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Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts

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PROTECTING PREGNANT WOMEN: A GUIDE TO SUCCESSFULLY CHALLENGING CRIMINAL CHILD ABUSE PROSECUTIONS OF PREGNANT DRUG ADDICTS

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This Comment is intended to enable advocates for pregnant women to challenge the impermissible and unconstitutional prosecutions of pregnant drug users for criminal child abuse and endangerment. The Comment surveys the history of such prosecutions, and considers the policy justifications for them, before turning to an analysis of the frameworks that state appellate and supreme courts have applied in holding that these prosecutions may not proceed under various state laws. In summarizing the various challenges that may be brought to criminal prosecutions of pregnant drug addicts, this Comment illuminates the strategies that have been successful in previous cases, and offers various notes for those challenging future prosecutions.

I. INTRODUCTION

Use of illegal drugs by addicted women during their pregnancies poses a significant public health problem.[1] Since the late 1970s, state prosecutors

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[1] Public concern over the use of drugs by pregnant women became widespread after the 1988 release of a study conducted by the National Association for Perinatal Addiction Research and Education suggesting that as many as 375,000 newborns per year faced potential health damage resulting from pre-natal drug exposure. Jane E. Brody, *Widespread Abuse of Drugs by Pregnant Women Is Found*, N.Y. TIMES, Aug. 30, 1988, at A1. A more recent survey conducted by the Substance Abuse and Mental Health Statistics Administration, a division of the Department of Health and Human Services, reported that in 2004-2005, 97,000 pregnant women between the ages of fifteen and forty-four had used some form of illicit drug in the month prior to the survey. In comparison, 5,836,000 non-pregnant women in the same age range used illicit drugs in that same time period. DEP'T OF HEALTH & HUMAN SERV., RESULTS FROM THE 2005 NATIONAL SURVEY ON DRUG USE AND

seeking to punish these women for their drug use have made the problem a complex legal one as well.[2] Prosecutors bring criminal charges against pregnant women who use illicit drugs under a wide range of state statutes, including but not limited to those governing criminal child abuse,[3] criminal child mistreatment,[4] and attempted first-degree intentional homicide.[5]

State appellate courts have almost uniformly found that criminal prosecutions of pregnant women for the effects of their drug use on their fetuses are impermissible.[6] However, prosecutors around the country

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HEALTH: DETAILED TABLES tbl.7.69A (2006), *available at* http://www.oas.samhsa.gov/nsduh/2k5nsduh/tabs/2k5TabsCover.pdf.

[2] It is difficult to determine exactly when the practice of prosecuting pregnant drug users under state child abuse or endangerment statutes became common. The first such case heard by a state appellate court was *Reyes v. Superior Court*. 144 Cal. Rptr. 912 (Ct. App. 1977). The first scholarly discussion of the issue was published in 1983. John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 439 (1983) (arguing that *Reyes* was wrongly decided since the court had failed to consider the post-natal effects of the mother's pre-natal drug abuse).

[3] *See, e.g.*, Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993) (upholding convictions for possession of a controlled substance and of drug paraphernalia, but vacating conviction for criminal child abuse).

[4] *See, e.g.*, State v. Dunn, 916 P.2d 952 (Wash. 1996) (affirming trial court's dismissal of criminal mistreatment charges).

[5] *See, e.g.*, State v. J.Z., 596 N.W.2d 490 (Wis. 1999) (reversing an order that had denied a motion to dismiss charges of attempted homicide and first-degree reckless injury).

[6] This Comment uses the medically appropriate term "fetus" to refer to the "the unborn offspring . . . in humans from nine weeks after fertilization until birth." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 684 (30th ed. 2003). As a general rule, scholars who advocate a limited view of fetal rights in favor of an expanded view of pregnant women's rights consistently use the medical terms for the various stages of pregnancy, and are careful to refer to women who have not yet given birth as "pregnant women," rather than as "mothers." *See, e.g.*, Pamala Harris, Note, *Compelled Medical Treatment of Pregnant Women: The Balancing of Maternal and Fetal Rights*, 49 CLEV. ST. L. REV. 133, 135-36 (2001) ("[A] competent woman's choice to refuse to submit to medical treatment must always be honored even where her choice may be harmful to her fetus. A pregnant woman must be afforded the same rights as if she were not pregnant."). Scholars who prefer fetal rights to women's rights generally use less scientific terms such as "unborn child," and refer to a woman who has not yet given birth as a "mother." *See, e.g.*, James Denison, Note, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. CAL. L. REV. 1104, 1105 (1991) ("Courts already recognize rights of the unborn in many civil law contexts, including actions against the plaintiffs' mothers, making clear that a woman's control over her body is no longer inviolable." (internal citations omitted)). This Comment takes the former view of women's rights, rather than the latter, and therefore uses the former terminology. *Cf.* Kenneth A. DeVille & Loretta M. Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 334-35 (1999) (arguing that "defining a fetus from conception as a 'child' . . . blurs the significant difference between the previously unenforceable interests possessed by the fetus and the very real interests possessed by an ex utero child").

continue to bring these cases.[7] In September of 2007, a Missouri appellate court dismissed child endangerment charges brought against a woman who had used marijuana and methamphetamines during her pregnancy.[8] The court, applying canons of statutory construction, found that Missouri's child endangerment statute did not specifically prohibit conduct that had occurred during pregnancy and thus was harmful only to a fetus and not to a living child.[9] In 2007 and 2008, eight women in one Alabama jurisdiction (population 37,000) were prosecuted in an eighteen-month period for drug use during pregnancy.[10] The local prosecutor, referring to the need to protect "the child-to-be" from prenatal drug use, made use of a statute criminalizing "chemical endangerment of [a] child" that "was primarily intended to protect youngsters from exposure to methamphetamine laboratories."[11]

Consideration of legislative intent, and analysis of other rules of statutory interpretation, are among several grounds upon which state appellate courts have dismissed prosecutions of pregnant drug users. This Comment is intended to provide a general overview of these grounds, and of other methods which may be used by advocates for pregnant women to challenge these prosecutions. To that end, Part II of this Comment surveys state court decisions and scholarly analyses related to prosecutions of pregnant women, and identifies strategies that have proven successful in past cases. Part II also offers an in-depth case study of one successful challenge to a prosecution of a pregnant woman.

State prosecutors and pro-prosecution legal scholars justify these prosecutions with a wide range of policy arguments. Part III of this Comment analyzes and responds to many such justifications, providing arguments related to the failure of fetal abuse prosecutions to deter or prevent drug abuse during pregnancy, provide appropriate punishment to women deserving of such, or achieve improvements in maternal or fetal health outcomes.

Most state courts that have considered the permissibility of criminal child abuse or endangerment prosecutions of pregnant women have addressed the issue within the frameworks of statutory interpretation and

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[7] *See, e.g.*, Marie Szaniszlo et al., *Pregnant Mom Busted for Heroin; Endangerment Charges Eyed*, BOSTON HERALD, Dec. 5, 2007, at NEWS 2 ("Prosecutors are wading into the state's murky child endangerment law to determine if it applies to a nine-months-pregnant woman busted for allegedly shooting up heroin . . . .").

[8] State v. Wade, 232 S.W.3d 663 (Mo. Ct. App. 2007).

[9] *Id.* at 664-65.

[10] Adam Nossiter, *Rural Alabama County Cracks Down on Pregnant Drug Users*, N.Y. TIMES, Mar. 15, 2008, at A10.

[11] *Id.*

legislative intent.[12] Part IV of this Comment analyzes these frameworks and their applications in this context. These prosecutions, brought under pre-existing statutes not written with the problem of prenatal drug exposure specifically in mind, must be distinguished from prosecutions brought under newly enacted state statutes instituting criminal penalties for pregnant women who use drugs.[13] Although the new laws pose significant problems of their own, this Comment focuses on criminal prosecutions brought under general statutes not aimed specifically at the conduct of pregnant women. Statutory interpretation challenges to the prosecutions of pregnant women under these generic child abuse statutes generally begin, and frequently end, with a consideration of the plain text of the given statute.[14] Other canons of statutory construction, such as the rule of lenity[15] and the advisement to avoid constitutional conflicts,[16] also weigh heavily in favor of the dismissal of charges against addicted pregnant women. In addition, state appellate courts frequently consider whether it was the intent of the state legislature, in enacting a given statute, to allow prosecutions for actions of a pregnant woman before the birth of her child.[17]

There are also a number of constitutional considerations at issue in the analysis of these prosecutions, as discussed in Part V of this Comment. One is the requirement of fair notice, a central prerequisite for criminal prosecutions that is based in the Due Process Clause of the Fifth and

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[12] *See, e.g.*, Reinesto v. State, 894 P.2d 733, 735 (Ariz. Ct. App. 1995) (applying rules of statutory interpretation and holding that Arizona's child abuse statute did not cover prenatal conduct); Commonwealth v. Welch, 864 S.W.2d 280, 281 (Ky. 1993) (dismissing, on legislative intent grounds, charges brought under Kentucky's criminal child abuse statute); State v. Dunn, 916 P.2d 952, 954 (Wash. Ct. App. 1996) (holding that a fetus was not a "child" falling within the Washington criminal child mistreatment statute).

[13] Wisconsin, South Dakota, and South Carolina were the first three states to enact so-called "cocaine mom" statutes. The statutes allow pregnant women to be taken into custody and forced to either undergo mandatory drug rehabilitation or remain incarcerated until the end of their pregnancies. *See* Christa J. Richer, Note, *Fetal Abuse Law: Punitive Approach and the Honorable Status of Motherhood*, 50 SYRACUSE L. REV. 1127, 1132-33 (2000) (providing citations to the relevant statutes).

[14] *See infra* notes 99-113 and accompanying text.

[15] *See infra* notes 115-123 and accompanying text.

[16] *See infra* notes 124-127 and accompanying text.

[17] *See infra* Part IV.B. Statutes designed to criminalize child abuse or endangerment, which generally do not include provisions for acts causing prenatal harm, should be distinguished from laws specifically designed to advance the state's interest in protecting pregnant women against acts of violence. For an excellent overview of the various state approaches to this problem, see Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845 (2000).

Fourteenth Amendments.[18] Courts have noted that applying a child abuse statute that does not clearly criminalize prenatal conduct to a pregnant woman violates constitutional due process requirements.[19] Advocates for pregnant women also argue that these criminal prosecutions violate the Fourteenth Amendment requirement that no State may "deny to any person within its jurisdiction the equal protection of the laws,"[20] either because they represent violations of gender-based equal protection or because they have a biased intent and disparate impact on racial minorities. As other scholars have extensively considered this issue,[21] this Comment will not address it at length; nonetheless, advocates are reminded of its importance as a central line of constitutional challenge to prosecutions. This Comment also does not analyze the Fourth Amendment[22] barriers to these prosecutions, which have been addressed by the United States Supreme Court in *Ferguson v. Charleston*[23] and by many other commentators,[24] but advocates seeking to challenge criminal prosecutions of pregnant women should consider those issues as well.

