

# NOTES

## Legislation Punishing Drug Use During Pregnancy: Attack on Women's Rights in the Name of Fetal Protection

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### Introduction

Medical science is becoming increasingly aware of how the behavior of pregnant women affects the developing fetuses they carry. Specifically, there is increased awareness that a woman's drug use during pregnancy may directly affect her newborn.<sup>1</sup> These developments have fueled a legal trend: Pregnant women are being sanctioned, both criminally and civilly, for behavior believed to be harmful to their fetuses. In an effort to reduce the number of infants affected by drugs, some state governments are targeting drug-dependent women for increasingly harsh penalties.

In the last five years, prosecutors have attempted to control women's prenatal drug use by applying drug trafficking and child abuse statutes to fetuses as well as to children. Applying the statutes in this way subjects many mothers of drug-exposed infants to imprisonment or deprivation of child custody. Prosecutors have achieved only partial success, however, in winning convictions through these statutory interpretations. Several trial courts have refused to define the term "children" to include fetuses,<sup>2</sup> and two trial courts have found criminalization of such behavior to be an unconstitutional invasion of the women's privacy.<sup>3</sup>

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1. It is estimated that in 1989, 375,000 children in the United States were born with drugs in their system. NATIONAL ASS'N FOR PERINATAL ADDICTION RESEARCH AND EDUC., *A First: National Hospital Incidence Survey, in THE DANGERS OF COCAINE USE IN PREGNANCY FACT SHEET*, Sept. 1989, at 4 [hereinafter NAPARE SURVEY] (on file with the *Hastings Constitutional Law Quarterly*).

2. See, e.g., *State v. Carter*, No. 89-6274 (Fla. Cir. Ct. (July 23, 1990)); *State v. Andrews*, No. JU 68459 (Ohio Ct. C.P. June 19, 1989); *State v. Gray*, No. CR88-7406 (Ohio Ct. C.P. July 13, 1989); *In re Torres*, No. N-3968/88 (N.Y. Fam. Ct. Oct. 7, 1988).

3. *Commonwealth v. Pellegrini*, No. 87970 (Mass. Super. Ct. Oct. 15, 1990); *State v. Bremer*, No. 90-3227-FH (Mich. Cir. Ct. Jan. 31, 1991).

Legislators in some states have responded to these decisions by proposing legislation of three different kinds: (1) criminalizing the act of giving birth to an addicted child, (2) forcing health providers to test pregnant women and newborns for drugs and report the results to law enforcement or child protection agencies, and (3) modifying child neglect statutes to include fetuses as well as children so that behavior during pregnancy can be used as a basis for terminating maternal custody. In effect, these statutes recognize the rights of fetuses against the women carrying them. Commentators have argued that criminalizing the act of giving birth to an addicted child violates women's constitutional rights.<sup>4</sup> This Note examines the constitutional and policy implications of the new testing, reporting, and custody statutes.

Part I of this Note discusses the history of the movement for recognition of "fetal rights." This section reviews cases that have been brought against drug-dependent pregnant women and the difficulties prosecutors have had in applying existing law to pregnant women's behavior in regard to their fetuses. Part II focuses on specific "fetal rights" legislation that lawmakers have recently proposed or passed into law as a result of these difficulties, and demonstrates that this legislation violates women's constitutional rights to privacy, due process, and equal protection. Part III argues that the new laws subvert the goal of effective health care delivery and do not achieve the purported goal of promoting the health of newborn children. Part IV discusses how the statutes confer legal personhood on the fetus and subordinate the constitutional rights of women to the perceived needs of fetuses. Finally, the Conclusion proposes that states should focus on approaches that are preventative and rehabilitative, rather than punitive. A punitive approach toward pregnant drug users may be attractive in the abstract. A closer analysis, however, reveals that it provides ineffective protection for the health of future children at the expense of the constitutional rights of potential childbearers.

## I. "Fetal Rights" History

### A. Court-Ordered Medical Intervention During Pregnancy

Advances in medical technology have enabled physicians to learn about and control the fetus' condition well before birth. As a result, some obstetricians now view the fetus as a "second patient,"<sup>5</sup> and some members of the general public view the fetus as an entity separate from

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4. Jacqueline Berrien, *Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures*, 2 YALE J.L. & FEMINISM 239 (1990); Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277 (1988).

5. Lawrence J. Nelson & Nancy Milliken, *Compelled Medical Treatment of Pregnant Women: Life, Liberty, and Law in Conflict*, 259 JAMA 1060, 1061 (1988).

the pregnant woman. Some courts have endorsed this view by ordering pregnant women to undergo medical treatment, including surgery, against their will when the courts feel the women's medical decisions improperly protect the fetus' interest.<sup>6</sup> As of 1987, eleven courts had ordered that caesarean sections be performed on women without their consent.<sup>7</sup> In *Deaconness Hospital v. McRoberts*,<sup>8</sup> a lower court relied on a Missouri statute stating that life begins at conception<sup>9</sup> to justify ordering Ms. McRoberts to undergo a caesarean section against her wishes. In *Jefferson v. Griffin Spalding County Hospital*,<sup>10</sup> a Georgia court granted the Department of Human Resources "custody" of Ms. Jefferson's fetus and ordered her to submit to a caesarean delivery which conflicted with her religious convictions. The court reasoned that because the "unborn child" was protected from arbitrary termination of its life by *Roe v. Wade*,<sup>11</sup> the rights of the mother may be subordinated to the needs of the fetus.<sup>12</sup> The Georgia Supreme Court refused Ms. Jefferson's motion to stay the order.<sup>13</sup>

These decisions depart from the tradition of deference to an individual's medical choices regardless of the physician's opinion.<sup>14</sup> They also depart from tradition by compelling an individual to submit to a medical procedure solely to benefit another.<sup>15</sup> In addition to forcing unwanted medical treatment on competent adults, these cases prescribe unequal treatment of women based on race and economic status. A study reported in the *New England Journal of Medicine* found that poor women

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6. Veronika E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 *NEW ENG. J. MED.* 1192 (1987).

7. Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 *HARV. WOMEN'S L.J.* 9, 11 (1987).

8. No. 874-00172 (Mo. Cir. Ct. May 21, 1987).

9. MO. REV. STAT. § 1.205.1(1)(2) (1986). This statute provides in pertinent part: "The general assembly of this state finds that: (1) The life of each human being begins at conception; (2) Unborn children have protectable interests in life, health, and well-being . . . ." *Id.* The constitutionality of this statute was subsequently challenged in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). The Court held that it need not rule on the constitutionality of this provision because the statute merely expressed the Missouri legislature's value judgment favoring childbirth over abortion. *Id.* at 506-07.

10. 274 S.E.2d 457, 458 (Ga. 1981).

11. 410 U.S. 113 (1973).

12. 274 S.E.2d at 458.

13. *Id.* Ms. Jefferson went into labor before the court-ordered surgery was performed. Although Ms. Jefferson's physician had predicted that the chances of the infant's survival were only one percent if delivered vaginally, the baby was born alive and healthy. George Annas, *The Most Unkindest Cut of All*, 12 *HASTINGS CENTER REP.* 16 (1982).

14. See *Canterbury v. Spence*, 464 F.2d 772, 781 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *Smith v. Shannon*, 666 P.2d 351, 354 (Wash. 1983); *Schloendorff v. Society of the New York Hosp.*, 105 N.E. 92 (N.Y. 1914). "[I]t is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie." *Canterbury*, 464 F.2d at 781.

15. See Gallagher, *supra* note 7, at 23-26.

and women of color were disproportionately subjected to legal intervention in their medical care during pregnancy.<sup>16</sup>

One forced-caesarean case was overturned on appeal. In *In re A.C.*,<sup>17</sup> the lower court ordered, against the family's wishes, that a caesarean be performed on an incompetent, pregnant woman who was dying of cancer. The court ordered the caesarean section even though the fetus' viability was uncertain and the operation would clearly hasten the woman's death. The Court of Appeals for the District of Columbia overturned this decision, ruling that the lower court should have considered what the patient would have decided had she been competent rather than balancing the rights of the pregnant woman against the interests of the state.<sup>18</sup>

The United States Supreme Court has not yet ruled on the constitutionality of court-ordered medical treatment of pregnant women. In *Webster v. Reproductive Health Services*,<sup>19</sup> however, the Court upheld the provision of a Missouri statute which proclaimed that human life begins at conception. This statute had been the justification for the compelled caesarean section in *Deaconness Hospital v. McRoberts*.<sup>20</sup> The Court reasoned that because the provision merely expresses the Missouri legislature's value judgement favoring childbirth over abortion, the Court need not address the provision's constitutionality until a specific application of it is challenged.<sup>21</sup> Thus, it remains undecided whether forcing a pregnant woman to undergo surgery solely to benefit her fetus violates her constitutional rights.

## B. The "Fetal Rights" Movement in Legal Academia

An emerging movement in legal academia advocates a drastic change in the legal position of pregnant women. Law Professor John Robertson proposes that although a woman may abort a fetus, once she decides to continue the pregnancy, her constitutional rights are diminished.<sup>22</sup> Under his scheme, pregnant women would be subject to government control of their medical treatment.<sup>23</sup> He proclaims that

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16. See Kolder et al., *supra* note 6, at 1195 (observing that 81% of all court-ordered medical procedures were performed on women who were African-American, Asian-American, or Latina).

17. 573 A.2d 1235 (D.C. 1990).

18. *Id.* This decision came too late to help the pregnant woman, who was subjected to the caesarean operation and died shortly thereafter. *Id.* at 1237.

19. 492 U.S. 490 (1989).

20. See *supra* note 8 and accompanying text.

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

22. John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 437 (1983).

23. *Id.* at 442-43.

a woman has an unrestrained right to control her body until the fetus reaches viability and then suddenly loses this right once she decides to carry the child to term. At that point, if the well-being of the potential child is at stake, she loses her autonomy, and her body may be invaded and treated for the child's sake.<sup>24</sup>

Philosophy Professor Charles Dougherty proposes that every human being has a legal right to be born with "sound body and mind" and a pregnant woman who acts in a way that infringes upon this right should be held liable.<sup>25</sup> He argues that a fetus itself, at any point in its development, should have a cause of action in tort against its mother for hazardous activities that she undertakes.<sup>26</sup>

Professor Barbara Shelley advocates not mere civil liability, but criminal liability for pregnant women's behavior that causes injury to developing fetuses in order to "to protect and vindicate the interests of the public as a whole . . ."<sup>27</sup> Thus, in her view, courts should intervene not only to protect the fetus, but also to prescribe criminal punishment for a woman who makes unwise decisions about the health of her fetus. Recently this view has been applied to women who use drugs during pregnancy.

### C. Punishment of Drug Use During Pregnancy Under Existing Statutes

The incidence of babies born with drugs in their system presents a growing problem. Estimates indicate that in the United States each year, 375,000 children are exposed to drugs before birth.<sup>28</sup> Exposure may have serious physiological effects on the developing fetus, although the effects vary widely among infants.<sup>29</sup> Prosecutors have reacted to the problem by applying existing criminal and civil statutes to pregnant women.

In some states, prosecutors have criminally charged pregnant women for use of drugs under drug trafficking statutes that were intended to apply to delivery of drugs to another human being. For example, in *State v. Black*<sup>30</sup> and *State v. Johnson*,<sup>31</sup> Ms. Black and Ms. Johnson were

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24. *Id.* at 463.

25. Charles J. Dougherty, *The Right to Begin Life with Sound Body and Mind: Fetal Patients and Conflicts with Their Mothers*, 63 U. DET. L. REV. 89 (1985).

26. *Id.* at 115.

27. Barbara Shelley, Comment, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 DICK. L. REV. 691 (1988).

28. NAPARE SURVEY, *supra* note 1. This figure includes exposure to cocaine, heroin, methadone, amphetamines, PCP, and marijuana.

29. Barry Zuckerman, *Drug-Exposed Infants: Understanding the Medical Risk*, THE FUTURE OF CHILDREN, Spring 1991, at 26, 27-29; Barry Zuckerman et al., *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 NEW ENG. J. MED. 762 (1989). Some of the immediate medical effects include impaired fetal growth, smaller head size at birth, *id.* at 764-65, and premature birth. Ira J. Chasnoff et al., *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 JAMA 1741, 1742 (1989).

30. No. 89-5325 (Fla. Cir. Ct. Jan. 3, 1990).

found guilty of delivering drugs to their infants through the umbilical cord. Ms. Black is currently serving an eighteen-month prison sentence. Ms. Johnson appealed, and the court affirmed her conviction but certified the question to the Florida Supreme Court.<sup>32</sup> Thus far, these are the only such cases to result in convictions.

