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The Criminalization of Perinatal Drug Use: A Constitutional Analysis

By

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THESIS

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Chapter One

Introduction: Perinatal Drug Use and The "War on Drugs"

On September 5, 1989, in his first prime-time presidential speech to the nation, President Bush declared America to be at war against drugs. The President exhibited a bag of crack cocaine that had been seized in an arrest staged by the Drug Enforcement Agency in a park across the street from the White House. Polls at the time showed that eighty-two percent of the American population believed the U.S. to be in a state of emergency as a result of illegal drug use.[1] Congress had passed anti-drug legislation every year since 1982, and had created a special cabinet position for a "drug czar" who would coordinate the federal efforts in the war on drugs.[2] Time passed, however, and the excitement of the war on drugs seemed to diminish. As of July, 1990, only twenty-five percent of persons polled cited drugs as being one of the nation's leading problems.[3]

This was not America's first war against drugs. The Nixon administration in 1971 declared drug use to be a

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[1]Strasser, *It's Not as Bad as People Think*, National L.J., Aug. 7, 1989 at S16.

[2]Barrett, *Moving On: Though the Drug War Isn't Over, Spotlight Turns to Other Issues*, Wall St. J., Nov. 19, 1990, at 1, col. 1.

[3]Id. This particularly became true as the *real* war with Iraq became eminent.

"national emergency" and "public enemy number one".[4] Like the Nixon administration before it, the Reagan and Bush administrations initiated a massive buildup of the existing drug enforcement bureaucracy. The efforts in the 1980's, however, were particularly vigorous: the CIA, the IRS, the FBI and the military were all called in to help in the interdiction of drugs as they were being shipped into the country. Unprecedented numbers of law enforcement officers were hired by the Drug Enforcement Agency; the federal prison system was expanded to house newly-convicted dealers and users; legislative reforms were called for and passed to modify aspects of the criminal law related to bail, criminal forfeiture, and sentencing; and Organized Crime Drug Enforcement Task Forces were created in thirteen metropolitan areas.[5]

It seems clear, however, that the state of emergency implied by the media and the administration, however, did not fairly represent the facts. The National Household Survey on Drug Abuse, performed every two to three years by the National Institute on Drug Abuse, has shown a steady decline in the use of illicit drugs (including marijuana, hallucinogens, cocaine, heroin, and nonmedical use of prescription drugs) amongst young adults from 37.1% in 1979

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[4]WISOTSKY, BREAKING THE IMPASSE IN THE WAR ON DRUGS 4 (1986).

[5]Id., at 4-6.

to 14.9% in 1990.[6] The disparity between the actual trends in overall substance abuse and the perception of the public has been attributed to the increased visibility of the sequelae of drug abuse in American society and to the changing social attitude towards drug use. Factors that seem to have added to the visibility of drug abuse include the introduction of a smokeable form of cocaine--"crack"--into the drug markets, particularly in large metropolitan centers such as Los Angeles, New York, Washington and Miami, and the large amount of media and political attention being devoted to illegal drugs and efforts at eradicating them.[7]

While overall drug use has declined, it is evident that the introduction of crack into metropolitan areas has resulted in devastating social disruption. The effects of crack on the inner city have been best documented by following its impact on the health care, social service and law enforcement systems. The lucrative nature of crack distribution has created violent struggles over new markets resulting in large increases in the number of reports of

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[6]Summary of Findings From the 1990 National Household Survey on Drug Abuse, National Institute on Drug Abuse, at 5 (December, 1990). These figures represent the percentage of young adults who have used illicit substances in the month previous to the survey. Similar, though less drastic reductions in drug use occurred in the age groups 12-17 (17.6% in 1979 to 8.1% in 1990) and in older adults, age 26 and above (6.5% in 1979 to 4.6% in 1990).

[7]Id. It is difficult to imagine that the Bush administration was unaware of the political value to be gained by cashing in on the existing downward trend in drug use.

gang-associated violence. From 1978 to 1987, annual drug arrests increased by 54%, and drug convictions made up at least one third of the recent increase in the ranks of state prisons.[8]

Inner city health care systems, particularly county hospitals, are frequently the only source of care for people without private insurance, for those who are eligible for medicaid, and for the medically-indigent. These systems have become increasingly overburdened by patients who, because of a lack of access to basic preventive and primary health care, tend to arrive at these facilities of last resort only after their illness has advanced significantly. The increase in the availability of cheap cocaine has compounded the problems of these busy facilities. Crack cocaine is extremely potent-- it rapidly achieves plasma concentrations similar to those observed in intravenous cocaine use, as opposed to the lower levels associated with snorting powdered cocaine hydrochloride. Although it is fairly rapidly cleared from the bloodstream, the short-term euphoria produced by smoking crack is intensely habituating, such that users frequently become addicted in a short period of time.[9] Use of crack and other forms of central stimulants is associated with a variety of medical problems

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[8]Strasser, *It's Not as Bad as People Think*, National L. J., Aug. 7, 1989, at S16.

[9]*See infra*, notes 149-153 and accompanying text.

which are being seen with ever-increasing frequency in hospitals serving the inner cities: seizure, hyperpyrexia, anxiety, psychosis, acute myocardial infarction, cardiac arrhythmia, reactive airway disease, sudden death, cerebral infarction, renal infarction, and muscle and skin infarction.[10] The psychiatric side-effects of cocaine use include depression, irritability, anhedonia, anergy, social isolation, sexual dysfunction, paranoid ideation, attention disturbances, and memory impairment.[11] Cocaine smoking and intravenous use of cocaine tends to result in rapid progression to dependence.[12]

Among the more publicized and dramatic public health consequences of the increasing availability of crack cocaine are the reports of large increases in the number of babies

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[10]Cregler & Mark, *Medical Complications of Cocaine Abuse*, 315 NEW ENGL J MED 1495 (1986); Jonsson, O'Meara & Young, *Acute Cocaine Poisoning: Importance of Treating Seizures and Acidosis*, 75 AM J MED 1061 (1983); Isner, Estes, Thompson, et al., *Acute Cardiac Events Temporally Related to Cocaine Abuse*, 315 NEW ENGL J MED 1438 (1986); Kissner, Lawrence, Selis & Flint, *Crack Lung: Pulmonary Disease Caused by Cocaine Abuse*, 136 AMER REV RESPIRATORY DISEASE 1250 (1987); Golbe & Merkin, *Cerebral Infarction in a User of Free-Base Cocaine ("Crack")*, 36 NEUROLOGY 1602 (1986); Sharff, *Renal Infarction Associated with Intravenous Cocaine Use*, 13 ANNALS EMERGENCY MED. 1145 (1984); Zamora-Quezada, Dinerman, Stadecker & Kelly, *Muscle and Skin Infarction after Free-Basing Cocaine (Crack)*, 103 ANNALS OF INTERNAL MED 564 (1988).

[11]DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, THIRD EDITION-REVISED 178 (1987).

[12]*Id.*

being born to drug-addicted mothers.[13] While it is unclear that the increase in such reports represents a real rise in the number of drug-exposed infants, a change in the drugs being used by pregnant women, or simply an increase in the reporting trends by medical facilities, it is clear that a significant number of infants are currently being born with evidence of intrauterine exposure to cocaine. A recent survey collected data from forty hospitals and found the overall incidence of intrauterine drug exposure to be approximately eleven percent--ie., eleven percent of all infants born in all types of hospitals appear to be exposed to one type of illegal drug or another.[14] The figures have been consistently worse in studies conducted by individual inner-city hospitals. For example, Harlem Hospital, an inner-city hospital serving a predominately indigent black

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[13]*See generally* Schachter, *Growing Problem: Babies Pay for Mothers' Drug Abuse*, L.A. Times, Dec. 11, 1986, at 1, col. 1; Gordon, *Crack's Incredible Cost to S.F.: City Could Go Broke Over Drug*, San Francisco Chron., Feb. 21, 1989, at A1, col. 6; Herscher, *Living Hell of Infant's Drug Battle*, San Francisco Chron., Feb. 21, 1989, at A13, col. 1; Brody, *Widespread Abuse of Drugs by Pregnant Women is Found*, N.Y. Times, Aug. 30, 1988, at A1, col. 1.

[14]Chasnoff, *Drug Use and Women: Establishing a Standard of Care*, 562 ANNALS NY ACAD SCIENCES 208 (1989). The hospitals were selected to represent a variety of different practice populations and had a total annual delivery rate of 154,856. The incidence figures ranged from 0.4% to 27%. These figures were related to the type of testing being used by the institution, the largest incidence figures being reported by those institutions with a standard protocol that included both history-taking (ie., voluntary self-reporting by the women) and urine toxicology testing. Id.

and Hispanic population, reported that 15% of newborn infants born in 1987 on their busy obstetrical service had urine toxicology screens that were positive for cocaine.[15] It has been difficult, however, to arrive at accurate figures for prevalence of drug use during pregnancy, largely because of biases in sampling and from shortcomings in study design.[16]

In the medical literature, particular attention has been directed towards ascertaining the effects of maternal cocaine use on the developing fetus and upon neonatal outcome. Maternal use of cocaine has been associated with an increased risk for prematurity, low birth weight, neonatal withdrawal or abstinence syndrome, fetal monitor abnormalities, fetal meconium staining, congenital malformations, and, rarely, intrauterine cerebral infarctions ("strokes").[17] In addition, studies have identified significant correlations between maternal cocaine

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[15]Bateman & Heagarty, *Passive Freebase Cocaine ('Crack') Inhalation by Infants and Toddlers*, 143 AJDC 25 (1989).

[16]Frank, Zuckerman, Amaro, et al., *Cocaine Use During Pregnancy: Prevalence and Correlates*, 82 PEDIATRICS 888 (1988).

[17]Petitti & Coleman, *Cocaine and the Risk of Low Birth Weight*, 80 AMER J PUBLIC HEALTH 25 (1990); Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 PEDIATRIC CLINICS OF NORTH AMER 1403 (1988); MacGregor, Keith & Chasnoff, *Cocaine use During Pregnancy: Adverse Perinatal Outcome*, 157 AM J OBSTETRICS AND GYNECOLOGY 686 (1987); Oro & Dixon, *Perinatal Cocaine and Methamphetamine Exposure: Maternal and Neonatal Correlates*, 111 J PEDIATRICS 571 (1987); Chasnoff, Bussey, Savich, et al, *Perinatal Cerebral Infarction and Maternal Cocaine Use*, 108 J PEDIATRICS 546 (1986).

use and placenta previa, abruptio placenta, spontaneous abortion and stillbirth.[18] The possible long-term effects of intrauterine cocaine exposure have been less well documented, but reports have suggested that cocaine-exposed children are more disposed to irritability, movement and sleep disorders, fine motor deficits, high emotional lability, poor attachment to caretakers, and emotional and cognitive delays which may last into the school years.[19]

While these studies have demonstrated significant correlations between cocaine use and infant outcome, nearly all of them have suffered from the presence of possible confounding variables. These outcome studies have largely been conducted with samples from hospitals serving predominately minority, inner city, indigent populations--populations which are already at risk for poor neonatal outcome. Because of this, these studies have been unable to completely control for maternal characteristics and health habits which have been independently shown to be negative predictors for perinatal outcome. These independent risk factors include maternal malnutrition, a history of past obstetrical complications, and heavy maternal use of

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[18]Chasnoff, et al, *Cocaine Use in Pregnancy*, 313 NEW ENGL J MED 666 (1985).

[19]Testimony of Neal Halfon, M.D., M.P.H., Director, Center for the Vulnerable Chiold, Children's Hospital, Oakland, CA, before the House Select Committee on Children, Youth and Families, April 27, 1989.

cigarettes and alcohol.[20] Thus, any additional risk associated with these uncontrolled variables would be attributed by these studies to maternal cocaine use.

Nevertheless, it is evident that use of cocaine by pregnant women is one of a number of factors which can have a significant and negative effect on the developing fetus and on the future infant.[21] The focus in the media on cocaine use during pregnancy is misleading, however. Bad infant outcomes are more commonly associated with other known factors such as lack of prenatal care, poverty, maternal ignorance concerning pregnancy and childbirth, inadequate maternal nutrition, inadequate maternal medical care (eg., lack of immunizations, undiagnosed and untreated sexually transmitted diseases), and maternal cigarette and alcohol use.[22] Thus, neonatal outcome results from the interaction of many variables which are in turn impacted by a variety of genetic, physiological, behavioral, educational, environmental, and medical processes. The focus of maternal drug use in the media and in the political arena has served to over-simplify the problem of bad

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[20]Frank, et al., *Cocaine Use During Pregnancy: Prevalence and Correlates*, 82 PEDIATRICS 888 (1988).

[21]*See* Bateman & Heagarty, *Passive Freebase Cocaine ('Crack') Inhalation by Infants and Toddlers*, 143 AJDC 25 (1989).

[22]*See generally* Wilkerson, *Infant Mortality, Frightful Odds in Inner City*, New York Times, June 26, 1987, sec. A, p. 1, col. 2.

neonatal outcomes and serves to distract from the total picture.

In a more general way, the national approach to solving the "drug crisis" has also been narrowly focused. As indicated by its rhetorical label, the "war" on drugs has focused primarily on punitive measures. Prior to his resignation in November of 1990, the "Drug Czar" William Bennett repeatedly called for the use of the death penalty for "brutal drug gangsters," for the expansion of America's criminal justice system in order that more drug offenders could be processed, and for the use of "tough" legal sanctions against users.[23] This national strategy has largely ignored the social aspects of drug abuse. The National Drug Control Strategy states that "we must avoid the easy temptation to blame our troubles first on those chronic problems of social environment--like poverty and racism...", because, it is argued, such difficulties have always been with us and have not been abated by past efforts.[24]

Curiously lacking in the War on Drugs mandate has been a serious commitment to the treatment of those who are addicted. For pregnant women in particular, precious little drug treatment is available even for those who want it.

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[23]The White House, National Drug Control Strategy 7 (1989).

[24]Id., at 8.

According to the Senate Judiciary Committee, only seven percent of pregnant addicts received treatment between September, 1989, and September, 1990.[25] The U.S. Congress has stated that "women who seek help for drug addiction during pregnancy cannot get it."[26] One survey of drug treatment centers in New York City found that 54% of them refuse to provide services to pregnant women; 67% deny treatment to pregnant addicts if they do not have private insurance or if they are covered by Medicaid; and 87% denied treatment to pregnant crack addicts on Medicaid.[27] Among the drug treatment centers that do accept women, few are sensitive to the needs of the women seeking treatment. For example, while most treatment centers in the state of Michigan do not accept pregnant women, of the twelve that do only one provides child care.[28]

The federal government's punitive approach to the problem of drug abuse has been widely adopted in state and

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[25]Barrett, *Moving On: Though the Drug War Isn't Over, Spotlight Turns to Other Issues*, Wall St J, Nov. 19, 1990, at 1, col. 1.

[26]BORN HOOKED: CONFRONTING THE IMPACT OF PERINATAL SUBSTANCE ABUSE: HEARING BEFORE THE SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES (opening statement of Congressman George Miller, Chairman Select Committee on Children, Youth and Families), 101st Cong., 1st Sess. 1 (4/27/89).

[27]Chavkin, *Help, Don't Jail, Addicted Mothers*, NY Times, July 18, 1989, Sec. 1, at 21.

[28]Kolata, *Racial Bias Seen on Pregnant Addicts*, NY Times, July 20, 1990, at A:13.

local jurisdictions, and has become a popular pet issue for local politicians. Courts are reported to be flooded with a multitude of drug-related cases, from "yuppie" users to Manuel Noriega.[29] Among the more interesting and complex aspects of the national response to the problem of drug abuse has been the recent increase in the number of cases involving the prosecution of women for the use of drugs during pregnancy.

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[29]Barrett, *Yuppie Nightmare: Program to Prosecute the Casual Drug User Is Casting Wider Net*, Wall St J, January 31, 1990, at 1, col. 1.

Chapter Two

The Judicial Response: Prosecutions for Perinatal Drug Use

While the first conviction of a pregnant woman for conduct related to drug use during pregnancy did not occur until 1989, there had been a few previous reported attempts to prosecute women for such conduct. One of the earliest prosecutions for drug use during pregnancy occurred in San Bernardino, California in 1977. In *Reyes v. Superior Court*, a woman who was addicted to heroin was charged with two counts of felony child endangerment after giving birth to twins who subsequently suffered symptoms of narcotic withdrawal.[30] In the first count, the woman was charged with having failed to heed the warning of a public health nurse that her continued use of heroin might endanger her children.[31] The second count referred to her failure to seek adequate prenatal care.[32] The court found that the child endangerment statute did not cover fetuses, and dismissed the charges.[33]

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[30]75 Cal. App. 3d 214, 216 (1977).

[31]Id., at 214.

[32]Id.

[33]Id., at 219. In a more recent case, an Ohio court dismissed child endangerment charges against a woman who had used drugs during her pregnancy, since the statute did not specifically include fetuses and since "all ambiguities and reasonable doubts in interpreting criminal statutes are to be resolved in favor of the accused..." State of Ohio v. Gray, No. CR88-7406 (Court of Common Pleas, Lucas County, Ohio, July 13, 1989), at 3.

