions.[76]

In *Bouie v. City of Columbia*,[77] a South Carolina trespass statute prohibited non-consensual entry onto private land.[78] The state court unforeseeably and retroactively enlarged the statute to prohibit, as a separate offense, the act of remaining on private property after being asked to leave.[79] The Supreme Court stressed that the South Carolina Supreme Court, in applying its new construction of the statute, deprived the petitioner of his right to fair notice of a criminal prohibition and thus violated the Due Process Clause of the Fourteenth Amendment.[80] The Court expressed concern that the new construction would "lull . . . the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction."[81] Similarly, in a later case that restated the holding of *Bouie*, the United States Supreme Court found that an "unforeseeable judicial enlargement of a criminal statute narrow and precise on its face violated the Due Process Clause."[82]

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73. *See supra* notes 36-50 and accompanying text.

74. *See* U.S. CONST. amend. XIV, § 1 (providing that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law").

75. U.S. v. Harriss, 347 U.S. 612, 617 (1954).

76. *See id.*

77. 378 U.S. 347 (1964).

78. *See id.* at 349-50.

79. *See id.* at 350.

80. *See id.*

81. *Id.* at 352.

82. Rose v. Locke, 423 U.S. 48, 53 (1975) (citing *Bouie*, 378 U.S. at 353, before

The *State v. Johnson*[83] case provides a good example of this concern. The Florida drug-delivery statute that prohibits illicit drug delivery to minors generally has been applied narrowly to adult drug pushers.[84] According to the defendant's counsel in *Johnson*,

> [t]hroughout its sixteen-year history, the prohibition of delivery of drugs to a minor has been construed in a fashion comporting with its plain meaning: individuals have been prosecuted for handling or arranging the transfer of a controlled substance outside of his or her own body to a person under the age of eighteen years.[85]

Thus, in the *Johnson* case, Florida's drug-delivery statute was not merely interpreted more broadly, it was applied in a completely novel fashion. If the court's interpretation had simply broadened the statute, the statute's new application would not necessarily have been unconstitutional. For example, in *Rose v. Locke*,[86] the Tennessee statute proscribing a "crime against nature"[87] did not offend the fair-notice requirement found in the Due Process Clause of the Fourteenth Amendment. The Supreme Court held that whether the "crime against nature" should be applied narrowly or broadly was insufficient to uphold a due-process violation.[88] In *Wainwright v. Stone*,[89] the Court determined that a different "crime against nature" statute[90] did not violate the requirement of fair notice.[91] Although the statute in *Wainwright* did not list specific prohibited acts, the conduct that served as the basis for the defendant's convictions had long been held to constitute a crime under the statute in question.[92]

Johnson's due-process right to fair notice was violated when Florida applied its drug-delivery statute in an unforeseeable manner. The statute

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distinguishing the *Bouie* holding as inapplicable to the case at hand).

83. No. 89-890-CFA (Fla. Cir. Ct. July 13, 1989), *aff'd*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), *rev'd*, 602 So. 2d 1288 (Fla. 1992).

84. *See supra* note 11 and accompanying text.

85. Johnson's Initial Brief, *supra* note 12, at 37.

86. 423 U.S. at 48.

87. TENN. CODE ANN. § 39-707 (1955) (repealed by Act of 1989, ch. 591, § 1).

88. *See Rose*, 423 U.S. at 50-51.

89. 414 U.S. 21 (1973) (rejecting defendant's claim that the Florida statute's proscription of "crimes against nature" did not encompass oral and anal sexual activity).

90. FLA. STAT. ANN. § 800.01 (West 1965) (repealed by laws of 1974, ch. 74-121, § 1).

91. *See Wainwright*, 414 U.S. at 22.

92. *Id.* at 22.

was applied to an entirely new category of conduct. The defendant had no notice that her actions were unlawful; the court's novel application of the drug-delivery statute is therefore unconstitutional.

B. *Right to Privacy*

The Due Process Clause of the Fourteenth Amendment also embodies the fundamental right to privacy.[93] The application of drug-delivery statutes to drug-addicted women infringes upon their fundamental privacy rights, including the right to autonomy in reproductive decision making.[94] In *Johnson*, both the state and the trial court viewed the prosecution of the mother as an attempt to affect a woman's behavior during pregnancy.[95] "The State made no claim that Johnson used cocaine as she lay on the delivery table; all of Johnson's relevant actions took place while she was pregnant."[96]

Regulation of a woman's activities while pregnant infringes upon her right to privacy in reproductive decision making—a right which was first acknowledged by the Supreme Court in *Griswold v. Connecticut*.[97] The *Griswold* Court struck down a statute that prohibited married couples from using contraceptives; the Court recognized that certain personal decisions deserve constitutional protection.[98]

Later cases, such as *Roe v. Wade*,[99] reinforced the constitutionally protected rights of pregnant women and served to limit state regulation of those rights. In *Roe*, the Court invalidated a Texas statute that criminalized all abortions except those that were necessary to save the mothers' lives.[100] The Court found that the state had a compelling interest in protecting the fetus against abortion only in the third trimester, which the

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93. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (finding that the right to privacy is founded in the Fourteenth Amendment's concept of personal liberty); Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (stating that the proper constitutional inquiry into an invasion of privacy is whether the statute infringed on the Due Process Clause of the Fourteenth Amendment).

94. Johnson's Initial Brief, *supra* note 12, at 35.

95. *See* Record at 368, State v. Johnson, No. 89-890-CFA (Fla. Cir. Ct. July 13, 1989), *aff'd*, 578 So. 2d 419, 420 (Fla. Dist. Ct. App. 1991), *rev'd*, 602 So. 2d 1288 (Fla. 1992); *Johnson*, 578 So. 2d at 420.

96. Johnson's Initial Brief, *supra* note 12, at 36 n.51.

97. 381 U.S. at 479.

98. *See id.* at 485-86.

99. 410 U.S. 113 (1973).

100. *See id.* at 117-18; *see also* TEX. REV. CIV. STAT. ANN. arts. 4512.1-.6 (West 1992) (acknowledging that sections penalizing the practice of abortion are unconstitutional) (original version at TEX. PENAL CODE ANN., arts. 1191-1196 (1925)).

Court determined to be the point of fetal viability.[101] The *Roe* Court acknowledged that after viability, the state's interest in protecting the fetus overrides the woman's right to privacy, but prior to fetal viability, a woman has a fundamental right to choose whether or not to continue her pregnancy.[102] While the plurality in *Webster v. Reproductive Health Services*[103] explicitly rejected the *Roe* Court's trimester framework as too rigid,[104] and while *Planned Parenthood v. Casey*[105] further eroded the freedom established in *Roe*,[106] a woman's right to reproductive freedom still remains.[107] Thus, until *Roe* is directly overturned or chipped away into a meaningless precedent, a woman's right to make reproductive choices prior to fetal viability remains free from governmental interference.