On the other hand, in *State v. Carter*,<sup>33</sup> the judge dismissed a charge of delivery of drugs through the umbilical cord, stating that the statute applied to delivery of drugs to people, not fetuses.<sup>34</sup> The state has filed an appeal.<sup>35</sup> Similarly, in North Carolina, a prosecutor charged a woman with assault with a deadly weapon and delivery of a controlled substance based upon her drug use during pregnancy.<sup>36</sup> The judge dismissed these charges because "a fetus is not a person" within the meaning of the assault and drug delivery statutes.<sup>37</sup> In *Commonwealth v. Pellegrini*<sup>38</sup> and *State v. Bremer*,<sup>39</sup> drug distribution charges were dismissed on grounds that applying the drug distribution statutes to a woman's use of drugs during pregnancy violated her constitutional rights to due process and privacy.

Other prosecutors have attempted to penalize pregnant drug users by characterizing their drug use as criminal child abuse. In *Kentucky v. Welch*,<sup>40</sup> the court convicted a woman of second-degree child abuse and sentenced her to five years in prison because her newborn baby suffered from "neonatal abstinence syndrome"<sup>41</sup> as a result of her use of drugs during pregnancy. Ms. Welch filed an appeal and is awaiting a decision.<sup>42</sup> In *Michigan v. Hardy*,<sup>43</sup> a prosecutor charged a woman with criminal child abuse and delivery of drugs to a minor because her newborn infant tested positive for cocaine. A circuit court quashed the child abuse charge because it found insufficient evidence that the defendant's ingestion of cocaine while pregnant caused serious physical harm to her child.<sup>44</sup> Although Ms. Hardy suffered no criminal penalty, her three

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31. No. E89-890-CFA (Fla. Cir. Ct. July 13, 1989).

32. No. 89-1765 (Fla. Dist. Ct. App. Apr. 18, 1991). No decision has been announced yet.

33. No. 89-6274 (Fla. Cir. Ct. July 23, 1990), *appeal docketed*, No. 90-2261 (Fla. Dist. Ct. App. (June 4, 1991)).

34. *Id.*

35. *Id.*

36. *State v. Inzar*, Nos. 90CRS6960, 90CRS6961 (N.C. Super. Ct. Apr. 9, 1991).

37. *Id.*

38. No. 87970, slip. op. at 9 (Mass. Sup. Ct. Oct. 15, 1990).

39. No. 90-32227-FH, slip op. at 12-13 (Mich. Cir. Ct. Jan. 31, 1991).

40. No. 90-CR-006 (Ky. Cir. Ct. Mar. 15, 1990).

41. For a description of this medical condition, see Stephen R. Kandall, *Neonatal Drug Abstinence*, in PEDIATRICS § 15.2.14 (Abraham M. Rudolph ed., 18th ed. 1987).

42. *Welch v. Kentucky*, No. 90-CR-006 (Ky. Ct. App. Sept. 11, 1991).

43. No. 89-2931-FY (Mich. Dist. Ct. filed Dec. 5, 1989).

44. *Id.* Although the court denied defendant's motion to quash the drug delivery charge, a Michigan Court of Appeals later reversed, reasoning that the legislature did not intend the

children were placed in foster care while her case was pending.

In *State v. Gethers*<sup>45</sup> and *State v. Andrews*,<sup>46</sup> each court held that its state's existing child endangerment statutes did not apply to women's prenatal drug use. The *Andrews* court considered but rejected the argument that the woman's privacy rights would be violated by such a charge.<sup>47</sup> A conviction under a child endangerment statute was overturned in *State v. Gray*<sup>48</sup> because the Court of Appeals found that the statute did not apply to the "passage of harmful substances from a mother to her child in the brief moments from birth to the severance of the umbilical cord." The Ohio Supreme Court has agreed to hear the state's appeal. The only state supreme court to address this question is Wyoming's, which concluded thirty-eight years ago that the state's child abuse statute was not intended to apply to fetuses.<sup>49</sup>

States have also tried to discourage drug use during pregnancy by taking custody of children whose mothers used drugs while pregnant. In both *In re Baby X*,<sup>50</sup> a Michigan case, and *South Dakota v. Christensen*,<sup>51</sup> the state took custody of infants because they were born with traces of illegal drugs in their systems. Even though the mother in *Christensen* successfully completed a drug treatment program, the judge will neither let her resume custody of her child nor permit her to visit her child.<sup>52</sup> Three women in South Carolina also lost temporary custody of their infants based on positive drug tests.<sup>53</sup> In *In re S.W.*,<sup>54</sup> a California court separated a mother from her children because she had abused drugs during her most recent pregnancy, even though she had made every effort possible to obtain treatment for her addiction and could prove her willingness and competence to take care of her children. In *In re Troy D.*,<sup>55</sup> a California Court of Appeals held that the presence of drugs in an infant's system and his mother's previous loss of custody of a child due to

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drug delivery statute to apply to a pregnant woman's ingestion of drugs. *State v. Hardy*, No. 128458 (Mich. Ct. App. Apr. 1, 1991).

45. No. 89-4454CF10A (Fla. Cir. Ct. Nov. 6, 1989).

46. No. JU 68459 (Ohio Ct. C.P. June 19, 1989).

47. *Id.*

48. No. L-89-239, slip. op. at 3 (Ohio Ct. App. Aug. 31, 1990).

49. *State v. Osmus*, 276 P.2d 469, 474-75 (Wyo. 1954).

50. 293 N.W.2d 736 (Mich. Ct. App. 1980).

51. No. CRI 90 (S.D. Cir. Ct. Mar. 12, 1990).

52. Lynn Paltrow & Suzanne Shende, American Civil Liberties Union Reproductive Freedom Project Memorandum, *State by State Case Summary of Criminal Prosecutions Against Pregnant Women and Appendix of Public Health and Public Interest Groups Opposed to These Prosecutions* (May 21, 1991) [hereinafter *Case Summary*] (on file with the *Hastings Constitutional Law Quarterly*).

53. Ellen Goetz et al., American Civil Liberties Union Reproductive Freedom Project Memorandum, *Poor and Pregnant? Don't Go to South Carolina . . .* (Feb. 1, 1990) (on file with the *Hastings Constitutional Law Quarterly*).

54. No. J-17240 (Cal. Cir. Ct. 1987).

55. 263 Cal. Rptr. 869 (Cal. Ct. App. 1989).

drug use provided sufficient evidence to support a dependency petition removing the infant from his mother.<sup>56</sup>

Some courts have terminated custody for the mother's use of substances other than illegal drugs. In *In re J. Jeffrey*,<sup>57</sup> a child was taken away several months after birth based on his mother's alleged use of valium, a legal painkiller, during her pregnancy, even though the mother was drug-free at the time of the custody hearing. The mother had no history of neglect of her other two children. Yet an entire year passed before she was allowed to resume custody of her infant.<sup>58</sup>

At least some courts, however, are unwilling to extend the definition of child neglect to drug-dependent pregnant women. In *In re Torres*<sup>59</sup> and *In re Sharon Fletcher*,<sup>60</sup> family courts in New York, holding that a determination of child neglect could not be based on prenatal drug use by the mother, refused to terminate custody.<sup>61</sup>

Some states have approached the problem of drug addicted babies by legally detaining pregnant women to protect their fetuses. In South Carolina, a woman was placed under house arrest for the duration of her pregnancy based on a single, positive drug test.<sup>62</sup>

This approach has not always succeeded. In Ohio, for example, a court of appeals overturned a juvenile court order placing a pregnant woman in a "secure treatment facility" to protect the woman's fetus from her alleged drug use. The court of appeals held that the juvenile court had no jurisdiction over an adult woman to control her behavior during pregnancy.<sup>63</sup> Notably, the decision rested on the jurisdictional issue and not on the constitutional argument made by defense counsel that such an order infringed the woman's right to liberty.<sup>64</sup> Judge Whiteside, in his concurrence, expressed his disappointment that the General Assembly had "not yet enacted law dealing with the rights of unborn children."<sup>65</sup> By expressing his concern for statutory fetal rights, Judge Whiteside implied that a woman's liberty interest should not prevent the involuntary detention of pregnant women who use drugs.

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56. *Id.* at 877.

57. No. 99851 (Mich. Ct. App. filed Apr. 9, 1987).

58. *The President's National Drug Abuse Strategy: Hearing Before the Subcomm. on Health and the Environment, House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 26 (1990) (statement of Lynn Paltrow, Kary Moss, and Judy Crockett on behalf of the American Civil Liberties Union) [hereinafter *Hearing*].

59. No. N-3968/88 (N.Y. Fam. Ct. Oct. 7, 1988).

60. 533 N.Y.S.2d 241 (1988).

61. The court in *In re Sharon Fletcher* stated that "[i]t is the Commissioner's burden to prove that any prior drug use puts the child in danger now." *Id.* at 243 (emphasis added).

62. *Case Summary*, *supra* note 52, at 12.

63. *Cox v. Court of Common Pleas*, No. 88AP 856 (Ohio Ct. App. Dec. 13, 1988).

64. *Id.*

65. *Id.* at 11.



Pregnant women are also subject to discriminatory sentencing by judges. Rather than being placed on probation, which is the usual sentence for forging checks, Brenda Vaughn, a pregnant woman, was sentenced to prison because a drug test indicated she was using cocaine.<sup>66</sup> Vaughn was never formally charged with illegal drug use and received no trial. The judge justified the sentence as necessary to protect Vaughn's fetus,<sup>67</sup> and explained that some of his fellow judges had similarly sentenced pregnant women who were drug abusers.<sup>68</sup>

Thus far, courts have responded unpredictably to the question whether existing statutes should apply to fetuses, which the Supreme Court has ruled are not "persons" under the Constitution.<sup>69</sup> Defense lawyers argue that extending statutes beyond their precise language and beyond the intentions of the legislators violates due process because women have no notice that drug delivery and child abuse statutes apply to prenatal behavior.<sup>70</sup> They also argue that these prosecutions and custody terminations violate women's constitutional rights to privacy and autonomy.<sup>71</sup> Among all the decisions favoring the mother, however, only two rested on the mother's constitutional rights of privacy and autonomy.<sup>72</sup> The other decisions rested on the basis that fetuses were not within the definitions in the statutes as written.

## II. Legislative Trend Toward Protection of "Fetal Rights"

The reluctance of courts to accept distorted interpretations of statutes to punish pregnant, drug-addicted women has prompted some lawmakers to propose legislation that expressly punishes these women.

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66. *United States v. Vaughn*, No. F-2171-88B (D.C. Super. Ct. Aug. 23, 1988).

67. *Id.*

68. *Id.* Illinois, Minnesota, and Delaware have recently enacted statutes allowing such special penalties to be imposed for drug use during pregnancy. Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster*, 138 U. PA. L. REV. 179, 194-95 n.52 (1989).

69. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

70. Appellant's Initial Brief at 36-39, *Johnson v. State*, No. 89-1765 (Fla. Dist. Ct. App. Apr. 18, 1991); Defendant-Appellee's Brief on Appeal at 16-18, *State v. Hardy*, No. 1288458 (Mich. Dist. Ct. filed Dec. 5, 1989); Brief for Appellant at 12-14, *Welch v. Kentucky*, No. 90-CCR-006, (Ky. Ct. App. (Sept. 11, 1991)).

71. Brief of Defendant-Appellee at 25-26, *State v. Gray*, No. L-89-239 (Ohio Ct. App. Aug. 31, 1990) (prosecution for criminal child endangerment); Appellant's Initial Brief at 40-49, *Johnson v. Florida*, No. 89-1765 (Fla. Dist. Ct. App. Apr. 18, 1991) (prosecution for delivering drugs to a minor); Memorandum of Law in Support of Petitioners' Motion for Leave to Appeal to the New York Court of Appeals at 11, *In re Stefanel Tyasha C.*, 556 N.Y.S.2d 280 (1990) (action to terminate custody).

72. *See Commonwealth v. Pellegrini*, No. 87970 (Mass. Super. Ct. Oct. 15, 1990); *State v. Bremer*, No. 90-32227-FH (Mich. Cir. Ct. Jan. 31, 1991). Although the family court in *In re Sharon Fletcher*, 533 N.Y.S.2d 241 (1988), based its dismissal of the child neglect claim on statutory construction, it also acknowledged that "[b]y becoming pregnant, women do not waive the constitutional protections afforded to other citizens." *Id.* at 243.