Then, in 1987, the state of California charged Pamela Rae Stewart under a criminal child support statute under three theories: "that the defendant took drugs during her pregnancy, that she engaged in sexual intercourse contrary to her doctor's orders, and that she failed to seek prompt medical attention when she experienced bleeding."[34] Stewart suffered from placenta previa, in which the embryo implants in the uterine lining near the cervix so that the placenta develops across that opening.[35] On November 23, 1985, having received instructions from her doctor to the contrary, Stewart allegedly engaged in illicit drug use and sexual intercourse and, after several hours of heavy vaginal bleeding, summoned an ambulance and was taken to the hospital where she delivered by caesarian section an infant with severe brain damage.[36] The baby died on January 1, 1986.[37] Eight months later Stewart was charged under section 270 of the California Penal Code which states that:

> If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment... not

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[34]People of the State of California v. Pamela Rae Stewart, Reporter's Transcript, No. M508197 (San Diego Municipal Ct., Feb. 26, 1987).

[35]SCHROEDER, STEVEN, ET AL., CURRENT MEDICAL DIAGNOSIS AND TREATMENT 487 (1989).

[36]Chambers, *Dead Baby's Mother Faces Criminal Charge on Acts in Pregnancy*, NY Times, Oct. 9, 1986, at A22, col. 1.

[37]Id.

exceeding one year...

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... A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.[38]

Upon examining the legislative history of section 270, the court found that Stewart's conduct did not fall under the intent of the statute--which had been to force estranged fathers to provide funds for child support--and charges were dismissed.[39]

For a few years following the Stewart case, the courts were largely silent on the issue.[40] Then, on July 13, 1989, Jennifer Johnson, a 23-year-old mother of four, was convicted of two counts of delivery of drugs to a minor when

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[38]Cal. Penal Code Sec. 270 (West 1986).

[39]People of the State of California v. Pamela Rae Stewart, Reporter's Transcript, No. M508197 (San Diego Municipal Ct., Feb. 26, 1987) at 10-11.

[40]In Butte County, California, however, District Attorney Michael Ramsey, in October, 1988, initiated a mandatory screening program of all infants born in the county. Under this plan, all positive tests would be reported to the prosecutor's office and used as evidence in prosecuting the mothers for illegal drug use, a misdemeanor crime carrying a sentence of ninety days. In addition, this information will be made available to Child Protective Services for use in removal decisions. Lacroix, Susan, *Jailing Mothers for Drug Abuse*, The Nation, May 1, 1989, at 585-587. The first prosecution under this plan was dropped, however, when it became clear that the woman had attempted to obtain drug treatment in her county but that none had been available. *Little Help Available for Addicted Poor*, Chico (CA) Enterprise-Record, Dec. 12, 1988, at A1, cited in McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Women for Harm to their Fetuses*, 16 Rev L Soc Change 277, 286 (1987-88), at note 52.

urine samples obtained from Johnson and her newborn tested positive for cocaine metabolites. She had been a cocaine addict for about three years prior to her arrest. She had sought treatment for her drug addiction while she was pregnant, but was unable to gain entry into a treatment program. Her labor and delivery progressed normally and the child showed no signs of withdrawal or medical difficulties.[41] The Honorable O.H. Eaton, Jr., of the Seminole County Circuit Court of Florida found that the state's drug delivery statute "includes passage of cocaine or a derivative of it from the body of the mother into the body of her child through the umbilical cord after birth occurs."[42] (This finding was necessary as the fetus is not considered a person under Florida law).

Johnson was sentenced to one year of house arrest within a residential treatment program during which time she was to undergo random drug testing. In addition, she was to serve fourteen years of closely-supervised probation during which time she will be required to avoid the use of alcohol, to perform two hundred hours of community service, and to avoid contact with others known to possess or use controlled

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[41]Kolbert, et al.,. Memorandum to ACLU Affiliates and Interested Parties RE: Discriminatory Punishment of Pregnant Women, at appendix iii (Feb. 15, 1990).

[42]Siegel, *The Criminalization of Pregnant and Child-Rearing Drug Users*, 2 DRUG L REPORT 169 (May-June, 1990).

substances.[43] The case has been appealed with the ACLU acting as co-counsel.

Johnson was the first woman to have been convicted under a drug delivery statute for "delivering" drugs to her infant through the umbilical cord in the seconds following birth. Since that time the state of Florida has charged and convicted at least one other woman under this statute.[44] The states of Georgia,[45] Massachusetts,[46] Michigan,[47] and South Carolina[48] have since joined Florida in prosecuting pregnant women under drug delivery statutes. The ACLU reports that since 1987, 19 states and the District of Columbia have brought at least fifty criminal proceedings against mothers for drug use during pregnancy.[49] In addition, pregnant women have received additional penalties for unrelated crimes

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[43]Kolbert, et al., Discriminatory Punishment of Pregnant Women, at appendix iii (Feb. 15, 1990) [hereinafter cited as *ACLU Memo*].

[44]Beverly Black has been sentenced to 18 months in prison. *ACLU Memo,* at appendix iii.

[45]*ACLU Memo*, at appendix iv.

[46]Gertner & Kennedy, *Cloudy Future After Infant-Cocaine Case*, Boston Globe, Aug. 23, 1989, at 1.

[47]*ACLU Memo*, at appendix v; Hoffman, *Pregnant, addicted--and Guilty?*, NY Times Magazine, Aug. 19, 1990, at 33.

[48]*ACLU Memo*, at appendix vi-vii.

[49]Hoffman, Jan, *Pregnant, Addicted--and Guilty?*, NY Times Magazine, Aug. 19, 1990, at 35.

based solely on their status as pregnant addicts.[50]

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While these prosecutions have grown out of a sense of urgency created by the War on Drugs, and from a real desire to do something about the problem of drug-exposed infants, many consider these cases to be part of a larger trend towards increased state scrutiny of and intervention in the lives of pregnant women. In a variety of contexts, courts have required pregnant women to submit to medical treatment--including surgery--against their will for the sake of their fetuses.[51] In general, state intervention in pregnancy has

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[50]*See* United States v. Vaughn, No. F-2171-88B (Super. Ct. of D.C., Aug. 23, 1988). In *Vaughn*, the judge sentenced a woman to prison for having pled guilty to a charge of second degree theft--a charge which usually carries a sentence of probation. Suspecting that the pregnant Vaughn had been using cocaine, the Judge ordered a urine screen and, "horrified" at the positive result, he sentenced her to "a long enough term in jail to be sure she would not be released until her pregnancy was concluded." (*ACLU Memo*, at appendix ii).

[51]*See generally*, Kolder, et al., *Court-ordered Obstetrical Interventions*, 316 N Engl J Med 1192 (1987) (documenting fifteen court ordered cesarean sections in eleven states, three court orders in two states for hospital detention of pregnant women against their will, and three court orders in two states for intrauterine transfusions); In re A.C., 533 A.2d 611 (D.C.Ct. of App. 1987) (ordering a terminally-ill woman to submit to a cesarean section without her consent based upon a medical judgement that she would not survive but that the fetus might); Jefferson v. Griffin Spalding County Hospital Authority, Ga., 274 S.E.2d 457 (1981) (granting Georgia Department of Human Resources temporary custody of an "unborn child" and ordering delivery by cesarean section); Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (per curiam), cert. den., 377 U.S. 985 (1964) (ordering blood transfusion for a woman who was thirty-two weeks pregnant, overriding her religious objections).

been increasingly applied as an attempt at improving neonatal outcomes by safeguarding the fetus against the actions of its mother. While the practice of imposing criminal penalties upon women who use drugs during their pregnancies may represents an extension of this trend, it is novel in that the sanction is generally applied after the pregnancy has ended, and because it includes the added element of societal condemnation. The use of blame and criminal penalties--as opposed to court-ordered treatment or other pre-natal interventions--as a method of attempting to improve perinatal outcomes seems to reflect the sense of moral urgency and alarm that has characterized the War on Drugs rhetoric. However, addressing the issue of perinatal drug from a position of moral outrage tends to mask the inner workings of the problem through oversimplification and scapegoating.

To understand the problems of perinatal addiction and intrauterine drug exposure, and to appreciate more fully the rationale behind punitive state responses to these problems, requires the analysis of a complex amalgam of social, medical, political and legal thought. Each of these disciplines operates with its own units of measure--making it difficult to blend them into a cohesive, coherent body of truth. The law, however, provides a unique mechanism for approaching such problems, inasmuch as it is the way in which society resolves complex questions involving disparate

bodies of information.

Partly for this reason, I have chosen the methodology of constitutional analysis for examining the problem of the criminalization of perinatal drug use. In recent years the Supreme Court has been active in adjudicating cases involving issues of reproduction, drug addiction, and gender and pregnancy discrimination--all of which touch the issue of perinatal drug use. Thus, the Court has staked out much of the legal terrain surrounding this issue and its implications.

In addition, constitutional analysis is useful for analyzing this issue because the constitution dictates the ultimate boundaries of the state's relationship with its citizens. It is at this level that one may ask the threshold question of whether or not the state *may* put a pregnant or newly-delivered woman in jail for having exposed her fetus to drugs. This threshold issue is related to the concept of the constitution as a counter-majoritarian safeguard, designed to protect minority groups from the destructive whims of temporary majorities. The population of women involved in these prosecutions (largely women of color from lower socio-economic groups),[52] might be described as particularly vulnerable to majoritarian sanctions. As such, it is

[52]See *infra* notes 164-171 and accompanying text.

appropriate to examine what, if any, protection the constitution might afford such a vulnerable group.

I have purposely refrained, however, from adhering to a strictly legalistic form of argumentation about rights and duties, etc., although I hope that I have adequately addressed these issues. The arguments that follow are meant to be more broadly-based than traditional legalistic arguments in order that the social, medical, and political implications of criminalization might be addressed. Where applicable, I have tried to highlight the legal boundaries of the arguments presented here, and to make clear how the non-legal aspects of the issue are or are not relevant to the constitutional inquiry. I have chosen, however, to cover as much of the terrain surrounding the problem of perinatal addiction and its implications as possible, perhaps at the cost of diluting the purely legal aspects of the discussion.

Chapter Three: Constitutional Analysis

I. Introduction

The general trend towards increased state intervention on behalf of fetuses has elicited vigorous constitutional argument in the legal commentary.[53] In the literature produced by women's advocates, instances of state intrusion into the lives of pregnant women--including forced cesarean sections, loss of child custody, involuntary confinement for the duration of pregnancy, and prosecution for drug use during and after pregnancy--have been lumped together for purposes of constitutional analysis. However, different interventions, depending on their timing and their degree of intrusiveness, pose different constitutional problems. For example, a state policy forcing women to submit to a 'medically necessary' cesarean section implicates the rights of women in different ways than do statutes establishing civil or criminal penalties for prematernal drug use.[54] In order to narrow the focus of the constitutional inquiry,

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[53]*See generally* McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 Rev L Soc Change 277 (1987-88); Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 Yale L J 599 (1986) [hereinafter cited as Johnsen].

[54]Specifically, prenatal interventions tend to create greater invasions of a pregnant woman's rights to bodily autonomy and liberty than to post-natal interventions. *See Medical Technology and the Law, Part IIIC, Limitations on Maternal Autonomy During Pregnancy*, 103 Harvard L R 1519, 1556-1584 (1990).

this analysis will address the policy of imposing post-natal criminal sanctions against women who use drugs during pregnancy and will focus on those cases alleging the delivery of drugs through the umbilical cord in the seconds following birth.[55]

A policy of punishing women for exposing their fetuses to drugs has several possible constitutional implications. The first to be considered here is the Eighth Amendment prohibition against cruel and unusual punishment, which has been interpreted by the Court to proscribe the punishment of addiction. The case history of the cruel and unusual punishment clause with respect to addiction is reviewed, as are several non-Eighth Amendment cases which provide additional insight into how the Court understands the process and effects of addiction. It is argued that because

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[55]While the majority of prosecutions of women to date have been under child endangerment or abuse laws, these prosecutions have generally failed to bring convictions. *But see* Commonwealth of Kentucky v. Welch, Action No. 90-CR-006 (Boyd Cty. Ct. 1990) (finding a woman pregnant of second degree criminal abuse and sentenced to five years imprisonment for having delivered oxycodone--a prescription narcotic--to her infant through the umbilical cord). The successful prosecutions of women for prematernal drug use have been for delivery of drugs to a minor through the umbilical cord. Many have argued that the drug-delivery statutes were not passed with prematernal drug use in mind. Although scrutiny of the legislative history and intent of drug delivery statutes will play a large part at trial for the women being prosecuted, these issues will not be addressed here. These concerns are largely technical and of little help in making the threshold determination of whether or not a policy of criminalization is a constitutional and/or appropriate response to the problem of drug use during pregnancy.

addiction is a disease, and because of the method that has been chosen to prosecute pregnant addicts, such prosecutions may violate the Eighth Amendment.[56]

The second constitutional provision discussed is the right of privacy. The case history of the right of privacy as it relates to procreative decisionmaking is explored. An argument is then presented which holds that a policy of prosecuting pregnant addicts is deserving of strict judicial scrutiny since it unconstitutionally infringes upon their right of privacy by unduly burdening their ability to make procreative decisions free from unwarranted governmental intrusion.

Finally, the equal protection clause is discussed as it relates to discrimination on the basis of gender and pregnancy. It is suggested that, despite the Supreme Court's views on discrimination on the basis of biological characteristics, the application of especially harsh drug-delivery penalties against women solely on the basis of their pregnant state should receive heightened judicial scrutiny in order for equal protection to be served.

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[56]See *infra* Chapter Three.

Chapter Three: Constitutional Analysis

II: The Eighth Amendment Prohibition Against Cruel and Unusual Punishment

The Eighth Amendment states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[57] The language of this amendment was adopted from the Virginia Constitution of 1776 which had borrowed the text from the English Bill of Rights of 1689.[58] Because of the nature of its origins, relatively little is known about the original intent of the Eighth Amendment. Perhaps for this reason, it was largely ignored by the Courts until 1910.[59] In determining whether a given punishment is cruel or unusual, the Court has not depended upon an exact, static definition of "cruel and unusual"; rather, the Court has considered the protection afforded by the Eighth Amendment to be plastic, changing as society's values and standards of decency change.[60]

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[57]U.S. CONST. amend. VIII.

[58]*See Note: Solem v. Helm: Extending Judicial Review under the Cruel and Unusual Punishments Clause to Require "Proportionality" of Prison Sentences*, 33 CATH U L R 479 (1984).

[59]Id. at 481. *See generally* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF L R 839 (1969).

[60]Weems v. United States, 217 U.S. 349 (1910) (finding the cruel and unusual punishments clause to be malleable based upon society's changing conception of humane justice); Trop v. Dulles, 357 U.S. 86 (1958) (the definition of cruel and unusual should change according to the changing standards of decency that occur as society matures).

Several methods of analysis have been used by the Court in detecting violations of the Eight Amendment prohibition against cruel and unusual punishment. A punishment may be considered cruel and unusual if it is inherently cruel or severe,[61] inflicted arbitrarily,[62] unacceptable to society,[63] or if it is excessive, disproportionate, or unnecessary.[64] Imprisonment, the imposition of the death penalty, and the abrogation of citizenship have been deemed in certain circumstances to be cruel and unusual punishments.[65]

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[61]Wilkerson v. Utah, 99 U.S. 130 (1878) (punishments involving torture or unnecessary cruelty are forbidden by the Eight Amendment provision against cruel and unusual punishment).

[62]Furman v. Georgia, 408 U.S. 238 (1972) (Douglas, concurring opinion) (a punishment may be considered cruel and unusual if it is arbitrarily or discriminatorily applied).

[63]Trop v. Dulles, 356 U.S. 86 (1958) (plurality found that abrogation of citizenship was cruel and unusual in part because the imposition of statelessness was a punishment considered unacceptable by the international community).

[64]Wilkerson v. Utah, 99 U.S. 130 (1878) (punishments which are unnecessarily cruel violate the cruel and unusual punishments provision of the Eighth Amendment); Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, concurring opinion) ("A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishments") (citing O'Neil v. Vermont, 144 U.S. 323, 331).

[65]Weems v. United States, 217 U.S. 349 (1910) (holding imprisonment with hard labor and various accessory penalties to be cruel and unusual punishment); Robinson v. California, 370 U.S. 660 (1962) (imprisonment of narcotic addicts held to be cruel and unusual); Furman v. Georgia, 408 U.S. 238 (1972) (death penalty held to be cruel and unusual punishment).

In the Eighth Amendment and other contexts, the Court has on several occasions addressed the propriety of using the criminal sanction to punish chemically dependent persons. In *Robinson v. California*[66], the Court widened significantly the protection afforded by the cruel and unusual punishment provision of the Eighth Amendment. In *Robinson* the defendant was accused under a California statute which made narcotic addiction a misdemeanor offense.[67] The Court divided the statute into distinct portions:

> "That portion of the statute referring to the 'use' of narcotics is based upon the 'act' of using. That portion of the statute referring to 'addicted to the use' of narcotics is based upon a condition or status. They are not identical..."[68]

The Court then stressed that it was well within the power of

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[66]370 U.S. 660 (1962).

[67]Section 11721 of the California Health and Safety Code states that:

"No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violated this section from the obligation of spending at least 90 days in confinement in the county jail."

[68]370 U.S. 660, 622 (1962).

the States to "regulate the narcotic drugs traffic within [their] borders..."[69], and to "impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders."[70] In addition, the Court found that a variety of measures were available to the state in order to deter the violation of such criminal laws or to promote public health:

> "... a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment programs."[71]

The Court compared making addiction a criminal offense to making "it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease",[72] and found that the criminalization of disease--including addiction[73]--"would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[74]

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[69]Id. at 664.

[70]Id.