The purpose of this Comment, therefore, is to provide pregnant women and their advocates with a set of tools that may be used to challenge

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[18] The Due Process Clause of the Fifth Amendment provides that no person may be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V, cl. 3. The Due Process Clause of the Fourteenth Amendment extends this requirement to the States: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1, cl. 3.

[19] Reinesto v. State, 894 P.2d 733, 734 (Ariz. Ct. App. 1995).

[20] U.S. CONST. amend. XIV, § 1, cl. 4.

[21] *See, e.g.*, DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 172-80 (Pantheon Books 1997); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (arguing that the punishment of black drug addicts who choose to carry their pregnancies to term violates equal protection rights because such punishment stems from, and perpetuates, racial stereotypes).

[22] U.S. CONST. amend. IV, cl. 1 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[23] 532 U.S. 67 (2001) (holding that a state hospital policy utilizing urine tests to obtain evidence of maternity patients' cocaine use for law enforcement purposes was an unreasonable search in violation of the Fourth Amendment).

[24] *See, e.g.*, Erin F. Barton, Comment, *What About My Right to Privacy? Where the Court Went Wrong in* Ferguson v. City of Charleston, 67 BROOK. L. REV. 261 (2001) (arguing that while reaching the correct result, the Court had failed to address the compelling right-to-privacy issues at stake in the case); Brigitte M. Nahas, Comment, *Drug Tests, Arrests & Fetuses: A Comment on the U.S. Supreme Court's Narrow Opinion in* Ferguson v. City of Charleston, 8 CARDOZO WOMEN'S L.J. 105, 106 (2001) (arguing that while the Court was correct in concluding that the policy at issue in *Ferguson* violated the Fourth Amendment prohibition on unreasonable searches and seizures, the Court's "special needs" analysis was vague and incomplete).

impermissible and unconstitutional criminal prosecutions brought against pregnant women under state child abuse or endangerment laws or similar statutes. After providing a historical overview, this Comment analyzes the policy arguments for and against these prosecutions. It then surveys past state appellate court decisions and discusses the various methods that advocates have successfully used to challenge prosecutions of pregnant women. This Comment concludes with a discussion of the constitutional implications of these prosecutions, focusing primarily on the violations of fair notice and equal protection requirements that are inherent in such cases.

II. BACKGROUND AND HISTORICAL OVERVIEW

A. EARLY CASES AND GENERAL TRENDS

In the late 1970s, state prosecutors began to prosecute pregnant women who used illegal drugs or alcohol under state child abuse or endangerment statutes, sometimes adding charges for drug trafficking or provision of drugs to a minor.[25] One of the first such prosecutions occurred in 1977, when the State of California charged a pregnant heroin user with felony child endangerment.[26] Although the defendant's twins had suffered withdrawal symptoms and other signs of heroin addiction as newborns, the California Court of Appeals held that the state child endangerment statute did not extend to conduct occurring before a child's birth.[27]

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[25] These prosecutions likely reflect the merger, and in a sense the personification, of two key social concerns that surfaced in this general time frame. The first of these was the beginning of a movement to establish fetal rights in order to undermine a woman's right to have an abortion, which the Supreme Court recognized in 1973; the second was mounting concern over the rising epidemic of drug abuse, particularly crack cocaine abuse, in the United States. *See* Janet Ashley Murphy & Robert A. Pugsley, *Successful Pregnancy Prevention Program for Addicts Remains Under Siege*, 5 J.L. SOC'Y 155, 157-72 (2003) (examining how the so-called crack baby crisis "transformed from a social and legal nightmare into a public health problem" and discussing a program, challenged by reproductive rights advocates, that offered drug-addicted women monetary incentives to undergo sterilization or use long-term forms of birth control such as Norplant); Andrea Sachs et al., *Here Come the Pregnancy Police: Mothers of Drug-Exposed Infants Face Legal Punishment*, TIME, May 22, 1989, at 104 (surveying early prosecutions of pregnant women for drug use during pregnancy and noting the "fear that the real goal in these cases may be an unspoken one: an end run around the U.S. Supreme Court's landmark abortion case"). *See generally* LAURA E. GÓMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE (1997) (chronicling the rise of public concern over so-called crack babies, describing the legislative process through which the supposed epidemic became a social problem, and explaining how state and local prosecutors began to use criminal child abuse laws to punish prenatal drug use by mothers, although not by fathers).

[26] Reyes v. Superior Court, 75 Cal. App. 3d 214 (Ct. App. 1977).

[27] *Id.* at 219.

In 1989, Jennifer Clarise Johnson was prosecuted under Florida law and convicted for delivering a controlled substance to minor children.[28] Johnson had used cocaine late in each of her pregnancies, and her conviction was upheld by the state district court on the theory that cocaine had passed from her system to her infant children after their birth but before the cutting of their umbilical cords.[29] The Florida Supreme Court subsequently overturned Johnson's conviction, holding that the Florida statute prohibiting delivery of controlled substances did not encompass delivery in this manner.[30]

The first case in which a woman was charged with child abuse on the theory that her use of drugs or alcohol during pregnancy constituted abuse of her fetus arose in 1990. Twenty-nine-year-old Diane Pfannenstiel, who was pregnant and the victim of spousal abuse, sought help from a Wyoming organization offering aid to battered women.[31] She went to the hospital for treatment, where testing revealed the presence of alcohol in her system.[32] Pfannenstiel was then arrested and charged under a Wyoming statute prohibiting child abuse, defined as "the intentional or reckless infliction of injury on a child."[33] This case represented "the first time that a woman was charged with child abuse, rather than fetal abuse, before there was a live child, and for engaging in an entirely legal activity."[34] A state trial judge dismissed the charges after a lengthy preliminary hearing, because the prosecution could not prove that the fetus had in fact suffered any injury.[35]

Mirroring the Pfannenstiel case, a recent prosecution of a woman in Alabama occurred when seven-months-pregnant Demetria Jones sought medical assistance at a Tennessee hospital, complaining of chest pains.[36] After tests revealed the presence of cocaine in her blood stream, she was arrested and taken to the county jail.[37] Jones was charged with "reckless endangerment with a deadly weapon," on the grounds that her cocaine

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

[29] *Id.* at 420.

[30] *Johnson*, 602 So. 2d at 1296.

[31] Ellen Goodman, *Being Pregnant, Addicted: It's a Crime*, CHI. TRIB., Feb. 11, 1990, at C12.

[32] *Id.*

[33] Renee I. Solomon, Note, *Future Fear: Prenatal Duties Imposed by Private Parties*, 17 AM. J.L. & MED. 411, 416 (1991) (citation omitted).

[34] *Id.*

[35] *Id.* Pfannenstiel later gave birth to a healthy baby boy. *See Woman Who Faced Charges Has Baby*, CHI. TRIB., June 17, 1990, at C22.

[36] Claudia Pinto, *Medical Officials Question Arrest of Pregnant Patient*, TENNESSEAN, Apr. 24, 2008.

[37] *Id.*

abuse constituted use of a deadly weapon against her fetus.[38] Her infant was later born healthy and "tested negative for cocaine."[39] Commentators at the time argued that the prosecution sent "the message to pregnant women: Don't seek emergency medical care."[40] The same could be said of Diane Pfannenstiel's case, almost twenty years previously.

As discussed below, state courts have generally held that prosecutions of pregnant women for criminal child abuse or endangerment (with a deadly weapon or otherwise) are impermissible.[41] Prosecutions based on state drug delivery statutes have also failed. For instance, the Nevada State Supreme Court held that the state child endangerment statute did not allow criminal charges to be brought for the transmission of illegal substances from mother to newborn child through the umbilical cord.[42] The Georgia Court of Appeals has ruled that transmission of drugs through the umbilical cord does not allow prosecution under drug transmission statutes, as such statutes require that the drugs be passed between two or more persons outside of their bodies.[43]

The weight of legal authority, therefore, supports the argument that prosecutions of pregnant women under state child abuse or endangerment statutes are impermissible. One notable exception to this general rule is a 1997 South Carolina Supreme Court case in which the court held that the state criminal child neglect statute would allow the prosecution of the mother of a newborn infant for injuries to her child resulting from her prenatal substance abuse.[44] This case is discussed at length in Part IV.B.

B. A CASE STUDY OF A SUCCESSFUL CHALLENGE

The 2006 New Mexico case of *State v. Martinez*[45] effectively illustrates many of the legislative and policy concerns that lead courts to prohibit the prosecutions of pregnant women under state child abuse or endangerment statutes. Moreover, it exemplifies the kind of successful

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[38] *Id.*

[39] *Id.*

[40] *Id.* (internal quotation marks omitted).

[41] *See infra* Part IV; *see, e.g.*, Reinesto v. Superior Court, 894 P.2d 733, 735 (Ariz. Ct. App. 1995) (noting a previous holding that the statutory definition of "child" as "an individual who is under eighteen years of age" did not extend to coverage of fetuses); State v. Gethers, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991) (holding that a state child abuse statute did not include harm to fetuses resulting from prenatal substance abuse).

[42] Sheriff v. Encoe, 885 P.2d 596, 599 (Nev. 1994).

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

[44] Whitner v. State, 492 S.E.2d 777, 778 (S.C. 1997).

[45] 137 P.3d 1195 (N.M. Ct. App. 2006).

challenge to prosecutions of pregnant addicts that this Comment is designed to facilitate.

In *Martinez*, the Court of Appeals of New Mexico held that the state's child abuse law did not authorize a criminal child abuse prosecution of a woman who had used cocaine during her pregnancy.[46] Martinez had delivered an infant daughter whose blood tested positive for high levels of cocaine.[47] Two months later she admitted to a police detective that she had ingested crack cocaine two days before her daughter's birth.[48] As a result, Martinez was charged with felony child abuse under the state statute that prohibited "knowingly, intentionally or negligently, and without justifiable cause, causing or permitting . . . [a c]hild to be . . . placed in a situation that may endanger . . . [a c]hild's life or health."[49]

The appellate court decided the question of "whether the Legislature intended a viable fetus to be considered a human being in the context of the child abuse statute."[50] In the course of finding that the state legislature had not so intended, the court cited its own prior holding that a fetus was not a human being for purposes of the state vehicular homicide law.[51] The court observed that subsequent to its decision in the vehicular homicide case, the legislature had been specific when it wished to include fetuses within the class of victims covered by a criminal statute.[52] The court also noted that it could not include fetuses within the statutory definition of "human being" in the absence of specific legislative intent to do so because the establishment of crimes and penalties was exclusively a legislative function.[53] A judicial decision criminalizing prenatal child abuse, the court explained, would violate Martinez's constitutional due process rights, as she did not have prior warning and fair notice that her conduct was criminal under the statute.[54]

A group of health care providers, child and social welfare advocates, and other entities filed an amicus curiae brief in the *Martinez* case that uses many of the most effective arguments against criminal prosecutions of pregnant drug addicts.[55] The brief argues that the criminal prosecution of

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[46] *Id.* at 1195.