In prosecutions against drug-addicted mothers, "the interpretation of the delivery statute unavoidably rests on a theory of the State's power to control women's behavior during pregnancy and to further interests in fetal health."[108] The danger in such a policy is that a state may then decide to regulate such areas as what a pregnant woman eats or drinks, when she goes to a doctor, or whether or not she has sex during pregnancy.[109] Limiting pregnant women's activities directly infringes upon their rights to make decisions during their pregnancies prior to fetal viability. Applying drug-delivery statutes to pregnant women would therefore unconstitutionally infringe upon a woman's right to privacy in reproductive decision-making.

C. *Lack of Evidentiary Support*

The conviction of drug-addicted pregnant women for delivering a controlled substance to a minor lacks evidentiary support. When a criminal conviction is "totally devoid of evidentiary support," it is unconstitutional under the Due Process Clause of the Fourteenth Amendment.[110] The

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101. *See Roe*, 410 U.S. at 163-64.

102. *See id.* at 154, 163-64.

103. 492 U.S. 490 (1989) (plurality opinion).

104. *See id.* at 520-21.

105. 112 S. Ct. 2791 (1992) (plurality opinion).

106. *See id.* at 2821-26.

107. *See id.* at 2804.

108. Johnson's Initial Brief, *supra* note 12, at 44.

109. *See* Note, *supra* note 27, at 1000. A controversy was created recently when two Seattle waiters refused to serve an alcoholic beverage to a pregnant woman. The incident further highlighted the debate over the slippery-slope argument; where is the line drawn? *See* Anna Quindlen, *Liberty, Autonomy, and Daiquiri*, N.Y. TIMES, Mar. 31, 1991, at E13.

110. Thompson v. City of Louisville, 362 U.S. 199, 206 (1960) (holding that

inquiry does not turn on a question of sufficiency of evidence, "but on whether th[e] conviction rests upon any evidence at all."[111] Two Michigan cases, *People v. Hardy*[112] and *People v. Bremer*,[113] included charges of delivery of drugs to a minor and contained serious evidentiary deficiencies.[114] "An issue in both the *Hardy* and *Bremer* cases was the preservation of evidence: neither umbilical cord was tested, much less saved."[115] Additionally, in *Johnson*, it was not medically established that a cocaine metabolite passed through the umbilical cord.[116] Dr. Tompkins, Ms. Johnson's doctor during delivery, admitted he was not watching the umbilical cord to know whether blood passed through it because he was preoccupied at the time with other tasks.[117] Furthermore, although Dr. Tompkins testified that physicians "are in the common practice of obtaining blood from the umbilical cord after clamping and cutting it," he could not recall whether a blood sample had been taken from the cord to test for the presence of cocaine.[118]

Another expert witness at Johnson's trial, Dr. Kendall, explained that although it was theoretically possible for a tiny amount of cocaine metabolite to pass through the baby's umbilical cord after delivery, it was

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petitioner's conviction for the two offenses of "loitering" and "disorderly conduct" was so devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment).

111. *Id.* at 199; *see also* Garner v. Louisiana, 368 U.S. 157, 173-74 (1961) (holding that petitioner's conviction for "disturb[ing] the peace" was so severely lacking evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment).

112. 469 N.W.2d 50 (Mich. Ct. App.), *appeal denied*, 471 N.W.2d 619 (Mich. 1991).

113. No. 90-32227-FH (Mich. Cir. Ct. Jan. 31, 1991), *appeal denied*, 483 N.W.2d 371 (Mich. 1992).

114. *See id.* at 13 (noting that there was no evidence that the defendant's child was injured by the cocaine derivative that was found in the child's body); *Hardy*, 469 N.W.2d at 52 (noting that the circuit court granted the defendant's motion to quash the charge of second-degree child abuse on the ground that "there was insufficient evidence that defendant's ingestion of cocaine . . . caused serious physical harm to the child"); *see also* Hoffman, *supra* note 5, at 35 (noting that Dr. Ira Chasnoff, who testified in support of the defendants in *Hardy*, does not have much regard for the theory that cocaine could be passed through the umbilical cord just before the cord is clamped, because "we just don't have that kind of data").

115. Hoffman, *supra* note 5, at 53 (italics added).

116. *See* Record at 24-38, State v. Johnson, No. 89-890-CFA (Fla. Cir. Ct. July 13, 1989), *aff'd*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), *rev'd*, 602 So. 2d 1288 (Fla. 1992).

117. *See id.* at 22, 26-27.

118. *Id.* at 37.

also possible that none was transferred during those crucial seconds.[119] Dr. Kendall testified that a sample of the cord blood was necessary to determine its components definitively.[120] Thus, evidence that a cocaine derivative passed through the umbilical cord is non-existent in Johnson's case. This lack of evidentiary support for the passage of the cocaine is alarming, given that the conviction rested on the "*deliver*[y] [of a] controlled substance to a person under the age of 18 years."[121] "Just as '[c]onviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a [person] without evidence of [her] guilt."[122]

D. *Ex Post Facto Legislation*

The application of drug-delivery statutes to women who give birth to drug-exposed babies constitutes ex post facto legislation.[123] The United States Constitution prohibits the federal[124] and state legislatures[125] from enacting ex post facto legislation. Ex post facto laws were best described by Justice Chase in *Calder v. Bull*:[126]

> 1st. Every law that makes an action done before the passing of the law and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the

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119. *Id.* at 234.

120. *See id.* at 296-97.

121. FLA. STAT. ch. 893.13(1)(c) (1989) (emphasis added).

122. Thompson v. City of Louisville, 362 U.S. 199, 206 (1960) (reversing convictions for loitering and disorderly conduct because of insufficient evidence, and finding that the conviction violated the Due Process Clause of the Fourteenth Amendment).

123. *See* People v. Bremer, No. 90-32227-FH (Mich. Cir. Ct. Jan. 31, 1991), *appeal denied*, 483 N.W.2d 371 (Mich. 1992).

124. *See* U.S. CONST. art. I, § 9, cl. 3 (providing that "[n]o . . . ex post facto Law shall be passed").

125. *See* U.S. CONST. art. I, § 10, cl. 1 (providing that "[n]o State shall . . . pass any ex post facto Law").

126. 3 U.S. (3 Dall.) 386 (1798).

> commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.[127]

Recently, the Supreme Court provided a historical overview of the Ex Post Facto Clause in *Collins v. Youngblood*.[128] The Court quoted Blackstone's Commentaries, which states that a law is ex post facto "when after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it."[129] Although historical references to the prohibition of increased punishments were not documented by the *Collins* Court, it held that increased punishments are also prohibited.[130] The Court found that "[t]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty."[131]

A Michigan trial court found a violation of the Ex Post Facto Clause when the State prosecuted a drug-addicted mother under the state's drug-delivery statute.[132] In his opinion, Judge Thomas S. Eveland first determined that the defendant did not have fair notice that her conduct was forbidden under the statute.[133] Thereafter, Judge Eveland asserted that "[t]his Court cannot expand or enlarge the ordinary and logical application of the law. To do so would be in violation of the ex post facto laws prohibited by Article I of the Constitution."[134]

The *Johnson* case provides a classic illustration of the unconstitutional application of an ex post facto law. Other than the crime charged, the most serious crime Johnson would likely have been charged with, as a drug user, was possession of a controlled substance.[135] Under Florida's Drug Abuse Prevention and Control statute, "[i]t is unlawful for any person to be in actual or constructive possession of a controlled substance."[136] Possession of a controlled substance is a third-degree

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127. *Id.* at 390.

128. 110 S. Ct. 2715, 2719 (1990)

129. *Id.* at 2720 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *46).

130. *See id.*

131. *Id.* (quoting *Calder*, 3 U.S. (3 Dall.) at 397).

132. *See* People v. Bremer, No. 90-32227-FH (Mich. Cir. Ct. Jan. 31, 1991), *appeal denied*, 483 N.W.2d 371 (Mich. 1992).

133. *See id.* slip op. at 10.

134. *Id.* slip op. at 11; *see also* U.S. CONST. art. I, § 9, cl. 3 (providing that "[n]o . . . ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1. (providing that "[n]o State shall . . . pass any . . . ex post facto Law . . . .").

135. *See* FLA. STAT. ch. 893.13(1)(f) (1989).

136. *Id.*

felony.[137] Johnson's prosecution under Florida's drug-delivery statute, although necessarily based upon her cocaine possession and use *during* pregnancy, is punishable as a *first-degree* felony.[138] Thus, the prosecution "*aggravates* a *crime*, or makes it *greater* than it was, when committed"[139] by elevating the crime from a third-degree to a first-degree felony. By applying this statute in such a novel fashion, the prosecution has devised an ex post facto law.

E. *Equal Protection Clause*

The exclusion of men from prosecution under a state's criminal drug-delivery statute may violate the Equal Protection Clause.[140] The Equal Protection Clause of the Fourteenth Amendment provides protection for individuals from discrimination based upon their race, gender, alienage, and national origin.[141] The Equal Protection Clause, among other constitutional safeguards, protects women from discrimination on the basis of gender.[142] The state statutes prohibiting the delivery of drugs to a minor do not appear to be facially violative of the Equal Protection Clause because men, as well as women, may be convicted under the language of the statute. Yet, a statute, although not invalid on its face, is unconstitutional if it is applied in a discriminatory fashion.[143] Only women can be prosecuted for delivery of illegal substances to a minor via the umbilical cord. Discrimination based upon gender is prohibited by the

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137. *Id.*

138. *See* Johnson's Initial Brief, *supra* note 12, at 1.

139. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

140. *See* U.S. CONST. amend. XIV, § 1 (providing that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws").

141. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that women in the armed services had the same rights to housing benefits as their male counterparts); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that a municipal ordinance, which made arbitrary and unjust distinctions based on race, color, or nationality, violates the Equal Protection Clause).

142. *See* Reed v. Reed, 404 U.S. 71, 76 (1971) (finding an Idaho statute that gave preferred status to males in applications and appointments to estate administrator positions unconstitutional under the Fourteenth Amendment's Equal Protection Clause); *Frontiero*, 411 U.S. at 688 (holding that federal laws allowing only male members of the armed services automatically to claim their spouses as dependents violated the Equal Protection Clause).

143. *See Yick Wo*, 118 U.S. at 373 (holding that any law that is nondiscriminatory on its face may, when applied in a discriminatory fashion, violate the Equal Protection Clause of the Fourteenth Amendment).

Equal Protection Clause; thus, the drug delivery statutes "as applied" are unconstitutional.[144]

Undercutting this argument, however, is the Supreme Court's decision that discrimination on the basis of pregnancy does not discriminate against women, but instead rationally discriminates between pregnant people and non-pregnant people.[145] Although this is the current state of the law, many maternal rights advocates argue that accepting reproductive differences as a permissive basis for differential treatment is unconstitutional.[146] Clearly, men are not similarly situated to women in these cases because men cannot transmit drug metabolites to a newborn via the umbilical cord. The drug-delivery statutes "as applied," however, overlook the fact that drug or alcohol use by males may adversely affect their sperm, which, in turn, may result in harm to a fetus and ultimately the delivered child.[147]

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144. Dawn E. Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After* Webster, 138 U. PA. L. REV. 179, 204 (1989) (stating that penalties imposed solely against pregnant women discriminate on the basis of gender and therefore, only those that are supported by an "exceedingly persuasive justification" should be deemed constitutional).

145. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 494, 496 n.20 (1974) (finding that excluding normal pregnancy-related expenses from state disability-insurance coverage is not gender discrimination). *But see generally* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1450-56 (1991) (arguing that prosecutions of pregnant drug users violate the Equal Protection Clause on both gender and racial bases because most pregnant drug-addicted women are of African-American descent); Ron Winslow, *Black Pregnant Women Far More Likely Than Whites to be Reported for Drug Use*, WALL ST. J., Apr. 27, 1990, at 7D (referring to a study that reported that a black woman is 9.6 times more likely than a white woman to be reported for substance abuse during pregnancy).

146. *See* Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 620-25 (1986) (arguing that laws that disadvantage people on the basis of pregnancy apply only to women and thus should be seen as gender discrimination); Lynn Paltrow, *When Becoming Pregnant Is a Crime*, 9 CRIM. JUST. ETHICS, Winter/Spring 1990, at 41, 45 (arguing that restricting prosecutions to pregnant women may violate the Fourteenth Amendment's guarantee of equal protection because any government action that singles out women for special penalties solely because they are pregnant discriminates on the basis of gender).

147. *See* Katha Pollitt, *"Fetal Rights," A New Assault on Feminism*, 250 NATION 409 (1990) (acknowledging that a man's use of drugs, alcohol, and prescription medications, and his exposure to work-place contaminants play a part in determining the quality of his sperm and affect the course of fetal development).

F. *Cruel and Unusual Punishment*

Lastly, the prosecution of pregnant mothers for delivering drugs to their unborn children amounts to cruel and unusual punishment and violates the Eighth Amendment.[148] In *Robinson v. California*,[149] the Supreme Court considered the constitutionality of a California misdemeanor statute that criminalized the status of being "'addicted to the use of narcotics,'" which was punishable by imprisonment.[150] The Supreme Court held that punishing someone suffering from the illness of addiction, without a finding of any related criminal act, is cruel and unusual punishment forbidden by the Eighth Amendment to the United States Constitution.[151] The crux of the Court's decision was that an addiction to narcotics is not an affirmative "act," but rather a condition or "status,"[152] not punishable as a crime.