[71]Id. at 665 (footnotes deleted).

[72]Id. at 666.

[73]The Court had previously found that addiction was a disease and that persons addicted to drugs "are proper subjects for [medical] treatment...". Linder v. United States, 268 U.S. 5, 18 (1925).

[74]370 U.S. 660, 666 (1961).

In a concurring opinion, Justice Douglas compared the criminalization of addiction with the pre-enlightenment treatment of the insane, stating that

> "... terror and punishment linger on as means of dealing with some diseases. As recently stated:
>
> > '... the idea of basing treatment for disease on purgatorial acts and ordeals is an ancient one in medicine. It may trace back to the Old Testament belief that disease of any kind, whether mental or physical, represented punishment for sin; and thus relief could take the form of a final heroic act of atonement. This superstition appears to have given support to fallacious medical rationales for such procedures as purging, bleeding, induced vomiting, and blistering, as well as an entire chamber of horrors constituting the early treatment of mental illness'..."
>
> "That approach continues as respects drug addicts."[75]

Justice Douglas found the parallels between mental illness and addiction to be compelling, and argued that the two conditions should be treated with equivalence under the law: "...if addicts can be punished for their addiction, then the insane can also be punished for their insanity."[76] As an alternative to criminalization, Justice Douglas cited an expert in the field:

> "'Cooperative interdisciplinary research and action, more local community participation, training the various healing professions in the techniques of dealing with addicts, regional treatment facilities, demonstration centers, and thorough and vigorous post-treatment rehabilitation program would certainly appear to be among the minimum requirements for any attempt to

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[75]Id., Douglas, J., concurring, at 669 [quoting ACTION FOR MENTAL HEALTH 27-28 (1961)].

[76]Id., at 674.

come to terms with this problem.'"[77]

Despite their powerful and pointed language, neither the majority opinion nor Douglas' concurring opinion make clear whether or not the Court was in fact applying a test for proportionality in *Robinson*, as it had in other cases,[78] or whether the Court found within the Eighth Amendment the power to simply declare certain actions as off-limits for purposes of applying the criminal sanction. The Court did address the issue of the penalty:

> "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold."[79]

In a sense, it seems that the Court ruled that *any* level of punishment for the "crime" of suffering from an addiction would be disproportionate and excessive, and, thus, impermissible under the Eighth Amendment as applied to the states through the Fourteenth Amendment.[80]

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[77]Id., at 675 [quoting Winick, *Narcotics Addiction and its Treatment*, 22 L & CONTEMP PROB 9, 33 (1957)].

[78]In U.S. v. Weems, the U.S. Supreme Court interpreted the Eighth Amendment as requiring that a penalty must bear a proportional relationship to the crime that it is designed to punish. United States v. Weems, 217 U.S. 349 (1910).

[79]Id. at 667.

[80]*See* Case Comment, *"Down the Road Toward Human Decency": Eighth Amendment Proportionality Analysis and Solem v. Helm*, 18 GEORGIA L R 109, notes 40-41 and accompanying text (1983) (*Robinson* has been variably interpreted in later cases as a use of the proportionality principle or as a substantive limitation on the use of the criminal sanction against

The precedent established in *Robinson* created confusion in the lower courts as to how broadly the prohibition against punishment for addiction should be interpreted. The majority in *Robinson* emphasized the fact that the conduct criminalized by the California statute was not an act but the status of addiction,[81] and that "the broad power of a State to regulate the narcotic drugs traffic within its borders" was not at issue.[82] In his dissenting opinion, Justice White emphasized that by finding the punishment of addiction *per se* to be cruel and unusual under the Eighth Amendment, the Court was in fact excusing from criminal sanction the "repeated or habitual use of narcotics", since such use is a definitional aspect of addiction.[83]

The *Robinson* case triggered a long line of cases seeking Eighth Amendment protection for a variety of offenses claimed to stem from the addiction process. There have been two lines of argument that have sought to extend *Robinson* to include protection from prosecution for crimes other than addiction "status" crimes, neither of which has met with particular success. The first type of argument posits that since punishing the illness of addiction is

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addiction).

[81]Robinson v. California, 370 U.S. 660, 666 (1961).

[82]Id., at 664.

[83]Id., at 686.

cruel and unusual, then the punishment for crimes impelled by addiction should also be considered cruel and unusual. The second type of argument emphasizes that addiction is an illness that involves powerful physiological and/or psychological compulsion which dominates self-control and causes the addict to commit crimes even though she knows her actions to be wrong. Both of these approaches have had only modest success in the lower courts.

Some courts have extended the prohibition against punishment for addiction found in *Robinson* to include other non-conduct crimes. In *People v. Davis*,[84] the defense successfully used the *Robinson* precedent to invalidate a state statute making it a criminal offense to be under the influence of or addicted to narcotics. In *Davis*, the state argued that because in that jurisdiction addiction was defined as the habitual use of narcotics, the defendant, by definition, was not being prosecuted for status as an addict but for the *use* of narcotics, and thus the statute fell outside of the *Robinson* prohibition against cruel and unusual punishment.[85] The court rejected this argument, finding that the statute was within the *Robinson* prohibition inasmuch as it prohibited no overt act of antisocial

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[84]People v. Davis, 27 Ill 2d 47, 188 NE2d 225 (1963).

[85]Id., cited in Hassman, *Annotation: Drug Addiction or Related Mental State as Defense to Criminal Charge*, 73 ALR3d 16, 34 (1976).

behavior.[86]

Eight years before *Robinson*, in *Commonwealth v. Warner*,[87] a statute which made it a felony to possess, sell or dispense any narcotic was analyzed under the Eighth Amendment. The Court found that if the word "possess" was interpreted broadly enough to include trivial possession (ie., personal use possession), then the punishment could be considered cruel and unusual, since drug users are commonly held by the health care professions to be persons suffering from illness.[88]

Many more courts, however, have refused to extend the holdings in *Robinson* to crimes impelled by addiction.[89] In general, courts have read *Robinson* to mean that punishments are cruel and unusual only if the addicted person is not being charged with an act, and that states may permissibly prosecute addicts for their actions, no matter how directly related to the addiction process.[90]

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[86]Id.

[87]Commonwealth v. Warner, 87 Pa D&C 91 (1954).

[88]Id. In *Warner*, however, the defendant was found to have been in possession of a large quantity of narcotics and was found guilty under the statute.

[89]*See generally,* Hassman, *Annotation: Drug Addiction or Related Mental State as Defense to Criminal Charge*, 73 ALR3d 16, 35-38 (1976) [hereinafter cited as Hassman].

[90]*Id.*, at 39.

The second approach to post-*Robinson* addiction defense resembles an insanity defense, arguing that the process of addiction causes the addict to lose her self-control, leading her to commit crimes that she knows to be wrong. This type of defense has occasionally been successful, particularly when it shows the defendant to be addicted and proves the existence of a compulsion to use at the time of the commission of the criminal act. In *Prather v. Commonwealth*,[91] the court accepted that the defendant, who had become addicted to narcotics while hospitalized for an appendectomy, could be considered insane and non-culpable for the fraudulent use of trust funds.[92] Likewise, in *State v. Flores*,[93] the court granted the defendant a new trial in order to weigh evidence that he may have been suffering from a mental disease of addiction at the time he committed a burglary, and therefore a reasonable doubt existed as to his guilt.[94] However, like the arguments in favor of broadening the Eighth Amendment protection of addicts from punishment for addiction-related crimes, the insanity defense has more typically been unsuccessful in the lower courts.[95]

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[91]Prather v. Commonwealth, 216 Ky 714, 287 SW 559 (1926).

[92]Id.

[93]State v. Flores, 82 NM 480 (1971).

[94]Id.

[95]*See generally*, Hassman, *supra* note 89, at 54-60.

The Supreme Court has not dealt further with the question of narcotic addiction and culpability, and has had little more to say on the matter of narcotic addiction generally. It has, however, addressed the issue of alcoholism and how its status as an addiction is relevant under the Eighth Amendment. These cases provide additional insight into the evolution of the Court's understanding of the nature of addiction.

In *Powell v. Texas*,[96] a badly split Court ruled that it does not violate the Eighth Amendment for a state to criminally punish individuals found intoxicated in public places.[97] *Powell* involved a man who had been arrested and charged under a Texas statute that stated in relevant part: "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."[98] He was tried and found guilty in the Corporation Court of Austin, Texas, and fined twenty dollars. He appealed to the County Court of Travis County, where the judge made the following findings of fact:

> "(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.

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[96]Powell v. Texas, 392 U.S. 514 (1968).

[97]Id., at 514.

[98]Texas Penal Code, Art. 477 (1952), cited in Powell v. Texas, 392 U.S. 514, 516 (1968).

"(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.

"(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."[99]

The trial court, however, found that chronic alcoholism was not an adequate defense for the crime in question and again found Powell guilty.[100]

The plurality opinion in *Powell* rejected the findings of fact of the lower court as being "premises of a syllogism transparently designed to bring this case within the scope of this Court's opinion in *Robinson v. California*."[101] The Court proceeded to attack the premise that alcoholism is a disease, citing several different approaches that have been taken by the medical and behavioristic researchers.[102] The Court then argued that the trial record failed to show that Powell was totally lacking in control of his drinking.[103] The Court noted that, although there has been success in treating alcoholism, "just as there is no agreement among doctors and social workers with respect to the causes of alcoholism, there is not consensus as to why particular

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[99]Powell v. Texas, 392 U.S. 514 (1968).

[100]Id.

[101]Id., at 521 (citation omitted).

[102]Id., at 522-526.

[103]Id., at 525.

treatments have been effective in particular cases and there is no generally agreed-upon approach to the problem of treatment on a large scale."[104] The Court cited the national shortage of treatment facilities as evidence that the health care community is no more capable of handling the problem of alcoholism than is the criminal justice system.[105] In fact, the Court found that the policy of jailing alcoholics is a benevolent one, since the state provides them a welcome respite of sobriety by taking them into custody.[106] Equating therapeutic interventions with civil commitment, the Court further found that the criminal process may be kinder to alcoholics than "therapeutic civil commitment", since the sentence for criminal violations has an upper limit, whereas a civilly-committed person could remain in custody for an indefinite period of time.[107] Thus, the Court was convinced that "Faced with this unpleasant reality, we are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can never be defended as rational."[108] That a large proportion of alcoholics conceal their drinking problems, the plurality

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[104]Id., at 527 (citation omitted).

[105]Id., at 528-529.

[106]Id., at 528.

[107]Id., at 529.

[108]Id., at 530.

argued, reveals the force that popular moral condemnation has had on persons with addictions and provides further support for the use of the criminal sanction to "reinforce this cultural taboo, just as we presume it serves to reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct."[109]

The Court in *Powell* was most concerned, however, with the ramifications of extending *Robinson* to protect alcoholics from charges of public drunkenness.[110] Unable to conceive of how such an extension of *Robinson* could be limited to addicts and alcoholics, the Court felt that "If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill, which is an 'exceedingly strong influence,' but 'not completely overpowering."[111] The Court was "unable to conclude" that based upon "the current state of medical knowledge, that chronic alcoholics, in general, and Leroy Powell in particular, suffer from such an irresistible

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[109]Id., at 531.

[110]The Court states: "Ultimately, then, the most troubling aspects of this case, were Robinson to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility." Id., at 534.

[111]Id. (citation omitted).

compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication."[112]

The Court's basic position, then, was that because alcoholism could not be precisely defined, and because there was no single treatment strategy or effective treatment delivery mechanism in place, there was no reason to disallow the use of the criminal sanction. The majority thought it "obvious" that the use of the criminal sanction against alcoholics has failed in deterring them from drinking, but did not find this to be of great importance, since "all those who violate penal laws of any kind are by definition undeterred."[113] The Court found these considerations, in addition to the public's powerful feelings of moral condemnation for addicts, to be enough to justify the use of the criminal sanction against alcoholics for public drunkenness.

The Court in *Powell* made short shrift of the Eighth Amendment argument, finding that the defendant was not being prosecuted for being a chronic alcoholic, but that the state was imposing a sanction against him for public behavior.[114]

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[112]Id., at 535.

[113]Id., at 531.

[114]Id., at 532.

The relationship between the activity and the addiction, the majority argued, is unimportant under the analysis presented in *Robinson*, which prohibited the state from punishing the status of addiction without reference to a particular act."[115] The majority found it difficult to imagine that if the Court were to allow a defense based upon alcoholism, that it would be able to limit the application of that defense to only those actions related to the addiction, and that such a ruling would threaten the "traditional common-law concepts of personal accountability..."[116]

However, five justices in *Powell* accepted that alcoholism is a disease. The dissent--Justices Fortas, Douglas, Brennan and Stewart--emphasized the trial court's findings that Powell suffered from the disease of chronic alcoholism, and that he was being prosecuted for a "compulsion symptomatic of the disease of chronic alcoholism."[117] Based upon these findings of fact, the dissent framed the issue narrowly:

> "...whether a criminal penalty may be imposed upon a person suffering the disease of 'chronic alcoholism' for a condition--being 'in a state of intoxication' in public--which is a characteristic part of the pattern of his disease..."[118]

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[115]Id., at 533.

[116]Id., at 535.

[117]Id., at 557.

[118]Id. at 558.

The dissent, while admitting that much about the disease of alcoholism remains obscure, emphasized that it is known to be a major public health problem which the American Medical Association had designated as a disease deserving of medical treatment.[119] The dissent cited research pointing to physiological, hereditary, psychological and cultural risk factors for alcoholism.[120] Testimony and research evidence supporting the efficacy of medical treatment of alcoholism was emphasized with the qualification that, while many treatment modalities are available, parameters for selecting the one best treatment for a given patient were yet to be found. The dissent questioned the plurality's implication that incarceration might be beneficial for chronic alcoholics, citing evidence that in fact, it would do nothing to reduce the alcoholic's desire for alcohol, would fail as a deterrent, and would serve only to drain resources and impede the overall goal of solving the problem.[121]

Turning to the constitutional issues, the dissent in *Powell* looked to *Robinson* and the Eighth Amendment, stating that

> "*Robinson* stands upon a principle which, despite its subtlety, must be simply stated and respectfully

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[119]Id., p. 561, citing *AMA, Report of Reference Committee on Medical Education and Hospitals, Proceeding of the House of Delegates, Seattle, Wash., Nov. 27-29, 1956,* 163 J Am Med Assoc 52 (1957).

[120]392 U.S. 514, 561.

[121]Id., at 564-565.

> applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized states and its citizens: criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[122]

The *Powell* dissent found that the findings of fact made by the trial court led them to believe that Powell was being prosecuted for something he was powerless to avoid, and urged reversal of the judgement below.[123]

Justice White--the swing vote in *Powell*--felt that *Robinson* should be read not only to protect addicts and alcoholics from criminal punishment for their status as addicts *per se*, but should also protect them from punishment for use:

> "Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flue or epilepsy but permitting punishment for running a fever or having a convulsion."[124]

Justice White felt, however, that being intoxicated in public was not sufficiently related to the disease of alcoholism as to justify invocation of the Eighth Amendment.

Powell reveals the basic difficulty the Court has had with addressing the problem of addiction in light of *Robinson*. Because of the complexity of the phenomena of alcoholism and drug addiction and the sparse and varied

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[122]Id., at 567.

[123]Id.

[124]Id., at 548.

nature of the research into their etiologies, the Court has not been able to divine the exact legal implications of these conditions. The lack of a simple, easily-understood and broadly-supported model for addiction reinforces what appears to be an even more basic concern to the Court, ie., that excusing an alcoholic or addict from responsibility for actions referable to their "disease" might lead to excusing muggers or rapists whose actions might be considered involuntary for their having suffered from a lack of a nurturing environment as a child.

With these concerns in mind, the Court in 1988 again addressed the issue of alcoholism. In the companion cases *Traynor v. Turnage* and *McKelvey v. Turnage* the Court was called upon to decide if the Veteran's Administration (VA) was correct in denying two recovering alcoholic army veterans extensions of the time in which they were allowed to use their education benefits under the GI Bill.[125] Normally, honorably discharged veterans may use their GI Bill benefits up to ten years after their release from active duty.[126] If a veteran suffers from "a physical or mental disability which was not the result of... willful misconduct", he may obtain an extension over the ten year

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[125]Eugene Traynor v. Thomas K. Turnage, Administrator, Veterans' Administration and The Veteran's Association, and James P. McKelvey v. Thomas K. Turnage, Administrator of Veterans' Affairs, et al., 88 CDOS 2631 (1988).

[126]38 USC Sec. 1661.

limit. Traynor and McKelvey were both honorably discharged veterans who claimed that they had been unable to use their educational benefits during the allotted time because during they had been disabled by alcoholism. The VA rejected their petitions for extensions, finding that their alcoholism constituted "willful misconduct." At issue in this case was whether or not the VA regulation unfairly discriminated against disabled persons, thereby violating the Rehabilitation Act. While this case did not involve an Eighth Amendment claim, the majority did make some interesting comments and references which suggest a shift in the Court's thinking about addiction.