[47] *Id.*

[48] *Id.* at 1196.

[49] *Id.* (citing N.M. STAT. § 30-6-1(D)(1)).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 1197.

[53] *Id.*

[54] *Id.* For further discussion of the fair notice problem, see *infra* Part V.A.

[55] Brief of Pegasus Legal Services for Children et al. as Amici Curiae Supporting Respondent, State v. Martinez, 161 P.3d 260 (N.M. 2007) (No. 29,775), *available at*

Martinez not only contradicted existing state law and policy, but also posed a serious public health threat that would negatively impact pregnant addicted women in the future.[56] While the brief focused largely on the medical, public health, and familial implications of prosecuting and punishing pregnant drug addicts,[57] it also observed that "the extension of child abuse statutes to include maternal conduct that may endanger a fetus leads to absurd, unintended, and dangerous results."[58] Advocates for pregnant women have strong arguments not only that these prosecutions are "absurd," but that they are also unwise, impermissible, and unconstitutional.

III. POLICY CONSIDERATIONS AND RATIONALES: ARGUMENTS FOR AND AGAINST ALLOWING CRIMINAL PROSECUTIONS OF PREGNANT WOMEN WHO USE DRUGS OR ALCOHOL

Before turning to the legislative and constitutional barriers to prosecutions of pregnant women, an advocate seeking to challenge such a prosecution should respond to the policy rationales offered by those advancing the particular prosecution. There are three main rationales generally presented in favor of these prosecutions. The first is that criminal prosecutions will have a deterrent effect: namely, that prosecuted women will refrain from drug use during potential future pregnancies and will serve as examples to their peers.[59] A South Dakota judge emphasized the prosecution-as-example motivation, stating that he "sought to 'send a strong message' to other pregnant addicts."[60] The second rationale is one of retribution, arguing that pregnant women who use drugs should be prosecuted not because it helps them or their children, but because they are deserving of punishment.[61] Finally, proponents argue that these criminal

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http://www.drugpolicy.org/docUploads/NMvMartinezAmicusBrief.pdf [hereinafter Brief of Pegasus Legal Services]. The brief was submitted after the New Mexico Supreme Court granted certiorari in the case, *State v. Martinez*, 141 P.3d 1280 (N.M. 2006), but before the court subsequently quashed its writ of certiorari, *Martinez*, 161 P.3d 260.

[56] Brief of Pegasus Legal Services, *supra* note 55, at 3.

[57] *See id.* at 7-26.

[58] *Id.* at 27.

[59] *See* Lisa M. Noller, Comment, *Taking Care of Two: Criminalizing the Ingestion of Controlled Substances During Pregnancy*, 2 U. CHI. L. SCH. ROUNDTABLE 367 (1995).

[60] Lisa Eckenwiler, *Why Not Retribution? The Particularized Imagination and Justice for Pregnant Addicts*, 32 J.L. MED. & ETHICS 89, 90 (2004) (citing State v. Christenson, No. CR1 (S.D. Circuit Ct. Mar. 12, 1990)).

[61] *See* Eckenwiler, *supra* note 60. For a compelling argument that pregnant women who use drugs are deemed worthy of punishment because they have failed to conform to societal norms of motherhood, see Richer, *supra* note 13, at 1141-43.

prosecutions will improve maternal and fetal health outcomes as a result of greater prenatal medical care and monitoring.[62]

The prosecution-as-deterrence argument is fairly straightforward. As with any deterrence rationale, the belief is that if pregnant women thought that their use of illegal drugs would lead to imprisonment, they would cease such use.[63] Ironically, those who advance this argument also note both that "addiction is a disease that is difficult to cure"[64] and that there are few to no drug rehabilitation programs willing to work with pregnant women.[65] Jennifer Johnson, the Florida woman discussed above who was prosecuted for delivering cocaine to her newborn through the umbilical cord, sought treatment during her pregnancy but was unable to find a substance abuse program that would accept her.[66]

In fact, there is sometimes a direct link between a woman's inability to access appropriate drug rehabilitation services and her subsequent prosecution. One young woman enrolled in a methadone-based heroin recovery program, and as a result gave birth to a drug-addicted newborn.[67] This story provides insight into further ramifications of the lack of appropriate drug-rehabilitation services for pregnant women, and makes the simple deterrence argument for prosecution seem even more difficult to achieve.

Additionally, experience has shown that women who face this dilemma often choose to end their pregnancies, rather than to end their addictions.[68] At least one state court has recognized that prosecutions of

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[62] *See* April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 154 (2007). This argument has also appeared in appellate briefs submitted on behalf of prosecuting States. *See* Brief for the National Association of Counsel for Children as Amicus Curiae Supporting Respondents at 4-5, State *ex rel.* M.W. v. Kruzicki, 561 N.W.2d 729 (Wis. 1997) (No. 95-2480-W), *available at* 1996 WL 33476203.

[63] Noller, *supra* note 59, at 369.

[64] *Id.* at 384.

[65] *Id.* at 372-73. For an example of a successful program specifically tailored to the needs of pregnant drug addicts, see Laura Novak, *Forging Ahead with Life's Tests, One Day at a Time*, N.Y. TIMES, Nov. 12, 2007, at H12.

[66] *Id.* at 132 (internal citation omitted).

[67] *See* Page McGuire Linden, *Drug Addiction During Pregnancy: A Call for Increased Social Responsibility*, 4 AM. U. J. GENDER SOC. POL'Y & L. 105, 116-17 (1995).

[68] *See* Roberts, *supra* note 21, at 1446 ("[T]he state's punitive action may coerce women to have abortions rather than risk being charged with a crime."). It is difficult to find exact statistics on the magnitude of this unintended consequence of prosecuting pregnant women, although one study reported that "two-thirds of the women [surveyed] who reported using cocaine during their pregnancies . . . considered having an abortion." JEANNE FLAVIN, OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA 112 (2009) (citation omitted). Although federal agencies maintain exhaustive records about women who have legal abortions, their data do not include any information about reasons why women

pregnant women for prenatal substance abuse would encourage at-risk mothers to terminate their pregnancies.[69] For this reason, some pro-life groups have spoken out against these prosecutions. The spokeswoman for Texas Right to Life, a major anti-abortion lobby, stated that "telling [a pregnant addict], 'By the way, you might be charged with criminal penalties,' would make it likely that she could abort the child."[70] Even some authors who support fetal abuse prosecutions have observed that the possibility of discovery and criminal punishment may encourage addicted women to seek abortions.[71]

A second rationale for prosecuting addicted pregnant women does not pretend to be interested in the health of these women or of the fetuses they carry, but appeals to a simpler and starker notion of criminal justice: retribution. Retribution is a theory of criminal justice and punishment based on the belief that those who intentionally commit morally or legally wrongful acts should be held responsible.[72] As a Florida judge stated upon convicting one pregnant drug user: "'The choice to use or not to use cocaine is just that—a choice'.... 'Once the defendant made that choice she assumed responsibility for the ... consequences ....'"[73] In the trial of Malissa Ann Crawley, a South Carolina woman who was sentenced to five years in prison for smoking cocaine during her pregnancy, the judge put the matter even more bluntly: "I'm sick and tired of these girls having these

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choose abortion, and there are no studies on the motivations of women who are forced to seek illegal abortions. *See, e.g.*, Lilo T. Strauss et al., CDC, *Abortion Surveillance—United States, 2004*, MORBIDITY AND MORTALITY WEEKLY REP., Nov. 23, 2007, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5609a1.htm. There are, however, many anecdotal examples of women forced to choose between facing criminal prosecution and ending their pregnancies. *See, e.g.*, *To Stop Abortion by Addict, Her Brother Steps in*, N.Y. TIMES, Feb. 23, 1992, at Sec. 1, pg. 24.

[69] State v. Gethers, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991).

[70] Lomi Kriel, *AG Says Docs Needn't Report Moms' Drug Use; Prosecutor Was Using Law to Go After Pregnant Women*, SAN ANTONIO EXPRESS-NEWS, Jan. 7, 2005, at 5B.

[71] Denison, *supra* note 6, at 1130.

[72] Eckenwiler, *supra* note 60, at 90. Feminist scholars have argued that the moral violation for which pregnant addicts are punished is not their drug abuse or any resultant harm to the fetus, but rather their deviation from "the norm of the ideal mother, especially when they commit 'unfeminine crimes.'" Richer, *supra* note 13, at 1142 (internal citations omitted); *see also* Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 951 (1997) (arguing that prosecutions predominately targeting black pregnant women stem from a widely held "image of the undeserving [b]lack mother").

[73] Mark Curriden, *Holding Mom Accountable*, 76 A.B.A. J., March 1990, at 50, 51 (quoting Florida Circuit Judge O.H. Heaton, Jr.). The judge in this case was acting upon a sentencing recommendation from a state prosecutor who stated that he wanted to send the "message ... that this community cannot afford to have two or three cocaine babies from the same person." *Id.*

bastard babies on crack cocaine and . . . the law they gave me, it said I could put them in jail."[74]

Just as the deterrence rationale ignores the possibility that women may choose to end their pregnancies rather than work to overcome their drug addictions, the retribution rationale ignores the wide array of social and cultural forces that lead to drug use and make it difficult for even the most well-intentioned pregnant women to cease their use of illegal drugs during their pregnancies.[75] Although a number of pilot programs focusing on early intervention, group counseling, and long-term follow-up have been successful, these programs are neither widely available nor well-funded.[76]

In addition, the selection of pregnant women as the particular targets of these retributive desires raises significant constitutional concerns, as some judges are motivated to punish pregnant drug users more harshly than other drug defendants.[77] This disparity raises concerns of equal protection violations as in any case where "judicial application of punitive measures is uneven" in a potentially gender-biased way.[78] Another equal protection

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[74] Bob Herbert, *In America; Pregnancy and Addiction*, N.Y. TIMES, June 11, 1998, at A31.

[75] In addition to the various well-known psychological factors that make drug addiction particularly difficult to cure, "[m]any drug treatment programs are not designed with the needs of women in mind," particularly as relates to the connection between drug abuse and domestic violence. Linda C. Fentiman, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U. L. REV. 537, 592-93 (2006). For an examination of the particularly traumatic nature of crack addiction for women, see Mindy Thompson Fullilove et al., Clinical Note, *Crack 'Hos and Skeezers: Traumatic Experiences of Women Crack Users*, 29 J. SEX RES. 275, 275 (1992) (explaining that female crack users are particularly susceptible to trauma not only as a result of their drug use, but also because of the stigma that results "from membership in a despised or oppressed group").