The Court in *Robinson* accepted the admission by the state's counsel that narcotics addiction is a mental and physical illness.[153] Addiction as an illness was further defined by Justice Douglas in his concurrence: "I do not see how under our system *being an addict* can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person."[154] Indeed, as far back as 1925, the Supreme Court recognized that persons addicted to narcotics "are diseased and proper subjects for medical treatment."[155] It appears, however, that Jennifer Johnson, Cheryl Cox, Lynn Bremer, and other women arrested for delivering drugs to minors were charged because of their "status" as addicts.

The thrust of the *Robinson* Court's interpretation of the Cruel and Unusual Punishment Clause is "that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*."[156] The

148. *See* U.S. CONST. amend. VIII.

149. 370 U.S. 660 (1962) (plurality opinion).

150. *Id.* at 660 (quoting CAL. HEALTH & SAFETY CODE § 11721 (West 1955 & Supp. 1961) (repealed 1972)).

151. *See Robinson*, 370 U.S. at 666.

152. *Id.* at 662.

153. *See id.* at 667.

154. *Id.* at 674 (Douglas, J., concurring).

155. Linder v. United States, 268 U.S. 5, 18 (1925) (holding that a narcotics law criminalizing the transfer of drugs was inapplicable when a physician, acting according to fair medical standards, gave an addict a moderate amount of drugs to detoxify the addict).

156. Powell v. Texas, 392 U.S. 514, 533 (1968) (plurality opinion) (affirming a

only "act" for which Jennifer Johnson was convicted was giving birth to a child.

The *Robinson* Court found that the act of using, purchasing, selling, or possessing narcotics was the reason to impose criminal sanctions[157]—not the natural involuntary "act" of giving birth or feeding a baby through the umbilical cord.[158] Jennifer Johnson, however, was not convicted for using, purchasing, selling, or possessing narcotics; she was convicted for delivering drugs to a minor.[159] The *Robinson* Court found that punishing a person for the mere "status" of being an addict is cruel and unusual punishment.[160] The indictment and conviction of new mothers for their drug-addicted status is, therefore, cruel and unusual punishment which violates the Eighth Amendment.[161]

IV. THE LACK OF CRIMINAL JUSTIFICATIONS FOR IMPOSING PUNISHMENT ON DRUG-ADDICTED MOTHERS

Prosecutions of drug-addicted pregnant women lack penological justification. As discussed above, the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits punishment for a status offense.[162] The Supreme Court has interpreted this Clause in a flexible and dynamic manner, extending its interpretation beyond the barbarous and inhuman physical punishments at issue in the Court's earliest cases.[163]

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conviction for public intoxication and finding that the appellant was punished for public drunkenness on a particular occasion, not for the status of being a chronic alcoholic).

157. *See Robinson*, 370 U.S. at 664.

158. An involuntary act cannot be the basis for criminal liability. *See* MODEL PENAL CODE § 2.01 (1962) (stating that a bodily movement that otherwise is not a product of the effort or determination of the actor is not a voluntary act); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.2(c) (2d ed. 1986) (stating that criminal liability requires that the activity in question must be voluntary).

159. Record at 365-66, State v. Johnson, No. 89-890-CFA (Fla. Cir. Ct. July 13, 1989), *aff'd*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), *rev'd*, 602 So. 2d 1288 (Fla. 1992).

160. *See Robinson*, 370 U.S. at 667.

161. *See* U.S. CONST. amend. VIII.

162. *See supra* notes 148-61 and accompanying text.

163. *See* Gregg v. Georgia, 428 U.S. 153, 171 (1976) (plurality opinion) (finding that "the Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice'" (quoting Weems v. United States, 217 U.S. 349, 373 (1910))); *see also* Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (finding "that the limits of the Eighth Amendment's proscription are not easily or exactly defined, . . . that the applicable standards are flexible, . . . and that broad and idealistic concepts of dignity, civilized standards, humanity, and decency are

Accordingly, punishments incompatible with "evolving standards of decency that mark the progress of a maturing society" have been held to be repugnant to the Eighth Amendment.[164] Thus, a punishment may be cruel and unusual if the sanction imposed is "totally [devoid of] penological justification."[165] For example, "[c]apital punishment has also been attacked as violative of the Eighth Amendment on the ground that it is not needed to achieve legitimate penal aims and is thus 'unnecessarily cruel.'"[166] The following subsections discuss whether sound bases exist for imposing criminal punishments on drug-addicted pregnant women.

A. *Theories of Punishment*

The purpose of the criminal law is to protect members of society and to prevent undesirable conduct.[167] "Since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state requires justification."[168] Thus, the justifications of punishment should help explain why society is warranted in imposing it.[169] There are several theories that seek to justify punishment.

The traditional theories of punishment include retribution, deterrence, rehabilitation, and incapacitation.[170] Retribution can be defined as "the intentional infliction of pain and suffering on a criminal to the extent he deserves it because he has willingly committed a crime."[171] Under a theory of general deterrence, "the sufferings of the criminal for the crime he has committed [is] supposed to deter other[]" people in the general population from committing future crimes for fear of receiving similar treatment.[172] "*Rehabilitation* is the acquisition of skills or values which

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useful and usable").

164. Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that depriving a soldier of United States citizenship for escaping from an army stockade and becoming a deserter for one day was cruel and unusual punishment).

165. *Gregg*, 428 U.S. at 183 (plurality opinion).

166. Furman v. Georgia, 408 U.S. 238, 391 (1972) (Burger, C.J., dissenting).

167. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 21 (4th ed. 1972).

168. Kent Greenawalt, *Punishment*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1336, 1337 (Sanford H. Kadish ed., 1983).

169. *See* Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1165 (1990).

170. *See* LAFAVE & SCOTT, *supra* note 167, at 271-72.

171. Blecker, *supra* note 169, at 1150.

172. LAFAVE & SCOTT, *supra* note 167, at 23.

convert [the] criminal into a law-abiding citizen."[173] Incapacitation protects society from persons deemed dangerous by virtue of their past criminal acts by isolating them from society.[174]

Much literature on the subject of punishment tends to advocate one particular theory while excluding the others.[175] For example, "[t]hose who espouse[] the rehabilitation theory condemn[] the rest, those who favor[] the deterrence theory den[y] the validity of all others."[176] An integrative approach, however, known as the "inclusive theory," takes into consideration all of the traditional theories of punishment.[177] Thus, more than one theory demands attention when analyzing the criminalization of a particular act. The analysis in the following section will focus on each theory of punishment to determine whether any of them justify the criminalization of drug use during pregnancy.