In defining "willful misconduct," the VA looked to a piece of legislation passed in 1987 which states in part:

> "If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohols as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin."[127]

In addition, alcoholism that was "secondary to and a manifestation of an acquires psychiatric disorder" was not

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[127] 38 CFR Sec. 3.301(c)(2)(1987). The distinction between the "proximate" effect (referring, one must assume, to alcoholism, acute intoxication and overdose) and "organic diseases and disabilities which are a secondary result of the chronic use of alcohol" is an interesting one. Apparently, one may be responsible for their developing alcoholism, but this responsibility fades when one develops cirrhosis.

to be considered willful misconduct.[128] The Court was being asked to decide if the VA system of denying primary alcoholism an extension violated the Rehabilitation Act, which states that

> No otherwise qualified handicapped individual... shall, solely be reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by an Executive agency."[129]

The Court found that the VA rules did not involve discrimination against handicapped versus non-handicapped persons, but that these rules instead treated disabled veterans *more* fairly than "able-bodied" veterans--that is, the rules discriminate between two types of disabled veterans--those who bear no responsibility for their disability and those that do.[130] Further, the Court stated that it was within the limits of Congressional authority to "establish priorities for the allocation of the limited resources available for veterans' benefits, and thereby to conclude that veterans who bear some responsibility for their disabilities have no stronger claim to an extended

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[128]Administrator's Decision, Veteran's Administration No. 988, Interpretation to the Residuals of Chronic Alcoholism, Aug. 13, 1964, App. 142-143, cited in Traynor v. Turnage, 88 CDOS 2631, 2631 note 2 (1988).

[129]Rehabilitation Act of 1973, 87 Stat. 394, 29 USC Sec. 794, cited in Traynor v. Turnage, 88 CDOS 2631 at note 1 (1988).

[130]Traynor v. Turnage, 88 CDOS 2631, 2633 (1988).

eligibility period than do able-bodied veterans."[131]

The petitioners claimed that not all cases of alcoholism which do not result from mental illness are necessarily "willful", since alcoholism is a disease characterized by an intense craving for alcohol and by the loss of will to control its use. The Court rejected this argument, citing a lower court finding of "'a substantial body of medical literature that even contests the proposition that alcoholism is a disease, much less that it is a disease for which the victim bears no responsibility.'"[132] Further, the Court stated that "even among many who consider alcoholism a 'disease' to which its victims are genetically predisposed, the consumption of alcohol is not regarded as wholly involuntary", citing an article by a philosophy professor.[133] The Court concluded that there was no need for the VA to provide individual inquiry into each alcoholic's case beyond the determination of whether or not mental illness was an involved factor, since "Congress and the VA have reasonably determined for the purposes of the veterans' benefits statutes that no such

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[131]Id., at 2634 (citation omitted).

[132]Id., at 2634 (citing 792 F.2d 194, 200-201).

[133]Id., at 2634 (citing Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 HARV L R 793, 802-808 (1970)).

[additional predisposing] factors exist."[134]

Traynor suggests several changes in the Court's thinking about alcoholism since *Powell*, not the least of which is that--by a four to three majority--the Court no longer appears willing to accept a "disease" model of alcoholism. In fact, the Court is willing to accept as "reasonable" that no other factor than mental illness may act to remove the responsibility of an alcoholic for her condition. Interestingly, the majority in *Traynor* made no reference to the vast medical, psychological and social welfare literature addressing the subject of alcoholism. Rather, the *Traynor* Court based its radically changed view of alcoholism on an eighteen-year-old law review article written by a philosophy professor.[135]

In this article, Professor Fingarette, concerned about the philosophical and legal implications of the *Powell* majority's apparent acceptance of the disease concept of alcoholism, sets out to "examine the factual content of the statements that alcoholism is a disease and that alcoholism, and the alcoholic's excessive drinking, are 'involuntary.'"[136] In order to assess whether or not

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[134]Id., at 2634.

[135]Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism"*, 83 HARV L R 793 (1970) [hereinafter cited as Fingarette (1970)].

[136]Id., at 797.

alcoholism is a disease, Fingarette picks apart the expert testimony of a single psychiatrist for Powell's defense, and analyzes the language of the dissent for logical inconsistencies. Nowhere in his article does Fingarette examine what the word "disease" means or, more importantly, why alcoholism is or is not a disease. He also fails to survey the broad spectrum of research into alcoholism and addiction, stating that "of course, moral exculpation is hardly a proper part of medical theory."[137] Rather, Fingarette looks to the medical literature for proof that alcoholism conforms to a particular legal or ethical model of involuntariness. Citing various alcohologists' interpretations of what the phrase "loss of control" means and how it is used in the diagnosis of alcoholism, Fingarette implies that alcoholism is not a clinically identifiable syndrome.[138] Next, Fingarette lists--without citation and without reference to the nature of the results--the areas in which research ius being conducted aimed at elucidating the physical mechanisms by which alcoholism is expressed, suggesting that the breadth of inquiry equates to a lack of information.[139] While Professor Fingarette supports the health professions' efforts at alleviating the

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[137]Id., at 800.

[138]Id., at 801-803.

[139]Id., at 803-804.

problem of alcoholism, he does not see these efforts as being "relevant to the propriety of punishing alcoholics."[140]

In *Traynor* the Court accepted Professor Fingarette's rather superficial analysis of the medical research and changed its model of thinking about alcoholism--and perhaps addiction in general--from a disease or medically-oriented model to what has been termed the "wet moral" model.[141] This model holds that "(a)lcoholics are drinkers who do not obey the rules of the drinking society; they behave badly when drunk, and they cannot hold their liquor" and that "(a)lcoholism is an unacceptable form of drinking behavior."[142]

The *Traynor* Court's position on alcoholism reflects two backward steps which may have relevance to future Eighth Amendment claims. First, the Court now appears to reject a substantial body of literature in support of the involuntary nature of alcoholism.[143] Second, the Court appears to have

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[140]Id., at 809.

[141]Siegler, et al., *Models of Alcoholism*, 29 Q J OF STUDIES ON ALCOHOL 571, 575 (1968).

[142]Id., at 575.

[143]For a general review of the scientific research dealing with alcoholism, *see* Woolf, *Central Nervous System Depressants: Alcohol*, in SUBSTANCE ABUSE (Bennett and Woolf, eds. 1991); Giannini and Miller, *Drug Abuse: A Biopsychiatric Model*, 40 AMER FAMILY PHYSICIAN 173, 175-176 (1989) (describing how alcohol use leads to depletion of neurotransmitters required for normal brain function, such that abrupt discontinuation of use produces acute withdrawal symptoms--such as generalized seizure activity--in chronic alcoholics); Schuckit, *Genetic Aspects of Alcoholism*, 15 ANNALS OF EMERGENCY MED 991 (1986)

adopted a standard of voluntariness which would be difficult to meet for any disease, save perhaps an acute infection.

Returning to the context of a policy of prosecuting pregnant or newly-delivered women for drug delivery based upon a positive toxicological screen for cocaine,[144] in order to make a cruel and unusual punishment claim under *Robinson* (in light of *Powell* and *Traynor*), three issues must be addressed. First, it must be established that there is a specific activity being punished in these prosecutions. Second, it must be determined to what extent the alleged conduct may be considered "willful." Finally, the *Traynor* Court's assertion that addiction is not a disease must be addressed--that is, how is cocaine addiction similar to or different from conditions commonly referred to as diseases?

(describing family, twin, and adoption studies which reveal a statistically significant increase in the risk of developing alcoholism among the children of alcoholics when controlled for environmental influences); Li, Ting-Kai, *Genetic variability of Enzymes of Alcohol Metabolism in Human Beings*, 15 ANNALS OF EMERGENCY MED 997 (1986) (discussing human genetic variability in hepatic enzymes important in the metabolism of alcohol and how this correlates to the development of alcoholism amongst people in Japan); Tabakoff, et al., *Alcohol Tolerance*, 15 ANNALS OF EMERGENCY MED 1005 (1986) (discussing how tolerance develops to alcohol and how it is related to increased consumption).

[144]Here I will focus on cocaine, as it is the most common drug involved in this type of prosecution.

In the case against Jennifer Johnson,[145] as in the vast majority of successful prosecutions in this area,[146] the prosecution's argument has rested on a claim that Johnson, in the seconds following the birth of each of her two children, illegally delivered drugs to them via their umbilical cords. Prosecution for the "delivery" of a drug through the umbilical cord specifies the involuntary movement of blood as its proscribed conduct.[147] The "action" in question in these cases is that of a pregnant or newly-delivered woman's heart contracting so as to create a pressure differential which allows a column of blood to flow into the placenta and thus allow gas and nutrient exchange with the fetus' or newborn's circulation. It is important to note that the prosecution in these cases has not sought to punish women like Johnson for drug use *per se*, but rather for the biological sequelae of use. Thus, such cases fail to penalize conduct, since the normal functioning of the woman's cardiovascular system can hardly be considered

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[145]Appellant's Initial Brief, Johnson v. Florida, Case No. 89-1765 (Dec. 28, 1989) at 1.

[146]*See generally*, ACLU Memorandum: State by State Case Summary of Criminal Prosecutions Against Pregnant Women and Appendix of Public Health and Public Interest Groups Opposed to these Prosecutions (Oct. 29, 1990) (citing seventeen cases of "drug delivery" against pregnant addicts in seven states).

[147]Brief of American Public Health Association and Other Concerned Organizations as Amici Curiae in Support of Defendant Appellant, Michigan v. Kimberly Hardy, No. 90-31745-FH, at 31 (Mich. Ct. App. June 29, 1990).

conduct. Clearly, however, the prosecutorial intent has been to punish these women for deliberately seeking to harm their future infants--a difficult case to make in most states, since the fetus is not widely recognized as being protected by criminal statutes. "Delivery" cases, because they fail to establish a specific action that is being punished, do nothing but punish women for their status as pregnant addicts. For this reason, these cases fall squarely into the category of prosecutions considered in *Robinson* to be invalid under the Eighth amendment. Indeed, such prosecutions would fail under the narrow assessment of *Robinson* provided in *Powell*.[148]

Because of the Court's apparent shift in *Traynor* towards a more moral-based concept of addiction, the issue of voluntariness needs to be addressed. The neurophysiological mechanism by which cocaine and other central stimulants cause addiction is now becoming understood. Cocaine and amphetamines--regarded as the most addictive of all the classes of drugs--produce their major neurological effects by increasing release and blocking synaptic reuptake of dopamine in the ventral tegmentum--an area of the brain that normally functions as a primary pleasure center. Repeated administration of these drugs appears to result in the depletion of dopamine and the

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[148]See *supra* notes 96-124 and accompanying text.

development of tolerance, such that ever-increasing doses are required to maintain a minimum dopamine level. Without repeated boosting of dopamine levels by administration of cocaine, the ventral tegmentum becomes deactivated and a profound dysphoria develops, accompanied by vasodilation, muscle cramping, and hypersomnia.[149] In addition, there is evidence that just a single dose of cocaine or amphetamine produces long-term DNA-level changes in neuronal function.[150] Interestingly, it appears that cocaine and alcohol, which have different apparent behavioral effects, produce these effects via separate receptors on the same cell system.[151]

These data, while largely based on experiments with animals, have been successfully applied to the human model in that they have been used to successfully predict effective treatments for the symptoms of withdrawal.[152] In

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[149]Giannini & Miller, *Drug Abuse: A Biopsychiatric Model*, 40 AMER FAMILY PHYSICIAN 173, 177 (1989); Dackis and Gold, *Addictiveness of Central Stimulants*, 9 ADVANCES IN ALCOHOL AND SUBSTANCE ABUSE 9, 20-23 (1990); Bozarth, *New Perspectives on Cocaine Addiction: Recent Findings from Animal Research*, 67 CANADIAN J OF PHYSIOLOGY AND PHARMACOLOGY 1158 (1989).

[150]Graybiel, et al., *Amphetamine and Cocaine Induce Drug-Specific Activation of the c-fos Gene in Striosome-Matrix Compartments and Limbic Subdivisions of the Striatum*, 87 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCE 6912 (1990).

[151]Miller, et al., *Cocaine*, 39 AM FAMILY PHYSICIAN 115, 119 (1989).

[152]The drug bromocriptine--a dopamine receptor agonist--has been successfully used to combat acute withdrawal from cocaine in humans, based upon the animal-derived evidence that cocaine depletes dopamine reserves. Dackis and Gold, *Bromocriptine as a Treatment of Cocaine Abuse*, 1 LANCET 1151 (1985). Additional support for the dopamine depletion

addition to the information gathered at the neurochemical level, a large amount of clinical and preclinical data have been gathered which support the assertion that cocaine addicts are unable to control their use. Self-administration studies with animals are the standard test for determining the abuse potential of a substance. Studies with rats and primates have demonstrated the extreme potency of cocaine and amphetamines as addictive substances. Both types of animals, given an unlimited supply of the drug, will self-administer to the point of death.[153] This complete loss of interest in self-preservation is clearly evident in humans who suffer medical, psychiatric, and social catastrophes as a result of their addiction.

In addition to the biochemical and animal data supporting the involuntary nature of cocaine addiction, there is evidence that women may be individually predisposed by social and environmental factors to substance abuse. Female substance abusers tend to come from more

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hypothesis rests on the observations that cocaine-addicted humans develop classic signs of systemic dopamine depletion--namely, hyperprolactinemia and decreased homovanillic acid levels. Dackis et al., *Central Stimulant Abuse: Neurochemistry and Pharmacology*, 6 ADVANCES IN ALCOHOL AND SUBSTANCE ABUSE 7 (1987); Extein et al., *Persistent Neurochemical Deficit in Cocaine Abuse*, Amer. Psychiatric Assoc. Abstracts, NR 61 (1987).

[153]Pickens and Harris, *Self-administration of d-Amphetamine by Rats*, 12 PSYCHOPHARMACOLOGY 158 (1968); Miller, et al., *Cocaine: General Characteristics, Abuse and Addiction*, 89 NY STATE J MEDICINE 390 (1989).

dysfunctional families than non-substance abusers.[154] In addition, female substance users are more likely to suffer depression, anxiety, and low-self esteem and to have been victims of sexual abuse as children.[155] Large percentages of women who abuse substances report suffering physical abuse and housing problems including homelessness.[156]

Finally, it is important to examine the term "disease" and whether or not perinatal addiction might be considered as such. The Court's opinion in *Traynor* suggests that they are unwilling to accept that alcoholism as a disease because of its behavioral or social determinants. This suggests that the Court considers the term "disease" to include only those conditions unrelated to "voluntary" behavior. However, addiction is no different from the majority of conditions which make up the principle causes of morbidity and mortality in this country. Coronary heart disease, cerebrovascular disease, cancer, adult-onset diabetes and many other common conditions are significantly correlated with a complex array of variables including behavior (eg., smoking, overeating, sedentary lifestyle, etc.), economic

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[154]AMA Board of Trustees Report, Drug Abuse in the U.S.: The Next Generation (Interim 1989), *cited in* Cole, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behaviors by Pregnant Women*, 264 J Am Med Assoc 2663, 2668 (1990) [hereinafter cited as Cole].

[155]Cole, *supra* note 154, at 2668.

[156]Id.

status, occupation, family history, geographic location, etc. Each of these conditions would fail to be included in any model of disease which requires that the victim "catch" the disease "involuntarily." In fact, such a model might only include diseases caused by infectious agents.[157] Over the course of the twentieth century the infectious diseases--such as smallpox and diphtheria--which used to be the common causes of morbidity and mortality have been largely overcome with advances in pharmacology, the development of preventative vaccines, and technologic advances in inpatient care. These developments have served to unmask the more complicated health problems of today, necessitating fundamental changes in the way that the health care field conceives of disease. As such, the model of disease has been broadened to include the social and environmental factors associated with the evolution and clinical expression of disease into what is referred to as the "biopsychosocial" model.[158] Philosophers disagree as to

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[157]However, it is clear that even infectious agents require host-specific characteristics and/or behaviors in order to infect. For example, the human immunodeficiency virus and the hepatitis B virus require access to the blood supply of a prospective host in order to infect, such that individuals who engage in behaviors involving parenteral contact are at increased risk for developing these diseases. Perhaps the most dangerous infectious illnesses encountered today result precisely from human behavior: ie., iatrogenic, or hospital-acquired infections.

[158]*See generally* Engel, *The Need for a New Medical Model: A Challenge for Biomedicine*, 196 SCIENCE 129 (1977); WHITE, THE TASK OF MEDICINE: DIALOGUE AT WICKENBURG (1988) (arguing for a change in the prevailing paradigm in medical practice with one that

whether or not addiction may be considered a disease (eg., whether or not the mind can be the locus of a disease agent). Focusing on the disease agent or entity without regard for the characteristics of the host/victim, however, assumes a monoetiologic model of disease which lost its clinical usefulness early in this century.

From a clinical perspective, addiction fits the mold of any of the major chronic illnesses: it frequently develops over a relatively long period of time, occurs in environmentally and genetically predisposed individuals, and frequently leads to multiple biopsychosocial system failures.[159] Addiction is perhaps unlike many of the other chronic illnesses (such as cardiovascular disease) in that its progression can be halted and much of its damage reversed with vigorous and well-coordinated treatment.[160]

"interacts disease with personal, social and psychological factors to explain individual differences in illness"; Id., at ix).

[159]See *supra* note 143.

[160]*See generally*, Dackis and Gold, *Addictiveness of Central Stimulants*, 9 ADVANCES IN ALCOHOL AND SUBSTANCE ABUSE 9, 23-24 (1990); Miller, et al., *Cocaine: General Characteristics, Abuse and Addiction*, 89 N.Y. STATE J MEDICINE 390, 393-394 (1989); Digregorio, *Cocaine Update: Abuse and Therapy*, 41 AM FAMILY PHYSICIAN 247, 249-250 (1990); Gawin, *Cocaine Abuse and Treatment*, 29 J FAMILY PRACTICE 193, 195-196 (1989); Chychula and Okare, *The Cocaine Epidemic: Treatment Options for Cocaine Dependence*, 15 NURSE PRACTITIONER 33, 35-40 (1990); Taylor and Gold, *Pharmacologic Approaches to the Treatment of Cocaine Dependence*, 152 WESTERN J MED 573 (1990).

