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Mothers Versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse

Meghan Horn

MOTHERS VERSUS BABIES: CONSTITUTIONAL AND POLICY PROBLEMS WITH PROSECUTIONS FOR PRENATAL MATERNAL SUBSTANCE ABUSE

ABSTRACT

This note examines the constitutional and policy implications of criminal prosecutions for prenatal maternal substance abuse under statutes criminalizing drug delivery, child abuse, and manslaughter. Although only one of these convictions has been upheld in the thirty years since a prosecutor first brought such charges, prosecutors continue to propose new and increasingly inventive theories of prosecution. Not only do these cases present procedural due process, substantive due process, and equal protection problems, they also cannot be supported by public policy. The prosecutions are opposed by healthcare workers, pit the interests of mothers and unborn children against each other, and actually drive pregnant addicts away from prenatal care. Although a number of punitive solutions have been proposed, including statutes written specifically to target prenatal drug use and civil sanctions, the only real solution to the problem of prenatal maternal drug use is to increase funding for drug treatment centers that cater to or can accommodate pregnant women.

INTRODUCTION

On June 3, 2004, Regina Kilmon gave birth to a 5.5 pound baby boy, Andrew, at Easton Memorial Hospital in Easton, Maryland.[1] Despite having completed numerous drug treatment programs, Regina continued to use cocaine during her pregnancy.[2] Andrew tested positive for cocaine one day after his birth.[3] As a result of this positive test result, in August of that year, Regina was prosecuted for "second degree child abuse, contributing to conditions that render a child delinquent, reckless endangerment, and possession of a controlled dangerous substance."[4] Regina pled guilty to the charge of reckless endangerment and was sentenced to four years in prison.[5]

Although Regina's conviction was ultimately overturned,[6] her prosecution marks a thirty-year trend of criminal prosecutions for maternal prenatal drug use.[7] Prosecutors variously rely upon three distinct theories: use of (1) statutes criminalizing delivery or distribution of drugs to the child either *in utero* or via the umbilical cord in the period between birth of the child and severance of the umbilical

1. Kilmon v. State, 905 A.2d 306, 307 (Md. 2006).

2. *See id.*; Greg Maki, *Woman Sentenced for Reckless Endangerment: Her Newborn Tested Positive for Cocaine*, STAR-DEMOCRAT (Easton, Md.), Mar. 30, 2005, *available at* http://www.stardem.com/printarticle.asp?article=3399.

3. *Kilmon*, 905 A.2d at 307.

4. *Id.* The reckless endangerment charge read that "Ms. Kilmon, 'on or about the 3rd day of June through the 4th day of June, 2004, in Talbot County, Maryland, did recklessly engage in conduct, to wit: using cocaine while pregnant with Andrew Kilmon that created a substantial risk of death and serious physical harm to Andrew Kilmon.'" *Id.*

5. *Id.*

6. *Id.* at 315.

7. *See* James G. Hodge, Jr., Annotation, *Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child*, 70 A.L.R.5th 461, 476 (1999).

cord;[8] (2) child abuse statutes;[9] and (3) manslaughter statutes.[10] Although generally unsuccessful, these prosecutions represent a disturbing trend toward a legal and societal view of pregnant women as being little more than incubators for unborn children.[11] Continued

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8. *E.g.*, Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992) (overturning the conviction of Jennifer Clarice Johnson for delivery of a controlled substance where the controlled substance was ingested prior to labor and the delivery occurred "during the thirty to ninety seconds following the infant's birth, but before the umbilical cord is severed."); State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992) (upholding the dismissal of charges of delivery and distribution of cocaine to unborn child against Darla Michelle Luster).

9. *E.g.*, Reinesto v. Superior Court, 894 P.2d 733, 734 (Ariz. Ct. App. 1995) (dismissing Teresa Lopez Reinesto's indictment for child abuse after she used heroin while pregnant and subsequently gave birth to a baby addicted to heroin); Reyes v. Superior Court, 141 Cal. Rptr. 912, 912-13, 915 (Cal. Ct. App. 1977) (finding that Margaret Velasquez Reyes could not be charged with felony child endangerment as a result of her addiction to heroin while pregnant that harmed her unborn twin sons); State v. Gethers, 585 So. 2d 1140, 1140-41, 1143 (Fla. Dist. Ct. App. 1991) (upholding the dismissal of aggravated child abuse charges against Cassandra Gethers where the charges were based on her use of cocaine during pregnancy and the newborn baby's subsequent dependency on the drug); Commonwealth v. Welch, 864 S.W.2d 280, 280-81 (Ky. 1993) (upholding appellate decision that vacated the conviction of Connie Welch based upon charges of criminal abuse for the birth of her full-term and otherwise healthy baby who was born addicted to oxycodone); People v. Hardy, 469 N.W.2d 50, 51-52, 53 (Mich. Ct. App. 1991) (finding not only that there was insufficient evidence to charge Kimberly Hardy with child abuse and delivery of cocaine based upon the infliction of serious harm upon her child, but also that the transfer of cocaine through the umbilical cord after birth and before severing the cord did not constitute delivery of cocaine under the relevant statute); Sheriff, Washoe County, Nev. v. Encoe, 885 P.2d 596, 597 (Nev. 1994) (finding that Cathy Encoe could not be charged with child endangerment for her use of drugs while pregnant where the drugs were transferred to the baby via the umbilical cord during the brief period after birth and before the cutting of the cord); People v. Morabito, 580 N.Y.S.2d 843, 844, 847 (Geneva City Ct. 1992) (granting Melissa Morabito's motion to dismiss charges of endangering the welfare of a child where Ms. Morabito smoked cocaine while pregnant, causing the premature birth of her child, who then tested positive for cocaine); State v. Gray, 584 N.E.2d 710, 711, 713 (Ohio 1992) (finding that Tammy Gray could not be charged with child endangerment based on her substance abuse occurring before the birth of her child where the child was subsequently born alive); Collins v. State, 890 S.W.2d 893, 895-96, 898 (Tex. App. 1994) (overturning the conviction of Debra Ann Collins on charges of reckless injury to a child where she smoked crack while pregnant, resulting in injury to her child who was born addicted and then suffered from withdrawal); State v. Dunn, 916 P.2d 952, 953 (Wash. Ct. App. 1996) (affirming the trial court's decision that Selena Dunn could not be charged with "second degree criminal mistreatment of her viable unborn child" because her newborn tested positive for cocaine).

10. *E.g.*, State v. Aiwohi, 123 P.3d 1210, 1210-12, 1225 (Haw. 2005) (reversing the trial court's denial of Tayshea Aiwohi's motion to dismiss charges of manslaughter after she smoked crystal methamphetamine on the three days preceding, as well as the day of, her son's birth, which resulted in her son's death from the toxic effects of the drug just two days after his birth).