1. Retribution

In May 1991, when Illinois State Senator Richard Kelly was preparing to introduce legislation establishing criminal penalties for illegal drug use during pregnancy, he stated that "there has to be some punishment if someone harms an innocent life."[178] Minnesota Representative Kathleen Blatz stated that "at some point we cannot be reluctant to punish people who make those decisions" to harm their fetuses by taking drugs during pregnancy.[179] Under the theory of retribution, the "good" that is achieved by punishment has nothing to do with the prevention of future crimes. Instead, "the good that punishment achieves is that someone who deserves it gets it."[180] Retributivism, therefore, rests on the notion that a criminal is receiving what he or she deserves. Critical to retributive theory is the underlying assumption that human beings possess free will and that their conduct is not manipulated by external factors.[181]

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173. Blecker, *supra* note 169, at 1150.

174. *See* LAFAVE & SCOTT, *supra* note 167, at 22.

175. *See id.* at 27.

176. *Id.*

177. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 303-04 (2d ed. 1960); LAFAVE & SCOTT, *supra* note 167, at 24.

178. Eileen McNamara, *Fetal Endangerment Cases on the Rise*, BOSTON GLOBE, Oct. 3, 1989, at 11 (quoting Illinois State Senator Richard Kelly).

179. Barbara Whitaker, *Protecting Baby From Mom: Tot Welfare at Issue in Drug Cases*, NEWSDAY, Nov. 6, 1989, at 32 (quoting Minnesota Representative Kathleen Blatz).

180. MICHAEL S. MOORE, LAW AND PSYCHIATRY 235 (1984).

181. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 7 (1987).

The views of philosopher Immanuel Kant support a pure retributivist theory.[182] According to Kant, the punishment of criminals is a good in and of itself, in addition to whatever side effects it may have on society.[183] Kant's claim, that an island society about to disband should still execute the last murderer remaining in prison, is an illustration of this viewpoint.[184] Before any consideration is given to the utility of the punishment, an individual "must first be found to be deserving of punishment."[185] Kant stated that

> [j]udicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else . . . .[186]

Thus, Kant views punishment as an end unto itself—the deliberate infliction of pain and suffering upon those who deserve it.

J.D. Mabbott, a legal scholar and another retributivist, stated that it is "essential to a legal system that the infliction of a particular punishment should not be determined by the good *that particular punishment* will do either to the criminal or to 'society.'"[187] Mabbott believes that a law presents a choice and an individual assumes freedom and responsibility with regard to the law.[188] According to Mabbott and the retributivists, punishment is a corollary of law-breaking and the criminal makes the essential choice: "[s]he brings it on [her]self."[189] Although a law may

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182. *See* Greenawalt, *supra* note 168, at 1338.

183. *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100-01 (John Ladd trans., 1965).

184. *See id.* at 102.

> Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment . . . .

Id.

185. *Id.* at 100.

186. *Id.*

187. J.D. Mabbott, *Punishment*, 48 MIND 152, 162-63 (1939).

188. *See* J.D. Mabbott, *Freewill and Punishment*, *in* CONTEMPORARY BRITISH PHILOSOPHY 289, 303 (3d Series, H. Lewis ed., 1956).

189. Mabbott, *supra* note 187, at 161.

threaten an individual, Mabbott asserts, the only thing that justifies punishment, something for which the legislator is not responsible, is the exercise of free choice by the individual.[190] Mabbott's focus on the individual's free will is the point at which the theory of retribution falls dangerously below the line of acceptability when applied to drug use during pregnancy. The addict or alcoholic does not exhibit a "free choice" when picking up a drink or a drug.[191] The retributivists could never justifiably punish a person for doing an act that could not be controlled by the actor.[192]

If one accepts the premise that drug addiction is a disease, it is easy to see how the retributivist theory misses the mark. Alcoholism is currently accepted as a disease by the American Medical Association and the National Council on Alcoholism.[193] In *Powell v. Texas*,[194] Justice Fortas quoted the National Council on Alcoholism, which defined an alcoholic as a "person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern."[195] In *Powell*, expert testimony by a doctor concluded that a "'chronic alcoholic' is an 'involuntary drinker,' who is 'powerless not to drink,' and who 'loses his self-control over his drinking.'"[196] In his dissent, Justice Fortas wrote "that alcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological makeup and history of the individual, cannot be controlled by him."[197] Others in the medical and legal profession have accepted the concept of alcoholism as a disease.[198]

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190. *See* Mabbott, *supra* note 188, at 303.

191. Helene M. Cole, M.D., *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2667 (1990) (stating the AMA's position that "it is clear that addiction is not simply the product of a failure of individual willpower").

192. *See* DRESSLER, *supra* note 181, at 8.

193. *See* AMA, MANUAL ON ALCOHOLISM 3 (3d ed. 1977) (stating that alcoholism is an illness); NATIONAL COUNCIL ON ALCOHOLISM, WHO SAYS ALCOHOLISM IS A DISEASE? 1-3 (1988) (supporting the concept that alcoholism is a disease).

194. 392 U.S. 514 (1968).

195. *Id.* at 560 n.3 (Fortas, J., dissenting) (quoting the National Council on Alcoholism).

196. *Id.* at 518 (plurality opinion) (quoting the testimony of Psychiatrist David Wade).

197. *Id.* at 561 (Fortas, J., dissenting).

198. *See generally* ELVIN M. JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM (1960) (analyzing opinions and attitudes concerning the disease concept of alcoholism and noting its acceptance by the public and professional communities); Warren Lehman, *Alcoholism, Freedom, and Moral Responsibility*, 13 INT'L J.L. & PSYCHIATRY 103 (1990)

Although cocaine and drug addiction have not been accepted as a disease by the American Medical Association, the World Health Organization lists drug addiction in the International Classification of Diseases.[199] The Supreme Court accepted the concept of drug addiction as a disease as far back as 1925.[200] The same sense of powerlessness and loss of self-control associated with alcoholism is exhibited with drug addiction.[201] The idea, therefore, that a pregnant woman who is addicted to drugs freely chooses to harm herself and her fetus is not tenable under the theory that drug addiction is a disease.[202] In addition, an ordinary connotation of the "term disease [is] that it is a condition not acquired through the moral fault of the sufferer."[203] Thus, to punish a woman for uncontrollable behavior for which she is not morally at fault is the antithesis of the main tenet of the theory of retribution.

The American Medical Association issued a report opposing the use of criminal prosecutions to deal with the problem of drug use during

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(defending the theory that alcoholism is a disease or at least an illness). *But see* HERBERT FINGARETTE, HEAVY DRINKING—THE MYTH OF ALCOHOLISM AS A DISEASE (1988) (arguing that drinking is conduct that is normally controllable by the drinker; persons labelled "alcoholic" can often control their drinking for substantial periods of time); Herbert Fingarette, *Alcoholism: Can Honest Mistake About One's Capacity for Self Control be an Excuse?*, 13 INT'L J.L. & PSYCHIATRY 77 (1990) (stating that alcoholism is not a disease and that an alcoholic's intoxication is therefore voluntary).