The application of the criminal sanction to a problem of this complexity serves little purpose aside from focusing societal blame for an admittedly serious problem on the individuals it most directly affects. At some point, however, blame becomes counterproductive as a means of addressing societal problems, as it tends to obscure the development of more effective solutions. The history of the treatment of the mentally ill in Western Europe is instructive here.[161] Prior to the enlightenment it was common practice to use torture (even to the point of death) to attempt to force the mentally ill to see the error of their ways. These methods reflected the predominant truth of the time--first discovered by two Dominican monks in 1487--that mental illness resulted from an act of free will and thus was deserving of punishment.[162] This approach was practiced until the early nineteenth century when the predominant conception of disease was broadened to include mental illness. This switch came precisely at the time that the study of the processes of mind began in earnest. Subsequently, effective treatments began to be developed for the mentally ill.[163]

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[161]See *supra* page 27-28, quoting Justice Douglas' comparison in *Robinson* of the punishment of addiction to the punishment of the mentally ill.

[162]Zegans and Victor, *Conceptual Issues in the History of Psychiatry*, in GENERAL PSYCHIATRY (Goldman, ed. 1988) at 10-11.

[163]Id.

The problem of perinatal addiction--and addiction in general--places society at a similar juncture, where a choice must be made between punishment and treatment, between blame and advocacy. This choice is necessary because one obviates the need for, and distracts attention and resources away from, the other. Choosing to blame and punish pregnant women who are addicted to illegal drugs may serve to block further inquiry into more compassionate and effective approaches.

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In summary, then, the Court's ruling in *Robinson*--that it violates the Eighth Amendment to punish people for having the disease of addiction--was important in that it represented an attempt by the Court to allow for changes in the predominant paradigm of disease. The Court modified its position somewhat in *Powell*, holding that while addiction (eg., alcoholism) is a disease, the protection afforded by the Eighth Amendment is very narrow and is to be applied to only those cases where no specific act is alleged. Pregnant addicts have been frequently charged for drug delivery--a more serious crime than simple use--based upon a positive urine or cord blood toxicological screen. The alleged "act" is the delivery of a drug to the infant ("minor") in the seconds following birth. Since no true action is being alleged, such policies punish pregnant women for having the disease of addiction, and thus violate the Eighth amendment.

From a broader (ie., policy) perspective, it is important to note that while in recent years the Court has narrowed its concept of disease--as in *Traynor*--the medical and other health professions have been required by changes in epidemiology to broaden their approach to disease. Many in the health and other caring professions feel that a new, broader model of disease must be adopted in order to allow for inquiry into the prevention and treatment of today's complicated morbidities--including addiction. The courts should adopt a more up-to-date model of disease and should refrain from using a punitive approach to problems that fall outside of the narrow mono-etiologic model of old. Otherwise, the effect will be to hobble the development and implementation of more compassionate, effective and inexpensive ways of managing problems such as addiction.

B. The Eighth Amendment Prohibition Against Arbitrary Punishment

In addition to proscribing the punishment of persons for the condition of having a disease, the Court has interpreted the Eighth Amendment in another way which impacts upon the discussion here. The Eighth Amendment has been found to proscribe the arbitrary application of criminal punishment. In *Furman v. Georgia*,[164] Mr. Justice

[164]508 U.S. 238 (1972).

Douglas in a concurring opinion held that the basic theme of equal protection is implicit in the Eighth Amendment: a penalty should be considered to be unusual if it is administered discriminatorily.[165] Justice Douglas stated that the

> "high service of the Eighth Amendment is to require legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."[166]

In addition, Douglas wrote that in

> "a nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position."[167]

Douglas' analysis suggests that current trends in the prosecution of pregnant women for drug use should be considered cruel and unusual, since studies have shown a distinct tendency to arbitrarily and discriminatorily prosecute certain groups of women, particularly impoverished women and women of color. In Pinellas County, Florida, a study performed by the National Association for Perinatal

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[165]Id.

[166]Id., at 256.

[167]Id., at 255.

Addiction Research and Education (NAPARE) revealed no significant difference between the incidence of a positive urine screen for illegal drugs between white women (15.4%) and black women (14.1%) at childbirth.[168] Despite the fact that drug use appears to be equally common in both groups, the same study found that black women were ten times more likely to be reported to law enforcement authorities than white women, despite Florida's mandatory reporting requirements.[169] In addition, the NAPARE study found that poor women were more likely to be reported, with sixty percent of those reported having incomes of less than $12,000. Only eight percent of the reported women had incomes of greater than $25,000 per year. Thus, despite the fact that the incidence of the *use* of illicit substances appears to be similar in all groups of women, it is much more likely that poor women of color will be reported.

In addition to such discrimination in reporting, more

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[168]Chasnoff, et al, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 N ENGL J MED 1202 (1990). *See also* Holly, *Study: Race Affects Drug-Abuse Testing*, Miami Herald, Sept. 19, 1989, at 2B; R. Winslow, *Black Pregnant Women Far More Likely Than Whites to be Reported for Drug Use,* Wall St J, Apr. 27, 1990.

[169]Id. The study showed, however, that the incidence of positive urine screens for cocaine metabolites was higher in black women than in white women, while the incidence for marijuana metabolites was higher in white women than in black women. Nevertheless, Florida law requires reporting of any controlled substance found in the urine of a delivering woman or her infant. Kolata, *Racial Bias Seen on Pregnant Addicts,* NY Times, July 20, 1990, at A13.

women of color are being prosecuted for prematernal drug use. The American Civil Liberties Union has reported that eighty percent of such prosecutions have involved women of color.[170] In another study a similar discriminatory trend was shown in court-ordered obstetrical interventions, where eighty-one percent of the women involved were women of color.[171]

In all probability, it is the discrimination in reporting practices which leads to discrimination in prosecution. It would be difficult to prove a discriminatory intent on the part of the state under these circumstances. The discriminatory effect, however, is clear and is particularly compelling because it involves the non-uniform application of the burden of loss of liberty. Thus, while it would be difficult to formulate a strong case for a constitutional violation of the Eighth Amendment proscription against arbitrary punishment, the discriminatory effects of criminalization policies warrants legislative and prosecutorial review and/or repeal of current reporting and prosecuting practices.

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[170]Memorandum: Overview of ACLU National Survey of Criminal Prosecutions Brought Against Pregnant Women: 80% Brought Against Women of Color at 2 (Oct. 3, 1990). The total number of prosecutions reported as of October, 1990, was fifty-three. Id at 2.

[171]Kolder, Gallagher & Parsons, *Court-ordered Obstetrical Interventions*, 316 N. Engl. J. Med. 1192 (1987).

Chapter Three: Constitutional Analysis

III. The Due Process Clause and the Right of Privacy

Because it relates to state intervention in the process of gestation and childbirth, the criminalization of perinatal addiction has implications that need to be analyzed in light of the constitutional right of privacy. In order to fully explore these implications, a brief history of the privacy case law will be discussed as it relates to reproduction. Some attempt will be made to find a common theme amongst these cases and to relate it to the issue at hand. The arguments in favor of fetal protection policies will be addressed and critiqued. It will be argued that a policy of criminalization does implicate a woman's right of privacy in that it burdens her ability to make reproductive decisions without unjustified interference on the part of the state. (The state interest in protecting fetuses and infants from harm and the relationship a policy of criminalization bears to that interest will be considered in a later section.)

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The constitutional right of privacy has engendered perhaps more public debate than any other development in the history of the Supreme Court. This, of course, is due to the fact that the most famous cases involving the right of privacy have been the abortion cases. The issue of abortion touches so many bare nerves in American society that the

right of privacy has become bound to the issue in popular debate. The right of privacy has its roots and origins, however, in much less exciting areas of the law.

In a law review article in 1890, Louis Brandeis and Samuel Warren argued that the concept of privacy as applied to constitutional doctrine should not be solely considered as an aspect of the right to hold property (as had been the practice), but should be conceived as having an intimate connection with personal liberty.[172] Forty years later, Justice Brandeis reiterated this position in a dissenting opinion in a case involving the constitutionality of wiretaps of telephones, in which he argued against the majority view that the protection afforded by the Fourth Amendment against warrantless searches and seizures did not apply to conversations because conversations were not property.[173] Brandeis argued that the framers, at a more fundamental level, had desired to protect "their beliefs, their thoughts, their emotions and their sensations", and that the Fourth Amendment, in addition to protecting property, should also be interpreted as implying a personal right "to be left alone--the most comprehensive of rights and the right most valued by civilized men."[174]

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[172]Warren & Brandeis, "The Right to Privacy", 4 HARVARD LAW REVIEW 193 (1890).

[173]Olmstead v. United States, 277 U.S. 438 (1928).

[174]Id., at 478 (dissenting opinion).

The scattered origins of the right of privacy have been variably cited to include the First Amendment,[175] the Fourth Amendment,[176] the due process clauses of the Fifth and Fourteenth amendments,[177] and the privileges and immunities clauses of Article IV and of the Fourteenth Amendment.[178]

Often cited as seminal in the development of the privacy right are the cases of *Meyer v. Nebraska*[179] and *Pierce v. Society of Sisters*.[180] In *Meyer*, the Court struck down a law forbidding the teaching of foreign languages in elementary school, finding it violative of the due process clause. In *Pierce*, the Court struck down a requirement that all children attend public school. The statutes stricken in these cases represented the substitution of state judgement over that of parents in ways that implicated fundamental

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[175]*See, eg.* Stanley v. Georgia, 394 U.S. 557 (1969) (overturning a conviction for possession of pornographic material on first amendment and privacy grounds); NAACP v. Alabama, 357 U.S. 479 (1965) (privacy in one's associations is protected as a peripheral first amendment right).

[176]Mapp v. Ohio, 367 U.S. 643 (1961) (right of privacy is protected by the fourth amendment prohibition on unlawful search and seizure).

[177]Roe v. Wade, 410 U.S. 113, 153 (1973).

[178]Doe v. Bolton, 410 U.S. 179, 200 (1973).

[179]262 U.S. 390 (1923).

[180]268 U.S. 510 (1925).

aspects of their childrens' lives.[181]

It was not until 1965, in *Griswold v. Connecticut*, that the Court declared the right of privacy to be an independent constitutional right, guaranteed by "penumbras, formed by emanations" of the First, Third, Fourth, Fifth, and Ninth Amendments.[182] The *Griswold* case involved a challenge to a Connecticut statute making it unlawful to use contraceptives or to dispense them for use. Thus, in addition to forging the right of privacy, *Griswold* also served to set the contextual agenda for many of the future privacy cases in that at its core was the issue of reproductive freedom. The majority in *Griswold* reasoned that enforcing a law forbidding the use of contraceptives by married couples would require unacceptable intrusions into marital bedrooms. Lawrence Tribe, Harvard Professor of constitutional law, however, points out that it is not the level of intrusion required to enforce the statute that makes it unacceptable under the privacy right; rather, it is the relationship of the law to intimate personal choices.[183] This distinction

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[181]For comment on how *Pierce* and *Meyer* relate to the development of the right of privacy, *see* Rubenfeld, *The Right of Privacy*, 102 HARVARD LAW REVIEW 737, 743 and 785-787 (1989) [hereinafter cited as Rubenfeld].

[182]Griswold v. Connecticut, 381 U.S. 479 (1965).

[183]See Tribe, AMERICAN CONSTITUTIONAL LAW 1338 (1988).

was firmly stated by the Court in *Eisenstadt v. Baird*,[184] in which Justice Brennan wrote that the right of privacy guaranteed that individuals would be "free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[185]

These cases thus established the right to choose not to procreate as being protected by the right of privacy. The right to choose to procreate had been established in *Skinner v. Oklahoma* in 1942, in which the Court overturned a state statute requiring the sterilization of persons convicted of two or more felonies.[186] In *Skinner*, the Court stated that right to reproduce is "one of the basic civil rights of man [sic]", and expressed the view that placing the decision of whether or not to reproduce in the hands of the government smacked of human experimentation and invited genocide.[187]

The year following the *Eisenstadt* decision, the Court found that the right of privacy guaranteed the freedom to decide whether or not to have an abortion. Justice

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[184]405 U.S. 438 (1972) (invalidating a Massachusetts statute prohibiting sale of contraceptives to unmarried persons).

[185]Id. at 453.

[186]316 U.S. 535 (1942) (striking, for violation of equal protection guarantee, a statute requiring forced sterilization of certain convicted felons).

[187]Id. at 541.

Blackmun, writing for the majority in *Roe v. Wade*, examined the historical reasons behind the criminalization of abortion--including the Victorian concern with illicit sexual conduct, the hazardous nature of the operation, and the concern with protecting prenatal life. He found no rational support for the first two concerns, but accepted the third. He examined the right of privacy, its origins and the protections provided by it, and concluded that it "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[188] The Court also stated, however, that the right to privacy in making the abortion decision "is not unqualified and must be considered against important state interests in regulation."[189] In *Roe* the Court constructed the trimester system in order to balance the maternal interest in privacy and the state interest in protecting life--referring to both the actual life of the mother and the potential life of the fetus.[190] During the first trimester, decisions concerning abortion are to be made by the woman in consultation with her physician; during the second trimester, the state may regulate the abortion procedure in ways aimed at protecting the health of the

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[188]410 U.S. 113, 153 (1972).

[189]Id., at 154.

[190]The Court did not consider the fetus to have interests unto itself, stating that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Id., at 158.

woman; during the third trimester (equated with the post-viability period), the state may choose to regulate or proscribe the abortion procedure in favor of protecting the potential life of the fetus, except when necessary to protect the life or health of the mother.[191]

The analysis proffered by the Court in *Roe* has withstood a number of flank attacks. Following the decision in *Roe*, many states attempted to limit the case's effects by placing obstacles in the way of women's obtaining abortions. The Court has invalidated state attempts to require that certain types of procedures be forbidden,[192] or that the abortion procedure be aimed at maximizing the chance of fetal survival.[193] Requirements that information about the women obtaining abortions be made public--believed to be transparent attempts at legalizing harassment of such women--have also been stricken by the Court.[194] Finally, requirements that women be given explicit information concerning the development of the fetus, the effects of the

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[191]Id., at 163-165.

[192]Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (striking down a state ban on the use of saline abortions during the first trimester).

[193]Thornburgh v. American College of Obstetricians & Gynecologists, 106 S.Ct. 2169 (1986) (striking a law requiring that the choice of abortion procedure be aimed at maximizing chances of fetal survival unless that procedure "significantly" increased maternal risk).

[194]Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

While not expressly overturning *Roe*, the *Webster* decision is believed by many to have initiated its dismantling.

The politics of the Supreme Court nomination process appear to have altered the strength of the protection afforded by the right of privacy. Between the *Thornburgh* decision and *Webster*, the Reagan administration appointed two justices--Scalia and Kennedy--both of whom joined the majority in *Webster*. Since *Webster*, the Bush administration has appointed David Souter to replace Justice Brennan. It is unclear what effect the Souter appointment will have on constitutional law affecting abortion, but it seems that the integrity of the foundation laid by *Roe* may be in doubt.

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The privacy right has been determined to provide constitutional protection to certain decisions involving reproduction including the right to choose whether or not to procreate, and the decision whether or not to have an abortion. In addition, the Court has overturned on privacy grounds laws criminalizing interracial marriage[199] and restricting the right of poor people to marry or divorce.[200] In *Moore v. City of East Cleveland*,[201] a bare majority overturned a city ordinance which had the effect of denying

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[199]Loving v. Virginia, 388 U.S. 1 (1967).

[200]*See* Zablocki v. Redhail, 434 U.S. 374 (1978); Boddie v. Connecticut, 401 U.S. 371 (1971).

[201]431 U.S. 494 (1977).

a grandmother the right to live together with two of her grandchildren, citing as precedent *Meyer*[202] and *Pierce*.[203] In a more recent case, however, the Court upheld a Georgia statute making homosexual sodomy a criminal offense.[204] Justice White, for the Court, rejected Hardwick's privacy claim on the grounds that sodomy bears no relation to the concerns of the previous privacy cases, which have involved marriage, procreation, and family relationships.[205] This curious distinction--that somehow homosexual sexual practices are somehow less deserving of privacy protection than are heterosexual practices--begs the question of just what *is* protected by the privacy right and why. Clearly, the right of privacy acts as a limitation on what the state may require of its citizens or forbid them to do. The central principle that determines in which areas of law the right of privacy affords this protection has yet to be delineated by the Court. As stated by one commentator, "privacy is like obscenity: the Justices might not be able to say what privacy is, but they know it when they see it."[206]

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[202]262 U.S. 390 (1923).

[203]268 U.S. 510 (1925); *See supra* notes 179-181 and accompanying text.

[204]Bowers v. Hardwick, 478 U.S. 186 (1986).

[205]Id., at 190-191.

[206]Rubenfeld, *supra* note 181, at 751.