[76] Nat'l Inst. on Drug Abuse, *Support Group Improves Outcomes for Pregnant Drug Users*, 14 NIDA NOTES, Nov. 1999, http://www.drugabuse.gov/NIDA_Notes/NNVol14N4/BBoard.html#Support (noting the release of a study finding that "women who participated in a drug abuse support group had more prenatal care visits than drug-abusing women who did not attend the support group, and their infants had higher birthweights"); *see also* Liz Szabo, *Intervention Negates Drug Toll in Pregnancy; Early Intervention Is Key to Healthiness*, USA TODAY, June 26, 2008, at 6D (discussing a successful comprehensive prenatal drug treatment program implemented at a California hospital). These programs appear to be funded sporadically by federal and private grants rather than on any consistent national basis. *See, e.g.*, Don Finley, *Grant Aims to Get 180 Moms off Drugs Over Next 5 Years*, SAN ANTONIO NEWS-EXPRESS, Oct. 27, 2007, at 4B.

[77] Peggy Hora & Barrie Becker, *Judicial Considerations When Sentencing Pregnant Substance Users*, 35 JUDGES J., Spring 1996, at 3, 7; *see also* Linden, *supra* note 67, at 129-30 (arguing, in the context of involuntary civil commitments of pregnant women, that "there is an injustice in a system which forces treatment upon a woman, not because she has committed a crime, but rather because she has become pregnant").

[78] Hora & Becker, *supra* note 77, at 8.

issue is raised by those who note that women of color are significantly more likely to be arrested and tried for drug use during pregnancy than white women,[79] an arguable violation of equal protection of the laws based on race that should be subject to strict judicial scrutiny.[80]

A third rationale for these prosecutions is that monitoring or imprisoning pregnant women through application of criminal sanctions will lead to improved maternal or fetal health outcomes.[81] For example, selective prosecutions of pregnant women of color are often justified in the guise of public concern over an epidemic of so-called crack babies.[82] Studies have shown, however, that cocaine's effects on a fetus "are less severe than those of alcohol and are comparable to those of tobacco."[83] Moreover, public health officials generally discourage these prosecutions, believing that pregnant women tend to react to the threat of prosecution not by terminating their drug use, but by avoiding prenatal care.[84] As a result of this concern, an array of leading medical and public health associations, including the American Medical Association and American Academy of Pediatrics, have registered their opposition to criminal punishment of pregnant drug users.[85] The Florida Supreme Court has also noted this issue, arguing that pregnant women who are addicted to drugs may choose not to

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[79] Roberts, *supra* note 72, at 938 & nn.3-5 (citing an unpublished report prepared by the American Civil Liberties Union Reproductive Freedom project and her own interviews with the attorneys of prosecuted women).

[80] *See infra* Part V.B; *see also* Kathleen R. Sandy, *The Discrimination Inherent in America's Drug War: Hidden Racism Revealed by Examining the Hysteria over Crack*, 54 ALA. L. REV. 665 (2003) (noting that the social costs of the drug war are disproportionately paid by black Americans and particularly by black mothers).

[81] *See, e.g.*, Noller, *supra* note 59, at 389 (advocating for strictly criminalizing drug use during pregnancy as the only way "to prevent thousands of babies from being born with physical and mental defects").

[82] *See* FLAVIN, *supra* note 68, at 108-15 (discussing selective prosecutions of women, particularly women of color, for exposing their fetuses to illegal drugs in the absence of clear evidence linking such exposure to actual harm).

[83] Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES, Jan. 27, 2009, at D1.

[84] 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, 470 (2007). For an excellent analysis of the "incomplete science" linking prenatal drug use to negative fetal health outcomes, see Michelle D. Mills, Comment, *Fetal Abuse Prosecutions: The Triumph of Reaction over Reason*, 47 DEPAUL L. REV. 989, 999-1001 (1998). Other scholars have noted the serious correlation versus causation problem present in many studies that attempt to separate the effects of prenatal drug abuse from other health and economic factors. *See* Roberts, *supra* note 21, at 1429-30 ("The interpretation of studies of cocaine-exposed infants is often clouded by the presence of other fetal risk factors . . . . [P]regnant addicts often receive little or no prenatal care and may be malnourished."). The problem implicates issues of access to health care and class disparities in medical treatment that go far beyond the scope of this Comment.

[85] Cherry, *supra* note 62, at 154.

seek prenatal care because they are afraid of detection and prosecution, even though their pregnancies present an extraordinary need for prenatal and neonatal interventions.[86] In one attempt to solve this problem, an Arkansas county circuit judge placed an unborn fetus in the custody of the Department of Human Services, and stated in her ruling that:

> I can't stop her [the mother] from using drugs, but I can keep her off of them until she has this child . . . by keeping her locked up. And the child is not to leave the hospital with her . . . . She's going to have an ultrasound and other prenatal tests, and I want to know if the baby has any overt signs of malformation. And then I want her to remain in the jail until she goes into labor, and then she's going to be taken directly out to the hospital for delivery.[87]

While having the virtue of blunt efficacy, incarcerating pregnant women simply to force them to undergo medical treatment violates their rights of personal liberty and bodily integrity. Pregnant women have been subjected to incarceration or other criminal sanctions for a variety of reasons: to prevent them from having access to illegal drugs, to compel them to carry their pregnancies to term, to force them to submit to a physician's orders regarding their care, or to allow the courts in other ways to control and direct a woman's conduct during her pregnancy.[88] Instead of improving access to comprehensive maternal and child prenatal care and thus benefiting the fetus and the mother, incarceration of pregnant women may actually result in serious harm, either by restricting access to prenatal care or exposing them to less-than-ideal conditions within the prison itself.[89] Incarceration of pregnant women does not help them to overcome their addictions, nor does it serve to protect their fetuses from drug use, as illegal drugs are readily available in prison.[90] Although some may argue that women in prison would have better access to prenatal care than they could afford or would choose to seek out otherwise, prisons are not prepared to offer adequate care to pregnant women.[91]

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[86] Johnson v. State, 602 So. 2d 1288, 1295-96 (Fla. 1992).

[87] Bennett v. Collier, 95 S.W.3d 782, 783-84 (Ark. 2003) (alteration in original) (referring to, but not citing, the opinion of Circuit Judge Collier in the course of overturning the lower court's ruling for lack of jurisdiction).

[88] Cherry, *supra* note 62, at 148.

[89] *Id.* at 154.

[90] *See, e.g.*, Thomas E. Feucht & Andrew Keyser, *Reducing Drug Use in Prisons: Pennsylvania's Approach*, NAT'L INST. OF JUST. J., Oct. 1999, at 10, 11 (asserting that "prison inmates still manage to obtain illicit drugs" and detailing the extreme lengths to which the Pennsylvania prison system went in order to control drug use in state prisons).

[91] Hora & Becker, *supra* note 77, at 6, 8 (detailing various cases in which pregnant women have brought suit against prison officials for misconduct resulting in late term miscarriages, infant deaths, and other harms).

For these reasons, the stated rationale that prosecuting and confining pregnant women will protect women and their fetuses can be challenged by advocates for pregnant women with evidence of the actual effects of such confinement. Even if pregnant women are not incarcerated, the threat of criminal prosecution can wreak serious harm on the doctor-patient relationship, and may encourage pregnant women to refrain from candidly discussing their drug use with their doctors because they are afraid such disclosure will result in criminal prosecution.[92]

Strong policy arguments can have the effect of encouraging appellate courts to defer to legislative judgments disallowing criminal child abuse prosecutions of pregnant women.[93] As a general procedural note, it is important that advocates for pregnant women present these policy arguments at the trial level in order to preserve them for appellate review. As the Kentucky Supreme Court noted with reference to a public health argument, the evidence and expert testimony underlying these policy arguments must be authenticated and rendered admissible at trial in order for them to enter into the record available for appellate review.[94]

IV. STATUTORY ANALYSIS AND LEGISLATIVE INTENT: A SURVEY OF STATE COURT HOLDINGS

While consideration of policy arguments is important for advocates for pregnant women, the majority of state appellate courts, when confronted with a prosecution of a pregnant woman under a state child abuse or endangerment statute, have chosen to treat the analysis as an exercise in statutory interpretation.[95] And in almost every case, that exercise has ended with the conclusion that the state statute at hand was not intended by the given state legislature to cover, and cannot be read to cover, prenatal conduct of a pregnant woman affecting only her fetus. This conclusion is the only correct one given existing standards and methods of statutory construction, and a defense argument based on statutory interpretation and

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[92] Brief of Pegasus Legal Services, *supra* note 55, at 8.

[93] Reinesto v. Superior Court, 894 P.2d 733, 737 (Ariz. Ct. App. 1995) (noting that the complexity of the policy arguments presented weighed heavily in favor of a legislative determination of which methods would most appropriately address the consequences of prenatal drug abuse).

[94] Commonwealth v. Welch, 864 S.W.2d 280, 284-85 (Ky. 1993).

[95] *See, e.g.*, Herron v. State, 729 N.E.2d 1008, 1010 (Ind. Ct. App. 2000) (writing that in addressing the question of "whether an unborn child is a dependent . . . we turn to the rules of statutory construction"); State v. Wade, 232 S.W.3d 663, 664 (Mo. Ct. App. 2007) (noting that "[s]tatutory interpretation is an issue of law which this court reviews *de novo*"); State v. Martinez, 137 P.3d 1195, 1196 (N.M. Ct. App. 2006) (explaining that "[r]esolution of this issue requires us to interpret and ascertain the Legislature's intent in drafting the child abuse statute").

legislative intent should prove successful if grounded in the particular language and legislative history of the statute at hand.

In conducting this analysis, courts focus on the guiding principle that it is the role of the legislature, rather than the judiciary, to define the limits of criminal behavior.[96] Courts often note that the decision not to enact particular statutes criminalizing prenatal conduct reflects a considered policy decision on the part of the legislature, one which they are reluctant to question.[97] Legislative intent can be analyzed positively on the basis of affirmative acts of the legislature in response to existing or proposed child abuse statutes. It can also be analyzed negatively; in at least one instance when a court had previously ruled on the construction of a state child abuse statute, legislative inaction after that holding was found to constitute an endorsement of the court's decision.[98]

A. APPLICATION OF THE RULES OF STATUTORY INTERPRETATION

Advocates for pregnant women facing criminal charges stemming from their use of illegal drugs during pregnancy can make statutory interpretation arguments based on the text of the given statute at issue. These include a textual argument that a fetus is not a "child" as defined in the state child abuse statute, a contextual argument based on the entirety of a given state's code, a legal argument related to the established rule of lenity, and a constitutional argument based on women's rights to bodily autonomy. This Part provides an overview of these arguments and an analysis of their efficacy.

Any exercise in statutory application begins with a close analysis of the statute itself.[99] In the prosecutions at issue here, the state statutes applied are usually expressly aimed at targeting the problem of child abuse. These laws allow the prosecutions of those who recklessly endanger or abuse children. To provide a specific example, the Illinois Code makes it unlawful "for any person to willfully cause or permit the life or health of a

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[96] *See, e.g.*, *Martinez*, 137 P.3d at 1197 ("[T]he power to define crimes and to establish criminal penalties is exclusively a legislative function.").