The legislation generally falls into one of three categories: (1) criminalization of the act of giving birth to an addicted child, (2) requirement that health care personnel test pregnant women for drugs and report test results or behavior to the government, and (3) removal of children from their mother's custody due to the mother's behavior during pregnancy.

#### A. A New Crime is Proposed: Giving Birth to a Drug-Addicted Child

Legislators in four states have proposed legislation that would make it a felony to give birth to a drug-addicted child. None of the proposed legislation was passed into law. A Georgia bill would have sentenced a first offender to one to ten years imprisonment, and a second offender to two to twenty years.<sup>73</sup> In Louisiana, the bill proposed that violators be "imprisoned at hard labor for not more than ten years or fined not more than fifteen thousand dollars, or both."<sup>74</sup> These sentences are much more severe than those typically imposed for drug trafficking convictions.<sup>75</sup>

Ohio's proposed legislation would have classified the offense as an "aggravated felony of the second degree" and prescribe the potentially harshest penalties of all the bills:

If the woman previously has not been convicted of or pleaded guilty to a violation . . . the court shall sentence the woman to elect to do one of the following[:] a) successfully complete a drug addiction program; b) undergo a tubal ligation; c) if available, partici-

73. The bill provided in relevant part:

(a) Any person who uses a controlled substance, . . . or a dangerous drug, . . . while pregnant and who as a result of such use gives birth to a child who at the time of birth tests positive for addiction to a controlled substance or a dangerous drug shall be guilty of the offense of distributing a controlled substance or a dangerous drug to an unborn child.

(b) Any person who violates subsection (a) . . . shall be guilty of a felony and . . . shall be punished by imprisonment for not less than one nor more than ten years. Upon a first conviction . . . the judge may probate the sentence; and such probation may be upon the special condition that the defendant undergo a mandatory period of counseling administered by an approved substance abuse treatment program or agency. . . . Upon a second or subsequent conviction of such offense, the defendant shall be punished by imprisonment for not less than two years nor more than 20 years.

H.B. 1146, 127th Gen. Assembly, 2d Sess., 1990 Georgia.

74. The bill provided in relevant part:

A. It is unlawful for a woman to give birth to an infant who is addicted to heroin or cocaine as the result of the mother's use of such substance during her pregnancy. . . .

B. Whoever violates this Section shall be imprisoned at hard labor for not more than ten years or fined not more than fifteen thousand dollars, or both.

H.B. 603, Reg. Sess., 1990 Louisiana.

75. For example, federal sentencing guidelines prescribe a sentence of two to eight months imprisonment for a first or second offense of possession or trafficking involving 50 to 200 grams of hashish. UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL 73, 242 (West 1991). The guidelines prescribe a sentence of six to twelve months for a first or second offense involving 200 grams of hashish. *Id.*

pate in a five-year program of monitored contraceptive use approved by the court that the court has determined is completely reliable and can be monitored effectively, and during the five-year period abstain from the addictive use of drugs of abuse.<sup>76</sup>

Although this proposal offers the woman three options, she would have little real choice. Option c) specifies no particular contraceptive method. Currently available contraceptive methods are not "completely reliable" in preventing pregnancy.<sup>77</sup> The most reliable method, the recently introduced Norplant implant, is expensive and more physically intrusive than any other method because it requires implantation under the woman's skin.<sup>78</sup> The Norplant implant also poses serious health risks to the woman if inserted improperly.<sup>79</sup>

The monitoring required under this option would be difficult, particularly if the contraceptive method required the woman to take a particular action daily, such as taking a birth control pill. If the court determines that no method is "completely reliable" and able to be monitored, or if the method chosen by the court requires an intrusive medical procedure, to which the woman does not wish to submit, the woman would have to choose between only the first two options.

The option of drug treatment may be ineffective as well, because the woman would satisfy the condition only if she is successful in treatment. If her drug-addiction problem is not cured through participation in the program, she would be left with only the second option of tubal ligation. Tubal ligation is an intrusive surgical procedure that permanently prevents her from bearing children and affects her overall health.

In addition, the bill does not specify what would happen if the agency has no funds available to pay for a particular woman's treatment. The legislation provides that the county's board of alcohol, drug addiction, and mental health services should bear the cost of treatment for indigent women. However, the funds allocated to any agency by the state government are limited. Evidently, a woman who is not able to afford the substantial cost of drug treatment would be forced to choose the option of tubal ligation.

According to the proposed statute, if a woman is convicted more than once of giving birth to a drug-addicted infant, the option of entering a drug-treatment program would be eliminated.<sup>80</sup> Again, since moni-

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76. S.B. 324, 118th Gen. Assembly, Reg. Sess., 1989-1990 Ohio.

77. ROBERT A. HATCHER ET AL., *CONTRACEPTIVE TECHNOLOGY 1990 TO 1992*, at 134 table 8:2 (15th rev. ed. 1990).

78. *Id.* at 304-05.

79. *Id.*

80. The proposed statute provides in pertinent part:

(2) If the woman previously has been convicted of or pleaded guilty to a violation of division (A) of this section, the court shall sentence the woman to elect to do one of the following and to act in accordance with the election: undergo a tubal

tored contraception may be unworkable due to limited contraceptive technology, the woman would be forced to undergo a tubal ligation. Although this legislation was not approved by Ohio's Health and Human Services Committee in 1990, Senator Cooper Snyder, the bill's author, intends to introduce a similar bill in the future.<sup>81</sup>

In Colorado, a legislator unsuccessfully proposed amending the definition of criminal child abuse to include abuse of a controlled substance during pregnancy.<sup>82</sup> The bill's author plans to introduce this legislation again in the future.<sup>83</sup> Similarly, former United States Senator Pete Wilson unsuccessfully attempted to prevent any state from receiving grants for prenatal health care unless the state made giving birth to a drug-addicted baby a felony punishable by at least three years in prison.<sup>84</sup> Bills creating this new type of crime have not become law in any state, but they continue to be introduced and debated.

## B. Pregnant Women Lose Their Right to Privacy in Their Medical Treatment

### 1. Testing and Reporting Statutes

Other, more successful, legislative proposals require health professionals to detect and report drug or alcohol use by pregnant women. Some recent fetal abuse cases were initiated when health care providers reported pregnant women whom they suspected of drug use to law enforcement agencies.<sup>85</sup> Some lawmakers believe that detection and reporting should be mandatory. For example, in Minnesota, a new law requires that a physician administer a toxicology test to a pregnant or

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ligation; if available, participate in a five-year program of monitored contraceptive use approved by the court that the court has determined is completely reliable and can be monitored effectively, and during the five-year period abstain from the addictive use of drugs of abuse.

S.B. 324, 118th Gen. Assembly, Reg. Sess., 1989-1990 Ohio.

81. Telephone interview with Amy Brooks, Aide to Ohio State Senator Snyder (Nov. 15, 1990).

82. H.B. 90-1170, 57th Gen. Assembly, 2d Reg. Sess., 1990 Colorado. This bill would amend the definition of child abuse to include "[a]ny case in which a child is born with medical evidence of exposure to any controlled substance . . . or any case in which a child is born with a serious physical impairment due to any such controlled substance." *Id.* at 20.

83. Telephone interview with Colorado State Representative Phil Pankey (Nov. 19, 1990).

84. S. 1444, 101st Cong., 1st Sess. (1989).

85. *State v. Bremer*, No. 90-32227-FH (Mich. Cir. Ct. Jan. 31, 1991), was initiated when a physician reported a pregnant woman to law enforcement agencies for "child" abuse after the woman admitted to him during treatment that she had used cocaine during her pregnancy.

A health worker in California tested a new mother for drugs solely because the woman had not received prenatal medical care, and reported the positive test results to child protection authorities. This led to an action to terminate the woman's custody of her children. *In re Troy D.*, No. D008442 (Cal. Ct. App. 1989). The woman challenged the action on grounds of breach of confidentiality, but was unsuccessful. *In re Troy D.*, 263 Cal. Rptr. 869 (Cal. Ct. App. 1989).

postpartum woman if there are any medical indications that the woman might have used drugs during pregnancy.<sup>86</sup> The mother's consent is irrelevant. If there is any evidence of drug use, the physician must report the test results to the local welfare agency.<sup>87</sup> This agency is required to notify the local law enforcement agency.<sup>88</sup>

Other recent legislation does not mandate drug testing but requires that health care workers report to the government results of tests or suspicions concerning drug use by pregnant or postpartum women. A recently passed Oklahoma law requires that medical personnel, under threat of criminal penalty, report a woman who gives birth to a drug-dependent child to the Department of Human Services.<sup>89</sup> That Department is in turn required to report the results of an investigation to law enforcement agencies.<sup>90</sup> A similar bill considered, but rejected, by the Missouri legislature would have required any medical practitioner who has "reasonable cause to suspect" the use of a controlled substance by a pregnant woman to report the woman to the Division of Family Services.<sup>91</sup> This Division would have been required to report the information

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86. A physician shall administer a toxicology test to a pregnant woman under the physician's care or to a woman under the physician's care within eight hours after delivery to determine whether there is evidence that she has ingested a controlled substance, if the woman has obstetrical complications that are a medical indication of possible use of a controlled substance for a nonmedical purpose.

MINN. STAT. ANN. § 626.5562 (West Supp. 1991).

87. A person mandated to report under section 626.556, subdivision 3, shall immediately report to the local welfare agency if the person knows or has reason to believe that a woman is pregnant and has used a controlled substance for a nonmedical purpose during the pregnancy.

MINN. STAT. ANN. § 626.5561 (West Supp. 1991).

88. "The local welfare agency, upon receiving a report, shall immediately notify the local police department or the county sheriff orally and in writing." MINN. STAT. ANN. § 626.556 (West Supp. 1991).

89. Every physician or surgeon . . . or any other health care professional attending the birth of a child who appears to be a child born in a condition of dependence on a controlled dangerous substance shall promptly report the matter to the county office of the Department of Human Services in the county in which such birth occurred. Provided it shall be a misdemeanor for any person to knowingly and willfully fail to promptly report any incident as provided above.

OKLA. STAT. ANN. tit. 21, § 846 (West Supp. 1991).

90. "[I]f the county office finds evidence of abuse and neglect [it shall] forward its findings to the district attorney's office . . ." *Id.*

91. When any [medical practitioner or child care worker] has reasonable cause to suspect that a child has been or may be subjected to abuse or neglect or observes a child being subjected to conditions or circumstances which would reasonably result in abuse or neglect, including the use of a controlled substance by a pregnant woman for a non-medical purpose, he shall immediately report or cause a report to be made to the division [of family services] . . . .

S. 756, 85th Gen. Assembly, 2d Reg. Sess., 1990 Missouri.

to the appropriate law enforcement agency.<sup>92</sup> Likewise, an amendment to a Utah statute adds "fetal alcohol syndrome" to the list of conditions that health care workers must report, under threat of criminal penalty, to social service agencies,<sup>93</sup> and requires that the social service agency respond to the report by investigating for possible child abuse.<sup>94</sup>

Each of these enacted or proposed statutes imposes on medical personnel and institutions a duty to "police" their patients. Both the Oklahoma and Utah statutes enforce this duty by imposing criminal penalties on health care workers who fail to comply.<sup>95</sup> Physicians in all states currently have a duty to report instances of child abuse.<sup>96</sup> The new requirements, however, impose the additional duty to conduct tests for the presence of drugs in a woman's bloodstream, or to report confidential medical information, even if there is no evidence of child abuse.

Even without these types of statutes, some hospitals have mandated their own testing procedures. According to Dr. Wendy Chavkin, most hospitals screen newborns for the presence of illegal drugs when maternal drug use is suspected, but there is no specified criteria by which physicians are to decide whether such a test is appropriate.<sup>97</sup> Although a single, positive toxicology screen does not indicate the extent of drug use,<sup>98</sup> Chavkin observes that hospitals interpret it as evidence of repeated illicit drug use by the mother.<sup>99</sup> Strict reporting statutes, particularly those that impose criminal penalties for failure to report, put pressure on

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92. "Upon receipt of a report . . . , the local [family services] office shall contact the appropriate law enforcement agency . . ." *Id.* The bill did not become law because the Senate Health Committee failed to vote on it before the end of the legislative session.

93. When any person . . . attends the birth of a child or cares for a child, and determines that the child, at the time of birth, has fetal alcohol syndrome or fetal drug dependency, he shall report that determination to the division as soon as possible.