11. Sarah Letitia Kowalski, Comment, *Looking for a Solution: Determining Fetal Status for Prenatal Drug Prosecutions*, 38 SANTA CLARA L. REV. 1255, 1256-58, 1263, 1278, 1290 (1998) (discussing how prosecutions for prenatal drug use violate the constitutional right to privacy, and advocating a "facilitative model" balancing maternal and fetal interests by providing greater prenatal care and substance abuse treatment); *see*

attempts to prosecute women for this behavior suggest the necessity of some kind of action to address prenatal substance abuse and reduce unnecessary prosecutions that are almost invariably unsuccessful. This note argues that criminal prosecutions of this kind present a number of constitutional and policy problems without protecting unborn children; these prosecutions may in fact subject unborn children to increased harm.

Although this note argues that cases overturning convictions for prenatal substance abuse are correctly decided, in effect arguing for the status quo, the true problem is that prosecutors continue to bring such charges. Even the threat of prosecution will drive women away from necessary resources and work to the detriment of mother and child alike. And while these convictions are generally reversed,[12] the time these women spend in jail awaiting appeal is itself a deterrent to seeking prenatal care. A better alternative is to increase funding for voluntary drug treatment, particularly programs that are equipped to assist pregnant women who are addicted to drugs. A number of commentators supporting this approach have noted that it promotes a view of mothers and fetuses as having united interests, rather than an adversarial relationship.[13]

This note will first explore the various ways in which prosecutors bring these cases: under statutes prohibiting drug delivery, child abuse, and manslaughter, and in proceedings terminating parental rights. Part II first examines the constitutional implications of these prosecutions, focusing on due process, vagueness, privacy, and equal protection problems. Next this note considers the public policy implications of these prosecutions by examining the health care response, the ways in which these prosecutions pit the pregnant woman against her unborn child, and the ultimate failure of these prosecutions to achieve their stated goals. Finally, Part III of this note discusses and

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also Kay Johnson et al., *Recommendations to Improve Preconception Health and Health Care* — United States, MORBIDITY & MORTALITY WKLY. REP. (Ctr. For Disease Control & Prevention), Apr. 21, 2006, at 1, 2, 7, 9, *available at* http://www.cdc.gov/mmwR/PDF/rr/rr5506.pdf (discussing healthy lifestyle changes in women as "preconception health care" measures necessary for all women aged 15 to 44 regardless of whether they intend to procreate).

12. *See* cases cited *supra* notes 8-10.

13. *See, e.g.*, Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569, 571-72, 573-76 (1992) (discussing the problems with the "adversarial model" of dealing with prenatal drug use and promoting use of a "facilitative approach" including prenatal medical care and drug treatment); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994, 1009-12 (1988) (discussing prenatal drug abuse prosecutions as problematic due to constitutional problems as well as the deterrent effect they serve for women who might otherwise seek prenatal care, while also advocating an "educative/funding approach" as an alternative).

evaluates various alternatives to criminal prosecution under these inapplicable statutes.

I. THEORIES OF PROSECUTION

A. Prosecutions Under Delivery of Drugs Statutes

Prosecutors' most inventive means of attempting to hold pregnant drug users accountable are prosecutions under statutes proscribing the delivery of controlled dangerous substances.[14] Although these prosecutions are generally not successful,[15] the explanations for how such delivery occurs include (1) that a pregnant woman will pass drug metabolites to the fetus *in utero*[16] and (2) that the mother will deliver drug metabolites to the newly born child after it has passed through the birth canal but before its umbilical cord has been cut.[17]

The first theory assumes that delivery to a fetus has the same meaning as delivery to a person, manifestly a problematic assumption unless the legislature has sought to abrogate the common law meaning of "person" by including a fetus in the delivery statute.[18] In such prosecutions, the statute simply will not apply. Under the second theory, where the legislative history fails to specifically reflect an intent to interpret "delivery" as meaning unplanned and unintended transmission of drugs to the fetus through an umbilical cord, such prosecutions also cannot be permitted.[19] Despite the fact that the pregnant drug user's behavior parallels that of a drug user-possessor rather than a drug dealer who would ordinarily be the target of drug delivery statutes, "prosecutions have relied upon criminal statutes for drug delivery and distribution which impose harsher penalties upon these women than would otherwise be imposed for drug possession."[20] Both formulations misread the intended purpose of the drafting legislatures.

B. Prosecutions Under Child Abuse Statutes

Despite initially seeming straightforward and self-explanatory, prosecutions for prenatal drug use under child abuse statutes are

14. *See* Kowalski, *supra* note 11, at 1270.
15. *See, e.g.*, Johnson v. State, 602 So. 2d 1288 (Fla. 1992); State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992).
16. *Luster*, 419 S.E.2d at 33.
17. *Johnson*, 602 So. 2d at 1290.
18. *Luster*, 419 S.E.2d at 34.
19. *Johnson*, 602 So. 2d at 1290.
20. Kowalski, *supra* note 11, at 1259.

based on varying arguments. Despite legislative language to the contrary, some prosecutors attempt to argue that a fetus is a child; therefore, this argument proceeds, child abuse statutes apply to fetuses as surely as they do to newborns or older children.[21] In the alternative, prosecutors argue that the injury occurs after birth, when the baby is born addicted to drugs; at this point, the baby is protected by the child abuse statute for any harm inflicted, even harm occurring before birth.[22]

Although these prosecutions likewise generally fail, it was under a child abuse theory that Cornelia Whitner was sentenced to eight years in prison in South Carolina.[23] Her conviction still stands.[24] The South Carolina Supreme Court found that the meaning of "child" encompassed a fetus for the purpose of child abuse statutes, stating that "it would be absurd to recognize the viable fetus as a person for purposes of homicide laws . . . but not for purposes of statutes proscribing child abuse."[25]

South Carolina is the exception.[26] Arguments that a fetus is a child for the purposes of child abuse statutes are generally struck down by the courts.[27] In *Reyes v. Superior Court*, the California court found that a fetus is not a person for the purposes of the murder statute or the manslaughter statute, the failure to provide child support statute, Fourteenth Amendment analysis, or the Social Security Act.[28] The court further indicated that if the child abuse statute "were interpreted as being applicable to endangering a fetus, the rather absurd result would be that endangering a fetus was more severely punished than aborting it."[29] The court in *State v. Dunn* likewise found that "[n]o Washington criminal case has ever included 'unborn child' or fetus in its definition of person."[30] Further, the court concluded that the legislature specifically includes fetuses within the

21. *See* Reyes v. Superior Court, 141 Cal. Rptr. 912, 913 (Cal. Ct. App. 1977); State v. Dunn, 916 P.2d 952, 953 (Wash. Ct. App. 1996).

22. Reinesto v. Superior Court, 894 P.2d 733, 735 (Ariz. Ct. App. 1995); State v. Gethers, 585 So. 2d 1140, 1141 (Fla. Dist. Ct. App. 1991); Commonwealth v. Welch, 864 S.W.2d 280, 280 (Ky. 1993); People v. Morabito, 580 N.Y.S.2d 843, 844 (Geneva City Ct. 1992); State v. Gray, 584 N.E.2d 710, 711-12 (Ohio 1992).