[97] *See, e.g.*, Kilmon v. State, 905 A.2d 306, 311 (Md. 2006).

[98] State v. McKnight, 576 S.E.2d 168, 175 (S.C. 2003) (arguing that as the South Carolina Supreme Court had previously held "child" to include "fetus" and the legislature had not acted to overturn that result, applying the same interpretation subsequently was in line with legislative intent). The McKnight decision will be discussed at greater length in Part V.B, *infra*.

[99] As Justice Rehnquist once wrote for a unanimous Supreme Court: "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Prod. Safety Comm'n. v. GTE Sylvania, 447 U.S. 102, 108 (1980).

child under the age of 18 to be endangered or to willfully cause or permit a child to be placed in circumstances that endanger the child's life or health."[100]

Because state child abuse statutes are designed to protect children, not other potential victims of abuse, interpretation of these statutes should begin with analysis of the scope of the protected class—what is meant by child abuse? Whether applying the Illinois Code or the Code of any other state, pregnant women can argue that the plain meaning of the word *child* cannot logically be stretched to cover acts affecting a fetus.[101] Courts have noted that the usual meaning of the word *child* does not include application prior to an infant's birth, observing that common usage of the terms *parent* and *child* generally means that pregnant women do not become parents prior to the birth of their children, and that fetuses do not become children prior to birth.[102]

Another commonly used technique is for courts to examine the use of the word *child* in other sections of a given state's code, as in this example from an opinion of the Oklahoma Supreme Court:

> Section 7001-1.3 contains definitions for "Child in need of mental health treatment," § 7001-1.3(5); "Child with a disability," § 7001-1.3(6); "Child-placing agency," § 7001-1.3(7). The legislature's choice to define and include these phrases within the ambit of the Oklahoma Children's Code makes it abundantly clear that it intended the Code to apply to those human beings who have been born and who are under the age of eighteen. No fetus could be in need of mental health treatment, and no fetus could be placed through child placement services. These terms apply only to those who are born, living outside the womb of the mother.[103]

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[100] 720 ILL. COMP. STAT. ANN. 5/12-21.6 (West 2002) (emphasis added). Illinois law does specifically address the exposure of newborns to illegal substances in another provision of the code, stating that "a newborn infant whose blood, urine, or meconium contains any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act or a metabolite thereof" is a neglected child for the purposes of civil actions to terminate parental rights. 325 ILL. COMP. STAT. ANN. 5/3 (LexisNexis 2007 & Supp. 2008).

[101] *See, e.g.*, People *ex rel.* H., 74 P.3d 494, 495 (Colo. App. 2003) (finding that the Colorado Children's Code intended *child* to mean a person from birth to age eighteen); *see also* Reinesto v. Superior Court, 894 P.2d 733, 735 (Ariz. Ct. App. 1995) ("Applying the ordinary meaning of these words leads us to conclude that the statute refers to conduct that directly endangers a child, not to activity that affects a fetus and thereby harms the resulting child.").

[102] State v. Gray, 584 N.E.2d 710, 711 (Ohio 1992) (holding that a mother could not be prosecuted under the state statute for substance abuse occurring before the birth of the child).

[103] Starks v. State, 18 P.3d 342, 346 (Okla. 2001) (holding that the trial court had committed reversible error when it found that "the Oklahoma Children's Code provided an avenue for it to take temporary emergency custody of appellant's fetus"); *see also H.*, 74 P.3d 494 (finding that the Colorado Code contained various references indicating that a "child" was a person from birth to age eighteen).

This technique is known as the whole act rule, a canon of statutory construction stating that individual provisions are to be interpreted in light of the language and objectives of the entire statute.[104] This rule generally means that courts will not confine their analysis to the particular line of legislation at issue, but will consider the entire statute as well as the underlying purposes and policies of the law.[105]

As noted throughout this Comment, however, there are outlier cases that provide counterweights to the prevailing conclusion that child abuse statutes do not cover conduct occurring before a child's birth. In 1998, the Family Court in New York's Suffolk County found that the Family Court Act could be extended to protect a fetus from acts of a pregnant woman which could cause damage to the child at or after its birth.[106] The court in that case considered the question of whether a fetus was a legal "personality" such that the court could enter a finding of "derivative neglect" of the fetus on the grounds that "evidence of abuse or neglect of one child indicates a fundamental defect in the parent's understanding of the duties of parenthood."[107] The court reasoned that the entirety of the Family Court Act must be read as a whole, and that various sections of the Act, particularly those related to paternity petitions and property rights, indicated a legislative intent and purpose to protect fetal interests.[108] As a result, the court found that the pregnant woman could be found liable for neglect of her fetus.[109] The court's analysis is problematic in several respects, and the case has little precedential value; to date, it has been referenced by only one other court, which presented it as a singular counterexample to a widely supported rule.[110]

In another case contrary to the weight of legal authority on the subject, the Ohio Supreme Court held, in a proceeding under that state's civil abuse statute, that a newborn child whose blood tests positive for the presence of illegal drugs is *per se* an abused child.[111] The court based its decision on

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[104] Described by Black's Law Dictionary as the "whole-statute rule," this is a "principle of statutory construction that a statute should be considered in its entirety, and that the words used within it should be given their ordinary meanings unless there is a clear indication to the contrary." BLACK'S LAW DICTIONARY 1628 (8th ed. 2004).

[105] Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (internal citations omitted).

[106] *In re* Unborn Child, 683 N.Y.S.2d 366, 368 (Fam. Ct. 1998) (addressing the State's petition of derivative neglect of a fetus when the pregnant woman had admitted to using drugs during her pregnancy, had previously given birth to a cocaine-positive infant, and, on grounds of child neglect, had her parental rights to her first four children terminated).

[107] *Id.*

[108] *Id.*

[109] *Id.* at 371-72.

[110] People *ex rel.* H., 74 P.3d 494, 497 (Colo. Ct. App. 2003).

[111] *In re* Baby Boy Blackshear, 736 N.E.2d 462, 465 (Ohio 2000).

the assertion that the question was not whether the fetus was a child within the meaning of the statute, but whether the relevant code section applied to a newborn child born with drugs in his system as the result of maternal drug use during gestation.[112] This is a rather oblique way of addressing the issue, seemingly intended to allow the court to avoid the truly critical question of whether a fetus is a child that can be covered by a state child abuse statute (as noted in the concurring opinion).[113]

As in the above Ohio case, pregnant women around the country sometimes face civil, rather than criminal, actions resulting from their use of illegal drugs during pregnancy, such as actions to remove children from their parents' custody and to terminate parental rights.[114] However, this Comment is intended primarily to strengthen defenses to criminal prosecutions. In this context, a canon of statutory interpretation applicable to criminal law, known as the rule of lenity, must also be considered.[115] The rule of lenity generally requires that when a criminal statute is ambiguous, courts must resolve the ambiguity in favor of the criminal defendant.[116] In cases where the text and context of the code provision may not clearly prove or disprove the applicability of a child abuse statute to a woman's prenatal conduct, the rule of lenity should apply, as expressed by the Supreme Court's dicta in *United States v. Granderson*: "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."[117]

Because there is significant legal debate concerning the permissibility and constitutionality of prosecutions of pregnant women who use drugs (at least absent legislative clarity), and because this area is replete with ambiguities, the rule of lenity militates against allowing these prosecutions.

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[112] *Id.* at 464.

[113] *Id.* at 465 (Resnick, J., concurring).

[114] *See, e.g.*, Bennett v. Collier, 95 S.W.3d 782 (Ark. 2003) (relating to an order terminating the parental rights of a pregnant woman who was using drugs even before the birth of the child); *H.*, 74 P.3d 494 (involving civil dependency and neglect proceedings brought as a result of a pregnant woman's methamphetamine use); State *ex rel.* M.W. v. Kruzicki, 561 N.W.2d 729 (Wis. 1997) (involving a civil action to take a fetus into protective custody).

[115] This is an old and well-established rule. *See, e.g.*, Rewis v. United States, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (citation omitted)).

[116] BLACK'S LAW DICTIONARY, *supra* note 104, at 1359.

[117] 511 U.S. 39, 54 (1994).

Courts in two recent cases have applied the rule of lenity in deciding that state statutes could not be extended to encompass prenatal conduct.[118]

In 2005, the Supreme Court of Hawaii held that a mother could not be charged for manslaughter when her infant son died two days after his birth as a result of her prenatal ingestion of crystal methamphetamine.[119] The court noted that since there was neither clear statutory language nor any clear expression of legislative intent, they were required to apply the rule of lenity and that as a result, the state statute had to be construed in favor of the defendant.[120]

In *State v. Martinez*, discussed in detail above, the Court of Appeals of New Mexico found that cocaine use during pregnancy could not form the basis for a felony child abuse charge.[121] The *Martinez* court explained that as a rule of statutory interpretation "penal statutes must be strictly construed, and any doubts about their construction must be resolved in favor of lenity."[122] Courts are also careful to avoid judicially expanding a criminal statute beyond the scope of that which was intended by the legislature.[123] The courts' analysis of the rule of lenity is closely tied to their concerns about constitutional requirements of fair notice, an issue analyzed at greater length in Part V.A.

A final relevant rule of statutory interpretation is the admonition that courts must avoid interpreting statutes in ways that would create constitutional conflicts, if other interpretations are available. In *NLRB v. Catholic Bishop of Chicago*, the Supreme Court made it clear that an act of Congress should not be construed to violate the Constitution if any other possible construction is possible.[124] State courts should do the same with state statutes and avoid interpreting the textual meanings of state criminal laws in ways that may create conflicts with federal or state constitutional rights.

Given that the Supreme Court has recognized a woman's right to bodily autonomy and to control over her own reproductive decisions,[125]

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[118] State v. Aiwohi, 123 P.3d 1210, 1225 (Haw. 2005); State v. Martinez, 137 P.3d 1195 (N.M. Ct. App. 2006).

[119] *Aiwohi*, 123 P.3d at 1225.

[120] *Id.* at 1224.

[121] *Martinez*, 137 P.3d at 1195.

[122] *Id.* at 1197 (quoting State v. Leiding, 812 P.2d 797, 799 (N.M. Ct. App. 1991)).

[123] *See, e.g.*, Herron v. State, 729 N.E.2d 1008, 1011 (Ind. Ct. App. 2000) (holding that an unborn child is not a dependent under Indiana law, and that therefore a pregnant woman cannot be charged with neglect of a dependent child).

[124] 440 U.S. 490, 500 (1979).