UTAH CODE ANN. § 62A-4-504 (1988).

Any person, official, or institution required to report a case of suspected child abuse, neglect, fetal alcohol syndrome, or fetal drug dependency, who willfully fails to do so is guilty of a class B misdemeanor.

UTAH CODE ANN. § 62A-4-511 (1988).

94. The division shall make a thorough investigation upon receiving either an oral or written report of alleged abuse, neglect, fetal alcohol syndrome, or fetal drug dependency, when there is reasonable cause to suspect a situation of abuse, neglect, fetal alcohol syndrome, or fetal drug dependency.

UTAH CODE ANN. § 62A-4-509 (1991).

95. *See supra* notes 89, 93.

96. John E.B. Myers, *A Survey of Child Abuse and Neglect Reporting Statutes*, 10 J. Juv. L. 1, 1 (1986).

97. *Hearing of House Select Comm. on Children, Youth and Families*, 101st Cong., 1st Sess. 3 (1989) (statement of Wendy Chavkin, M.D., M.P.H.).

98. Judith Larsen et al., *Medical Evidence in Cases of Intrauterine Drug and Alcohol Exposure*, 18 PEPP. L. REV. 279, 285 (1991).

99. *Hearing of House Select Comm. on Children, Youth and Families*, *supra* note 97, at 3.

health care workers and institutions and may encourage the widespread adoption of practices similar to those observed by Chavkin.

Although the new testing and reporting requirements are purportedly designed to help children,<sup>100</sup> in reality they focus on identifying women who use drugs or alcohol, as opposed to identifying children who are at risk for future abuse by their parents. Because the Constitution protects individuals from unjustified governmental actions, these statutes are only permissible if the governmental interest they seek to protect outweighs the individual interests at stake. The next section of this Note evaluates the testing and reporting statutes in light of specific constitutional provisions and concludes that pregnant women suspected of drug use do not receive the protections traditionally guaranteed by the Constitution.

## 2. *Constitutional Arguments Against the New Testing and Reporting Requirements*<sup>101</sup>

### a. Protection from Unreasonable Searches and Seizures

The Fourth Amendment protects individuals from unreasonable searches and seizures of their person or property by the federal government,<sup>102</sup> and has been applied to the individual states through the Fourteenth Amendment.<sup>103</sup> This protection ensures that the government does not arbitrarily invade citizens' privacy and security.<sup>104</sup> As the Supreme Court stated in *Schmerber v. California*,<sup>105</sup> "The integrity of an individual's person is a cherished value of our society."<sup>106</sup>

This protection applies if a police officer wishes to search a person or area for evidence of a crime. Before searching, the officer must first obtain a warrant based on "probable cause" that evidence of a particular crime will be found.<sup>107</sup> A vague suspicion is not sufficient: the officer or prosecutor must present specific facts supporting the suspicion in order to receive permission to conduct a search.<sup>108</sup> She must present this information to a "neutral and detached magistrate" for determination of probable cause.<sup>109</sup>

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100. For example, the Minnesota reporting statute declares "that the public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse." MINN. STAT. ANN. § 626.556 (West Supp. 1991).

101. This Note analyzes the statutes' compliance with the United States Constitution and not compliance with each state's constitution.

102. U.S. CONST. amend. IV.

103. *Mapp v. Ohio*, 367 U.S. 643 (1961).

104. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 613-14 (1989).

105. 384 U.S. 757 (1966).

106. *Id.* at 772.

107. *United States v. Harris*, 403 U.S. 573, 584 (1971).

108. *Id.*

109. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

A compulsory urine or blood test constitutes a search of one's person,<sup>110</sup> and therefore must be evaluated under the above standards. In Minnesota, health care personnel are required to test any woman, during pregnancy or immediately after childbirth, who has any medical complication that indicates "possible" drug use during her pregnancy.<sup>111</sup> No warrant is required. Health care workers decide who should be tested based on indications of "possible" drug use. "Possible" cause replaces "probable" cause, providing pregnant women with less protection than non-pregnant criminal suspects.

The government may search permissibly without first obtaining a warrant under some limited occasions when exigent circumstances exist.<sup>112</sup> The search, however, must be based on a reasonable suspicion of wrongdoing.<sup>113</sup> The Supreme Court in *Schmerber v. California* found that a compelled blood test of a drunk-driving suspect satisfied the probable cause requirement.<sup>114</sup> Although the officer did not have a warrant, the suspect had caused a serious traffic accident and exhibited numerous symptoms of drunkenness, providing probable cause to arrest.<sup>115</sup> In *Mincey v. Arizona*,<sup>116</sup> however, the Court ruled that the occurrence of a homicide in a person's home was insufficient to justify a four-day warrantless search of the home.

The state may assert that its interest in law enforcement provides the exigent circumstances that allow a search without a warrant. Because neither ingestion of drugs nor addiction to drugs is a crime, these searches would not be based upon reasonable suspicion that evidence of a crime will be found. If a state were to make drug use during pregnancy a crime, and require testing and reporting based on indications that this crime had been committed, suspicion of a specific crime would exist. Physicians and other health care workers would make a legal determination as to whether it is reasonable to conduct the procedure against the wishes of their patient. Thus, permission to conduct a search would not be subject to approval by a neutral and detached magistrate.

The Supreme Court has also established an exception to the usual warrant requirement when the government has a "special need" beyond law enforcement.<sup>117</sup> In *New Jersey v. T.L.O.*,<sup>118</sup> for example, junior high school officials were permitted to search a student's purse based on only

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110. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (urine test); *Schmerber*, 384 U.S. at 767 (blood test).

111. MINN. STAT. ANN. § 626.5562 (West Supp. 1991).

112. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966).

113. *Id.*

114. *Id.* at 768-69.

115. *Id.*

116. 437 U.S. 385 (1978).

117. *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

118. 469 U.S. 325 (1985).



“reasonable suspicion” as opposed to “probable cause” because officials had a special need to protect the safety of the entire student population.<sup>119</sup> In *Bell v. Wolfish*,<sup>120</sup> the Supreme Court upheld the body search of prison inmates without any individualized suspicion of wrongdoing. The Court relied on the inmates’ severely diminished expectation of privacy and the importance of safety concerns in the uniquely dangerous environment of a prison.<sup>121</sup>

Pregnant women in Minnesota are treated as a special category of people whose privacy interests may be invaded, as were the students in *T.L.O.* and the prison inmates in *Bell*. Adult pregnant women, however, can be readily distinguished from these groups. Prison inmates have diminished privacy rights because they have been convicted of a crime, and junior high school students are children whom the school has a legal duty to protect.

These tests require many pregnant women to undergo blood testing in order for the government to identify the few drug-using women. Advocates of compelled blood testing without warrants received some support for their position in two recent Supreme Court decisions. In *Skinner v. Railway Labor Executives’ Ass’n*<sup>122</sup> and *National Treasury Employees Union v. Von Raab*,<sup>123</sup> government agency regulations compelling drug testing without a warrant or individualized suspicion were upheld as not violative of the Fourth Amendment. *Skinner* and *Von Raab* departed from precedent by allowing searches based merely on a low level of individualized suspicion.<sup>124</sup> The regulations at issue in both cases, however, differ significantly from legislation targeting pregnant women. The regulations upheld in *Skinner* mandate blood testing of railroad employees who are working when a serious train accident occurs.<sup>125</sup> The regulations provide for drug testing only in very specific circumstances: if there is reasonable suspicion that an employee’s acts contributed to an accident, evidence that specific rules were violated, and observation of impairment by two supervisors.<sup>126</sup> The Court held that individualized suspicion of wrongdoing was not necessary in these circumstances because of the significant public safety interest advanced by

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119. *Id.* at 341.

120. 441 U.S. 520 (1979).

121. *Id.* at 558-60.

122. 489 U.S. 602 (1989).

123. 489 U.S. 656 (1989).

124. Justice Scalia, dissenting in *Von Raab*, noted that previously the Court had upheld body searches without individualized suspicion of wrongdoing in only one case, *Bell v. Wolfish*. *Von Raab*, 489 U.S. at 680 (1989) (Scalia, J., dissenting) (citing *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979)). In *Bell*, the Court upheld body searches of prison inmates after contact with visitors, relying on the unique safety needs of a prison setting. *Bell v. Wolfish*, 441 U.S. 520 (1979).

125. 489 U.S. 602 (1989).

126. *Id.* at 611.

the drug-testing requirement and because the employees' privacy interest was diminished because they had willingly assumed employment in a heavily regulated industry.<sup>127</sup>

Unlike the railroad workers in *Skinner*, pregnant women targeted by fetal rights legislation have not entered into employment that is regulated pervasively by the government, and thus have no diminished expectation of privacy. In contrast to the public safety interest in *Skinner*, the purported interest advanced by Minnesota's forced testing statute is the fetus' safety. In addition, in contrast to the specification of when testing is required in the *Skinner* regulations, under the Minnesota statute, medical professionals have wide discretion in determining which women must undergo testing.<sup>128</sup>

A state may argue that it has a special need to prevent child abuse which justifies intrusive behavior. The special need to protect children, although significant, is not served by a requirement of testing all women suspected of using drugs while pregnant. A toxicology test reveals only whether the woman has ingested drugs recently.<sup>129</sup> It does not indicate how often the woman ingests drugs, whether the drug use has actually damaged her fetus,<sup>130</sup> or whether the woman is likely to abuse her child. Although a woman's prenatal drug use may directly affect her fetus, the woman's drug use has no direct effect after the child's birth. Therefore, compelled blood testing does not serve to protect children.

Statutes forcing medical personnel to disclose patients' medical information implicate an additional aspect of Fourth Amendment protection: the "right of the people to be secure in their . . . papers and effects."<sup>131</sup> The Supreme Court has held that an area is protected from an unreasonable search if an individual has a reasonable expectation of privacy in the area.<sup>132</sup> People have a reasonable expectation that their medical records will be kept confidential, and thus medical records generally should be protected from disclosure to the government. A California court supported this view in *Wood v. Superior Court*,<sup>133</sup> holding that "good cause" was required for issuance of subpoenas for examination of medical records. The new statutes in Minnesota<sup>134</sup> and Oklahoma<sup>135</sup> and the proposed statute in Missouri<sup>136</sup> force health care workers to ignore

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127. *Id.* at 627-28.

128. Under MINN. STAT. ANN. § 626.5562 (West Supp. 1991), a health professional is required to test any woman who exhibits "any medical indication" of possible drug or alcohol use during pregnancy.

129. Larsen et al., *supra* note 98, at 285.

130. *Id.*

131. U.S. CONST. amend. IV.

132. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

133. 212 Cal. Rptr. 811 (Cal. Ct. App. 1985).

134. MINN. STAT. ANN. § 626.5561 (West Supp. 1991).

135. OKLA. STAT. ANN. tit. 21, § 846 (West Supp. 1991).

136. S.B. 756, 85th Gen. Assembly, 2d Reg. Sess., 1990 Missouri.

the traditionally confidential nature of medical records whenever the patient is a pregnant woman.

States may assert a number of reasons to justify this intrusion. The government may claim that reporting by physicians is justified by the need to protect third persons, that is, the need to protect children from abusive parents.<sup>137</sup> The reporting requirements, however, identify only women who have had a single, positive drug or alcohol test, as opposed to identifying children who are being abused or are at risk for future abuse. The statutes do not address the actual level of harm suffered by the fetus or newborn child. No evidence indicates that a woman who uses drugs during pregnancy is more likely to neglect her child in the future.<sup>138</sup> In addition, because toxicology tests are not absolutely accurate,<sup>139</sup> some women will be falsely accused. The risk of false accusation is even greater under a proposed law in Missouri that would require a health care worker to report mere suspicions without performing a drug test.<sup>140</sup>

All states currently have child abuse reporting statutes. These statutes require health care workers and other professionals to report their belief that a child is in danger of abuse by her parents.<sup>141</sup> In contrast, the new statutes require reporting women based on their drug use alone and not on the harm they have caused or risk of harm they pose to their child. Existing child abuse reporting statutes serve the state interest in identifying children at risk for abuse. Therefore, additional reporting requirements based on maternal drug use are not justified.

State governments may also assert their interest in law enforcement to justify the intrusion.<sup>142</sup> Drug or alcohol use is not a crime, however. Moreover, drug or alcohol use by pregnant women does not by itself constitute criminal child abuse in any of the states with prenatal drug use reporting statutes. Therefore, the only law enforcement purpose served by the reporting requirements is enforcement of drug trafficking laws. Even if enforcement of these laws is a proper goal, pregnant women do not receive the same right to a confidential relationship with their doctor as non-pregnant patients.