199. *See* WORLD HEALTH ORG., MANUAL OF THE INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES, INJURIES, AND CAUSES OF DEATH 198 (1977). Section 304 defines drug dependence as

> [a] state, psychic and sometimes also physical, resulting from taking a drug, characterized by behavioral and other responses that always include a compulsion to take a drug on a continuous or periodic basis in order to experience its psychic effects, and sometimes to avoid the discomfort of its absence. Tolerance may or may not be present. A person may be dependent on more than one drug.

Id. at 198-99.

200. *See* Linder v. United States, 268 U.S. 5, 18 (1925) (stating that addicts are "diseased" and are "proper subjects for [medical] treatment").

201. *See* AMA, *supra* note 193, at 4 (stating that alcoholism is also manifested as a type of drug dependence that ordinarily interferes with a patient's mental health).

202. *See* Wendy K. Mariner et al., *Pregnancy, Drugs, and the Perils of Prosecution*, 9 CRIM. JUST. ETHICS, Winter/Spring 1990, at 30, 36 (arguing that continued use of drugs by pregnant addicts is rarely, if ever, truly voluntary because drug-addicted mothers do not want to harm their fetuses); Cole, *supra* note 191, at 2667 (stating that "[i]n all but a few cases, taking a harmful substance such as cocaine is not meant to harm the fetus but to satisfy an acute psychological and physical need for that particular substance").

203. Greenawalt, *supra* note 23, at 947.

pregnancy and its potential harm to the newborn.[204] The report emphasized that

> [i]ndividuals who are substance dependent have impaired competence in making decisions about the use of that substance.
>
> Punishing a person for substance abuse is generally ineffective because it ignores the impaired capacity of substance-abusing individuals to make decisions for themselves. . . . If a pregnant woman suffers from a substance dependency, it is the physical impossibility of avoiding an impact on fetal health that causes severe damage to the fetus, not an intentional or malicious wish to cause harm.[205]

If a person is an addict, and thus suffers from an illness, it is neither plausible nor fair under the theory of retribution to impose punishment. One comment made by an American Civil Liberties Union attorney summarizes this viewpoint succinctly:

> Narcotics addiction is an illness, not a crime. Conceptualizing narcotics use as a willful abuse of self and others that can successfully be controlled through the imposition of criminal sanctions mischaracterizes the nature of the disease, and results in a state response that is punitive and [that] fails to meet the needs of drug-addicted women.[206]

2. General Deterrence

Michigan prosecutor Tony Tague maintains that a major goal of criminal prosecution is to bring women into treatment. "When physicians make suggestions, it doesn't appear that's enough for them to seek treatment. The possibility of prosecution is a strong incentive."[207] Charles Condon, the South Carolina Solicitor, stated that "[w]e're not really interested in convicting women and sending them to jail. . . . We're just interested in getting them to stop using drugs before they do something horrible to their babies."[208]

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204. *See* Cole, *supra* note 191.

205. *Id.* at 2667-68.

206. Kary L. Moss, *Legal Issues: Drug Testing of Postpartum Women and Newborns as the Basis for Civil and Criminal Proceedings*, 23 CLEARINGHOUSE REV. 1406, 1413 (1990).

207. Hoffman, *supra* note 5, at 55 (quoting Prosecutor Tony Tague).

208. Tamar Lewin, *Drug Use in Pregnancy: New Issues for the Courts*, N.Y. TIMES, Feb. 5, 1990, at A14 (quoting South Carolina Solicitor Charles Condon).

Under general deterrence, "punishment should not be designed to exact retribution on convicted offenders but to deter the commission of future offenses."[209] One view of deterrence theory espoused by Jeremy Bentham,[210] an English utilitarian,[211] assumes that people are rational and that people choose between possible activities based on a calculation of risks of pain and pleasure.[212] According to Bentham, "[w]hen a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act."[213] One of the chief criticisms of this view, as pointed out by Bentham himself, is "that a spirit of calculation has place among the passions of men, who it is said, never calculate."[214] This criticism of the deterrence theory is applicable to the present issue of convicting drug-addicted women who become pregnant. Similar to the argument made against retribution, it is illogical to conclude that an addict is going to weigh the costs of her action.[215]

The reality is that drug-addicted pregnant women are being driven away from seeking help from doctors because of the threat of prosecution. After Pamela Rae Stewart was arrested under California's criminal child-abuse statute, several women explicitly expressed, to their health care workers, their fear of being reported to the police.[216] Some women refused to seek drug treatment because of their fear of prosecution.[217] The Perinatal Center for Chemical Dependence at Northwestern University School of Medicine reported numerous cases of women calling to say they would rather stop treatment than risk possible prosecution.[218] Gladden V. Elliot, M.D., President of the California Medical Association, testified that

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209. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 149 (5th ed. 1989).

210. *See* 1 THE ENCYCLOPEDIA OF PHILOSOPHY 280 (3d ed. 1967).

211. Classic utilitarian theory espouses the view that inflicting punishment or pain on anyone is senseless unless some benefit will be obtained from it. Punishment serves to reduce crime because individuals generally act rationally and avoid proscribed behavior that carries unpleasant consequences. *See* DRESSLER, *supra* note 181, at 10.

212. *See* JEREMY BENTHAM, *Principles of Penal Law*, *in* 1 THE WORKS OF JEREMY BENTHAM 396 (John Bowring ed., 1962).

213. *Id.*

214. *Id.* at 402.

215. *See supra* notes 191-92 and accompanying text.

216. *See ACLU Testimony*, *supra* note 4, at 13.

217. *See id.*

218. *See id.* at 14.

> "[w]hile unhealthy behavior cannot be condoned, to bring criminal charges against a pregnant woman for activities which may be harmful to her fetus is inappropriate. Such prosecution is counterproductive to the public interest as it may discourage a woman from seeking prenatal care or dissuade her from providing accurate information to health care providers out of fear of self-incrimination. This failure to seek proper care or to withhold vital information concerning her health could increase the risks to herself and her baby."[219]

Thus, punishing a woman for her drug abuse is not an effective way of alleviating her drug dependency or preventing future abuse by herself or others.[220]

Lynn Bremer, who faced charges of delivery of drugs to a minor, felt compelled to tell her doctor about her drug problem, even though friends warned her not to.[221] Ms. Bremer said, "[p]eople told me not to tell anybody about my drug usage. You know, people said, '[d]on't tell anybody or you'll end up like Kim Hardy,' but I felt I had to."[222] After Bremer's doctor told her to stop using drugs and she could not, he reported her to Child Protective Services.[223] Bremer believes that the "threat of going to prison will scare women away from getting any kind of prenatal care."[224] Many women will choose not to confide in their doctors about a drug addiction if that information will be used to prosecute them at another time.[225]

3. Rehabilitation

Jeff Deen, the lawyer who prosecuted Jennifer Johnson, believes that prosecution is the only way to stop cocaine use.[226] Speaking about Jennifer Johnson, Deen said that "[s]he wasn't doing anything to help herself. The arrest is what motivated her to get help that she wasn't getting on her own."[227]

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219. Cole, *supra* note 191, at 2669 (quoting testimony of Gladden V. Elliot in California v. Stewart, Civ. No. 575396 (San Diego, Cal. Mun. Ct. 1987)).