The result in *Bowers* emphasizes that the Court has left much room for wobble in the interpretation of the range of protection afforded by the privacy right. This vacuum is the pivotal issue in the conflict between fetal rights (or, more specifically, the right of the state to intervene on behalf of fetuses) and maternal rights. The location of the margins of the privacy right determines the level of scrutiny to be given to state interventions in pregnancy. The limits of this right have been variously interpreted in the lower courts. In *Commonwealth vs. Pellegrini*, for instance, the Superior Court in Plymouth, Massachusetts found that the prosecution of a pregnant woman for delivery of an illegal drug to her newborn through the umbilical cord *did* violate the woman's right of privacy,[207] whereas the court in the *Johnson* case found the opposite.[208] For those who advocate the use of criminal sanctions against women for their conduct during pregnancy, it is important to dissect away a woman's management of her life during pregnancy from the privacy issue. Civil libertarians, on the other hand, see the conduct of a woman during pregnancy as being protected under the privacy right.

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[207]Commonwealth v. Josephine Pellegrini, Memorandum of Decision and Order on Defendant's Notion to Dismiss, Case No. 87970 (Sup. Ct. Plymouth, ss.) (1989), at 7-8.

[208]Johnson v. Florida, Case No. 89-1765, Appellant's Initial Brief (Dist. Ct. Appeal, 5th Dist., Fl.) (1989), at 1.

Advocates for fetal rights base their arguments on a narrow reading of the protection afforded by the privacy right combined with a broad generalization of the state power to intervene against maternal actions based upon the analysis in *Roe*. This position, best explicated by John Robertson, relies on a taxonomic approach to the privacy cases.[209] Robertson atomizes the right of privacy as applied to procreation into smaller rights, including the "right not to procreate", and the liberties to transfer ones genes, to conceive, and to gestate.[210] By breaking down the reproductive process, Robertson distinguishes the areas that have not been deliberated by the Court as being areas not deserving of protection. Specifically, Robertson argues that the right of privacy protects a woman's right to conceive or abort, but not to manage her pregnancy. A woman

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[209]Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VIRGINIA L.R. 405 (1983). Professor Robertson's arguments are analyzed here since they represent a particularly lucid and compelling construction of the relationship between mother, fetus and the state. Professor Robertson does not, however, advocate the immediate use of wide-ranging and coercive fetal protection policies:

> "The speculative danger of abuse is no reason to exempt children from legal protection against pregnant women who are not able to meet reasonable community standards about safe conduct during pregnancy. Of course, voluntary compliance, education, and making treatment and resources available, rather than coercive sanctions, remain the most desirable policies."

Robertson, *Fetal Abuse: Should We Recognize it as a Crime? Yes,* AMERICAN BAR ASSOC. JOURNAL, August, 1989, at 38.

[210]Id., at 408-410.

may, Robertson argues, manage her pregnancy in ways that might harm the fetus as long as she has chosen to abort.[211] However, once she chooses to bring a fetus to term, she loses her ability to manage her pregnancy and may be held accountable for any action or inaction which is not referable to a fundamental right (other than the right to privacy) and that results in harm to her fetus.[212] In addition, Robertson finds that in the event of a conflict between maternal autonomy and fetal interests, the preference should be for the fetus, since a pregnant woman jettisons fundamental rights by deciding to bear a child: "She waive(s) her right to resist bodily intrusions made for the sake of the fetus when she cho(oses) to continue the pregnancy."[213]

In support of this waiver concept, fetal rights advocates look to *Roe*, where the Court found that in the third trimester of pregnancy the state interest in the future life of the fetus becomes compelling and the state may, if it so chooses, proscribe all abortions save those to protect the health of the mother.[214] Based on this aspect of

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[211]Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VIRGINIA LAW REVIEW 405, 437-438 (1983) [hereinafter cited as Robertson (1983)].

[212]Id., at 442.

[213]Id., at 445.

[214]Roe v. Wade, 410 U.S. 113, 163-165 (1973).

Roe, advocates for fetal rights argue that states, in addition to prohibiting abortion, should also be able to prohibit maternal activity which may "lead to the same result."[215] By broadening the state interest in the future life of the viable fetus found in *Roe* to include an interest in that fetus being born as healthy as possible, Robertson finds that, in addition to abortion, many maternal activities may be proscribed by the state. Under Robertson's analysis, the state could require a pregnant woman to eat a particular diet, to take whatever medication is prescribed to her, to submit to fetal therapy and/or cesarean section, to avoid certain types of work and recreation, and to undergo mandatory prenatal screening tests such as amniocentesis in order to maximize the health outcome for her fetus.[216] In the instant case, Robertson finds that the states may use criminal sanctions against pregnant women who use tobacco, alcohol, or other "psychoactive substances", since there is no fundamental right to their use.[217]

The analysis proffered by Robertson and other fetal rights advocates frames the issue of whether or not the state may intervene in a pregnant woman's life by dissecting

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[215]Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 Duq. L. Rev. 1, 18 (1984).

[216]Robertson (1983), at 442-450.

[217]Id., at 442.

the reproductive process to find the areas unaddressed by the Court. The protection the Court has given to certain aspects of the reproductive process is considered to derive from fragmentary rights, whereas those areas that have not been deliberated are assumed to be unprotected and open to state intervention without compelling justification. This analysis utilizes artificial distinctions to deface the central theme of the privacy cases--that people should be free from unwarranted governmental intrusion into aspects of their lives that are fundamental to their personhood, such as reproduction. The privacy cases strongly suggest the presence of a core value which the right of privacy is meant to protect and which taxonomic analyses like that of Robertson obscure. One commentator finds trouble with taxonomic systems aimed at resolving the areas protected by the right of privacy, and suggests that in the privacy cases the Court is concerned with the preservation of "those attributes of an individual which are irreducible in his selfhood."[218] The dicta of the privacy cases corroborate this theme: "If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to

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[218]Tribe, *supra* note 197, at 1304, quoting Freund, 52nd ALI Ann.Mtg. 42-43 (1975).

bear or beget a child."[219] It has also been suggested that the right of privacy be viewed as protecting a person from state intrusions which might lead to major changes in the future of that person's life--that the right of privacy is meant as a protection against totalitarian governmental policies.[220]

Another difficulty with Robertson's analysis is his reliance on a distorted version of *Roe*. *Roe* does not say that a woman waives her rights to manage her pregnancy once her fetus has reached viability. The Court in *Roe* specifically stated that at viability the state interest in the life of the fetus becomes compelling, and it may at that point, if it chooses, proscribe abortion--ie., the deliberate act of killing the fetus. From a larger perspective, it is interesting to note that *Roe*, far from justifying state intervention in the lives of pregnant women, erected a powerful new barrier against just such intervention.

Perhaps the most difficult aspect of Robertson's analysis is the breadth of the intrusions into a pregnant

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[219]405 U.S. 438, 453 (1972) (emphasis in original); also *see* Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (striking a rule requiring unpaid maternity leave for pregnant teachers as violative of the guarantee of freedom in reproductive decisionmaking provided by the due process clause of the Fourteenth Amendment).

[220]*See generally* Rubenfeld, *The Right of Privacy*, 102 HARVARD L.R. 737 (1989).

woman's life that it might justify. Nearly every action taken by a pregnant woman could be construed to involve some risk to her fetus. The kinds and scope of state interventions mentioned by Robertson would almost certainly implicate a woman's right to privacy in that they would place such a great burden upon the pregnant woman so as to weigh heavily against the decision to bear a child. As evidenced by the contraception and the abortion decisions, the Court has not been willing to allow this kind of state pressure upon a woman's decision of whether or not to reproduce. In the contraception cases, despite the fact that there is no fundamental right to access to contraceptives, the Court found that statutes which restricted such access would be subjected to strict scrutiny because they infringed upon the fundamental right of the individual to make decisions involving "matters of childbearing..."[221] In several of the abortion cases the Court struck down state provisions which infringed upon the woman's right to choose to abort.[222] The theme in these

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[221]Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977). *See* Johnsen, *supra* note 53, at 617-618.

[222]*See generally* Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (striking down a state ban on the use of saline abortions during the first trimester); Thornburgh v. American college of Obstetricians & Gynecologists, 106 S.Ct. 2169 (1986) (striking a law requiring that the choice of abortion procedure be aimed at maximizing chances of fetal survival unless that procedure "significantly" increased maternal risk); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (Court held unconstitutional several statutory requirements including a mandatory twenty-four hour waiting

cases is that women should be able to make decisions concerning the reproductive aspects of their lives without state-mandated pressure unless the state has a compelling interest in doing so.

Using the power of the state to threaten women with post-birth sanctions should their pregnancies result in bad outcomes would place pressure on a woman to opt not to have children in the first place. Non-pregnant women, threatened with their loss of rights as individuals, would probably be less interested in reproducing should they be required to meet an arbitrary standard of prenatal conduct or be the guarantors of the outcome of their pregnancies. By choosing to become pregnant they might run the risk of being forced out of their jobs, required to avoid recreational activities to which they are accustomed, and be required to submit to invasive surgical procedures. Pregnancy would become the only area in the law where we require a person to jettison her basic ability to live her life as an individual, to power her own destiny. State action aimed at protecting the "unborn" from their mothers' activities threatens the individuality of pregnant women and therefore implicates their right to privacy. Such state action must therefore survive strict scrutiny in order to pass constitutional

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period before one could attain an abortion, a requirement for informed consent, and the requirement that all third-trimester abortions be performed in a hospital).

muster.

Returning to the instant case, it is difficult for many to consider prematernal drug use as a legitimate exercise of individual freedom that might trigger strict scrutiny by implicating the right of privacy. Advocates for criminalization stress that there is no fundamental right to use psychoactive substances, and that the compelling state interest in future life cited in *Roe* empowers the state to sanction such activity. Framing the issue in such simplistic terms, however, ignores several important factors in the equation. First, the criminal model ignores a large body of scientific literature and clinical experience with addiction which clearly points to its being a disease which is characterized by its loss of the ability to regulate the ingestion of a given substance.[223] In addition, certain individuals appear to be at greater risk for developing an addiction based upon genetic and environmental risk factors beyond their control--factors which lie outside the range of general deterrence.[224]

The criminal model also neglects to take into consideration the lack of availability of drug treatment--a factor that was clearly ignored in the prosecution of

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[223]*See* supra Chapter 3, Section IIA.

[224]Id.

Jennifer Johnson.[225] If treatment were available, one might be able to argue that criminalization policies might create an incentive for pregnant women with addictions to seek treatment. However, discrimination by drug treatment programs against women in general and pregnant women in particular, and the long waiting lists for the few programs that do exist, leaves a pregnant woman suffering from addiction with no way to shield herself against the criminal liability that will be imposed upon her once her fetus is born. While criminalization may or may not deter drug use amongst addicts,[226] it may very well serve to deter pregnant women from carrying their fetuses to term. The decision of whether or not to terminate pregnancy is much less remote with respect to the threat of criminal punishment, and probably within the range of its deterrent effect. Deterring the pregnant addict from bringing her fetus to term would serve the same policy goal as deterring drug use--preventing the birth of drug-affected infants. Thus, while the theoretical purpose of criminalization policies is to deter drug use during pregnancy, the realities of the nature of addiction and the lack of availability of treatment redirect the blunt deterrent

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[225]TESTIMONY OF JUDGE BEFORE THE CALIFORNIA SUBCOMMITTEE; NEED PAGE NUMBER.

[226]See *infra* notes XXXX and accompanying text [RE:SS test and prong #2).

effect of such policies against childbirth itself. A policy which has the effect of burdening the decision to bear a child arguably threatens a woman's liberty in making procreative decisions protected by the right of privacy and thus requires the application of strict judicial scrutiny.[227] As stated in *Eisenstadt v. Baird*, "If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[228] As established in the contraception and abortion cases, the state may not place obstacles in the way of a woman's ability to make procreative decisions. The effect of criminalization policies is to impair a pregnant woman's freedom to control her own procreation, and such policies may therefore implicate her right of privacy.[229]

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[227]Memorandum of Decision and Order on Defendant's Motion to Dismiss, Commonwealth v. Pellegrini, No. 87970, Superior Court of Plymouth, Mass., (Oct. 15, 1990) at 7 (finding the prosecution of a pregnant woman for delivery of drugs to a minor unconstitutional on privacy grounds). *See also* Johnson v. Florida, Case No. 89-1765, Appellant's Initial Brief (Dist. Ct. Appeal, 5th Dist., Fl.) (1989), at 40-49.

[228]405 U.S. 438, 453 (1972) (emphasis in original); also *see* Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (striking a rule requiring unpaid maternity leave for pregnant teachers as violative of the guarantee of freedom in reproductive decisionmaking provided by the due process clause of the Fourteenth Amendment).

[229]Additional concerns involving aspects of constitutional privacy would be raised by the methods used to enforce a drug delivery statute upon pregnant women, including drug testing and the appropriation of medical records. These issues lie

In summary, then, the right of privacy should be considered to protect a woman's right to make decisions that involve reproduction free from unwarranted governmental intrusion. As such, a state policy seeking to intervene in a pregnant woman's life on behalf of her fetus must be able to survive strict scrutiny, inasmuch as it burdens her ability to maintain control over her own procreation. A policy of criminalizing perinatal addiction places women in a bind, because the nature of the disease and the shortage of available treatment combine to make it difficult for a pregnant addict to escape criminal liability. Thus, a policy of criminalization results in a deterrent effect being directed at pregnancy and childbirth. Because state policies which limit a woman's ability to exercise her procreative liberty implicate her right to privacy, such policies must be narrowly drawn to serve a compelling state interest.[230]

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beyond the scope of this project, but *see generally* Moss, Legal Issues: Drug Testing of Post-Partum Women and Newborns as the Basis for Civil and Criminal Proceedings, ACLU Women's Rights Project (1989).

[230]For a discussion of the state interest in these cases and the means test, *see infra* Chapter Four.

Chapter Three: Constitutional Analysis

IV. The Equal Protection Clause and Discrimination Based Upon Gender and Pregnancy

The prosecution of women for perinatal addiction has implications that touch a third Constitutional provision--the equal protection clause of the Fourteenth Amendment. This section will present a brief case history of the equal protection clause as it pertains to gender discrimination, with particular emphasis on how the Court has viewed discrimination based upon pregnancy. It will be argued the Court has perhaps not been rigorous enough in its review of pregnancy discrimination cases, and that such cases should receive heightened scrutiny. Finally, it will be argued that the methods used in the prosecution of perinatal addiction (ie., the use of particularly severe drug trafficking penalties for what amounts to simple evidence of use, and the application of excessive penalties for unrelated crimes) target women for differential treatment based upon biological characteristics and therefore may implicate their right to equal protection.

In analyzing cases involving discrimination against women, the Court has tended to waver in its interpretation of the equal protection clause. In *Bradwell v. Illinois*,[231] the first case ever heard involving a gender discrimination

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[231] 16 Wall. 130 (1873).

claim under the equal protection clause, the Court upheld an opinion by the Illinois Supreme Court which refused to allow women admission to the bar in that state, citing common law precedent. The Court remained unimpressed by gender discrimination claims under the equal protection clause until 1971.[232] In *Reed v. Reed*, the Court overturned an Idaho statute that automatically granted the power to administer an estate to a man in cases where a man and a woman were equally positioned to do so.[233] In its analysis in *Reed*, the Court found that the generalization implied by the classification was arbitrary and in violation of the equal protection clause, although the Court did not find that classifications based upon gender were inherently suspect.[234] The level of scrutiny provided in *Reed* has been termed intermediate; it required that legislative classifications "be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation."[235] Since *Reed*, the Court has been rather fluid in the level of judicial

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[232]*See* Goesaert et al. v. Cleary, 335 U.S. 464 (1948) (upholding a Michigan statute barring women from working as bartenders unless they are the wife or daughter of the owner of the establishment); Hoyt v. Florida, 368 U.S. 57 (1961) (upholding a statute excluding women from jury duty unless they specifically volunteer).

[233]404 U.S. 71 (1971).

[234]Id.

[235]*Reed v. Reed*, 404 U.S. 71, 76 (1971).

review it has given to gender-based classifications. In *Frontiero v. Richardson*, the Court struck down as violative of the due process clause of the Fourteenth Amendment a statute that required women in the military to show that their spouse was a dependent prior to obtaining a salary increase, whereas men were automatically granted such an increase. The Court could not, however, conclude that gender-based classifications were inherently suspect.[236]

At the time of *Frontiero*, the Court had yet to comment on the merits of an equal protection clause challenge to a statute which discriminated on the basis of pregnancy. Over the two years following *Frontiero*, the Court had two opportunities to address this type of discrimination, but in neither case did the Court reach the question of whether or not pregnancy discrimination was suspect under the equal protection clause. In the first such opportunity, *Struck v. Secretary of Defense*, the Court remanded an equal protection challenge to the Air Force policy of discharging pregnant officers as moot, as the Air Force had dropped the policy after having won in the district court.[237] Then, in

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[236]Four justices called for the granting of suspect status to gender-based classifications, Id at 682-691, while four others concurred that the regulations in question violated the due process clause, but felt that the implications of granting suspect status would be too far-reaching, desiring to wait for the passage of the Equal Rights Amendment, Id. at 691.

[237]460 F2d 1372 (9th Cir.), *vacated and remanded*, 409 U.S. 1071 (1972).

Cleveland Board of Education v. LaFleur, the Court chose not to address the equal protection challenge presented against a mandatory unpaid maternity leave provision, instead finding the policy unconstitutional on the grounds that it involved irrebuttable presumptions.[238]

Finally, in *Geduldig v. Aiello*, the Court tangentially addressed an equal protection claim brought by pregnant women against the California state workers' disability program which excluded pregnancy and childbirth from its list of covered disabilities.[239] The Court addressed the case not strictly as a gender discrimination case, as had the lower court.[240] Rather, the Court asked whether or not "the Equal Protection Clause requires such policies (ie., workers' disability programs) to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy and delivery."[241] The Court dealt with the gender

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[238]*See* Law, *Rethinking Sex and the Constitution*, 132 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 955, note 105 and accompanying text (1984).