23. Whitner v. State, 492 S.E.2d 777, 778-79 (S.C. 1997) (affirming the conviction of Cornelia Whitner for child abuse and endangerment after she used cocaine while pregnant because the word "child" as used in the statute includes viable fetuses), *cert. denied*, 523 U.S. 1145 (1998).

24. *Id.* at 779.

25. *Id.* at 780.

26. *Id.*

27. *E.g.*, *Morabito*, 580 N.Y.S.2d at 846-47.

28. Reyes v. Superior Court, 141 Cal. Rptr. 912, 913 (Cal. Ct. App. 1977).

29. *Id.* at 914.

30. State v. Dunn, 916 P.2d 952, 955 (Wash. Ct. App. 1996).

ambit of a statute when it intends to do so, making it inappropriate for the court to read that meaning into the statute on its own.[31]

The alternative argument supporting the use of child abuse statutes to prosecute women for their drug use while pregnant seeks to "prosecute [the mother] under the statute for prenatal conduct that caused [the baby] injury *after* her birth" even though the conduct occurred before birth.[32] This kind of argument essentially seeks to analogize child abuse to the common law rule that an assault upon a pregnant woman could be prosecuted as manslaughter if the baby died only after being born alive.[33] As in child abuse prosecutions under the "delivery theory," these arguments attempt and fail to overcome the legislative intent manifest in the statute.[34]

C. Prosecutions Under Manslaughter Statutes

Interestingly, even a Hawaii prosecution for manslaughter based upon the mother's prenatal drug use, where her son was born alive and subsequently died, failed.[35] The court compared caselaw from around the country on prosecutions based on prenatal drug use[36] to caselaw holding a third party guilty based on "conduct perpetrated against a pregnant mother, causing the death of the subsequently born child."[37] The court ultimately determined that Ms. Aiwohi did not fall within the bounds of the Hawaii manslaughter statute because the statute only applies to the death of a person, and the definition of person does not include a fetus.[38]

D. Consideration of Prenatal Drug Use in Termination of Parental Rights

A more predictable method of utilizing evidence of prenatal drug use in judicial action against a new mother is to use this evidence to justify the termination of parental rights. Although courts generally

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31. *Id.*

32. Reinesto v. Superior Court, 894 P.2d 733, 735 (Ariz. Ct. App. 1995).

33. *See* Williams v. State, 550 A.2d 722, 725-26 (Md. Ct. Spec. App. 1988), *aff'd*, 561 A.2d 216 (Md. 1989) (summarizing Sir Edward Coke's statement of the common law rule (cited in 3 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND (M. Flesher ed., London, W. Lee & D. Parkman 1644))).

34. *Reinesto*, 894 P.2d at 735-36; State v. Gethers, 585 So. 2d 1140, 1141-42 (Fla. Dist. Ct. App. 1991); Commonwealth v. Welch, 864 S.W.2d 280, 282-84 (Ky. 1993); People v. Morabito, 580 N.Y.S.2d 843, 845-47 (Geneva City Ct. 1992); State v. Gray, 584 N.E.2d 710, 712-13 (Ohio 1992).

35. State v. Aiwohi, 123 P.3d 1210 (Haw. 2005).

36. *Id.* at 1214-18.

37. *Id.* at 1218-21.

38. *Id.* at 1222-24.

tend to find this acceptable, they are by no means uniform in reaching this conclusion.[39] The court in In re *Valerie D.* focuses primarily on the problem of legislative intent, finding that the legislature did not intend the child abuse statute to apply to facts involving prenatal drug use.[40] Courts reaching the opposite conclusion consider common law discussion of manslaughter of an unborn child and the state's interest in the health of an unborn viable child.[41] Considering the fact that there are few treatment options available for pregnant women who use drugs, this initially seems to be an unjust conclusion, because it in essence penalizes behavior that women have few viable options for changing.[42] If treatment options and better education are made available to pregnant addicts, but the mother-to-be resists help and continues to use drugs through her pregnancy, the only just option for protecting the child after birth is to remove him or her from the home at least temporarily. Use of termination of parental rights proceedings where treatment options are unavailable will be a deterrent to women seeking treatment or prenatal care.[43]

II. PROBLEMS WITH CRIMINAL PROSECUTIONS

A. Constitutional Implications

1. Procedural Due Process and Vagueness

The Due Process Clause of the Constitution guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without

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39. *See, e.g.*, *In re* Baby X, 293 N.W.2d 736 (Mich. Ct. App. 1980) (finding that evidence of a newborn baby's withdrawal symptoms indicating its mother's prenatal drug use is sufficient to support a finding of child neglect for the purpose of terminating parental rights); *In re* Smith, 492 N.Y.S.2d 331 (N.Y. Fam. Ct. 1985) (finding that evidence of prenatal consumption of alcohol by the mother was sufficient to prove child neglect for the purpose of termination of parental rights); *In re* Ruiz, 500 N.E.2d 935 (Ohio C.P. 1986) (finding that evidence of Nora Ruiz's heroin use while she was pregnant was sufficient evidence to prove child abuse for the purpose of terminating her parental rights). *But see, e.g.*, *In re* Valerie D., 613 A.2d 748, 755-56 (Conn. 1992) (finding that Ms. D.'s prenatal drug use could not be used as evidence to justify the termination of her parental rights).

40. *In re Valerie D.*, 613 A.2d at 759-65.

41. *In re Smith*, 492 N.Y.S.2d at 334-35; *In re Ruiz*, 500 N.E.2d at 936-38.

42. *E.g.*, Louise Marlane Chan, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 203, 208-09, 213 (1993) (proposing legislation criminalizing prenatal drug use in order to prevent prosecutions "based on the subjective and often discriminatory whims of state officials."); Kowalski, *supra* note 11, at 1260.

43. *See* Schuyler Frautschi, *Understanding the Public Health Policies Behind* Ferguson, 27 N.Y.U. REV. L. & SOC. CHANGE 587, 596-97 (2002) (examining the problems with the *Ferguson* policy of delivering positive urinalysis results to the police for legal action, which resulted in some women avoiding the program for fear of having their children taken away).

due process of law."[44] A standing principle of criminal law recognizes that "[d]ue process prohibits prosecutors and courts from interpreting or applying an existing law in an unforeseeable or unintended manner."[45] This principle is why the issue of legislative intent is so crucial: if the state legislature did not intend or foresee these results when it drafted child abuse, delivery, and manslaughter statutes, any argument that such statutes can be the basis for criminal prosecution in instances of prenatal drug use must fail.[46]

Prosecutors' use of statutes criminalizing the delivery of controlled dangerous substances is so inventive as to be constitutionally problematic.[47] Women prosecuted under these statutes "could not reasonably have known that [they] would be prosecuted for 'delivering' or 'distributing' cocaine to [their] unborn child[ren] if [they] ingested [drugs] while pregnant."[48] The accepted definitions of delivery and distribution as used in the delivery statutes are so far afield from the transmission of drug metabolites via the umbilical cord as to render that argument absurd.[49]

Further, prosecutors' arguments that fetuses fall directly within the ambit of child abuse statutes is manifestly problematic. Unless fetuses are expressly included within the text of a statute, it is impossible to say that these statutes cover prenatal activity directly.[50] Fetuses have never been held to be people, most notably in the arena of Fourteenth Amendment jurisprudence,[51] but also in the context of the Social Security Act of 1935[52] and under certain guardianship statutes.[53] Common law once dictated that wrongful death suits could only be brought on behalf of a fetus where the fetus died after live birth; this rule has since been modified in most jurisdictions, and

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44. U.S. CONST. amend. XIV, § 1.