220. *See id.* at 2667.

221. *See 60 Minutes*, *supra* note 43, at 10.

222. *Id.*

223. *See id.*

224. *Id.* at 11.

225. *See* Cole, *supra* note 191, at 2667.

226. *See* Curriden, *supra* note 39, at 51.

227. *Id.*

Rehabilitation is the most plausible justification for criminalizing drug use during pregnancy. Rehabilitative treatment benefits offenders by changing their attitudes through counseling, education, vocational training, and medical and psychological treatment.[228] Rehabilitation or reformation is a process by which "enlightened" criminals learn to consider themselves valuable members of society and to function productively and lawfully.[229]

Unfortunately, in light of the recent prosecutions against drug-addicted women, many are undergoing an "enlightening" process as a criminal. Jennifer Johnson sought rehabilitative measures in Florida prior to her arrest, but she was turned away.[230] At the time Kim Hardy was pregnant, no drug-treatment programs existed in her area that were designed specifically for the needs of pregnant addicts.[231]

Wendy Chavkin, a faculty member at the Columbia University School of Public Health, released a 1988 study, of seventy-eight New York City drug-treatment programs, that revealed that fifty-four percent of these programs excluded pregnant women, sixty-seven percent refused to admit pregnant women who paid with Medicaid, and eighty-seven percent excluded pregnant women who were also addicted to crack.[232] The director of Family and Children's Services for the San Francisco Department of Social Services, Ann O'Reilly, stated that "if these mothers were walking away from treatment [in San Francisco], I might feel differently, but they are not walking away from treatment — they're walking away from waiting lists."[233] Thus, pregnant women, especially those who are poor and addicted to cocaine, have little help available to them.[234] Additionally, many drug-treatment programs that do exist are designed to treat the male heroin addict and consequently have male-oriented modes of treatment.[235] Most rehabilitation centers are not

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228. *See* JEROME HALL ET AL., CRIMINAL LAW 711 (4th ed. 1983).

229. *See* Blecker, *supra* note 169, at 1197.

230. *See* Lewin, *supra* note 208, at A14.

231. *See 60 Minutes*, *supra* note 43, at 11.

232. *See* Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM. J. PUB. HEALTH 483, 485 (1990). Less than 20% of the drug-treatment programs in the Washington D.C. area admit pregnant women that are poor or depend on Medicaid. *See* Michele L. Norris, *Cries in the Dark Often Go Unanswered: For Drug-Addicted Mothers, Treatment is Hard to Find, Even Harder to Stick With*, WASH. POST, July 2, 1991, at A1, A8.

233. Susan LaCroix, *Birth of a Bad Idea: Jailing Mothers for Drug Use*, 248 NATION 585, 588 (1989).

234. *See* Cole, *supra* note 191, at 2669.

235. Many studies have addressed the lack of special treatment modes for women. *See, e.g.*, Beth G. Reed, *Developing Women-sensitive Drug Dependence Treatment Services:*

designed to meet the specific psychological and physiological needs of women and do not teach them the skills necessary to take care of newborn children.[236]

In light of the difficulty experienced by poor women in gaining access to treatment centers,[237] it is ironic that women must be made criminals before they can receive treatment. Jennifer Johnson was admitted to a treatment facility as part of her sentence.[238] As one author recently expressed, "creating a new crime for the sole purpose of getting pregnant women into treatment stands the goal of rehabilitation on its head. . . . This is not rehabilitation. It is using the criminal law to gain access to social services."[239]

Rehabilitation would be a legitimate justification for imposing criminal sanctions if women were not pursuing help on their own and if adequate

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Why So Difficult?, 19 J. PSYCHOACTIVE DRUGS, Apr.-June 1987, at 151 (examining the reasons for a lack of progress in reaching out to, and providing gender-sensitive treatment services for women experiencing problems with alcohol and other drugs); Sally Stevens et al., *Women Residents: Expanding Their Role to Increase Treatment Effectiveness in Substance Abuse Programs*, 24 INT'L J. ADDICTIONS 425 (1989) (advocating the use of a female-based therapeutic model, which after implementation, had favorable results for both male and female populations); Beth G. Reed, *Drug Misuse and Dependency in Women: The Meaning and Implications of Being Considered a Special Population or Minority Group*, 20 INTL J. ADDICTIONS 13 (1985) (stating that prevention, outreach, and treatment recommendations should be tailored to the needs of female drug abusers); Tom Doshan & Charles Bursch, *Women and Substance Abuse: Critical Issues in Treatment Design*, 12 J. DRUG EDUC. 229 (1982) (recommending components of treatment to include women-only therapy groups, assertiveness training, social skills training, attention to child-care issues, and outreach activities).

236. *See* Cole, *supra* note 191, at 2669.

237. *See* Elaine W. v. Joint Diseases N. Gen. Hosp., No. 6230/90 (N.Y. Sup. Ct. May 31, 1991), *rev'd*, 580 N.Y.S.2d 246 (App. Div. 1992). The American Civil Liberties Union's Women's Rights Project brought a class action suit on behalf of pregnant addicts against several drug-treatment programs in New York City for denying equal access to detoxification-treatment facilities solely because the addicts were pregnant. To date, two of the defendants have settled with plaintiffs. *Id.* at 3. The complaint has been dismissed as to Joint Diseases North General Hospital. *See* Elaine W. v. Joint Diseases N. Gen. Hosp., 580 N.Y.S.2d 246 (App. Div. 1992). St. Barnabas Hospital, Bronx-Lebanon Hospital Center, and Puerto Rican Organization to Motivate Enlighten and Serve Addicts, Inc. remain as defendants on the date of this note's publication.

238. *See* Mariner et al., *supra* note 202, at 37.

239. *Id.*

services were available.[240] Because rehabilitative services are effectively non-existent for the cocaine-addicted woman, however, rehabilitation via criminal prosecution is unwarranted.