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137. See *supra* note 100.

138. Bonnie I. Robin-Vergeer, Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 763-71 (1990).

139. Larsen et al., *supra* note 98, at 284.

140. S. 756, 85th Gen. Assembly, 2d Reg. Sess., 1990 Missouri; see *supra* note 91.

141. Myers, *supra* note 96.

142. The Minnesota reporting statute originated in the Judiciary Committee of both houses of the Minnesota legislature and was passed as part of the Omnibus Crime Bill, a bill "relating to crime." See Judith M. Nyhus Johnson, *Minnesota's "Crack Baby" Law: Weapon of War or Link in a Chain?*, 8 L. & INEQUALITY 485, 491 (1990). The Oklahoma reporting statute is part of Title 21, entitled "Crimes and Punishments." OKLA. STAT. ANN. tit. 21, § 846 (West 1991).

Compelled blood testing compromises women's bodily integrity and intrudes on the intensely personal relationship between patient and doctor in deciding matters of the patient's medical care. Mandatory reporting exposes women's personal medical information. Traditionally, the Fourth Amendment has protected citizens, pregnant or not, against unreasonable invasions of their privacy and bodily integrity. If the Supreme Court continues to erode the protection against unreasonable searches and seizures, however, and statutes requiring increased monitoring are enacted, all pregnant women may be at risk for unjustified intrusions.

b. The Right to Privacy

The Supreme Court has found a fundamental right to privacy implicit in the Constitution.<sup>143</sup> In *Whalen v. Roe*,<sup>144</sup> the Supreme Court recognized that the right to privacy includes a patient's interest in keeping her medical information private. The Supreme Court in *Thornburgh v. American College of Obstetricians and Gynecologists*<sup>145</sup> acknowledged the private nature of one's reproductive health information when it struck down statutory provisions requiring physicians to report information about women seeking abortions.

Like the statutes struck down in *Thornburgh*, the proposed reporting legislation interferes with a woman's right to privacy. The right to privacy is fundamental.<sup>146</sup> Therefore, the proposed statutes are constitutional only if they are justified by a compelling state interest and employ means which are narrowly tailored to serve that interest.<sup>147</sup>

States may assert a strong governmental interest in identifying children who are at risk for abuse by their mothers.<sup>148</sup> Even if this interest is considered sufficiently compelling to override the woman's privacy right, mandatory reporting of results of drug tests is not narrowly tailored to achieve this goal. The statute in Minnesota<sup>149</sup> and a proposed statute in Missouri,<sup>150</sup> require a single, positive toxicology test to be reported to the government. In Minnesota a health care worker is required to report a woman who exhibits a medical indication of possible drug use even without performing a toxicology test.<sup>151</sup> A woman who used drugs during

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143. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that there is a zone of privacy emanating from the protections of the Bill of Rights which includes the right of married persons to use contraceptives).

144. 429 U.S. 589, 600 (1977).

145. 476 U.S. 747, 765-67 (1986).

146. *Griswold*, 381 U.S. at 485.

147. *Roe v. Wade*, 410 U.S. 113, 155-56 (1973).

148. *See supra* note 100.

149. MINN. STAT. ANN. § 626.5561 (West Supp. 1991).

150. S. 756, 85th Gen. Assembly, 2d Reg. Sess., 1990 Missouri.

151. *See supra* note 87 and accompanying text.

her pregnancy, even if only once, is thus treated as though she is more likely to abuse her child after birth. Data show, however, that women who use drugs during pregnancy are not more likely than other women to abuse their children once they are born.<sup>152</sup> Reporting to authorities may result in criminal prosecution of the woman or termination of custody, neither of which serves the interest of the child in most cases.<sup>153</sup> In addition, health care workers may report women falsely due to inaccurate test results or mistaken suspicions. States can more effectively and less intrusively identify children at risk by enforcing existing child abuse reporting statutes that require health care workers to report parents who are abusing their children or not caring for them properly.<sup>154</sup>

Five states have classified drug use during pregnancy as per se "child abuse."<sup>155</sup> Thus, in those states, doctors must report drug use under the existing child abuse reporting laws. In these cases, the state allows the interests of the fetus to outweigh the mother's right to privacy in medical treatment. The fetus is treated as though it were already a child with rights independent of the woman carrying it.

*Roe v. Wade*<sup>156</sup> held that fetuses do not have legal status as persons under the Constitution.<sup>157</sup> *Roe* also held, however, that the state has an interest in potential life which may become compelling after the fetus reaches viability, so that at this stage the interest in the fetus may take precedence over the woman's rights.<sup>158</sup> Thus, states may be able to regulate women later in pregnancy without violating the Constitution. The new reporting requirement in Minnesota and the proposed requirement in Missouri, however, apply to a woman's drug use at any point in the pregnancy,<sup>159</sup> including pre-viability. The Court in *Roe* established that a woman's right to privacy encompasses the right to terminate her pregnancy before the fetus is viable, reasoning that at this stage the state's interest in the fetus' well-being is not compelling.<sup>160</sup> *Roe* also required that the severity of the intrusion be balanced against the level of harm sought to be prevented by the intrusion.<sup>161</sup> These statutes, however, do not consider the frequency of the woman's drug use or actual harm suffered by the fetus.

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152. See Robin-Vergeer, *supra* note 138.

153. See *infra* Part III.

154. See Meyers, *supra* note 96 and accompanying text.

155. These states are Indiana, Nevada, Oklahoma, Illinois, and Minnesota. See *infra* Part III.C.1.

156. 410 U.S. 113 (1973).

157. *Id.* at 157-58.

158. *Id.* at 163-64.

159. See MINN. STAT. ANN. § 626.5561 (West Supp. 1991); S. 756, 85th Gen. Assembly, 2d Reg. Sess., 1990 Missouri.

160. *Roe*, 410 U.S. at 163-64.

161. *Id.* at 155.

The statutes subordinate the woman's right of privacy in her medical treatment and records to the fetus' right to be protected from possible harm. Moreover, they are not narrowly tailored to achieve the purported goal of protecting the health of children. These statutes diminish the liberty of all pregnant women by disregarding *Roe* and elevating the legal status of fetuses.

c. Equal Protection

Because these statutes expressly apply only to women, they implicate the Equal Protection Clause of the Fourteenth Amendment, which requires equal treatment under the law for all citizens.<sup>162</sup> Laws that treat people differently because of their gender require strong justification.<sup>163</sup> In *Craig v. Boren*,<sup>164</sup> the Supreme Court declared that legislation which discriminates by gender must be subject to an intermediate level of judicial scrutiny.<sup>165</sup> Under this level of scrutiny, it is not enough that gender based legislation relate in a rational way to a legitimate goal of government. Rather, the Equal Protection Clause demands that differential treatment based on gender serve an important governmental interest and be substantially related to that interest.<sup>166</sup>

The proponents of fetal rights legislation assert that encouraging the birth of healthy children is an important state interest and that this interest is served by regulating pregnant women's behavior. Although the birth of healthy children is indisputably an important societal interest, holding only women responsible for harm to this interest is unjustified discrimination. Scientific studies have demonstrated that men contribute directly to the future health of their children in many ways. A fetus is more likely to be born with low birth weight if a man smokes<sup>167</sup> or drinks alcohol<sup>168</sup> before the fetus is conceived. Low birth weight babies much more frequently experience certain severe health difficulties after birth.<sup>169</sup> If a man uses cocaine, a child he fathers is more likely to have developmental disabilities.<sup>170</sup> Yet, the statutes do not require physicians to test

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162. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

163. *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

164. 429 U.S. 190 (1976).

165. *Id.* at 197.

166. *Id.*

167. *Fetuses Weigh Less If Father Smokes*, NEW SCIENTIST, Aug. 28, 1986, at 19.

168. Ruth Little et al., *Association of Father's Drinking and Infant's Birth Weight*, 314 NEW ENG. J. MED. 1644 (1986); Rita Robinson, *High-Proof Paternity*, HEALTH, June 1988, at 20; Andrew Purvis, *The Sins of the Fathers*, TIME, Nov. 26, 1990, at 90.

169. Michael Lewis & Margaret Bendersky, *Cognitive and Motor Differences Among Low Birth Weight Infants: Impact of Intraventricular Hemorrhage, Medical Risk, and Social Class*, 83 PEDIATRICS 187, 187 (1989).

170. Ricardo A. Yazigi et al., *Demonstration of Specific Binding of Cocaine to Human Spermatozoa*, 266 JAMA 1956 (1991).

sexually active men for drugs and to report their test results or suspected drug or alcohol use to the government. If a man batters a pregnant woman, serious injury to the developing fetus can result.<sup>171</sup> Yet no increased penalty is imposed on a man who intentionally harms the fetus in this way. Although a significant number of women who were arrested for their drug or alcohol use during pregnancy had been physically abused by the father of the child, none of these men have been charged with child endangerment.<sup>172</sup> Likewise, a person who sells drugs to a pregnant woman does not receive an increased penalty because his drug trafficking harmed the fetus.

The birth of healthy children is an important concern. Sincere concern for fetal health, however, would dictate that fetus-endangering behavior of women and men be punished equally. Burdening only women is not substantially related to the goal of protecting children, and therefore the new testing and reporting statutes violate the Equal Protection Clause.

The Equal Protection Clause also guards against racial discrimination by the government.<sup>173</sup> Government action that distinguishes between people based on race is subject to a strict level of judicial scrutiny.<sup>174</sup> Although the fetal rights statutes are racially neutral on their face, racial discrimination in their application may be unconstitutional.

In *Yick Wo v. Hopkins*,<sup>175</sup> the Supreme Court held that although the language of a statute may be impartial, administration of a statute in a racially discriminatory manner violates the Constitution.<sup>176</sup> A recent Florida study concluded that although Caucasian women and African-American women engaged in similar levels of cocaine use during pregnancy, African-American women were reported to health authorities at approximately ten times the rate of Caucasian women.<sup>177</sup> This indicates that racial bias was a factor in the decision to report.

Two obstacles may thwart an Equal Protection challenge to this practice, however. One obstacle is that constitutional protections apply

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171. Linda F. Bullock & Judith McFarlane, *The Birth-Weight/Battering Connection*, 1989 AM. J. NURSING 1153.

172. *The President's National Drug Abuse Strategy: Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 4-5 (1990) (statement of Lynn Paltrow, Kary Moss, and Judy Crockett on behalf of the American Civil Liberties Union).

173. U.S. CONST. amend. XIV, § 1.

174. *Korematsu v. United States*, 323 U.S. 214 (1944).

175. 118 U.S. 356 (1886).

176. *Id.* at 373-74.

177. Ira J. Chasnoff et al., *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202 (1990).

only to government action,<sup>178</sup> and the physicians who decide which women to test under the statute may be private physicians. The Supreme Court considered a claim that constitutional rights were implicated when physicians used statutory guidelines to decide in which medical facilities Medicaid patients should be treated. The Court held that the action of the physicians was not state action. "[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."<sup>179</sup>

Another obstacle is the requirement of showing intent to discriminate either by the legislators enacting the statute<sup>180</sup> or by those who enforce the statute.<sup>181</sup> No evidence demonstrates that the fetal rights statutes were enacted or are enforced with racially discriminatory intent. A challenge to the reporting statutes on the basis of racial discrimination in their application would succeed only if the physicians are considered state actors and if some evidence of intentional discrimination can be uncovered.<sup>182</sup>

Some legislators have attempted to curb drug use during pregnancy by mandating blood testing and reporting of prenatal drug use. These new approaches provide ineffective protection for children's health and

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178. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-1, at 1688 (2d ed. 1988).

179. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

180. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

181. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

182. It is possible, however, that the recent criminal prosecutions of pregnant women under drug delivery laws described in Part I.C, *supra*, violate the Equal Protection Clause. A study conducted by the American Civil Liberties Union revealed that 80% of the prosecutions for drug use during pregnancy were brought against African-American women. Lynn Paltrow et al., ACLU Reproductive Freedom Project Memorandum, *Overview of ACLU National Survey of Criminal Prosecutions Against Pregnant Women: 80% Brought Against Women of Color* (Oct. 3, 1990) (on file with the *Hastings Constitutional Law Quarterly*). Evidence shows, however, that African-American women are no more likely to engage in illicit drug use during pregnancy than Caucasian women. *See Chasnoff et al.*, *supra* note 177; *Interim Hearings on Parental Substance Abuse and Its Effects on the Fetus and Children Before the California Legislature, Senate Select Subcomm. on Substance Abuse* at 8 (Oct. 24, 1988) (testimony of Xylina Bean, M.D.) [hereinafter *Interim Hearings on Parental Substance Abuse*], cited in Jacqueline Berrien, *Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures*, 2 *YALE J.L. & FEMINISM* 239, 243 (1990). Although in *Snowden v. Hughes*, 321 U.S. 1 (1944), the Court ruled that discriminatory application of a neutral statute violates the Constitution only if "intentional or purposeful," *id.* at 8, the interpretation of "intentional" and "purposeful" is unclear. WAYNE R. FAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 13.4(d) (1985). Professors LaFave and Israel argue that the Equal Protection Clause should apply to a district attorney or police officer who exhibits racial bias in enforcement of the law even without conscious intent to discriminate. *Id.* Professor Dorothy E. Roberts argues convincingly that the Equal Protection Clause should apply to discriminatory prosecution of pregnant African-American women. Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARV. L. REV.* 1419, 1450-56 (1991).



compromise women's rights to bodily integrity, privacy, and equal protection.

### C. Separating Drug-Dependent Women from Their Children

#### 1. Changes in Custody Laws

Another legislative response to the problem of drug-exposed infants has been separation of drug-dependent women from their children. Indiana,<sup>183</sup> Nevada,<sup>184</sup> and Oklahoma<sup>185</sup> have expanded their definitions of a neglected or abused child to include newborns who exhibit symptoms of fetal alcohol syndrome or drug addiction. The legislatures in Delaware<sup>186</sup> and Missouri<sup>187</sup> considered, but did not vote on, similar proposals.

Some states have amended their statutes even further. In Illinois, for example, a newborn is now considered "neglected" if her blood or urine contains any amount of a controlled substance, whether or not the infant exhibits any effects of exposure to the substance.<sup>188</sup> Minnesota also changed its definition of neglect to include prenatal exposure to a controlled substance.<sup>189</sup> A newborn may be considered neglected if a positive toxicology test is performed on the mother at delivery, even if the infant shows no indications of exposure.<sup>190</sup> An Arizona State Representative proposed an almost identical measure<sup>191</sup> as part of the Omnibus

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183. This statute provides: "A child is a child in need of services if: (1) The child is born with: (A) Fetal alcohol syndrome; or (B) An addiction to a controlled substance or a legend drug . . ." IND. CODE § 31-6-4-3.1 (1990).

184. This statute provides: "1. A child is in need of protection if: . . . (b) He is suffering from congenital drug addiction of the fetal alcohol syndrome, because of the faults or habits of a person responsible for his welfare . . ." NEV. REV. STAT. § 432B.330 (1989).

185. OKLA STAT. tit. 10, § 1101(4) (1990).

186. H.B. 416, 135th Gen. Assembly, 2d Reg. Sess., 1990 Delaware.

187. S.B. 756, 85th Gen. Assembly, 2d Reg. Sess., 1990 Missouri. This bill provides:

[N]eglect also includes prenatal exposure to a controlled substance . . . used by the mother for a non-medical purpose, as evidenced by withdrawal symptoms in the child at birth, results of a toxicology test performed on the mother at delivery or the child at birth, or medical effects or developmental delays during the child's first year of life . . . .

*Id.*

188. ILL. REV. STAT. ch. 37, para. 802-3 (1989). The presence of an illegal substance in an infant at birth indicates only that the mother ingested the substance recently, but not that the infant suffered any effects.

189. MINN. STAT. ANN. § 626.556 (West Supp. 1991). This statute provides:

Neglect includes prenatal exposure to a controlled substance . . . used by the mother for a nonmedical purpose, as evidenced by withdrawal symptoms in the child at birth, results of a toxicology test performed on the mother at delivery or the child at birth, or medical effects or developmental delays during the child's first year of life that medically indicate prenatal exposure to a controlled substance.

*Id.*

190. *Id.*

191. This bill provided:

Child Protection Act. However, the legislature removed this measure before it approved the Act.

A proposed Colorado bill would have amended the definition of criminal child abuse to include giving birth to a drug-addicted child.<sup>192</sup> The bill did not become law in the 1990 session of the legislature but its author plans to reintroduce the bill.<sup>193</sup> A Hawaii bill provided that children have a right to be born drug free, and that a mother who gives birth to a second drug-exposed child could lose custody of all of her children.<sup>194</sup> The bill was defeated in the 1990 session.

Some of these new statutes have already had an effect. For example, the new definition of child abuse in Indiana led to *State v. Yurchak*.<sup>195</sup> In this case, hospital officials reported a baby's cocaine addiction to welfare agencies, which notified the police.<sup>196</sup> The police then charged the woman with possession of cocaine.<sup>197</sup>

When a woman is charged with child abuse or neglect, the state removes her children from her custody immediately. Children are usually separated from their mothers the entire time a case is investigated, and women often have difficulty regaining custody of their children even if they are cleared of the charges.<sup>198</sup> The fetal rights statutes presume that these women are unfit parents. They shift the focus from the mother's desire and ability to care for the child to the mother's behavior before the child was born.

The proposals to change custody laws, whether successful or not, illustrate the growing trend toward protection of fetuses at the expense of the women carrying them.<sup>199</sup> The next section of this Note evaluates the constitutionality of the changes in custody laws and argues that this trend jeopardizes the rights of all women who are potential child bearers.

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Abuse includes exposure to a controlled substance used by a mother for a nonmedical purpose, as medically indicated by withdrawal symptoms in the child at birth or results of a toxicology test performed on the mother at delivery or the child at birth.

H.B. 2690, 39th Gen. Assembly, 2d Reg. Sess., 1990 Arizona.

192. H.B. 90-1170, 57th Gen. Assembly, 2d Reg. Sess., 1990 Colorado; *see supra* note 82.

193. *See supra* note 83 and accompanying text.

194. H.B. 3219, 15th Gen. Assembly, 2d Reg. Sess., 1990 Hawaii.

195. No. 64D01-8901-CF-181B (Ind. Super. Ct. filed Oct. 2, 1989) (decision pending).

196. Telephone interview with Patrick Young, attorney for defendant Brenda Yurchak (Jan. 14, 1991).

197. *Id.*

198. *See supra* notes 51-52, 57-58 and accompanying text.

199. A related bill which did not pass in the Alaska legislature in 1990 provided that "a person may be committed to the custody of a private or public facility by the superior court" if "the person is an alcoholic who habitually lacks self-control in using alcoholic beverages and . . . the person is pregnant and, unless committed, is likely to harm the fetus by continued use of alcohol . . ." S.B. 414, 16th Gen. Assembly, 2d Reg. Sess., 1990 Alaska. Rather than assisting the woman to overcome her alcoholism so that both she and any children she bears will be healthy, this legislation would merely prevent her from drinking while she is physically connected to a fetus.

## 2. *Constitutional Arguments Against the New Custody Statutes*

### a. Procedural Due Process

A parent's right to raise her children constitutes a fundamental liberty interest protected from government interference by the Fourteenth Amendment.<sup>200</sup> Before the government intrudes on a protected liberty interest, it must satisfy the requirements of procedural due process.<sup>201</sup> *Santosky v. Kramer*<sup>202</sup> established that before irrevocably terminating parental rights, the state must satisfy due process by proving by clear and convincing evidence that a parent is unfit.<sup>203</sup> In *Stanley v. Illinois*,<sup>204</sup> the Supreme Court invalidated an Illinois law denying all unmarried fathers custody because they were presumed to be neglectful parents. A state may not presume that each member of a certain class of people is unfit to be a parent.<sup>205</sup>

The new statutes in Illinois,<sup>206</sup> Indiana,<sup>207</sup> Nevada,<sup>208</sup> and Oklahoma,<sup>209</sup> as well as the proposed legislation in Arizona,<sup>210</sup> presume that a woman who uses drugs or drinks alcohol during pregnancy is unfit to care for her child. A mother's drug or alcohol use after the child's birth does not harm the child in the same direct way that it might before birth. Therefore prenatal behavior can be the basis for termination of custody only if it constitutes clear and convincing evidence that the woman will harm her child in other ways. Studies have provided no evidence that mothers who used drugs during pregnancy will be abusive.<sup>211</sup> A woman's opportunity to form an emotional bond with her infant in the first month of life is important for the child's development.<sup>212</sup> Although women accused of abuse will eventually resume custody of their children if they are judged to be fit parents, even a short separation is a serious intrusion on parental rights.

The severity of terminating child custody necessitates a hearing on a woman's fitness *before* any separation from her child. As the Supreme Court stated in *Santosky v. Kramer*,<sup>213</sup> "[T]he fundamental liberty inter-

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200. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

201. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

202. 455 U.S. at 745.

203. *Id.* at 747-48.

204. 405 U.S. 645 (1972).

205. *Id.* at 657-58.

206. ILL. REV. STAT ch. 37, para. 802-3 (1989); *see supra* note 188 and accompanying text.

207. IND. CODE § 31-6-4-3.1 (1990); *see supra* note 183.

208. NEV. REV. STAT. § 432B.330 (1989); *see supra* note 184.

209. OKLA. STAT. tit. 10, § 1101(4) (1990); *see supra* note 185.

210. H.B. 2690, 39th Gen. Assembly, 2d Reg. Sess., 1990 Arizona; *see supra* note 191.

211. *See Robin-Vergeer, supra* note 138, at 763-71.

212. BOBBY CREW & RUTH G. MULLINS, *GROWTH AND DEVELOPMENT: A PRIMARY HEALTH CARE APPROACH* 219-20 (1982); GEORGE H. LOWREY, *GROWTH AND DEVELOPMENT OF CHILDREN* 136-39 (7th ed. 1978).

213. 455 U.S. at 745 (1982).

est of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . ."<sup>214</sup> Separating mothers from their children for any length of time without a hearing, based only on the mothers' use of drugs, violates their rights to procedural due process.

b. Equal Protection

These statutes expressly apply only to women. Given this, the Equal Protection Clause requires that they satisfy an intermediate level of judicial scrutiny.<sup>215</sup> Although only women become pregnant, ample evidence demonstrates that drug and alcohol abuse by men jeopardize the health of fetuses they father.<sup>216</sup> Yet no legislator has proposed classifying this behavior as child abuse or separating drug using fathers from their children. No legislator has suggested imposing criminal sanctions on men. Thus, the current approach burdens women unequally.

c. Right to Privacy

The new child neglect statutes also implicate women's fundamental right to privacy.<sup>217</sup> The Court has described this right in terms of autonomy: it includes the "interest in independence in making certain kinds of important decisions."<sup>218</sup> In *Eisenstadt v. Baird*,<sup>219</sup> the Supreme Court held that the fundamental right to privacy encompasses a person's decisions about whether or not to procreate. A state must justify any invasion of this fundamental right by asserting a compelling governmental interest and by demonstrating that the particular invasion is necessary to protect that interest.<sup>220</sup> In *Cleveland Board of Education v. LaFleur*,<sup>221</sup> the Supreme Court struck down statutes mandating a particular length of pregnancy leave that a woman must take from her employment. According to the Court, this would penalize a woman for her decision to reproduce.<sup>222</sup>

The aforementioned fetal protection statutes similarly abridge women's right to reproductive freedom. Under these statutes, a pregnant woman with a drug problem must choose to either terminate her pregnancy or suffer criminal or civil punishment. Forcing the woman to abort her pregnancy to avoid punishment impermissibly burdens her fundamental right to make the decision whether or not to bear children.

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214. *Id.* at 753.

215. *See supra* Part II.B.2.c.

216. *See supra* notes 167-70 and accompanying text.

217. *See* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

218. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

219. 405 U.S. 438, 453 (1972).

220. 429 U.S. at 599-600.

221. 414 U.S. 632 (1974).

222. *Id.* at 640.

Another aspect of the fundamental right to privacy is the right to control the upbringing of one's children.<sup>223</sup> These statutes deny the woman this right because a child is removed immediately from a mother who tests positive for drug use. Furthermore, the state removes the child without an investigation into the mother's fitness as a parent. Immediate removal deprives the mother and child of the opportunity to establish the emotional bond necessary for the child's early development.<sup>224</sup> Courts should balance such a severe burden against the governmental interest at stake.