45. Carol Jean Sovinski, Comment, *The Criminalization of Maternal Substance Abuse: A Quick Fix to a Complex Problem*, 25 PEPP. L. REV. 107, 118 (1997) (discussing constitutional and deterrence problems with prenatal substance abuse prosecutions and proposing increased treatment options as a more viable alternative).

46. *See id.* at 116-17.

47. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1431-32 (1991) (discussing the disparate impact of nationwide prosecutions of poor women of color for prenatal drug abuse as a reproductive rights issue which serves to perpetuate historical devaluation of black motherhood); *see also* Kowalski, *supra* note 11, at 1270.

48. State v. Luster, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992).

49. *See* Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992); *see also Luster*, 419 S.E.2d at 34.

50. *See* People v. Morabito, 580 N.Y.S.2d 843, 846-47 (Geneva City Ct. 1992).

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

52. *See* Burns v. Alcala, 420 U.S. 575, 580-81 (1975).

53. *E.g.*, *In re* Guardianship of J.D.S., 864 So. 2d 534, 538 (Fla. Dist. Ct. App. 2004) (holding that a guardian could not be appointed to represent the interests of a fetus separate from the mother).

suits are now limited to situations where the fetus is viable at the time of the injury.[54] Holding that fetuses are children for the purposes of child abuse statutes where no legislative intent exists to that end would fly in the face of established jurisprudence.

Prosecutors attempt to circumvent this problem by arguing that prenatal abuse is ripe for criminal prosecution because it has injurious effects after the fetus is born, i.e., once it is a person.[55] This interpretation contradicts "the accepted principle that criminal statutes focus on the conduct of the accused, not on the status of the alleged victim."[56] Adopting these prosecutors' arguments would mean focusing on the result of the conduct (the newborn's addiction to drugs), rather than the conduct itself (the ingestion of drugs).

Further, if the trend reverses and courts find that these various child abuse and drug-delivery statutes and theories do support prosecutions for prenatal drug use, it will open up a veritable Pandora's box of potential crimes for a wide range of otherwise ordinary activities that could have deleterious effects when engaged in by a pregnant woman.[57] The statutes therefore would "transgress reasonably identifiable limits; they [would] lack fair notice and violate constitutional due process limits against statutory vagueness" because of the literal impossibility of predicting what will subject the mother to criminal liability.[58] Courts already note that upholding convictions for prenatal drug use may lead to prosecutions for more ordinary and legal activity that might cause harm to a fetus, from

> consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child.[59]

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54. Note, *supra* note 13, at 1004.

55. *See, e.g.*, Reinesto v. Superior Court, 894 P.2d 733, 735 (Ariz. Ct. App. 1995); State v. Gethers, 585 So. 2d 1140, 1141 (Fla. Dist. Ct. App. 1991).

56. *Reinesto*, 894 P.2d at 736.

57. Kilmon v. State, 905 A.2d 306, 311-12 (Md. 2006) (reasoning that these kinds of prosecutions "could well be construed to include not just the ingestion of unlawful controlled substances but a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature").

58. Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993).

59. *Kilmon*, 905 A.2d at 311.

This slippery slope is inevitable and not a mere logical fallacy: a few women have in fact already been prosecuted for otherwise legal acts undertaken while pregnant, although their prosecutions were ultimately unsuccessful.[60] The most well-known of these cases is *State v. Deborah J.Z.*, in which Ms. J.Z. consumed alcohol during the week before her due date and was then unsuccessfully prosecuted for attempted "first-degree intentional homicide and first-degree reckless injury."[61] According to the court in *Kilmon v. State*, "[i]f the State's position [in these cases] were to prevail, there would seem to be no clear basis for categorically excluding any of those activities from the ambit of the statute; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be."[62]

2. Substantive Due Process and Privacy

The landmark case of *Griswold v. Connecticut* provides the framework for the discussion of privacy concerning familial and procreative decisions.[63] Although that case specifically discussed only protecting the marital relationship, its holding in fact creates a right to privacy concerning intimate matters such as decisions about procreation.[64] No less important a right than whether to have children is how to conduct one's life once one is already pregnant.[65] For this reason, although few if any people would argue that women should imbibe drugs and alcohol while they are pregnant, criminalizing such conduct is problematic.[66] The women that these prosecutions generally seek to hold responsible — poor women of color — are frequently women who do not have access to prenatal care and education.[67] These women may not have access to information informing them of the risks and dangers inherent in continuing to use drugs while pregnant.[68] Even

60. State v. Ashley, 701 So. 2d 338, 339 (Fla. 1997) (holding Kawana Ashley could not be charged with the death of her child "resulting from self-inflicted injuries during the third trimester of pregnancy"); State v. Deborah J.Z., 596 N.W.2d 490 (Wis. Ct. App. 1999) (finding that Deborah J.Z. could not be held criminally liable for her ingestion of alcohol late in her pregnancy).

61. *Deborah J.Z.*, 596 N.W.2d at 491.

62. *Kilmon*, 905 A.2d at 311-12; *see also* Johnsen, *supra* note 13, at 586.

63. Griswold v. Connecticut, 381 U.S. 479 (1965).

64. *Id.* at 485-86; Note, *supra* note 13, at 998.

65. *See* Note, *supra* note 13, at 998-1001.

66. *See id.* at 1000.

67. *See* Kimani Paul-Emile, *The Charleston Policy: Substance or Abuse?*, 4 MICH. J. RACE & L. 325, 349-51, 374 (1999) (discussing the disparate impact of the Charleston policy on poor women of color and the need for increased access to prenatal care and substance abuse treatment); Roberts, *supra* note 47, at 1432-33.