[239]417 U.S. 484 (1974).

[240]Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973) (finding the exclusion of coverage for pregnancy from the California State workers' disability program in violation of the equal protection clause for lack of a rational relation to the purposes of the program), *rev'd sub nom.*, Geduldig v. Aiello, 417 U.S. 484 (1974).

[241]Geduldig v. Aiello, 417 U.S. 484, 494 (1974). *See also* Scales, *Toward a Feminist Jurisprudence*, 56 INDIANA L J 375, 378-382 (1981).

discrimination claim in a footnote, finding that the decision to exclude pregnancy from the disabilities list did not, in fact, discriminate against women but, rather, between "pregnant women and nonpregnant persons."[242] The Court referred to the judgment in *Geduldig* in a subsequent Title VII case, finding that the exclusion of pregnancy from the disabilities list covered by a private company's insurance plan did not constitute a violation of Title VII.[243] Shortly thereafter, the Congress passed the Pregnancy Discrimination Act, which amended Title VII to include pregnancy discrimination under its definition of sex discrimination.[244]

The Court's position on pregnancy and equal protection has been widely criticized because of its contorted logic and its loose associations with the facts presented in the cases.[245] One difficulty with the Court's position on pregnancy discrimination is that it doesn't really seem to have a position. In *Michael M. v. Superior Court*, the Court upheld a California statutory rape law which says that a man cannot legally have sex with a woman under the age of

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[242]Geduldig v. Aiello, 417 U.S. 484, 496 note 20 (1974).

[243]General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

[244]Pub. L. No. 95-555, Sec. 1, 92 Sts. 2076, 42 U.S.C. Sec. 2000e(k) (1982).

[245]*See* Law, *Rethinking Sex and the Constitution*, 132 U PENN L R 955, 983 note 107 (1984) (citing thirty-three articles critical of the *Geduldig* decision).

eighteen unless they are married.[246] Applying the rational basis test,[247] the Court reasoned that such a statute was sufficiently related to the state interest of preventing pregnancy to justify discrimination based upon gender.[248] Thus, in *Michael M.* the Court ruled that gender discrimination may be upheld because only women can become pregnant,[249] while in *Geduldig* it held that classifications based upon pregnancy are, in fact, not gender discrimination. While the positions taken in these two cases are not, strictly speaking, *logically* dissonant, they do place a strain on common sense.

Besides its contradictions with other cases, the analysis presented in *Geduldig*--referred to by Lawrence Tribe as being "so artificial as to approach the farcical"[250]--is filled with internal discrepancies. In *Geduldig*, the Court upheld the exclusion of childbirth from insurance coverage by dissecting pregnancy away from female gender by arguing that pregnancy was a "normal" condition

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[246]450 U.S. 464 (1981).

[247]Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[248]450 U.S. 464, 473 (1981).

[249]In *Michael M.*, Justice Rehnquist stated that "Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity..." Id. at 471.

[250]TRIBE, CONSTITUTIONAL LAW 1578 (1988).

which did not apply to each member of the female gender. It is interesting to note that the disability plan under question in *Geduldig* covered risks which applied only to men, such as prostatectomies, and risks which applied to particular races, such as sickle cell disease. An extremely large percentage of men develop prostatic hypertrophy which eventually requires surgery.[251] One wonders if the Court would have found the insurance policy to be discriminatory based on gender had it neglected to cover prostate removal; perhaps it would have instead viewed such a policy as classifying into the groups people with prostatic hypertrophy and people without. However, although the plan considered in *Geduldig* apparently covered all conditions a man could suffer, it neglected to cover pregnancy and childbirth--conditions associated with considerable morbidity and occasional mortality which affect a large number of women.

Because the set "women" is never mutually inclusive with the set "pregnant women", the *Geduldig* Court argued that discrimination against the set "pregnant women" was not gender discrimination (ie., was not discrimination against the set "women"). The Court did not address the fact that such a policy not only discriminates against "persons" who

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[251]Prostatic hypertrophy will occur in 70% of all men before the age of sixty, and will occur in 90% of all men by the eight decade of life. COTRAN, KUMAR & ROBBINS, ROBBINS PATHOLOGIC BASIS OF DISEASE 1119 (1989).

are currently pregnant; it also discriminates against those who might become pregnant in the future--ie., all women of reproductive capacity who desire to reproduce at some future time. (Of course some percentage of women will choose never to reproduce or who will be physically unable to do so; however, one wonders if there has *ever* been an example of discrimination against exactly all members of a group). Nevertheless, by the Court's logic, cases involving discrimination based on pregnancy do not represent discrimination based on gender and, therefore, are not deserving of heightened scrutiny.

In the Title VII case, *General Electric Co. v. Gilbert*, the Court took a slightly different tack to avoid granting pregnancy discrimination heightened review, this time emphasizing that it was the voluntary nature of pregnancy which justified its exclusion from disability programs,[252] despite the fact that the plan in question covered vasectomies and other elective surgeries.[253] In *Gilbert*, Justice Stevens in his dissent scuttled the logic of the Court's approach to these cases by emphasizing that insurance companies insure persons *at risk* for acquiring a given condition, and that the appropriate classification for such purposes is between those who are and those who are not

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[252]General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

[253]TRIBE, CONSTITUTIONAL LAW 1578, note 14 (1988).

at risk.[254]

More recently, the Court was presented with a Title VII claim against a battery manufacturer which had initiated a policy of refusing to hire women of child-bearing age (or those who could not prove infertility) from jobs involving exposure to levels of lead that might be harmful to a developing fetus.[255] In *Johnson Controls*, the Court overturned an *en banc* appellate court decision which had affirmed the district court judgment that the company was entitled to summary judgement in that the fetal protection policy could be considered a business necessity. The Court of Appeals found that the company's sex-specific fetal protection policy was not facially discriminatory for the purposes of Title VII, but rather that it was facially neutral with a discriminatory effect.[256] With these findings, the appeals court looked to the burden-shifting principles established in *Wards Cove Packing Co. v. Antonio*,[257] requiring that the plaintiff carry the burden of proving discrimination.[258] The Supreme Court, however,

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[254]429 U.S. 125, 161 note 5 (1976) (Stevens, dissenting).

[255]International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, et al., v. Johnson Controls, Inc., 1991 U.S. Lexis 1715 (1991).

[256]886 F.2d 871, 886-887 (1989).

[257]490 U.S. 642 (1989).

[258]886 F.2d, at 887-888.

disagreed, finding that the policy was facially discriminatory and therefore forbidden under Title VII and the Pregnancy Discrimination Act (PDA).[259]

Thus, in *Johnson Controls* the Court has found that for the purposes of Title VII and the PDA, a policy which classifies on the basis of the *potential* for pregnancy as being discrimination based upon gender. However, it remains unclear what implications, if any, *Johnson Controls* will have on claims of gender and/or pregnancy discrimination under the Equal Protection Clause. It appears that the Court has been straining to find a comfortable position wherein biological differences between men and women are given consideration by the law. The passage of the PDA and the result in *Johnson Controls* may mean only that unjustified pregnancy discrimination will no longer be allowed under Title VII, or, perhaps the passage of the PDA has made the Court more comfortable with granting heightened scrutiny to pregnancy discrimination claims under the equal protection clause as well. Whether this case will have such an effect is uncertain.

It is important that the Court give heightened scrutiny to classifications based upon pregnancy (or "real"

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[259]1991 U.S. Lexis 1715, at 22 (1991). The Court found that the company could only enforce such a discriminatory policy if it could show that such discrimination was necessary as a bona fide occupational qualification (BFOQ), and that in this case, the company could not do so. Id., at 17-18.

biological differences) so that it can avoid reinforcing generalizations about the roles of women which have traditionally been used to relegate them to lesser legal status. It is also important that the Court recognize that "real biological differences" are frequently confused with culturally-defined differences.[260] Thus, by allowing an exception from heightened scrutiny for statutes loosely considered to be based on biological differences, the Court runs the risk of allowing discrimination based on outdated attitudes about the rightful position of women (pregnant or not) in society. By allowing pregnancy discrimination the Court undermines the doctrinal basis of gender equality.

The Court would be wise to abandon the tenuous stance taken in *Geduldig* and *Gilbert*. Policies which discriminate based upon pregnancy deserve judicial scrutiny because they tend to create barriers to the achievement of equality for all women. This is not to say that classifications that are truly based upon biological differences would be best approached using the intermediate scrutiny test normally applied to gender-based classifications. Such an approach would imply a constitutional denial of the significance of

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[260]*See generally* Law, *Rethinking Sex and the Constitution*, 132 U PENN L R 955 (1984) [hereinafter cited as Law (1984)]. Professor Law reviews cases in which the Court has cited biological differences in order to disallow a father to sue for his child's wrongful death (Parham v. Hughes, 441 U.S. 347 (1979)), and to deny a father the opportunity to protest the adoption of his child by the mother and her new husband (Lehr v. Robertson, 103 S. Ct. 2985 (1983)).

the biological differences between men and women, which would only create dissonance between constitutional doctrine and common experience.

Professor Sylvia Law cogently argues for a third approach:

> "I propose that laws governing reproductive biology should be scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state purpose. Given how central state regulation of biology has been to the subjugation of women, the normal presumption of constitutionality is inappropriate and the state should bear the burden of justifying its rule in relation to either proposition."[261]

The history of the imposition of legal inferiority upon women based upon their reproductive abilities suggests that, even though men and women cannot be similarly situated in terms of the biology of reproduction, such classifications deserve to be scrutinized as to their effects and the purpose they are purported to serve.

Turning to the case at hand, criminalizing prematernal drug use arguably has the effect of punishing women for their status *as* women in that it targets them for particularly vigorous law enforcement and prosecutory measures based on their reproductive status. Pregnant women are not being punished under statutes which criminalize drug use for everyone; rather, they are being targeted with

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[261]Law, *supra* note 260, at 1008-1009.

special legal weapons--specifically, convoluted interpretations of drug delivery and child abuse statutes, and excess penalties for unrelated crimes.[262] While punishing women for perinatal drug use is not facially discriminatory (since such use is illegal for everyone), the vigorous and novel application of drug delivery statutes and the use of unusually severe penalties for unrelated crimes represent differential treatment on the basis of biological characteristics. Although it is doubtful that the Rehnquist Court would officially view such policies as discriminatory against women, such classifications nevertheless deserve judicial scrutiny if the integrity of the doctrine of Equal Protection is to be preserved.

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[262]*See generally*, Johnson v. Florida, Case No. 89-1765, Appellant's Initial Brief (Dist. Ct. Appeal, 5th Dist., Fl.) (1989); United States v. Vaughn, No. F-2171-88B (Super. Ct. of D.C., Aug. 23, 1988).

Chapter Four: Judicial Scrutiny and the Interests of the State

I. Introduction

The imposition of criminal penalties for perinatal drug use arguably interferes with a pregnant woman's fundamental right to liberty in making decisions concerning reproduction and must withstand strict judicial scrutiny.[263] To withstand such scrutiny, the policy must derive from a compelling state interest and must be "narrowly drawn to express only the legitimate state interests at stake."[264] This section will analyze the state interests that have been proffered in favor of prosecuting women for perinatal drug use and the degree of relatedness between such interests and policies.

The chief state interest offered in support of policies advocating the prosecution of pregnant women for drug use is the desire to protect the "unborn" from harm caused by maternal activities.[265] Ironically, fetal rights advocates

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[263]See *supra* Chapter Three, Section III.

[264]Roe v. Wade, 410 U.S. 133, 155 (1972) (citations omitted).

[265]*See* Stearns, *Maternal Duties During Pregnancy: Toward a Conceptual Framework*, 21 NEW ENGL L R 595, 629 (1985) [hereinafter cited as Stearns]; Note, *Developing Maternal Liability Standards for Prenatal Injury*, 61 ST JOHN'S L R 592, 612 (1987); Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 SO CAL L R 1209, 1237 (1987); Note, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 DICKENSON L R 691, 710 (1988); Mathieu, *Respecting Liberty and Preventing Harm: Limits of State Intervention in Prenatal Choice*, 8 HARVARD J L PUB POL'Y 19, 47-49 (1985); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VIRGINIA L R 405, 438

hold that it was *Roe* that served to legitimate the state interest in protecting future life, since in that case the Court did find that the state's interest in future life becomes compelling in the third trimester.[266] Some argue that this interest may be assumed to enable the state to interfere with *any* maternal activity--including but not limited to abortion--which may threaten the viable fetus.[267] Advocates for the criminalization of perinatal drug use point to the recent decision in *Webster v. Reproductive Health Services*[268] as evidence that the Court is increasingly willing to promote the state interest in fetal life over the liberty interests of the mother.[269]

While it is true that the *Webster* decision may portend a substantial change in the position of the Court on abortion,[270] it remains a matter of speculation as to whether

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(1983); Logli, *Drugs in the Womb: The Newest Battlefield in the War on Drugs*, CRIM J ETHICS, Winter, 1990, 23, 25.

[266]Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 SO CAL L R 1209, 1220-1221 (1987).

[267]Id. at 1221.

[268]109 S.Ct. 3040 (1989).

[269]Logli, *Drugs in the Womb: The Newest Battlefield in the War on Drugs*, CRIM J ETHICS Winter/Spring, 1990, at 23, 26.

[270]In *Webster*, the Court apparently downgraded the woman's ability to elect to have an abortion from a "fundamental right" to a "liberty interest." 109 S.Ct. at 3058. The *Webster* plurality did not directly justify this abrupt change, but instead set about attacking the trimester system established in *Roe*, stating that it was "unsound in principle and unworkable in practice." Id. at 3056 (citing Garcia v.

or not the state has a compelling interest in protecting fetal life by criminalizing perinatal drug use. The Supreme Court has never addressed the issue of whether or not the state has an interest in protecting fetal rights against the mother in the nonabortion context. This lack of precedent necessitates analysis of the legal arguments for the imposition of such an interest in the context of criminal prosecution for prematernal drug use.[27']

Fetal rights advocates feel that the use of criminal sanctions against pregnant women who abuse drugs represent the logical extension of recent developments in other areas of the law that have granted the fetus a greater legal presence. In particular, fetal interests have been increasingly recognized in tort law, where a duty of care has been found to exist between third parties and fetuses. This duty, it is argued, should be enforced upon the pregnant woman as well. Attempts to extend this duty to the pregnant woman herself have had mixed results, however. The maternal-fetal relationship in tort law and the general legal status of the fetus represent important structural components of state arguments in favor of the criminalization of perinatal drug use.

San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

[27']I will not argue that the state does not have a *moral* interest in preventing the birth of drug-exposed infants, for I believe it does. Here I am concerned with the *methods* used to further this interest.

Chapter Four: Judicial Scrutiny and the Interests of the State

II. The Judicial View of the Fetus

In general, the legal recognition granted to the fetus as an entity unto itself has been relatively confined to the areas of property law, criminal law, and tort law.

Fetuses have traditionally been granted certain rights under property law, among them the right to inherit by will, the right to inherit property, and the right to act as the beneficiary of a trust.[272] A major proviso to these rights, however, has been that the fetus be born alive. This proviso was intended to protect a woman from legal action should her fetus be stillborn.[273] Thus, these rights do not attach to the fetus *per se,* but to the person the fetus is to become, and serve the ultimate purpose of granting the wishes of the testator.

Historically, the unborn fetus has been largely ignored by the criminal law. Under common law, killing a fetus is not a murder and, in fact, killing a viable fetus was a

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[272]See Stearns, *supra* note 265, at 612-613, note 134; Johnsen, *supra* note 53, at 601, note 5; Sullivan, *Maternal Liability: Courts Strive to Keep Doors Open to Fetal Protection--But Can They Succeed?*, 20 JOHN MARSHALL L R 747, notes 8-16 and accompanying text (1987) [hereinafter cited as Sullivan].

[273]Gallagher, *Prenatal Invasions and Interventions: What's Wrong With Fetal Rights,* 10 HARV WOMEN'S L J 9, 40 (1987) (citing HOFFER & HULL, MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND--1558-1803).

misdemeanor under the common law.[274] If the injured fetus was born alive and subsequently died, however, the common law held the action to be a murder.[275] The courts have been hesitant to change the live birth requirement established in the common law, partly because of the traditional deference given to the legislature on criminal matters. Several states have amended their homicide statutes to include fetuses.[276] Still other states have passed specific "feticide" statutes.[277] These statutes were modeled in order to prevent especially egregious conduct against pregnant

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[274]Sullivan, *supra* note 272, at 749 note 19 (citing Pennsylvania v. McKee, 1 Add. 1 (1791)).

[275]Sullivan, *supra* note 272, at 750, note 20 (citing PERKINS, CRIMINAL LAW 140 (2d ed. 1969)).

[276]*See, e.g.*, CAL. PENAL CODE Sec. 187 (West Supp. 1987) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); N.Y. PENAL LAW Sec. 125.00 (McKinney 1987).