[125] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973). In *Roe*, the Court held that there is a constitutionally-based right to privacy "broad enough to cover the abortion decision." *Id.* at 155. The Court has subsequently noted that decisions regarding reproductive rights are those

criminal prosecutions of pregnant women for acts which harm their fetuses but no one else veer dangerously close to infringing upon constitutionally protected privacy and procreative rights. State legislatures cannot be presumed to enter purposefully into such shaky constitutional terrain absent evidence of specific intent to do so.[126] While many women have asserted a constitutional conflict when challenging their prosecutions for prenatal drug use, courts generally decline to reach the constitutional question, instead deciding the cases on statutory interpretation, legislative intent, or other less fundamental grounds.[127]

A successful statutory interpretation challenge, therefore, should rely upon these four main arguments: the word *child* or *person* in the statute at issue is not intended to encompass conduct with reference to fetuses; the whole act of the given state's children's or family code indicates a legislative understanding and intent of *child* as meaning a minor from birth onwards; the rule of lenity militates against reading a criminal child abuse or endangerment statute in a way that would punish a woman for conduct during pregnancy; and a punitive reading would conflict with a woman's constitutional rights of privacy and reproductive autonomy.

B. LEGISLATIVE INTENT

Courts confronting prosecutions of pregnant women, after considering the text of the statute at issue, have also analyzed the intentions of the state legislatures as expressed during the enactment process of the state's child abuse or endangerment statutes.[128] The majority of courts that have

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"matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [that] are central to the liberty protected by the Fourteenth Amendment." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

[126] *See, e.g.*, N.J. Div. of Youth & Family Serv. v. L.V., 889 A.2d 1153, 1158 (N.J. Super. Ct. Ch. Div. 2005) (holding that a woman who had refused to take certain HIV medications during her pregnancy had not committed child abuse because, *inter alia*, the relevant statute "does not and cannot be construed to permit government interference with a woman's protected right to control her body and her future during her pregnancy").

[127] *See, e.g.*, Reinesto v. Superior Court, 894 P.2d 733, 738 (Ariz. Ct. App. 1995) ("Petitioner also argues that charging her with violating section 13-3623 violates her right to privacy under the Arizona and Federal Constitutions. Given our conclusion that Arizona's child abuse statute does not reach petitioner's conduct, we decline to reach that constitutional issue.").

[128] *See, e.g.*, Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993) (addressing the question of whether "the General Assembly intend[ed] to include prenatal injury from a pregnant woman's self-abuse as well as injury inflicted by a third person" as the "dispositive" issue in the case); State v. Wade, 232 S.W.3d 663, 666 (Mo. Ct. App. 2007) (finding a clear "indication of the legislature's intent to avoid the criminal prosecution of mothers whose addictive behaviors may indirectly harm their unborn children"); State v. Martinez, 137 P.3d 1195, 1196 (N.M. Ct. App. 2006) (stating that "this Court must

performed this analysis have concluded that legislative intent underlying state child abuse or endangerment statutes does not allow prosecutions of pregnant women for acts or omissions with reference to the fetuses they carry.[129]

One such case was an appeal from a criminal child abuse prosecution in Kentucky.[130] In *Welch*, the Supreme Court of Kentucky vacated a conviction entered against a woman whose newborn had suffered severe drug withdrawal symptoms shortly after birth. The court held, on the basis of its legislative intent analysis, that the legislature had not intended to impose additional criminal penalties upon the use of drugs during pregnancy, but rather intended to subject pregnant drug users to the same criminal penalties as all other drug users.[131]

In a Maryland case, Regina Kilmon was charged with creating a substantial risk of harm to her child by using cocaine during pregnancy,[132] and was found guilty of reckless endangerment under Maryland law.[133] On appeal, her case was combined in the Maryland Court of Appeals with that of Kelly Lynn Cruz, which contained similar facts and a similar reckless endangerment charge.[134] The appellate court reversed the two convictions, explaining that the answer to the question presented—"whether the intentional ingestion of cocaine by a pregnant woman can form the basis for a conviction . . . [for] the reckless endangerment of the later-born child"—was *no*.[135]

The court noted that because the crime charged was purely one of statutory creation, the issue before it was a matter of statutory

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determine whether the Legislature intended a viable fetus to be considered a human being in the context of the child abuse statute"); State v. Dunn, 916 P.2d 952, 955 (Wash. Ct. App. 1996) (explaining that "[w]hen the Legislature intends to include the fetus in a class of criminal victims, it specifically writes that language into the statute").

[129] *See, e.g.*, *Welch*, 864 S.W.2d at 280; *Wade*, 232 S.W.3d at 666; *Martinez*, 137 P.3d at 1198; *Dunn*, 916 P.2d 952 at 955.

[130] *Welch*, 864 S.W.2d 280.

[131] *Id.* at 284.

[132] Kilmon v. State, 905 A.2d 306, 307 (Md. 2005).

[133] MD. CODE ANN., CRIM. LAW § 3-204(a)(1) (LexisNexis 2002 & Supp. 2008).

[134] *Kilmon*, 905 A.2d at 308. Cruz had given birth at twenty-nine weeks of pregnancy to a baby boy, and drug tests had revealed the presence of cocaine in his system and in her own. Stephanie Desmon, *Cocaine Baby Cases Reversed; Md. High Court Rejects Reckless Endangerment Convictions for Drug Use by Pregnant Women*, BALT. SUN, Aug. 4, 2006, at 1A.

[135] *Kilmon*, 905 A.2d at 307. For a comprehensive overview of the *Kilmon* case, see Jason Weintraub, Recent Development, Kilmon v. State*: A Pregnant Woman's Intentional Ingestion of Cocaine Cannot Form the Basis for a Conviction Under Section 3-204(A)(1) of the Criminal Law Article for the Reckless Endangerment of Her Later-Born Child*, 37 U. BALT. L.F. 64 (2006).

construction.[136] As a result, the inquiry before the court was to ascertain whether the Maryland General Assembly had intended to criminalize the conduct of the two pregnant defendants.[137] The Maryland statute at issue states that it is a misdemeanor for a person to recklessly "engage in conduct that creates a substantial risk of death or serious physical injury to another."[138]

Aware of the constitutional issues that would arise from a charge predicated upon fetal personhood, the State in the *Kilmon* case argued that Kilmon was prosecuted not for harm to her fetus, but because her use of cocaine during pregnancy constituted reckless endangerment of her child at or after his birth.[139] The State's argument was generally based on prior common law and statutory rulings that "an injury committed while a child is still *in utero* can produce criminal liability if the child is later born alive,"[140] and upon a legislative intent-based argument that the legislature had implicitly adopted the "born alive" rule into the state's reckless child endangerment statute.[141] The appellants responded that the common law "born alive" rule applied only to homicides committed by actors other than the pregnant woman, and did not reflect any legislative determination with reference to the acts of the pregnant woman herself.[142]

The Maryland Court of Appeals noted that there was no evidence of direct legislative intent that would settle the dispute,[143] and stated that in the absence of such specific indicia, it would follow a general requirement that courts are not permitted to construe a statute in a way that produces "farfetched, absurd, or illogical results which would not likely have been intended by the enacting body."[144] The court was particularly concerned that a reading of the reckless endangerment statute which encompassed acts of a pregnant woman harming only her fetus would allow the statute to be interpreted not only to prohibit drug use during pregnancy, but to criminalize a huge range of potentially harmful acts of pregnant women.[145]

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[136] *Kilmon*, 905 A.2d at 308.

[137] *Id.*

[138] MD. CODE ANN., CRIM. LAW § 3-204(a)(1).

[139] *Kilmon*, 905 A.2d at 308-09 (Md. 2006) (referring to, but not citing, the State's briefs for the prosecution).

[140] *Id.* at 310.

[141] *Id.* at 311.

[142] *Id.* In fact, it appears that the born-alive rule would have specifically excluded acts of the mother during pregnancy, as it required "a showing that an infant was completely expelled from the mother's womb and possessed a separate and independent existence from the mother." BLACK'S LAW DICTIONARY, *supra* note 104, at 196.

[143] *Kilmon*, 905 A.2d at 311.

[144] *Id.*

[145] *Id.*

This "slippery slope" argument has been of great concern to the courts in several other cases as well.[146]

Having found no clear indication that the legislature had intended to include prenatal acts of a pregnant woman within the aegis of the reckless endangerment statute, the court in *Kilmon* then considered the many instances in which the lawmakers of Maryland had chosen not to enact bills specifically criminalizing similar acts.[147] The court noted that a number of bills seeking to expand the definition of criminal child abuse to include drug use by pregnant women had failed in the face of opposition from state agencies and public interest groups.[148] The court explained that an analysis of the legislative history made it clear that the General Assembly rejected the bills not because drug use during pregnancy was already criminal under the reckless endangerment law, but because criminalizing it would not be a wise public health or policy decision.[149] Even when enacting a code provision specifically governing the murder or manslaughter of viable fetuses, the legislature specifically included language exempting the acts or omissions of pregnant women with regard to their own fetuses.[150] Clauses contained within fetal homicide laws exempting the acts of the mother are quite common and represent a sound public policy protecting pregnant women from extreme judicial scrutiny.[151]

The Maryland Court of Appeals then noted that the General Assembly's decision to avoid imposing criminal penalties on pregnant women for the effects that their drug use might have on their children after birth reflected a policy judgment, not simply a lack of opportunity to address the issue.[152] As a result, the court held that the legislature had not

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[146] *See, e.g.*, Reinesto v. Superior Court, 894 P.2d 733, 736 (Ariz. Ct. App. 1995) ("Were we to extend the statute to prenatal conduct that affects a fetus in a manner apparent after birth . . . the boundaries of proscribed conduct would become impermissibly broad and ill-defined."); State v. Wade, 232 S.W.3d 663, 666 (Mo. Ct. App. 2007) ("[T]he logic of allowing such prosecutions would be extended to cases involving smoking, alcohol ingestion, the failure to wear seatbelts, and any other conduct that might cause harm to a mother's unborn child."); State v. J.Z., 596 N.W.2d 490, 494 (Wis. Ct. App. 1999) ("Under such a construction, a woman could risk criminal charges for any perceived self-destructive behavior during her pregnancy that may result in injuries to her unborn child.").

[147] 905 A.2d at 312-13 (discussing a number of bills introduced into and rejected by the Maryland General Assembly during the two decades prior to the case at bar that would have either criminalized drug use during pregnancy or rendered it subject to civil sanctions).

[148] *Id.* at 312 (noting that the Department of Human Services had opposed, on public policy grounds, two bills that eventually died in the House Judiciary Committee).

[149] *Id.*

[150] *Id.* at 313 (citing MD. CODE. ANN., CRIM. LAW § 2-103(f)).

[151] *See* Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 734-37 (2006).

[152] *Kilmon*, 905 A.2d at 314.

intended for the reckless child endangerment statute to apply to drug use by a pregnant woman.[153] The *Kilmon* case thus provides an excellent example of the kind of careful analysis of legislative intent that may enable a successful challenge to a prosecution of a pregnant woman.