68. *See* Note, *supra* note 13, at 1010-11.

where a woman is aware of the risks, she simply may be unable to give up her drug habit because she cannot afford treatment or, more tellingly, because of the lack of resources available for treatment of pregnant female addicts.[69] As one commentator noted, "[t]he state's belief that a woman has made an ill-considered choice does not entitle it to criminalize her procreative decision."[70]

Further, enforcing laws proscribing drug use during pregnancy for the purpose of preventing prenatal drug use is akin to mandating medical treatment against the will of the patient-mother.[71] Courts already acknowledge such mandates as a violation of the constitutionally protected right of bodily integrity.[72] The only reasonable, reliable, and long-term effective means of stopping drug use is through a rehabilitation program, where the withdrawal process, while still incredibly painful and disruptive, can be managed by medical professionals.[73] Forcing an individual to undergo withdrawal unassisted is akin to forcing patients to undergo stomach pumping, to take antipsychotic drugs, or to submit to treatment for their own or a family member's benefit, all medical procedures that courts conclude may not be constitutionally mandated.[74]

Ultimately, these arguments are analytically problematic because they frame the issue as protecting a woman's right to engage in an illegal activity, namely, substance abuse. In the case of criminal prosecutions for prenatal substance abuse, however, the behavior under attack is not so much the drug use, but the continuation of the pregnancy while addicted to drugs.[75] Notably, "[t]he woman's right at issue is not the right to abuse drugs or to cause the fetus to be born with defects."[76] The right these mothers are attempting to exercise is the right to procreate despite being addicted to drugs.[77] The right to procreate — or not — is manifestly protected by the holding in *Griswold*.[78]

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69. Paul-Emile, *supra* note 67, at 375.

70. Note, *supra* note 13, at 1001.

71. *Id.* at 1001-02.

72. *Id.*

73. *See* Philip Bean & Teresa Nemitz, *Introduction* to DRUG TREATMENT: WHAT WORKS? 5 (Philip Bean & Teresa Nemitz eds., 2004); Paul-Emile, *supra* note 67, at 385 n.295.

74. Note, *supra* note 13, at 1002 (citing Rochin v. California, 342 U.S. 165 (1952); Rennie v. Klein, 653 F.2d 836 (3rd Cir. 1981) (en banc), *vacated on other grounds*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3rd Cir. 1983); *In re* Osborne, 294 A.2d 372 (D.C. 1972)).

75. Roberts, *supra* note 47, at 1462-63.

76. *Id.* at 1462.

77. *Id.* at 1462-63.

78. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

3. Equal Protection

Under the Equal Protection Clause of the Constitution, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[79] The seminal cases on gender-based equal protection issues, *Craig v. Boren*[80] and *Michael M. v. Sonoma County Superior Court*,[81] both find gender to be a protected class, but only within certain parameters. Although gender, unlike race, is not an "inherently suspect" class, gender classifications are subject to a more stringent test than the traditional rational relation test.[82] To be constitutionally permissible, classifications based on gender must serve important governmental interests and be substantially related to those interests.[83] Gender classifications that merely rely upon or impose gender stereotypes cannot be constitutionally permitted.[84] The contrary is also true: where men and women are genuinely not "similarly situated," they may be treated differently for the purpose of gender-based classifications.[85]

Criminal prosecutions for prenatal substance abuse create a de facto gender classification in that only mothers are prosecuted for their children's injuries.[86] Initially it may appear that men and women are not similarly situated for the purposes of childbearing, because women and not men carry children to term and it is women's life-style choices that most obviously impact the health of the fetus.[87] In fact, at least one study indicates that drug use by men can likewise impact fetal health.[88] Further, holding women alone responsible for injuries sustained by their children as a result of parental substance

79. U.S. CONST. amend. XIV, § 1.

80. Craig v. Boren, 429 U.S. 190 (1976).

81. Michael M. v. Superior Court, 450 U.S. 464 (1981).

82. *Id.* at 468.

83. *Craig*, 429 U.S. at 197.

84. *Michael M.*, 450 U.S. at 469; *Craig*, 429 U.S. at 198-99.

85. *Michael M.*, 450 U.S. at 469.

86. *See, e.g.*, Reinesto v. Superior Court, 894 P.2d 733 (Ariz. Ct. App. 1995) (dismissing Teresa Lopez Reinesto's indictment for child abuse for her prenatal drug use); Johnson v. State, 602 So. 2d 1288 (Fla. 1992) (overturning the conviction of Jennifer Clarice Johnson for her prenatal drug use and subsequent delivery of a controlled substance); State v. Aiwohi, 123 P.3d 1210 (Haw. 2005) (reversing the trial court's denial of Tayshea Aiwohi's motion to dismiss charges of manslaughter based on her prenatal drug use).

87. *See* Sam S. Balisy, Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1232 (1987).

88. *See* Johnsen, *supra* note 13, at 608 (citing Sandra Blakeslee, *Research on Birth Defects Shifts to Flaws in Sperm*, N.Y. TIMES, Jan. 1, 1991, at A1; Devra L. Davis, *Fathers and Fetuses*, N.Y. TIMES, Mar. 1, 1991, at A27; *Father's Smoking May Damage Sperm*, WASH. POST, Jan. 25, 1991, at A8); Ricardo A. Yazigi et al., *Demonstration of Specific Binding of Cocaine to Human Spermatozoa*, 266 J. AM. MED. ASS'N 1956 (1991).

abuse perpetuates the stereotype that women alone bear the responsibility for childbearing and fetal health.[89]

Although it is true that holding men responsible for drug use that harms future children is highly impractical,[90] it does not follow that women alone can constitutionally be prosecuted. "[A]dministrative ease and convenience" are not sufficiently important governmental objectives to permit otherwise impermissible gender classifications.[91] If prosecutors persist in seeking to hold women criminally responsible for fetal injuries as a result of parental substance abuse, they should apply the same statutes to new fathers with substance abuse problems.

Overzealous prosecutors' problems with the Equal Protection Clause do not end with gender. The brunt of criminal prosecutions for parental substance abuse falls on poor women of color,[92] as the majority of the women criminally prosecuted for prenatal substance abuse have been poor women of color.[93] Proof of disparate impact is relevant to show racial discrimination, although not alone dispositive.[94]

An instructive example is the Medical University of South Carolina's Interagency Policy of Management of Substance Abuse During Pregnancy, in place from 1989 until the Supreme Court found it to be unconstitutional in 2001.[95] According to one commentator who has extensively studied the policy, it "established a protocol which required: (i) [drug] testing, without consent, women who sought obstetrical care; (ii) disclosing the results of these tests to third persons; (iii) arresting women who tested positive; and (iv) criminally prosecuting them."[96] Although the policy was found to be unconstitutional because the urine tests constituted unreasonable searches under the Fourth Amendment,[97] the policy also had a disproportionate impact upon African-American women.[98]

Between 1989 and 1999, the policy justified the arrest of thirty women, only one of whom was white,[99] although the racial balance of positive tests for drugs reflected the natural racial balance of the

89. Johnsen, *supra* note 13, at 608.
90. Chan, *supra* note 42, at 224.
91. Craig v. Boren, 429 U.S. 190, 198 (1976).
92. Paul-Emile, *supra* note 67, at 349.
93. Roberts, *supra* note 47, at 1421.
94. Washington v. Davis, 426 U.S. 229, 241 (1976) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
95. Ferguson v. Charleston, 532 U.S. 67 (2001); Paul-Emile, *supra* note 67, at 326.
96. Paul-Emile, *supra* note 67, at 326.
97. *Ferguson*, 532 U.S. at 76-85.
98. Paul-Emile, *supra* note 67, at 326.
99. *Id.* at 328 n.10.