States may claim that the interest in the welfare of children is a sufficiently compelling governmental interest to justify this burden. The removal statutes, however, are not narrowly tailored to achieve this goal. None of these statutes considers the level of harm suffered by the newborn infant. None of them considers the current ability of the mother to care for her child. Under the Minnesota statute, even if a woman overcomes her addiction early in her pregnancy and her infant is born drug-free, the woman's drug use early in her pregnancy nevertheless could constitute child neglect.<sup>225</sup> The statute's focus is on the woman's behavior during pregnancy rather than the child's welfare. Some experts believe that in many cases separating children from their parents is more harmful than the risk of physical harm, and recommend keeping families together if at all possible.<sup>226</sup> These statutes infringe women's right to raise their children without achieving the purported goal of protecting children.

In states that have classified drug use during pregnancy as "child" abuse, it can be argued that the states' interest is the fetus itself and that therefore the states place the interest of the fetus above the woman's right to privacy. The Supreme Court in *Roe* said, "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."<sup>227</sup> The Court, however, distinguished between the government's interest in potential human life at different stages of pregnancy. The Court held that before the fetus is viable, the woman's right to reproductive autonomy outweighs the state's interest in the well-being of the fetus.<sup>228</sup> Thus, a woman may terminate her pregnancy dur-

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223. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish children allowed to leave school after eighth grade because of parents' religious beliefs); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (parents have the right to determine what kind of school their children attend); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (parents have a right to control what languages their children learn to speak).

224. See *CREW & MULLINS*, *supra* note 212.

225. The Minnesota statute provides that "[n]eglect includes prenatal exposure to a controlled substance . . ." It does not specify when in the woman's pregnancy the exposure must occur. MINN. STAT. ANN. § 626.556(2)(c) (West Supp. 1991).

226. JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD* (1973).

227. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

228. *Id.* at 163.

ing this period.<sup>229</sup> But after the fetus is viable, the state has a compelling interest in protecting "potential life" which must be weighed against the privacy interests of the pregnant woman.

In Minnesota, however, a woman may violate the statute if she uses drugs in the early days of her pregnancy before she knows she is pregnant.<sup>230</sup> In that case the fetus is the object of the government's interest, not only before it is born, but even before it is viable. Advocates of this type of fetal rights legislation challenge the current legal doctrine delineating a woman's legal rights in relation to her fetus.

States can protect future children through less intrusive and more effective means. In fact, the measures pursued thus far have not protected children.<sup>231</sup> The most direct way to protect the health of the future child of a drug-addicted woman is to provide the woman with effective drug treatment services before, or at least during, pregnancy.<sup>232</sup> To protect children from abuse without unnecessarily separating children and their mothers, the court should order an in-depth investigation into the mother's fitness before an infant is taken from her. Drug treatment and other necessary services should be provided before removal. In these ways states can pursue the important goal of protecting the welfare of children without intruding impermissibly into the reproductive autonomy of women.

Legislators who change the definition of child abuse and neglect to include prenatal drug use shift the focus from the mother's desire and ability to care for the child to the mother's behavior before the child was born. The new laws violate women's rights to procedural due process, equal protection, and reproductive autonomy. Moreover, this approach fails to achieve the goal of improving children's health. Public policy concerns alone provide a strong argument against the punitive approach embodied in the new custody, testing, and reporting statutes.

### III. Public Policy Arguments Against the New Testing, Reporting, and Custody Laws That Recognize Fetal Rights

Despite the assertion of fetal rights proponents that healthy children are their primary concern, their punitive approach toward pregnant women and new mothers fails to prevent the birth of drug-addicted newborns. The few reports of decreases in the numbers of drug-addicted

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229. *Id.*

230. MINN. STAT. ANN. § 626.556(2)(c) (West Supp. 1991); see *supra* note 225.

231. See *infra* Part III for a discussion of this point.

232. This approach is not only less intrusive, but cost effective. A recent study concluded that prevention and treatment programs would cost significantly less than caring for drug-addicted babies. Ciaran S. Phibbs et al., *The Neonatal Costs of Maternal Cocaine Use*, 266 JAMA 1521, 1526 (1991).

newborns have been linked to preventative approaches, such as public education, rather than punitive ones.<sup>233</sup> Increased efforts to monitor and punish pregnant women who use drugs, and to separate drug-using mothers from their children, hinder effective health care and divert attention and resources from preventative measures that would benefit children in the long term.

Prenatal health care is an extremely important contributor to fetal health, especially for drug-dependent women.<sup>234</sup> Providing prenatal care and helping drug- or alcohol-abusing women to abstain during pregnancy significantly reduces the risk of damage to the newborn.<sup>235</sup> For many women, lack of adequate prenatal care is more detrimental to the health of the developing fetus than the mother's use of drugs during pregnancy.<sup>236</sup> The threat of being reported to law enforcement officials or losing custody of children deters women from seeking prenatal care and treatment for their addiction.<sup>237</sup> Fear of legal repercussions causes women who do seek prenatal health care to conceal important information from their doctors, which jeopardizes the effectiveness of their treatment.<sup>238</sup>

Those who advocate helping babies by punishing drug-addicted women either ignore or do not recognize that drug addiction is a physical disease influenced by genetic and environmental factors beyond the sufferers' control.<sup>239</sup> Sufferers need treatment to overcome the loss of control they experience over their own behavior.<sup>240</sup> Those who blame women for failing to overcome their addiction ignore the lack of drug treatment programs, especially those that accept pregnant women.<sup>241</sup> Even the available treatment programs are not always effective for drug

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233. News Broadcast, KQED radio, June 3, 1991.

234. S.N. MacGregor, *Cocaine Use During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, 74 *OBSTETRICS & GYNECOLOGY* 882 (1989).

235. Ira Chasnoff et al., *Temporal Patterns of Cocaine Use in Pregnancy*, 261 *JAMA* 1741, 1744 (1989).

236. *Taxpayers Pay for Lack of Prenatal Treatment*, *ST. PETERSBURG TIMES*, Nov. 3, 1986, at 7B.

237. Helene M. Cole, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 *JAMA* 2663, 2667 (1990); Kary L. Moss, *Legal Issues: Drug Testing of Postpartum Women and Newborns as the Basis for Civil and Criminal Proceedings*, 23 *CLEARINGHOUSE REV.* 1406, 1411-12 (1990).

238. Carol Gentry, *Angry Doctors Cut Drug Tests After Police Interview Moms*, *ST. PETERSBURG TIMES*, May 13, 1989, at 1B.

239. Cole, *supra* note 237, at 2667. A recent study demonstrated a connection between mental illness and drug and alcohol addiction. Karen Klinger, *Mental Illness Linked to Drug, Alcohol Abuse*, *S.F. CHRON.*, Nov. 21, 1990, at B1.

240. See *AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 166 (3d ed. rev. 1987); see also *supra* note 237, at 2667.

241. *S.F. WEEKLY*, June 26, 1991, at 7; Karol L. Kumpfer, *Treatment Programs for Drug-Abusing Pregnant Women*, *THE FUTURE OF CHILDREN*, Spring 1991, at 50, 53.

abusing pregnant women; many of the programs focus on the needs of male patients and not on the unique social and emotional needs of pregnant women.<sup>242</sup>

These obstacles to curbing the problem of drug use during pregnancy will not be overcome by punishing pregnant women for their problems. A punitive attitude toward drug-addicted pregnant women prevents effective health care for the mother and fetus, making the birth of a healthy baby even less likely. Statutes penalizing one-time drug use may actually discourage a woman from seeking the drug treatment that would benefit her fetus. Once the mother has used drugs, she will be penalized even if she subsequently overcomes her drug addiction.

Imprisonment of pregnant women also makes the birth of a healthy baby less likely because the poor living conditions and inadequate health care in prison jeopardize the health of the woman and her developing fetus.<sup>243</sup> Numerous medical associations recognize that punitive measures are detrimental to women and children and have denounced them publicly.<sup>244</sup>

Similarly, fetal rights laws that impose obligations on health care professionals to police patients are unproductive because the laws compromise the professionals' ability to provide effective and compassionate health care. Physicians might be obligated under the new statutes to report women to authorities for one-time drug use. However, they probably would not want the women to be sent to prison where they would receive inadequate medical attention. Physicians would also know that reporting deters women from pursuing desperately needed health care. Moreover, to provide effective care, a physician needs to encourage patients to discuss all health problems, including drug use, candidly and completely. A duty to report women who use drugs may discourage this necessary discussion. Under the Minnesota statute,<sup>245</sup> which requires reporting of positive toxicology test results, physicians may forego potentially useful tests in order to avoid having to report patients. On the

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242. See Cole, *supra* note 237, at 2669; Lisa Leff, *Treating Drug Addiction with the Woman in Mind*, WASH. POST, Mar. 5, 1990, at E1; Kumpfer, *supra* note 241, at 55. Drug-abusing women tend to experience lower self-esteem and greater anxiety and depression than men. Kumpfer, *supra*, at 55. Research has concluded that 80% to 90% of female drug abusers and alcoholics were victims of rape or incest. Leff, *supra*. These different characteristics necessitate different types of therapy. Kumpfer, *supra*, at 55.

243. Ellen M. Barry, *Pregnant Prisoners*, 12 HARV. WOMEN'S L.J. 189 (1989); see also, Ellen M. Barry, *Quality of Prenatal Care for Incarcerated Women Challenged*, YOUTH LAW NEWS, Nov.-Dec. 1985, at 1.

244. Some of these groups are the American Public Health Association, the American Society of Law and Medicine, the American Society of Addiction Medicine, the American Medical Association, and the National Association for Perinatal Addiction Research and Education. See *Case Summary*, *supra* note 52, at 16-17.

245. MINN. STAT. ANN. § 626.5561 (West Supp. 1991).



other hand, laws such as those proposed in Oklahoma<sup>246</sup> and Utah,<sup>247</sup> establishing criminal penalties for a health professional's failure to report suspected pregnant drug-abusers, might encourage physicians to be overzealous in their procedures and test all women. The reporting statutes force doctors to choose between their duty to the patient and their duty to the government.

Removing newborns from their mothers' custody temporarily or permanently is also counterproductive. It prevents the necessary emotional bonding between infant and mother in the first few months of the infant's life.<sup>248</sup> Children who are removed from their mothers are usually placed in an institution where they receive little personal attention.<sup>249</sup> One commentator argues that long-term foster care can cause lasting psychological damage.<sup>250</sup> A child's interest in being cared for by her own parents, although not accorded the status of a fundamental constitutional right, should be given serious weight by legislators when they determine the criteria for termination of parental custody. Even temporary removal, in the absence of evidence of actual abuse, does not serve the interests of either parents or children. Although drug-dependent women need help to overcome their addiction, most succeed in treatment and are willing to care for their infants.

Fetal rights statutes also ignore social and economic conditions that contribute to the health problems of newborn children. Studies reveal that many diverse aspects of the woman's life and environment contribute to the health of her child.<sup>251</sup> Specifically, exposure of either the male or the female to various toxic substances before conception can cause serious damage to children they conceive.<sup>252</sup> One study demonstrated that financial hardship is a greater contributor to low birth weight of newborns than illegal drug use by a pregnant woman.<sup>253</sup> Low birth

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246. OKLA. STAT. ANN. tit. 21, § 846 (West Supp. 1991); *see supra* note 89.

247. UTAH CODE ANN. § 62A-4-504 (1988); *see supra* note 93.

248. *See* CREW & MULLINS, *supra* note 212.

249. *Hearing of House Select Comm. on Children, Youth and Families*, 101st Cong., 1st Sess. (1989) (statement of Wendy Chavkin, M.D., M.P.H.).

250. Douglas Besharov, *How Child Abuse Programs Hurt Poor Children: The Misuse of Foster Care*, 22 CLEARINGHOUSE REV. 218, 222 (1988).

251. Irving Emanuel et al., *Poor Birth Outcomes of American Black Women: An Alternative Explanation*, 1989 J. PUB. HEALTH POL'Y 299. This study concluded:

It appears that the mother's own intrauterine life and her childhood may be important predictors of future reproductive health. If this is so, it is unlikely that suboptimal reproductive health can be completely corrected by focusing only on what transpires during the nine months of a woman's pregnancy and delivery.

*Id.* at 302-03.

252. *See, e.g., Effects of Perinatal Exposure to PCBs*, 261 JAMA 3214 (1989); Andrew Purvis, *The Sins of the Fathers*, TIME, Nov. 26, 1990, at 90.