4. Incapacitation

Florida Prosecutor Jeff Deen stated that Johnson "'had used up all her chances. [The state] need[s] to make sure this woman does not give birth to another cocaine baby. The message is that this community cannot afford to have two or three cocaine babies from the same person.'"[241]

Incapacitation is founded on the premise that a dangerous person removed from society cannot hurt others; thus society is protected.[242] The goal of incapacitation is to deny the incarcerated individual the opportunity to commit further offenses.[243] Incapacitation should be intertwined closely with rehabilitaton because "resorting to restraint without accompanying rehabilitative efforts is unwise, as the vast majority of prisoners will ultimately be returned to society."[244] If a pregnant addict could seek help in a treatment clinic and isolate herself from the allure of the street, no criminal prosecutions would be necessary. Kim Hardy was struggling to remain free from drugs, but when she was visited by a few friends who were using crack, she started using drugs again.[245] Hardy said, "[t]he more I sat there and watched them, the more I wanted to, you know, use the drug and eventually I did."[246]

B. *Alternatives to Criminal Prosecutions*

If more federal and state government aid could be channelled into developing female-oriented drug-treatment programs, then drug-addicted women, the vast majority of whom are poor and minorities, would not have to confront criminal prosecutions.[247] In New York City, Mayor

240. *See* Moss, *supra* note 206, at 1414 (concluding that it is tragic to punish a drug-addicted mother for her disease, rather than to provide her with treatment and help to recover). *See also* Lewin, *supra* note 208, at A14 (referring to Wendy Chavkin's statement that prosecuting Jennifer Johnson for failing to get help, when nobody would provide it, hardly seems fair).

241. Curriden, *supra* note 39, at 51 (quoting Florida Prosecutor Jeff Dean).

242. *See* LAFAVE & SCOTT, *supra* note 167, at 22.

243. *See id.*

244. *Id.*

245. *See 60 Minutes*, *supra* note 43, at 9.

246. *Id.*

247. *See* Mariner et al., *supra* note 202, at 37; *see also* Chavkin, *supra* note 11, at

David Dinkins announced the formation of a study group, chaired by former Attorney General Nicholas deB. Katzenbach, to develop a coordinated anti-drug plan for the city.[248] One proposed project, which the study group recommended begin immediately, was designed to provide drug-abuse services for all pregnant and postpartum addicts seeking treatment. The services would include "general health care; prenatal and postnatal care; drug treatment (individual and group therapy, acupuncture, 12-step and other self-help programs); instruction in delivery, parenting, nutrition and homemaking; counseling for domestic violence and incest survivors; vocational and educational assessment and referral; and advocacy for housing and entitlements."[249] The proposed project intends to model itself on Odyssey House's Mother and Baby on Narcotics program (MABON), the only residential drug-free program for mothers and their children in New York State.[250]

The Mandella House, in Oakland Hills, California, is also a residential program for drug-addicted mothers and their babies.[251] Minnie Thomas, director of the Mandella House, explained that the environment of the residence is structured so that women learn how to take care of themselves and their babies.[252] Only six women live in the Mandella House at one time.[253] They begin their stay during their pregnancy and remain for twelve to eighteen months after giving birth. There are very strict rules for the women: no visitors are allowed and the women must be escorted when they temporarily leave the house.[254] Jackie, a woman living in the house, is grateful to be there with her son. Previously, she could not gain admission into any facility because, as she said, "[y]ou had to be an alcoholic or not pregnant."[255]

Both New York City's Odyssey House and Oakland Hills' Mandella House have helped women to become drug free, while simultaneously

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2 (stating that "these women need treatment, not prosecution, for their addiction").

248. *See* NICHOLAS DEB. KATZENBACH ET AL., REPORT AND RECOMMENDATIONS TO THE MAYOR ON DRUG ABUSE IN NEW YORK CITY, at preface (1990).

249. *Id.* at 68.

250. *See id.* at 30. In 1989, MABON was the only residential treatment program designed specifically for chemically dependent pregnant women in New York State; yet, the State Assembly Committee on Alcoholism and Drug Abuse estimated that 12,000 babies were going to be born addicted to drugs in New York City in 1989. *See* Michael Dorris, *A Desperate Crack Legacy*, NEWSWEEK, June 25, 1990, at 8.

251. *See Sacramento, California, Local News Program* (NBC affiliate KCRA television broadcast, Jan. 4, 1985).

252. *See id.*

253. *See id.*

254. *See id.*

255. *Id.*

addressing perinatal and postnatal needs.[256] Unfortunately, the programs have only a limited number of beds available, with hundreds of women on their waiting lists.[257] By encouraging every city to develop programs such as the Odyssey House's MABON program and Mandella House's program, addicted pregnant women could seek help and avoid prosecution.[258]

V. CONCLUSION

Drug-addicted pregnant women who have drug-exposed babies are being prosecuted at an alarming rate.[259] Many prosecutors are applying existing drug laws in a novel and unconstitutional fashion.[260] Florida's Supreme Court, the highest court in the country to render an opinion on the delivery of drugs to a newborn infant, unanimously reversed Jennifer Johnson's conviction on July 23, 1992.[261] The *Johnson* reversal will necessarily stop the progression of pending cases in Florida as well as foreclose any new prosecutions. The question remains, however, whether other states will follow the Florida Supreme Court's precedent.[262]

The blameworthiness of the addict is doubtful because she is suffering from a disease. As a result, retribution should not be deemed a justification for punishment.[263] Similarly, deterrence does not frighten women into stopping their drug use. Rather, it is more likely to frighten them away from seeking medical help for fear of being reported to zealous local prosecutors.[264] Rehabilitation remains the only plausible justification for criminal punishment, but criminal sanctions are not the best means to achieve the goals of rehabilitation. Instead, the federal and state governments need to make an effort to provide funds for the development of female-oriented drug-treatment programs for pregnant

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256. *See* Telephone Interview with Yolanda P., an evening caseworker at the Mandella House (Mar. 15, 1991) (stating that Mandella House has an eighty-five- to ninety-percent success rate of women remaining drug free after they leave).

257. *See id.* (stating that there are 150-200 people on the waiting list).

258. In New York, unfortunately, drug-treatment programs for pregnant mothers and prenatal care programs were the first to be eliminated in a recent fiscal crisis. *See* Celia W. Dugger, *New York Losing Weapons Against Poverty*, N.Y. TIMES, July 10, 1991, at A1; *Excerpts From Dinkins' Speech: 'Our Difficult Journey Ahead,'* N.Y. TIMES, May 9, 1991, at B2.

259. *See* discussion *supra* part II.A.

260. *See* discussion *supra* part III.

261. *See* Johnson v. State, 602 So. 2d 1288 (Fla. 1992).

262. *See* Hoffman, *supra* note 5, at 35.

263. *See* discussion *supra* part IV.A.1.

264. *See* discussion *supra* part IV.A.2.

women. These programs must also be designed to meet the needs of the poor, so that criminal sanctions need not be imposed.

Julie Petrow[*]

* The author wishes to acknowledge Professor Michael Perlin for his assistance in this project as well as his guidance in other endeavors during law school. In addition, the author wishes to thank her notes and comments editor, Elisa Fazio, for her advice and encouragement.