maternity ward at the hospital: "68% Black and 32% White."[100] Notably, the single white woman arrested "was distinguished in medical charts as having a 'Negro boyfriend.'"[101] The policy was implemented at a hospital unique in South Carolina for its service of a large proportion of black patients and in such as a way to target cocaine users exclusively, factors that "inevitably skew[ed] the Policy to disproportionately impact Black women."[102] The very design of the policy was to target poor women of color.[103]

Racist criminal prosecution for prenatal substance abuse is not limited to this policy in South Carolina. Nationwide, prosecutors tend to focus on prenatal crack cocaine use.[104] Perhaps a reaction to hysteria over the so-called "crack epidemic,"[105] these prosecutions tend also to be of poor black women.[106] Although crack cocaine is not the only drug abused by pregnant women that has serious detrimental effects on the fetus, crack cocaine is a drug found disproportionately in "inner-city Black communities."[107] Ultimately, these prosecutions are prompted by and reinforce societal notions of black mothers as undeserving and inadequate.[108] There is no reason to focus on pregnant crack cocaine users, while ignoring pregnant women addicted to drugs not disproportionately used by members of the poor African-American population. These prosecutions, grounded in stereotypes and racism, cannot be justified against equal protection attacks.

B. Public Policy Implications

The fact that these prosecutions mainly target women of color addicted to cocaine or crack suggests that the use of drug delivery and child abuse statutes to combat prenatal drug use is merely a response to "crack baby hysteria," rather than an indicator of any real concern about the effects of drugs on the fetus.[109] Although prosecutors generally justify these charges as protecting fetal health,[110]

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100. *Id.* at 351.
101. *Id.* at 326.
102. *Id.* at 349.
103. *Id.* at 360.
104. Roberts, *supra* note 47, at 1421.
105. *Id.* at 1428.
106. *Id.* at 1445.
107. *Id.* at 1435.
108. *Id.* at 1436-44.
109. Frautschi, *supra* note 43, at 594-96; Paul-Emile, *supra* note 67, at 356-57; Roberts, *supra* note 47, at 1434.
110. Marcy Tench Stovall, Note, *Looking for a Solution:* In re Valerie D. *and State Intervention in Prenatal Drug Abuse*, 25 CONN. L. REV. 1265, 1278 (1993) (approaching prenatal drug abuse prosecution as "a legal solution for a health-care problem" by rejecting

this cannot be so: these types of prosecutions create a far greater risk to fetal health by discouraging pregnant drug users from seeking prenatal care for fear of being prosecuted.[111]

1. Health Care Response to Prosecutions

Prenatal care is widely acknowledged to be a very important factor affecting fetal health.[112] Health care workers have united against being forced to produce newborns' urine samples revealing maternal drug use, arguing vehemently that to do so will cause pregnant drug users to avoid medical care entirely.[113] Further, they argue, forcing health care workers to produce such evidence undermines patient-physician relationships.[114]

Not only do health care workers oppose the use of newborns' urine samples as evidence in these prosecutions, respected medical associations, including the American Medical Association, the American Public Health Association, and the American Society on Addiction Medicine oppose these types of prosecutions entirely.[115] As one commentator noted, even "groups that are primarily concerned with the health and rights of children, such as the American Academy of Pediatrics, the Center for the Future of Children, and the March of Dimes, also oppose punitive approaches to substance abuse and pregnancy."[116] These organizations have reached the common-sense conclusion that imposing punishments on women seeking prenatal care is counterintuitive and will ultimately drive women away from health care resources, putting their offspring at greater risk.[117] Most notably, these prosecutions drive drug-addicted women away from the very health care that their drug-addicted fetuses need.[118]

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criminal sanctions and promoting education, substance abuse treatment, and prenatal care).

111. Frautschi, *supra* note 43, at 616; Paul-Emile, *supra* note 67, at 356; Roberts, *supra* note 47, at 1449; Stovall, *supra* note 110, at 1266.

112. Note, *supra* note 13, at 1010.

113. *See, e.g.*, Frautschi, *supra* note 43, at 597 (citing the research of Dr. Ira J. Chasnoff, director of the National Association for Perinatal Addiction Research and Education).

114. Stovall, *supra* note 110, at 1278.

115. Helene M. Cole, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 J. AM. MED. ASS'N 2663, 2666-67 (1990); Johnsen, *supra* note 13, at 602; Sovinski, *supra* note 45, at 131-32.

116. Sovinski, *supra* note 45, at 131-32.

117. Johnsen, *supra* note 13, at 595, 602; Sovinski, *supra* note 45, at 131-32.

118. Johnsen, *supra* note 13, at 603.

2. Maternal Interests Versus Fetal Interests

Rather than viewing the mother and fetus as having parallel interests,[119] prosecutors using these statutes set up a situation in which the fetus's legal rights are in opposition to the mother's rights by arguing that the fetus's right to be born healthy trumps the mother's right to bodily integrity and privacy.[120] Doing so treats women as little more than incubators for their children:[121] the mother's interests are subordinated to those of her unborn child, prioritizing the mother's cessation of drug use by any possible means over her safety and well-being. Prosecutors approach this situation as if "the government's role is to protect the fetus from the woman."[122] Because pregnant women make innumerable decisions affecting the fetus, from taking prenatal vitamins to engaging in illegal drug use, this approach has no logical end.[123]

Numerous courts and commentators, including the court in *Kilmon v. State*, note the slippery slope inherent in these prosecutions.[124] Although prosecutors are generally unsuccessful in using these statutes to target pregnant drug users, their continued attempts suggest that they may make increasingly attenuated and outlandish attempts. Courts and commentators express the concern that overzealous prosecutors will target even lawful, everyday behavior merely because it is engaged in while pregnant.[125]

3. Prosecutions Do Not Satisfy the Intended Goal

The stated goal of such prosecutions, to encourage women to seek treatment,[126] is manifestly impossible. Few if any viable treatment options exist for pregnant addicts,[127] as pregnancy entails a number of additional health issues that complicate the recovery process.[128] As the American Medical Association noted, "it would be an injustice to punish a pregnant woman for not receiving treatment for her substance abuse when treatment is not an available option to her."[129]

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119. Stovall, *supra* note 110, at 1280-81.

120. Kowalski, *supra* note 11, at 1261.

121. *Id.* at 1257.

122. Johnsen, *supra* note 13, at 571; *see also* Note, *supra* note 13, at 1010.

123. Kowalski, *supra* note 11, at 1261.

124. Reinesto v. Superior Court, 894 P.2d 733, 737 (Ariz. Ct. App. 1995); Kilmon v. State, 905 A.2d 306, 311-12 (Md. 2006); Kowalski, *supra* note 11, at 1261.

125. *Kilmon*, 905 A.2d at 311-12.