253. Donald B. Binsacca et al., *Factors Associated With Low Birthweight in an Inner-City Population: The Role of Financial Problems*, 77 AM. J. PUB. HEALTH 505, 506 table 2 (1987).

weight is the single most important contributor to neonatal deaths.<sup>254</sup> Poor women who lack adequate nutrition and prenatal health care have a much higher rate of infant mortality than do middle and upper class women.<sup>255</sup> States have not responded by providing adequate prenatal care to all who need it.

The new statutes are explicitly gender biased. Only women's personal habits in relation to reproduction are scrutinized. Although only women bear children, men contribute substantially to the health of fetuses and children. Before conception, the potential father's exposure to cocaine, cigarettes, alcohol, or chemicals damages his sperm and can create serious health risks and developmental problems in the newborn.<sup>256</sup> Men who batter their pregnant partners endanger maternal and fetal health.<sup>257</sup> Men who abandon their pregnant partners leave them emotionally and financially vulnerable, risking the health of the fetus. Admittedly, only recently has the public become aware of some of the ways that the behavior of fathers affects fetuses. Nevertheless, with our current knowledge there is no justification for recognizing the rights of fetuses only in relation to their mothers and ignoring the fathers' contribution to the health of babies.

Application of the reporting statutes has exhibited both racial and class bias. A recent study demonstrates that African-American women are almost ten times as likely as Caucasian women to be reported to authorities, although there is no difference between the level of drug use by each group.<sup>258</sup> Since more Black women are poor and receive no prenatal health care, medical personnel using the lack of prenatal care as a criteria for drug testing are likely to report more Black women to law enforcement authorities. The discretion given to health care professionals to test and report based on "suspicions" or "indications" of drug use allows racism to influence their decisions.<sup>259</sup> Class or cultural biases may also influence custody determinations.<sup>260</sup> One commentator has noted

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254. Emanuel et al., *supra* note 252, at 299.

255. Binsacca et al., *supra* note 254; Antonovsky, *Social Class and Infant Mortality*, 11 SOC. SCIENCE MED. 453 (1977); Celia W. Dugger, *Cocaine Use and Infant Mortality Decline Together in New York City*, N.Y. TIMES, Apr. 20, 1991, at 1.

256. See notes 167-70 and accompanying text.

257. Bullock & McFarlane, *supra* note 171; Family Violence Project Fact Sheet (on file with the *Hastings Constitutional Law Quarterly*).

258. See Chasnoff et al., *supra* note 177; *Interim Hearings on Parental Substance Abuse*, *supra* note 182, at 8.

259. Professor Dorothy Roberts argues that the historical devaluation of African-American women as mothers underlies the trend toward punishing drug dependent women. Roberts, *supra* note 182, at 1436-50.

260. As the Supreme Court observed, "[B]ecause parents subject to termination proceedings are often poor, uneducated, or members of minority groups . . . such proceedings are often vulnerable to judgments based on cultural or class bias." *Santosky v. Kramer*, 455 U.S. 745, 763 (1982).

that courts and social services agencies remove children from their homes more often because of deprivation attributable to poverty rather than because of physical abuse.<sup>261</sup>

Contrary to the alleged purpose of these new policies, increased monitoring, punishment, and deprivation of custody have not resulted in healthier children. There is reason to question whether the health of children is the only, or even the most important, purpose behind these policies. First, expressions of concern for fetuses are ironic when one considers that some of the statutes give no attention to the actual level of harm or risk to the born child. The Minnesota laws and the proposed law in Missouri require a woman to be reported for drug use regardless of the condition of her infant.<sup>262</sup> In Illinois, any amount of drugs in an infant's system at birth constitutes neglect.<sup>263</sup> In Minnesota, proof that the infant was exposed to drugs at any time during pregnancy, even if the infant is completely unaffected at birth, constitutes neglect.<sup>264</sup> Second, as demonstrated above, there are more effective ways to combat the problem of drug-addicted babies. Sincere concern for babies should lead states to provide drug treatment and health care services to pregnant women. Third, our government has demonstrated insufficient concern for the needs of children after they are born. Most state welfare programs provide insufficient funds for women to obtain prenatal health care and for mothers to feed and care for their children.<sup>265</sup> These factors indicate that underlying the new policies is the fetal rights advocates' desire to control women's behavior and punish them for failing to live up to society's idea of a good mother. The current trend toward recognition of fetal rights focuses on only one factor contributing to children's health rather than addressing the enduring societal problems that continue to harm children.

#### **IV. Giving the Fetus the Status of Constitutional Personhood: Subordination of Women's Constitutional Rights**

Although evidence demonstrates that a punitive approach has been ineffective, fetal rights advocates persevere in their quest to create legal duties owed by the pregnant woman toward her fetus. Lawmakers are allowing speculation about future harm to an entity that does not yet have sufficient independent legal rights to justify intrusions into the pregnant woman's rights to privacy, autonomy, due process, and equal pro-

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261. Besharov, *supra* note 250, at 219.

262. MINN. STAT. ANN. § 626.5561 (West Supp. 1991); S. 756, 85th Gen. Assembly, 2d Reg. Sess., 1990 Missouri.

263. ILL. REV. STAT. ch. 37 para. 802-3 (1989).

264. MINN. STAT. ANN. § 626.556 (West Supp. 1991).

265. CHILDREN'S DEFENSE FUND, THE HEALTH OF AMERICA'S CHILDREN 26-7, 29, 31, 37 (1991).

tection. The new statutes treat fetuses, in some cases nonviable fetuses, as legal entities whose needs take precedence over the constitutional rights of women.

The Supreme Court has declared that a fetus is not a "person" for the purpose of the Fourteenth Amendment's protection of life, liberty and pursuit of happiness.<sup>266</sup> The Court also recognized, however, that the state has an interest in potential life which is to be weighed against the woman's autonomy rights.<sup>267</sup> Fetal rights advocates weigh these rights and conclude that the rights of the fetus should take precedence.

The current trend toward creation of fetal rights has the potential to lead to unprecedented governmental intrusion. First, the proposals are not limited to protection of fetuses that are viable. Recently passed or proposed laws apply to a woman's behavior in her early months of pregnancy, before the fetus is able to survive outside the pregnant woman.<sup>268</sup>

Second, fetal rights proposals are not limited to prohibition of illegal behaviors. Women already have been sanctioned for legal behavior during pregnancy. In *In re J. Jeffrey*,<sup>269</sup> the state took custody of a child several months after birth based on his mother's alleged use of valium, a legal pain-killer, during her pregnancy, even though the mother was drug-free at the time of the custody hearing.<sup>270</sup> Recently enacted statutes in three states apply to women's use of alcohol during pregnancy.<sup>271</sup> Fetal rights advocates and some judges have noted with approval the potential for extending fetal rights laws to other behaviors that might result in a less-than-perfect child.<sup>272</sup> Professor John Robertson suggests the following standard for pregnant women in their first trimester:

When she is undecided [whether or not to abort her pregnancy], . . . she should have a duty to avoid the harmful activities in case she decides not to abort. Similarly, she should be penalized for failing to use a fetal therapy before viability, so that the infant will be healthy if she decides to go to term. If she does not want the therapy, her choice will be to abort or to risk the penalty. . . . If she has reason to know she is pregnant—if, for example, she has been sexually active and has missed a period—but she has not yet had her pregnancy confirmed, it does not seem unreasonable to require

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266. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

267. *Id.*

268. See MINN. STAT. ANN. §§ 626.556, 626.5561 (West Supp. 1991); S. 756, 85th Gen. Assembly, 2d Reg. Sess., 1990 Missouri.

269. No. 99851 (Mich. Ct. App. filed Apr. 9, 1987).

270. See *Hearing*, *supra* note 58, at 26.

271. IND. CODE ANN. § 31-6-4-3.1 (West Supp. 1991), NEV. REV. STAT. § 432B.330 (1989), UTAH CODE ANN. §§ 62A-4-504, 62A-4-509 (1991).

272. See Emily M. Dargatz, *Legal Representation of a Fetus: The Mother and Child Disunion?*, 18 CAP. U. L. REV. 591, 602 (1989); Margery W. Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 81, 83, 89 (1984); Michele Magar, *The Sins of the Mothers*, STUDENT LAW., Sept. 1991, at 30.

her either to have a pregnancy test or to refrain from activities that would be hazardous to the fetus if she were pregnant.<sup>273</sup>

Many activities may be hazardous to the fetus. If a woman has reason to believe she is pregnant, she may have to avoid, among other things, smoking cigarettes, drinking alcoholic beverages, undergoing medical X-rays, exercising too little or too much, improper nutrition, flying in airplanes, prescription drugs, and sexual activity. Professor Margery Shaw argues that maternal duties in early pregnancy should include "regular prenatal checkups, a balanced diet with vitamin, iron, and calcium supplementation, weight control, and judicious use of medications, tobacco, and caffeine."<sup>274</sup> Taken to their logical extension, fetal rights policies could force a woman with medical conditions such as AIDS, cancer, or epilepsy to have an abortion because the condition, or drugs taken to combat or control the condition, are likely to harm the fetus.<sup>275</sup> If a woman is to be held accountable for every activity during her entire pregnancy, she must accept severe limitations on her personal autonomy in order to bear and raise children. Women already have been forced to undergo state-ordered caesarean sections in order to procreate.<sup>276</sup>

Women may be pregnant without knowing it. Under the fetal rights advocates' line of reasoning, all women of childbearing age would be required to behave as if they are pregnant at all times. The only way the government could enforce such policies would be to monitor women's sexual activity, menstrual cycles, and daily lifestyles.

The Constitution should protect against such intrusive government action. *Roe v. Wade* expressly declares that the fetus is not a person.<sup>277</sup> *Webster v. Reproductive Health Services*,<sup>278</sup> however, signals the Supreme Court's recent willingness to weaken *Roe*. In *Webster*, the Court upheld a Missouri statute's declaration that life begins at conception.<sup>279</sup> It reasoned that the declaration merely expressed a value judgement and did not actually circumscribe any rights under the Constitution.<sup>280</sup> The rest of the statute, however, severely restricted women's ability to obtain abortions.<sup>281</sup> Since this decision, three *Roe* supporters have left the Court and have been replaced by Justices Kennedy, Souter, and Thomas, who appear to be unsupportive of the reasoning and result of *Roe*. The Court may soon have an opportunity to revisit the issue of the legal sta-

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273. Robertson, *supra* note 22, at 447 n.129.

274. Shaw, *supra* note 273, at 83.

275. Professor Shaw proposes legal duties which include monitoring a fetus for defects, and aborting if any abnormality is present. *Id.* at 81.

276. *See supra* Part I.A.

277. 410 U.S. 113, 158 (1973).

278. 492 U.S. 490 (1989).

279. *Id.*

280. *Id.* at 506-07.

281. *Id.* at 500.

tus of the fetus in the abortion context. The Third Circuit Court of Appeals recently upheld Pennsylvania's abortion restrictions,<sup>282</sup> and the losing party has petitioned for certiorari to the Supreme Court. If the Court considers fetal rights superior to women's right to reproductive autonomy, the new statutes concerning drug use during pregnancy would be considered constitutional.

### Conclusion

States are understandably concerned about the problem of drug-addicted babies. Unfortunately, states have tried to solve this problem by turning to punitive, rather than preventative, measures. The new statutes are counterproductive to the goal of helping children. They also give too much discretion to the state to punish women who do not conform to society's idea of the perfect mother. In addition, any increase in the legal status of the fetus necessarily reduces the rights of women. The decisions that compel pregnant women to undergo surgery against their wishes to protect the fetus and the new testing, reporting, and custody statutes reflect a judicial and legislative trend toward controlling women's reproductive lives. Unfortunately, the current Supreme Court may accept this approach as constitutional.

State governments need not ignore their interest in potential life in order to respect women's constitutional rights. They should acknowledge the special relationship between the pregnant woman and her fetus, and act in ways that promote the welfare of both. Instead of legislating pregnant women's behavior, states should invest resources in drug education, drug treatment, and prenatal health care. Legislators should prohibit discrimination against pregnant women by drug and alcohol treatment centers. They should prohibit reporting of test results by hospitals and health care workers so that women will not be deterred from seeking medical care during pregnancy. Child neglect laws should mandate in-depth investigation of parental fitness, and provision of services if necessary, before ordering children's removal from their parents' care. In addition, states should make a true commitment to the health of babies through efforts to combat poverty and the lack of health care. These efforts would effectively protect the welfare of children without sacrificing women's civil liberties.

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282. *Planned Parenthood of Southeastern Pa. v. Casey*, No. 90-1662, 1991 U.S. App. LEXIS 24792 (3d Cir. Oct. 21, 1991).