The foregoing courts have determined that state legislators and others responsible for the enactment of laws did not intend that laws governing child abuse be expanded to criminalize the acts of women prior to giving birth. There are, however, a few cases to the contrary. In 1997 the Supreme Court of South Carolina held, on the basis of a legislative intent analysis, that the state's child abuse statute did allow prosecutions of pregnant women.[154] The court held that the state legislature had intended to include viable fetuses within the protection of the state Children's Code, and dismissed the petitioner's fair notice and right-to-privacy constitutional arguments.[155]

The South Carolina case, the only one thus far in which a state supreme court has allowed the criminal prosecution of a pregnant woman for child abuse or endangerment, arose when Cornelia Whitner was found guilty of criminal child neglect after her child was born with cocaine in its system as a result of her drug use during pregnancy.[156] Social workers took Whitner's child from the hospital maternity ward, without notifying her in person, when he was three days old.[157] The local judge assigned to the case asked Whitner if her son was "a crack baby," then told Whitner's lawyer, "I think I'll just let her go to jail."[158]

On appeal, the State argued that the relevant South Carolina statute "encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a *viable fetus*."[159] The South Carolina Supreme Court reasoned that the broad scope and "comprehensive remedial purposes" of the Children's Code allowed them to infer the coverage of viable fetuses within the Code, even in the absence of specific legislative history so indicating.[160] The court held, primarily on the basis of its own precedent,

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[153] *Id.* at 315.

[154] Whitner v. State, 492 S.E.2d 777, 781 (S.C. 1997).

[155] *Id.* at 784-85.

[156] *Id.* at 778-79.

[157] *Crack Mom in Prison to Appeal to Supreme Court; Her Lawyers Will Challenge S. Carolina's Child-Abuse Law*, CHI. TRIB., Mar. 19, 1998, at C8 [hereinafter *Crack Mom in Prison*]. Whitner's petition for certiorari review was denied by the United States Supreme Court. Whitner v. South Carolina, 523 U.S. 1145 (1998).

[158] *Crack Mom in Prison, supra* note 157. Whitner had previously faced this judge in neglect proceedings related to one of her older children, and he had sentenced her to probation on the condition that she "stay away from drugs and alcohol." *Id.*

[159] *Whitner*, 492 S.E.2d at 779.

[160] *Id.* at 780-81.

that the plain language of the statute allowed such a reading, stating that it "would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse."[161] It dismissed Whitner's argument that the introduction of several specific bills intended to criminalize prenatal drug use implied a legislative belief that such conduct was not already criminal.[162] In response, the court asserted that the acts of subsequent legislatures were of no aid in understanding the intent of the legislature that had enacted the child abuse law.[163] However, as Associate Justice Moore wrote in strong dissent, "the repeated failure of the legislature to pass proposed bills addressing the problem of drug use during pregnancy is evidence the child abuse and neglect statute is not intended to apply in this instance" and that by finding otherwise, the majority ignored both the intent of the South Carolina legislature and the weight of authority from other courts which had considered the issue.[164]

The South Carolina case is a disturbing anomaly in the legislative intent jurisprudence governing prosecutions of addicted pregnant women. As a general rule, it appears that a legislative-intent challenge to such a prosecution can be brought if based on two primary factors: the nature of the state's statutory and common law at the time the applied statute was enacted, and any subsequent attempts to enact legislation specifically criminalizing a pregnant woman's drug use under a child abuse or endangerment rubric (which would imply that such conduct was not covered under the statute at the time of prosecution).

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[161] *Id.* at 780. As the Chief Justice of the court noted in dissent, South Carolina precedent was not uniform in its definition of "child" as encompassing fetuses: "We have already indicated that a child within the meaning of § 20-7-90(A)(1985), which criminalizes non-support, must be one already born." *Id.* at 787 (Finney, C.J., dissenting). The legal distinction between statutes authorizing prosecutions for fetal homicides and statutes governing child abuse is complex and far beyond the scope of this Comment. However, fetal homicide statutes generally explicitly state that they are intended to govern acts affecting fetuses, while child abuse statutes do not do so. In addition, fetal homicide statutes generally include explicit exemptions for acts of pregnant women that result in the deaths of their fetuses, while child abuse statutes obviously do not exempt parents from acts that harm their children. *See, e.g.*, KY. REV. STAT. ANN. § 507A.010 (LexisNexis 2008) (establishing Kentucky's fetal homicide framework, but stating that "[n]othing in this chapter shall apply to any acts of a pregnant woman that caused the death of her unborn child"). For an excellent analysis of the debate surrounding fetal homicide laws and their inescapable conflicts with women's reproductive autonomy, see Ramsey, *supra* note 151.

[162] *Whitner*, 492 S.E.2d at 781.

[163] *Id.*

[164] *Id.* at 787 (Moore, A.J., dissenting). For further consideration of the flaws in the court's legislative intent analysis, see Tara-Nicholle B. DeLouth, Recent Developments, *Pregnant Drug Addicts as Child Abusers: A South Carolina Ruling*, 14 BERKELEY WOMEN'S L.J. 96, 97-99 (1999).

V. CONSTITUTIONAL CONSIDERATIONS

A. FAIR NOTICE REQUIREMENTS AS A BAR TO PROSECUTION

One of the most fundamental precepts of criminal law is that the constitutional right of due process of law is predicated upon the accused having fair notice that his conduct is proscribed by the applied law. This proposition was already well established by 1931, when Justice Holmes explicitly defined fair notice as "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."[165] The U.S. Supreme Court has more recently written that in addition to its status as a central aspect of due process, "[t]he fair warning requirement also reflects the deference due to the legislature, which possesses the power to define crimes and their punishments."[166]

It is important to distinguish the concept of fair notice from the equally well established precept that ignorance of the law is no excuse for breaking it.[167] Whereas the main argument in an "ignorance of the law" defense would be that the criminal defendant did not personally know that his conduct was forbidden,[168] a fair notice defense argues that the conduct was not in fact forbidden by the statute, and that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[169]

The notice that is lacking when pregnant women are prosecuted for using drugs is not that women cannot be expected to know illegal use of controlled substances is a crime,[170] which is of course common

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[165] McBoyle v. United States, 283 U.S. 25, 27 (1931).

[166] Lanier v. United States, 520 U.S. 259, 265 n.5 (1997).

[167] *Ignorantia juris non excusat* is the principle that "lack of knowledge about a legal requirement or prohibition is never an excuse to a criminal charge." BLACK'S LAW DICTIONARY, *supra* note 104, at 762.

[168] *See, e.g.*, Lambert v. California, 355 U.S. 225, 228 (1957) (holding that Los Angeles's felon registration requirements violated due process when applied to an individual who had no actual knowledge of her duty to register); United States v. Harriss, 347 U.S. 612, 617 (1954) ("[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.").

[169] *Lanier*, 520 U.S. at 266.

[170] It is worthwhile, however, to note that "[v]irtually no state . . . punishes drug use per se. As a result, the prosecutors are in fact seeking to have the judiciary create a new crime of drug use, and then only for one group of people—pregnant women." Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1021-22 (1999).

knowledge.[171] Rather, the argument is that women cannot be expected to know that use of these substances during their pregnancies constitutes the crime of child abuse, reckless endangerment, delivery of drugs to a minor, or whichever other particular crime is alleged in a given prosecution, as none of these crimes are established by statutes explicitly governing the conduct of pregnant women with regard to their fetuses.[172] In addition, as one state court has pointed out, "it is inflicting intentional or wanton injury upon the child that makes the conduct criminal under the child abuse statutes, not the criminality of the conduct *per se*."[173] Thus the fair notice analysis of these prosecutions should hinge not upon the pregnant woman's knowledge of the illegality of her drug use, but rather upon whether or not the effect of that drug use on her fetus is within the purview of the statute.

One case that is particularly illuminating of the fair notice problem is *Reinesto v. State*, in which the Court of Appeals of Arizona held that Arizona's child abuse statute would not allow prosecution of a woman whose newborn daughter experienced heroin withdrawal symptoms at birth.[174] After conducting many of the same statutory interpretation and legislative intent inquiries described above, the court considered the due process implications of the case.[175] It found that an interpretation of the child abuse statute sufficiently broad to cover prenatal drug use would expand the statute to a point of unconstitutional vagueness and violate constitutional due process requirements.[176] The court recognized that the defendant could not have known that she was liable for child abuse as a

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[171] The Supreme Court has, however, "established the principle that it is cruel and unusual punishment to punish an individual solely for his or her status as a drug offender." Tiffany Lyttle, Note, *Stop the Injustice: A Protest Against the Unconstitutional Punishment of Pregnant Drug-Addicted Women*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 781, 782 (2006). As a result, some have argued that "a State's punishment of a drug-addicted woman for her actions during pregnancy violates the Eighth Amendment's Cruel and Unusual Punishment Clause because the State is penalizing the woman for her status as a drug addict." *Id.* at 783.

[172] *See, e.g.*, State v. Wade, 232 S.W.3d 663, 666 (Mo. Ct. App. 2007) (arguing that "the mother is already subject to prosecution for such unlawful activity, and the only purpose of allowing additional pregnancy-related charges would be to protect the interest of the fetus . . . . [T]he logic of allowing such prosecutions would be extended to cases involving smoking, alcohol ingestion, the failure to wear seatbelts, and any other conduct that might cause harm to a mother's unborn child"). *Contra State v. McKnight*, 576 S.E.2d 168, 176 (S.C. 2003) ("[I]t is common knowledge that use of cocaine during pregnancy can harm the viable unborn child. Given these facts, we do not see how [McKnight] can claim she lacked fair notice that her behavior constituted child endangerment . . . .").

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

[174] Reinesto v. State, 894 P.2d 733, 734 (Ariz. Ct. App. 1995).

[175] *Id.* at 736.

[176] *Id.*

result of her conduct during her pregnancy, because the child abuse statute as written did not include harm done to fetuses.[177]

Courts have often combined their statutory interpretation and fair notice arguments to hold that an unambiguous child abuse statute cannot be expanded to encompass the acts of pregnant women, as in one case where the Court of Appeals of Georgia stated that "[t]he unambiguous words of a criminal statute are not to be altered by judicial construction so as to punish one not otherwise within its reach."[178] Other courts have decided that such prosecutions are impermissible as the result of a statutory analysis alone, and have declined to reach the constitutionally complex fair notice question.[179] This suggests that the fair notice argument may be a good second line of defense. In cases where the court cannot decide, or declines to decide, a given case on purely statutory grounds, it may be helpful to provide the court with this strong basis upon which to find a prosecution constitutionally impermissible.

B. EQUAL PROTECTION OF THE LAWS AS A BARRIER TO PROSECUTION

In 2001, Regina McKnight was convicted by a South Carolina jury of homicide by child abuse after giving birth to a stillborn child and after having admitted to use of crack cocaine during her pregnancy.[180] McKnight was twenty-two years old, homeless, and had an I.Q. of seventy-two.[181] She consented to drug tests of both her system and that of her fetus without knowing that such tests could expose her to prosecution.[182] The South

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[177] *Id.* at 734.

[178] State v. Luster, 419 S.E.2d 32, 34-35 (Ga. Ct. App. 1992) (holding the state statute prohibiting the delivery and distribution of cocaine could not be extended to transmission of cocaine metabolites to a fetus).