126. *E.g.*, Johnson v. State, 602 So. 2d 1288, 1294 (Fla. 1992).

127. *E.g.*, Chan, *supra* note 42, at 208; *see also* Kowalski, *supra* note 11, at 1260.

128. Roberts, *supra* note 47, 1448.

129. Johnsen, *supra* note 13, at 606 (quoting Board of Trustees, Am. Medical Ass'n, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties*

Not only is treatment not as viable an option for pregnant addicts as prosecutors appear to believe, but these prosecutions may further endanger fetal health by pushing the addicted mother away from prenatal health care for fear of being reported to the authorities.[130]

Further, some commentators have noted that these prosecutions actually push expectant mothers toward having abortions for fear of being criminally prosecuted.[131] This is ironic, because the so-called fetal rights advocates share an ideological viewpoint with antiabortion extremists: both groups justify their viewpoint by arguing that fetal health should trump maternal individual choice.[132] Along with causing them harm by deterring their mothers from seeking prenatal care, in some cases, these measures may ultimately kill some of these fetuses through abortion.[133]

III. ALTERNATIVES TO PROSECUTION UNDER ABUSE OR DELIVERY STATUTES

Despite the undesirability of criminal prosecutions under attenuated theories, the state has a responsibility toward the unborn children of pregnant drug addicts.[134] This responsibility should translate to encouragement of both treatment for the mother and continuation of adequate prenatal care.[135] The principal alternatives proposed by commentators are drafting statutes to specifically sanction prenatal drug abuse;[136] imposing civil commitment like that imposed on the mentally ill;[137] and improving education on the impact of drug use on fetal health while simultaneously providing greater access to treatment for pregnant addicts.[138]

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for Potentially Harmful Behavior by Pregnant Women, 264 J. AM. MED. ASS'N 2663, 2669 (1990)).

130. *Id.* at 603-04.

131. *Id.* at 586; Kristen Rachelle Lichtenberg, Comment, *Gestational Substance Abuse: A Call for a Thoughtful Legislative Response*, 65 WASH. L. REV. 377, 392 (1990).

132. John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 437 (1983) ("Once [a woman] decides to forgo abortion and the state chooses to protect the fetus, the woman loses the liberty to act in ways that would adversely affect the fetus."); National Right to Life, Abortion: Some Medical Facts — Defining "Abortion," http://www.nrlc.org/abortion/ASMF/asmf3.html (last visited Mar. 16, 2008).

133. Johnsen, *supra* note 13, at 586; Lichtenberg, *supra* note 131, at 392.

134. *See* Note, *supra* note 13, at 1003.

135. Johnsen, *supra* note 13, at 613.

136. *E.g.*, Chan, *supra* note 42, at 203-19.

137. Lichtenberg, *supra* note 131, at 387-95.

138. Johnsen, *supra* note 13, at 576; Kowalski, *supra* note 11, at 1291; Note, *supra* note 13, at 1011-12.

A. Statutes Tailored to Prenatal Drug Use

Some commentators have proposed enacting "a criminal statute that specifically proscribes drug use during pregnancy," with mandatory residential drug treatment as an alternative to imprisonment.[139] Supporters of this approach argue that women have a diminished right to privacy in this context because of the nature of their illegal acts and the state's interest in the well-being of the fetus.[140] One commentator has even suggested that once a woman decides to keep a pregnancy, her rights with regard to that pregnancy are thereby limited and she should no longer be permitted to act in ways potentially adverse to her unborn child.[141]

Even if this is true, these types of prosecutions remain problematic. Although women would now be on notice that engaging in reckless or unsafe behavior while pregnant could subject them to criminal sanctions, it would simply not be possible to sufficiently define exactly what misconduct would be illegal.[142] Even if the statute prohibited drug use during pregnancy, issues of prescription drug and alcohol use would remain hazy. Such a specific law could potentially infringe on constitutionally-protected arenas of privacy and bodily integrity because of the likelihood that the statute would fail to give adequate notice of illegal behavior to expectant mothers.[143] Likewise, problems of equal protection with regard to gender and race would remain, as it continues to be impractical to consistently make determinations of the father's role in his child's fetal well-being,[144] and there continues to be no guarantee that any such policy or statute would not be applied with the intent of targeting race, as in the case of the Charleston policy.[145] The history of discrimination perpetrated on women of color with regard to their procreative freedom should further raise skepticism that the statutes will be applied dispassionately.[146] Because these same women are subject to simple possession charges prior to pregnancy, if they are charged under these hypothetical pregnant drug use statutes, they will in effect suffer an extra penalty for the same behavior merely because they are pregnant.[147]

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139. Chan, *supra* note 42, at 214-15.
140. *Id.* at 221; Kowalski, *supra* note 11, at 1283-84.
141. Robertson, *supra* note 132, at 437.
142. Note, *supra* note 13, at 1006; *see* Kilmon v. State, 905 A.2d 306, 311-12 (Md. 2006).
143. Note, *supra* note 13, at 1006.
144. Chan, *supra* note 42, at 224.
145. Paul-Emile, *supra* note 67, at 334-60.
146. *See id.* at 334-49.
147. *Id.* at 384; Kowalski, *supra* note 11, at 1259.

As a matter of public policy, statutes explicitly proscribing prenatal drug use would likely have some of the same impractical results as prosecutions under inapplicable statutes: by pitting the fetus and mother against each other,[148] they would push women away from prenatal care and toward having abortions.[149] These results are obviously antithetical to the stated goal of the proposed statutes.[150]

No precedent exists for creating statutes prohibiting drug use while pregnant.[151] State legislatures that have considered broadening abuse statutes to encompass a newborn's physical dependency on controlled substances have rejected these proposals, citing the concern that it would lead to prosecutions for prenatal drug use.[152] The fact that no legislatures have thus far passed statutes proscribing drug use while pregnant suggests that legislators do not believe any such crime should exist.[153] Although none of these assertions are binding on any legislature, they are persuasive as to why it would be ill-advised to enact such statutes.

B. Civil Sanctions

At least one scholar has proposed civil commitment as a solution to the problem of prenatal substance abuse, in the vein of involuntary commitment of drug addicts or the mentally ill.[154] This alternative hopes to balance fetal rights and state interests against the mother's privacy and bodily rights by acknowledging the problems inherent in criminal prosecution and avoiding such punitive measures.[155]

Ultimately the same problems exist with regard to civil commitment as with criminalization. Although this commentator suggests that drafting a statute narrowly will prevent slippery slope problems,[156] it would still open the door to sanctioning otherwise legal behavior, including alcohol use, as the commentator suggests.[157] On a practical level, there is very little difference between civil and criminal commitment. One of the legal justifications for civil commitment

148. Johnsen, *supra* note 13, at 571; Note, *supra* note 13, at 1009.
149. Johnsen, *supra* note 13, at 586; Lichtenberg, *supra* note 131, at 392.
150. *See* Sovinski, *supra* note 45, at 127-32, 137; Stovall, *supra* note 110, at 1277.
151. Kowalski, *supra* note 11, at 1283.
152. Johnson v. Superior Court, 602 So. 2d 1288, 1293-94 (Fla. 1992).
153. Hodge, *supra* note 7, at 472-73 (citing State v. Gethers, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991); State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992); Sheriff, Washoe County, Nev. v. Encoe, 885 P.2d 596 (Nev. 1994)).
154. Lichtenberg, *supra* note 131, at 378.
155. *Id.* at 387-88.
156. *Id.* at 394.
157. *Id.* at 385.

is the state's police power,[158] and civil commitment still entails involuntary confinement for treatment of mental illness, drug addiction, and the like.[159] Civil commitment entails involuntary confinement, restriction of movement and activity, and limited communication with individuals not confined.[160] Civil commitment is typically imposed after a hearing before a judge or other neutral factfinder.[161] In fact, civil commitment can be regarded as "a massive curtailment of liberty, in many ways one that is greater than penal incarceration."[162] Because of the involuntary nature of the commitment and the fact that to a layperson it appears very much the same as criminal incarceration, pregnant drug users will still be deterred from seeking prenatal care for fear of being committed.[163] Although the proposed civil commitment is marginally better than criminalization because it would include treatment rather than merely confinement,[164] civil commitment must ultimately fail for the same reasons criminalization is undesirable: it will fail to remedy the ultimate wrong, which is harm to the fetus.

C. Increased Funding for Voluntary Treatment

The primary alternative to criminal or civil sanctions is to provide more and better education to pregnant mothers and greater funding and access to treatment for pregnant women.[165] This is a solution that actually gets at the goal prosecutors and legislators seek to promote: the improvement of fetal health.[166] The same medical groups that oppose fetal abuse support this option.[167] According to the American Academy of Pediatrics Committee on Substance Abuse, the "appropriate way to prevent intrauterine drug exposure is to educate women of childbearing age about the hazards of drugs to the fetuses and to encourage drug avoidance. . . . [T]reatment programs should be made readily available to pregnant women."[168] In this way,

158. GARY B. MELTON, PHILLIP M. LYONS, JR. & WILLIS J. SPAULDING, NO PLACE TO GO: THE CIVIL COMMITMENT OF MINORS 102-03 (1998).

159. *See* BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 1 (Carolina Academic Press 2005) (discussing civil commitment of mentally ill individuals).

160. *Id.*

161. *Id.* at 139.

162. *Id.* at 2.

163. *Cf.* Johnsen, *supra* note 13, at 603 (discussing a woman's reluctance to seek treatment for fear of facing punishment).

164. Lichtenberg, *supra* note 131, at 394.

165. Kowalski, *supra* note 11, at 1258.

166. Stovall, *supra* note 110, at 1277.

167. Sovinski, *supra* note 45, at 132.

168. *Id.* (quoting American Academy of Pediatrics, Committee on Substance Abuse, *Drug-Exposed Infants*, 86 PEDIATRICS 639, 641 (1990)).

pregnant drug users will not be driven away from seeking prenatal care by the threat of jail or similar confinement.

Although this solution may seem too toothless to be entirely effective, this approach takes into consideration the notion that most women have every desire to give birth to healthy babies.[169] Providing access to drug treatment programs capable of catering to the specialized needs of pregnant women and new mothers would greatly improve fetal and infant health,[170] a goal aligned with both fetal and maternal interests.[171]

Once drug treatment programs and education about the dangers of drugs to fetal health are made more available to pregnant drug addicts, continued drug use by the expectant mother obviously cannot be permitted. If the mother fails to make progress in her drug treatment, once the baby is born, the household should be evaluated by the appropriate department of social services to determine whether the child should be removed from the home. In this way, the pregnant addict is given every opportunity to amend her behavior. Because the threat of criminal sanctions is removed and the threat that the child will be taken away after birth is conditional and temporary, this solution should not deter the mother-to-be from seeking prenatal care, which is often the result of the use of proceedings for termination of parental rights along with the threat of prosecution and imprisonment.[172]

CONCLUSION

Threatening women with the prospect of special criminal prosecution because of their drug use while pregnant implicates a number of constitutional issues. These issues include problems of vagueness and due process that have been cited by courts,[173] equal protection problems due to sexist and racist application,[174] and privacy problems,[175] which have been noted by commentators. The *Kilmon* court is unique in that it recognized arguments proposed by commentators

169. Johnsen, *supra* note 13, at 575; Note, *supra* note 13, at 1011; *see also* Paul-Emile, *supra* note 67, at 374-75.

170. Sovinski, *supra* note 45, at 132-33.

171. Johnsen, *supra* note 13, at 573-76; Paul-Emile, *supra* note 67, at 380; *see* Kowalski, *supra* note 11, at 1290.

172. Frautschi, *supra* note 43, at 616.

173. State v. Luster, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992); Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993); People v. Morabito, 580 N.Y.S.2d 843, 846-47 (Geneva City Ct. 1992).

174. Johnsen, *supra* note 13, at 606-13; Paul-Emile, *supra* note 67, at 349-52; Roberts, *supra* note 47, at 1432-36; Stovall, *supra* note 110, at 1274-76.

175. Note, *supra* note 13, at 998-1000; Roberts, *supra* note 47, at 1462-71.

but generally disregarded by courts, including the likelihood of slippery slope problems leading to prosecutions for otherwise legal activities.[176]

These prosecutions are likewise undesirable as a matter of policy. They deter women from seeking prenatal care, a critical factor influencing fetal health.[177] The prosecutions do not even fulfill the stated goal of protecting fetal life, and evidence exists that these prosecutions may instead push woman toward having abortions.[178] For this reason, it is especially important that the solution to the problem of prenatal substance abuse encourages rather than discourages treatment and prenatal care. Proposed solutions that look like punishments, such as child abuse statutes that include prenatal substance abuse or civil sanctions, will only serve as deterrents to prenatal care.[179] The best solution is to provide real access to treatment and better education about the risks of prenatal drug abuse.[180] This approach recognizes women's genuine desire to give birth to healthy babies,[181] the shared interests and goals of women and their unborn children,[182] and pregnant women's status as more than simply incubators.[183]

MEGHAN HORN*

176. Kilmon v. State, 905 A.2d 306, 311 (Md. 2006).

177. Note, *supra* note 13, at 1010.

178. Johnsen, *supra* note 13, at 586; Lichtenberg, *supra* note 131, at 392; Note, *supra* note 13, at 1011.

179. Johnsen, *supra* note 13, at 595.

180. *Id.*; Note, *supra* note 13, at 1011-12.

181. Johnsen, *supra* note 13, at 575; Note, *supra* note 13, at 1011.

182. Johnsen, *supra* note 13, at 573-76; Note, *supra* note 13, at 1009-12.

183. Kowalski, *supra* note 11, at 1257.

* J.D. Candidate 2008, William & Mary School of Law, B.A. English, magna cum laude, 2005, Salisbury University.