[179] *See, e.g.*, State v. Aiwohi, 123 P.3d 1210, 1225 (Haw. 2005) ("Inasmuch as our holding—that Aiwohi's prosecution for the offense of manslaughter is unsupported by the plain language of the HPC—is dispositive, it is unnecessary to address Aiwohi's remaining constitutional arguments.").

[180] For a very sympathetic summary of the facts, see Dana Page, Note, *The Homicide by Child Abuse Conviction of Regina McKnight*, 46 HOW. L.J. 363, 365-70 (2003). For the South Carolina Supreme Court's take on the facts of the case, see *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003). Feminist commentators have placed McKnight's prosecution in a broader policy context, focusing on her status as a "black, homeless, crack-addicted mother of three children" and arguing that "the state in McKnight exploits the unique vulnerability accompanying pregnancy in order to regulate and punish a particular stratum of women for perceived deviance." Shalini Bhargava, Note, *Challenging Punishment and Privatization: A Response to the Conviction of Regina McKnight*, 39 HARV. C.R.-C.L. L. REV. 513, 513-14 (2004).

[181] Page, *supra* note 180, at 365, 367.

[182] *Id.* at 366.

Carolina Supreme Court upheld McKnight's conviction on several grounds, but relied heavily on its holdings in a prior series of cases that had expanded the definition of "person" and "child" throughout the South Carolina code to include viable fetuses.[183] The court argued that "the fact that the legislature was well aware of this Court's opinion in *Whitner*,[184] yet failed to omit 'viable fetus' from the statute's applicability, is persuasive evidence that the legislature did not intend to exempt fetuses from the statute's operation."[185]

Although the court declined to consider McKnight's equal protection arguments—she had not raised these issues in the lower courts, thereby failing to preserve them for appeal—they nonetheless form the basis of another strong line of defense for women facing unconstitutional prosecutions resulting from their drug use during pregnancy.[186] McKnight made three main claims in support of the argument that her prosecution violated the Equal Protection Clause of the Fourteenth Amendment: "(1) it unlawfully distinguishes between pregnant and non-pregnant persons; (2) it discriminates based on gender by subjecting women to enhanced penalties; and most importantly, (3) it discriminates based on race."[187] As is the case with the fair notice constitutional arguments discussed above, most courts that have been confronted with this argument have chosen to decide in favor of the women challenging their prosecutions on statutory grounds before reaching the constitutional grounds.[188]

The South Carolina Supreme Court revisited McKnight's equal protection claims in 2008, in the context of reviewing and reversing a denial of her petition for post-conviction relief.[189] The court reversed the lower court's decision denying McKnight relief on a number of evidentiary and ineffective assistance of counsel grounds.[190] The court again rejected her

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[183] *See, e.g.*, *McKnight*, 576 S.E.2d at 173-75.

[184] For further analysis of the *Whitner* decision, see *supra* notes 156-164 and accompanying text.

[185] *McKnight*, 576 S.E.2d at 175.

[186] *Id.* at 177. *But see* Page, *supra* note 180, at 397 ("McKnight made a number of constitutionally based pre-trial motions to dismiss her case, all of which were denied.").

[187] Page, *supra* note 180, at 398-99.

[188] *See, e.g.*, Starks v. State (*In re* Unborn Child), 18 P.3d 342, 348 (Okla. 2001) (declining to reach the constitutional issues after dismissing the case on legislative intent grounds).

[189] McKnight v. State, 661 S.E.2d 354 (S.C. 2008).

[190] In addition to her equal protection claims, McKnight claimed that her original "counsel was ineffective in her preparation of McKnight's defense through expert testimony." *Id.* at 357. She also argued that her counsel had failed to "investigate medical evidence contradicting the State's experts' testimony on the link between cocaine and stillbirth . . . ." *Id.* at 360. The court also held that "counsel's failure to introduce the autopsy report into evidence was deficient and that this deficiency . . . was prejudicial to

equal protection claims, however, holding that her original counsel had not been ineffective for "failing to move to dismiss the charges on the grounds that the disparity between the sentences for criminal abortion and homicide by child abuse violates the Equal Protection Clause."[191] The court ultimately reversed McKnight's conviction,[192] but did not address any of the problematic language in its previous decisions, which has made South Carolina an outlier among the states in its allowance of criminal child abuse prosecutions of pregnant women who use drugs. Instead, the court argued that the statute under which she had been prosecuted had been "wrongfully enforced almost as a strict liability rule; prosecutors never proved that McKnight's drug use caused the miscarriage."[193] Thus, even though Regina McKnight was able to secure some measure of justice, South Carolina remains at odds with the usual jurisprudence governing drug use by pregnant women.

Many of the commentators who have written on the subject of equal protection claims in the drug-use-during-pregnancy context have addressed with particular strength the implicit racism in the manner in which these prosecutions are conducted.[194] Indeed, the majority of women who are targeted for prosecution as a result of their drug use during pregnancy are black.[195] Some commentators have hypothesized that women of color are

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McKnight." *Id.* at 365. With respect to the statute under which she had been charged, McKnight's petition for post-conviction relief argued that her counsel "was ineffective in failing to object to the trial court's charge on the measure of criminal intent required for conviction under the Homicide by Child Abuse (HCA) statute." *Id.* at 361. The South Carolina Supreme Court ruled in McKnight's favor on these three claims, thus reversing the lower court's denial of post-conviction relief. *Id.* at 360-62. The court ruled against McKnight's claims of ineffective assistance of counsel on other claims, however, related to her burden of proof, to the possibility of requesting a jury charge on involuntary manslaughter, and to the counsel's failure to argue that McKnight had not intended harm to her fetus. *Id.* at 363.

[191] *Id.* at 363.

[192] Regina McKnight, *Victory at Long Last*, NAT'L ADVOCATES FOR PREGNANT WOMEN, http://advocatesforpregnantwomen.org/blog/2008/05/regina_mcknight_victory_at_lon.php (May 12, 2008, 03:14 EST).

[193] Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657 (2008).

[194] *See* Roberts, *supra* note 21, at 1450-56 (arguing that under Supreme Court precedent, a prima facie case of discriminatory purpose could be made by pointing out "the disparity between the percentage of defendants who are [b]lack and the percentage of pregnant substance abusers who are [b]lack").

[195] A 1992 report prepared for the American Civil Liberties indicated that 70% of targets of prosecution whose race could be identified were women of color. LYNN M. PALTROW, ACLU, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW (1992), *available at* http://advocatesforpregnantwomen.org/file/1992%20State-by-State%20Case%20Summary.pdf. For a possible explanation underlying the racial disparity, see Roberts, *supra* note 21, at 1424 (theorizing that "[p]oor [b]lack women have

selected for prosecution because of the racial disparity in media accounts, which focus primarily on the use of illegal drugs by minorities, especially minority women.[196] It is also noteworthy that while there is no clear evidence that crack is substantially more harmful to a developing fetus than any other illegal drug (or than legal ones such as alcohol), criminal prosecutions of pregnant drug addicts focus on crack users, who are predominately poor and African American.[197] Thus, advocates can argue that these prosecutions have a discriminatory effect and purpose, even if that purpose can only be shown by the disparate impact they have upon women of color.

Scholars have also argued that the prosecution of pregnant women for child abuse violates equal protection rights in a broad sense, as a form of pregnancy discrimination, and should be analyzed under at least an intermediate scrutiny standard, as particularly likely to offend constitutional requirements of gender equality.[198] There is a large body of scholarship pointing to the constitutional conflict that arises when fetal rights are advanced at the expense of pregnant women's rights.[199] A fair survey of the literature is beyond the scope of this Comment, particularly since, as previously noted, courts will generally decline to reach constitutional arguments that are presented in a challenge to such a prosecution. Advocates for pregnant women should be aware, however, that they may find many allies in the broader reproductive justice movement, and that criminal child abuse prosecutions of pregnant women are but one way in which the growing conflict between conceptions of fetal rights and women's rights manifests itself.

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been selected for punishment as a result of an inseparable combination of their gender, race, and economic status").

[196] DeVille & Kopelman, *supra* note 6, at 338.

[197] Sandy, *supra* note 80, at 686; *see also* Okie, *supra* note 83 (discussing expert opinions related to the lack of long-term negative effects of prenatal cocaine use on child development).

[198] Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 382-83 (2008).

[199] *See, e.g., id.*; April L. Cherry, *Roe's Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723, 724 (2004) (arguing that *Roe*'s recognition of a "compelling state interest" in fetal life has "in some ways led to the derogation of women's choices, women's autonomy, and, consequently, women's citizenship"); Fentiman, *supra* note 75, at 540 (arguing that "'fetal protection' efforts undermine women's health, limit women's ability to fully participate in the economic life of the nation, and disproportionately affect the indigent and racial minorities"); Nora Christie Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy*, 26 LAW & INEQ. 171, 172 (2008) (arguing that "[w]omen's constitutional rights are violated when the justice system treats women unequally due to their condition of being pregnant").

VI. CONCLUSION

Abuse of controlled substances by pregnant women is clearly undesirable and certainly a public health problem. However, criminal prosecutions of these women under state statutes designed to criminalize child abuse or endangerment are not legally permissible, constitutional, or wise. They also fail to achieve their stated policy intentions. Criminal prosecutions cannot act as effective deterrents because women who wish to seek treatment for their addictions lack access to effective and affordable programs designed to assist them.[200] They do not impose retributive punishment on those who properly and morally deserve such punishment, but instead target women on the basis of questionable and unconstitutional stereotypes of race and gender.[201] Finally, criminal prosecutions with resultant incarceration fail to improve maternal or fetal health outcomes, and may actually wreak serious harm.

As a result of these policy considerations and of their own statutory analysis and legislative intent inquiries, most courts that have addressed this problem have chosen to defer the consideration of appropriate solutions to the state legislatures. Courts have also demonstrated an awareness of the significant constitutional issues at stake in these prosecutions, including the requirements of fair notice and equal protection of the laws, notwithstanding their reluctance to address such issues directly. The results of this survey of court decisions offer reason for optimism, as it is clear that advocates for prosecuted pregnant women have a wide variety of possible ways in which to challenge the impermissible and unconstitutional prosecutions of their clients.

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[200] *See* Linden, *supra* note 67, at 131-34 (noting that few drug treatment programs currently accept pregnant women, and those that do fail to meet the child care, prenatal care, and other needs of women struggling with both addictions and high-risk pregnancies); *see also* Eckenwiler, *supra* note 60, at 91 (explaining that "there are many reasons why women avoid those services that have nothing do to with a lack of desire to stop using," including distrust of the medical establishment and fear of losing custody of their children).

[201] *See* Eckenwiler, *supra* note 60, at 94-95 (commenting on the "hostility aimed at women who diverge from ideals of femininity and motherhood established by groups with greater social power, hostility directed with a particular vengeance at women of color").