[277]*See* ILL. ANN. STAT. Ch. 38, Para. 9-1.2 (Smith-Hurd 1988) ("A person commits the offense of intentional homicide of an unborn child if, in performing acts which cause the death of an unborn child, he without lawful justification: (1) either intended to cause the death of or do great bodily harm to the pregnant woman or her unborn child..."). *See also* IOWA CODE ANN. Sec. 707.7 (West 1979); MICH. COMP. LAWS ANN. Sec. 750.322 (West 1968); MINN. STAT. ANN. Sec. 609.2661 (West 1987); MISS. CODE ANN. Sec. 97-3-37 91973); N.H. REV. STAT. ANN. Sec. 585.13 (1986); OKLA. STAT. ANN. tit. 21, Sec. 713 (West 1983); UTAH CODE ANN. Sec. 76-5-201 (1988); WASH. REV. CODE ANN. Sec. 9A.32.060 (1988); WIS. STAT. ANN. Sec. 940.04 (West 1982). A total of nineteen states have enacted feticide statutes. Kolbert, et al., ACLU Memorandum: Discriminatory Punishment of Pregnant Women, appendix B at i (Feb. 15, 1990).

women.[278] Few courts have extended criminal liability to include actions resulting in the death of a fetus unless specific statutory coverage of fetuses exists.[279]

The widest attention granted fetuses in the law has been in the area of third party tort liability. Frequently cited as the seminal case in the legal treatment of torts against fetuses, *Dietrich v. Inhabitants of Northampton* involved a civil claim on the part of a woman who fell on a poorly-constructed highway while pregnant.[280] Because of injuries resulting to the mother, the fetus was delivered prematurely and died approximately fifteen minutes later. The fetus itself sustained no injury in the fall. In this case, Judge Holmes (later Justice Holmes) ruled that the fetus could not be considered a separate entity from the mother and, as such, could not on its own maintain an action against a negligent tortfeasor that injured it in utero. He reasoned that any damages incurred to the fetus must be through the mother and any attempt at recovery should be on

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[278]*See* People v. Apodaca, 76 Ca.App.3d 479, 486 (1978) (assaulting pregnant woman, absent consent, with the intent of murdering her fetus can constitute murder).

[279]*See* People v. Guthrie, 293 N.W.2d 775, 780 (1980) (refusing to override the born alive rule without specific legislative instruction). *But see* Commonwealth v. Cass, 392 Mass. 799 (1984) (ruling that, for the purposes of the Massachusetts vehicular homicide statute, a viable and unborn fetus is a person); State v. Horn, 319 S.E.2d 703 (1984) (killing of a full-term fetus is a homicide).

[280]Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884).

the part of the mother. As grounds for his decision, Judge Holmes cited the lack of legal precedent, the difficulty in establishing cause and effect, and the possibility of fraudulent claims. This case established the precedent which was to be followed for sixty years--namely, that an infant could not maintain an action for prenatal injury in tort law.

The precedent established by *Dietrich* was widely criticized.[281] In a dissenting opinion in *Allair v. St. Luke's Hospital*, Judge Boggs contradicted the *Dietrich* ruling, reasoning that since at viability the fetus can exist separate from its mother, a fetus should be considered an independent entity in injury claims.[282] Then in 1946, the court in *Bonbrest v. Kotz* first allowed recovery for prenatal injuries to a viable fetus.[283] In this case, as in *Dietrich*, the infant was born alive; however, the fetus in *Bonbrest* suffered direct injuries as a result of the actions of the tortfeasor.[284] In *Bonbrest* the court noted cases where viable fetuses had been removed alive from dead mothers, finding them dissonant with Justice Holmes' view in

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[281]KEETON, DOBBS, KEETON & OWEN, PROSSER & KEETON ON THE LAW OF TORTS 368 (1984).

[282]56 N.E. 638, 640 (1900).

[283]65 F. Supp. 138 (D.D.C. 1946).

[284]The complaint was a malpractice claim that alleged negligent injury to the fetus while it was being removed from the womb.

However, in *Toth v. Goree*,[288] the Michigan Court of Appeals found that a fetus not born alive but that had sustained third-party injury prior to viability did not qualify as a person under the Wrongful Death Act of Michigan and did not qualify under the *Womack* case. Thus, the *Toth* case limited the *Womack* decision as meaning that to protect a fetus' right to be born with sound mind and body required that the injury occur post viability or that the fetus be born alive.

In *Renslow v. Mennonite Hospital*, the Supreme Court of Illinois essentially did away with all limitations on recovery based on fetal age.[289] This case granted recovery to an infant for injuries inflicted by a mismatched blood transfusion that occurred 8 years prior to the birth of the infant.

In a parallel development, the courts have struggled to determine if recovery for prenatal tort requires that the fetus be born alive. In 1985, the Arizona Supreme Court held that the parents of a stillborn, viable fetus could sue for medical malpractice that led to the death of the fetus *in utero*.[290] The inclusion of fetuses under so-called wrongful death statutes is now practiced in nearly all American jurisdictions.

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[288]65 Mich. App. 296, 237 N.W.2d 297 (1976).

[289]67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

[290]Summerfield v. Superior Court, Maricopa City, 144 Ariz. 467, 698 P.2d 712 (1985).

Thus, the fetus has been granted the ability to recover for pre-natal (and pre-conception) injuries with fewer and fewer limitations. Few courts, however, have been asked to rule on the issue of whether or not liability for prenatal torts should be extended to include injuries to the fetus caused by maternal actions. Two state supreme court cases, *Grodin v. Grodin*,[291] and *Stallman v. Youngquist*,[292] express the range of viewpoints on this issue. In *Grodin v. Grodin*, the Michigan Court of Appeals elected to extend the trend towards easing prenatal recovery to include actions alleging maternal fault.[293] In this case, a father sued his son's mother (on his son's behalf) for having caused the child to develop discolored teeth as a result of the mother's having used the antibiotic tetracycline during her pregnancy. Specifically, the complaint alleged that the mother had failed to obtain adequate prenatal care, had failed to inform her doctor that she was taking the drug, and that she failed to obtain a pregnancy test in a timely fashion.[294] In analyzing the case, the court looked to *Plumley v. Klein*,[295] wherein the Michigan Supreme Court had narrowed the

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[291]301 N.W.2d 869 (1980).

[292]125 Ill. 2d 267; 531 N.E.2d 355 (Ill.Sup.Ct., 1988).

[293]102 Mich. App. 396, 301 N.W.2d 869 (1981).

[294]Id., at 870.

[295]388 Mich. 1, 8, 199 N.W.2d 169, 172-73 (1972).

protection traditionally afforded parents by the parental immunity doctrine[296] such that only those actions considered by the court to be "reasonable" forms of exercise of parental authority or of parental discretion in decisions involving housing, food, health care, etc., would be considered immune from liability.[297] The court remanded the case to the trial court to determine if the mother's actions conformed to the reasonableness standard but stated that, if her actions were found to fall outside the standard, then she could be held liable.[298] (In a subsequent case, however, the *Grodin* court's application of the guidelines established in *Plumley* was held to have been incorrect).[299]

In *Stallman v. Youngquist*, daughter and father sued mother for prenatal injuries resulting from an automobile accident which occurred when the mother was five months

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[296]American courts have traditionally disallowed claims by minor children against their parents for personal torts. Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891). This rule has been expressly abrogated in most jurisdictions. PROSSER & KEETON 907.

[297]Plumley v. Klein, 388 Mich. 1, 8 (1972) (cited in *Grodin v. Grodin*, 301 N.W.2d 869, 870 (1980).

[298]Grodin v. Grodin, 102 Mich. App. at 400, 301 N.W.2d at 870.

[299]Mayberry v. Pryor, 134 Mich. App. 826 (1984). In *Mayberry*, the court held that the *Grodin* court had been incorrect in allowing summary judgement when a fact question existed as to the reasonableness of the mother's action of having taken tetracycline while pregnant. Id., at 832-833.

pregnant.[300] The supreme court of Illinois acknowledged the trend towards recognizing the fetus as a separate object of harm in third party prenatal torts. The court felt, however, that the policy implications of allowing a cause of action against the mother of a fetus distinguished such cases. The court in *Stallman* criticized the ruling issued in *Grodin*, stating that

> "The Grodin court failed to understand that the question of the application of Michigan's partial abrogation of the parental immunity doctrine was a separate question from that of recognizing a cause of action by a fetus, subsequently born alive, against its mother for the unintentional infliction of prenatal injuries. The Grodin court would have the law treat a pregnant woman as a stranger to her developing fetus for purposes of tort liability. The Grodin court failed to address any of the profound implications which would result from such a legal fiction and is, for that reason, unpersuasive."[301]

The *Stallman* court felt that by enforcing a fetal right to begin life with sound mind and body against the mother, the courts would be creating a legal duty on the part of the mother to maximize the outcome of her pregnancy. As almost any action or omission on the part of the pregnant woman could conceivably bear some risk to or have some impact upon her fetus, the woman could be subject to scrutiny for her every move and decision during her pregnancy. This would amount to "a legal duty to guarantee the mental and physical

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[300]Stallman v. Youngquist, 125 Ill.2d 267 (1988).

[301]Id., at 279.

extension of this trend to include tort claims against the mother of a fetus is in doubt. Nevertheless, many commentators have argued that criminalization policies are consistent with the increase in fetal recognition in third-party tort cases. However, this position assumes that a pregnant woman's relationship to her fetus is no different from a stranger's. As pointed out by Dawn Johnsen, allowing recovery for fetal injury or wrongful death claims against third parties serves not only fetal interests, but maternal interests as well. This maternal interest, Johnsen argues, is the factor that legitimizes fetal recognition in third party tort claims.[306] Several courts have expressed similar opinions. The Supreme Court in *Roe* stated:

> "In a recent development, generally opposed by the commentators, some states permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life."[307]

Johnsen cites other court decisions in which recovery was granted in cases of the wrongful death of a fetus in order to provide compensation to the parents.[308] The existence of

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[306]Johnsen, *supra* note 53, at 602-603.

[307]Roe v. Wade, 410 U.S. 113, 162 (1973), as cited in Johnsen, *supra* note 53, at 603, note 15.

[308]Johnsen, *supra* note 53, at 603, note 15 [citing Volk v. Baldazo, 103 Idaho 570, 574, 651 P.2d 11, 15 (1982); Dunn v. Rose Way, Inc., 333 N.W.2d 830, 832-833 (Iowa 1983)].

such maternal interests highlights the differences between the maternal-fetal relationship and the third party-fetal relationship. Thus, favoring the extension of third-party tort principles to cover claims involving the maternal-fetal relationship both oversimplifies the maternal-fetal relationship and misapplies the third-party tort cases.

Enforcing a duty of care upon pregnant women represents a significant threshold issue with great implications. As pointed out by the *Stallman* court, enforcing such a duty to any consistent degree would require that the pregnant woman jettison her rights to privacy and autonomy, given the fact that nearly any action she might take during her pregnancy would bear some conceivable relationship to the eventual outcome of her fetus. For example, a woman could be held liable to her fetus for damages resulting from her decision to operate a motor vehicle, from taking antibiotics or antiseizure medication or for failing to eat an adequate diet.[309] She could also be liable to her fetus medically--subject to scrutiny for any refusal to submit to any procedure deemed to be medically necessary for the fetus. Such a duty of care would clearly violate the woman's autonomy, creating obligations on her part that are not

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[309]Certain commonly-used antibiotics and anti-seizure medications are teratogenic. See KATZUNG, BASIC AND CLINICAL PHARMACOLOGY 764 (1989).

required of anyone else.[310]

In sum, there is a lack of clear precedent favoring extending tort liability for fetal injuries to include the pregnant woman herself. This fact, combined with the severity of the legal implications of imposing such a duty, weighs against using the developments in tort law as justification for using criminal sanctions against women who use drugs during pregnancy.

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[310]*See, eg.*, McFall v. Shimp, 10 Pa.D.&C.3d 90 (Allegheny Cty.C.P. 1978)(refusing to order a man's cousin to provide him with bone marrow for a transplant).

Chapter Four: Judicial Scrutiny and the Interests of the State

III. Strict Judicial Scrutiny

The discussion thus far has centered on the practice of prosecuting and jailing women for drug delivery, and has not addressed the state's interest in doing so. Assuming that such a policy would trigger strict scrutiny,[311] the state would be required to present a compelling interest to justify its use. There can be little argument but that the state does have a compelling interest in protecting born persons from harm, and that perinatal drug exposure does result in harm.[312] Caring for drug-exposed infants extracts great social and economic costs, and prevention efforts are urgently needed. This sense of urgency, however, has resulted in the adoption of criminalization policies without adequate attention being paid to their implications. The urgency and severity of a problem should not remove all

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[311]See *supra* Chapter Four, Sec. I.

[312]Here I use the word "harm" in the sense used by Joel Feinberg:

> "Harm can be caused to a person before his birth, or before the commencement of personhood in pregnancy, in virtue of the child that can already be anticipated... [O]n the assumption that the fetus will be born (or evolve into a person), we can ascribe to it certain 'future interests', as the law calls them, and these can be damaged by actions done before the potential person even becomes an actual person."

FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: VOL. 1, HARM TO OTHERS 96 (1984).

limits from state action.

As stated by the Court in *San Antonio v. Rodriguez*,

> "[S]trict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the state rather than the complainants must carry 'a heavy burden of justification,' that the State must demonstrate that [the law] has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives."[313]

Thus, the second prong of the strict scrutiny test requires that the policy of prosecuting women for prematernal drug use be a precise, narrowly-tailored, and non-drastic method for achieving the admittedly legitimate goal of protecting infants from the harm that results from drug exposure *in utero*.

Using the criminal sanction against mothers for perinatal drug use fails this second prong of the test for several reasons. It is highly doubtful that threatening drug-addicted women with jail terms should they decide to become and/or remain pregnant would deter their drug use. As previously discussed, cocaine addiction is characterized by changes in neurophysiology that drive repeated ingestion of the offending substance--behavior that falls beyond the range of general deterrence. In addition, because addiction tends to be a chronic, long-term condition, it is doubtful that criminalizing perinatal addiction will deter the

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[313]San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16-17 (1973).

addiction-initiating events of use, since these events will in many cases have occurred prior to the pregnancy. In any case, it is clear that proscribing the use of illicit substances has never been effective in deterring drug use, given the large numbers of persons still using.[314]

However, the criminal law has an additional function, aside from the creation of deterrence--the allocation of societal condemnation. Jailing pregnant or newly-delivered women for perinatal drug use fails to achieve even this policy goal because it is relies on methods of detection which are extremely insensitive (ie., result in a large number of false negatives) and narrow in range. By testing newly-delivered infants or their mothers, only those women who have used an illicit substance within the time range detectable by the test will be "caught". For example, cocaine and its metabolites are detectable in the urine for only a few days after use, so that post-partum testing will detect only those women who have used during the few days prior to delivery.[315] This method will fail to detect many women who have used throughout their pregnancies but who have not used just prior to delivery; nor will it detect women who used during the first trimester only--the period

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[314]*See* Jonas, *Solving the Drug Problem: A Public Health Approach to the Reduction of the Use and Abuse of Both Legal and Illegal Recreational Drugs*, 18 HOFSTRA L R 751, 761 (1990).

[315]Frank, et al., *Cocaine Use During Pregnancy: Prevalence and Correlates,* 82 PEDIATRICS 888, 889 (1988).

during which many of the drug's most damaging effects occur.[316] (It is interesting to note that testing at delivery might be more effective at detecting women who are grossly addicted than it would be at detecting women who use drugs recreationally, such that those women who suffer from the disease of addiction are more likely to be punished than those whose drug use is voluntary).

Criminalization is also overly narrow in that it would fail to punish uniformly the large numbers of pregnant women who are addicted to or using nicotine, alcohol, or other drugs known to be harmful to developing fetuses. It also fails to address the larger social forces which are known to be associated with increased risk for low birth weight and infant mortality, such as poverty, ignorance and lack of access to basic health and prenatal care.[317]

Criminalization policies will also have the tendency to be overbroad, in that they will produce unintended effects, some of which will actually impede state efforts at improving perinatal outcome. Of greatest concern is the possibility that pregnant addicts--in order to avoid detection and prosecution--will avoid contact with the health care system. This might result in harm to a large

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[316]Chasnoff, et al., *Temporal Patterns of Cocaine Use in Pregnancy*, 261 J Am Med Assoc 1741, 1743-1744 (1989).

[317]Wilkerson, *Infant Mortality, Frightful Odds in Inner City*, NY Times, June 26, 1987, sec. A, p. 1, col. 2.

number of infants in order to prevent a few--if any--infants from being born drug-exposed. In addition, such a policy will have grave effect on the relationship between women and their doctors. A policy requiring doctors and hospitals to report perinatal drug use alienates the woman from the clinical picture by requiring that the focus be upon the fetus. Thus, criminalization will erect multiple barriers to service delivery which will result in *more* harm to children, not less.

Finally, criminalization represents a costly approach to the problem of perinatal addiction. Surveillance and detection, prosecution and incarceration of newly-delivered or pregnant women (with the attendant medical costs), will require a substantial state investment which may have been better spend elsewhere.[318]

In summary, then, a policy of criminalization, while powered by a legitimate state interest in the health of its children, would fail to pass constitutional muster in that it is a blunt, poorly-designed remedy to the problem of perinatal drug abuse. This approach will fail as a deterrent, will fail as a method of delivering punishment and social condemnation, and will create greater harm to children by erecting barriers to the delivery of services to

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[318]For a discussion of the cost of criminalization, see *Note: The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 INDIANA L J 357, 373-373 (1989).

all pregnant women.

Chapter Five: Conclusions

The prosecution of women for perinatal drug delivery has implications that bear on constitutional law. The Eighth Amendment prohibition against cruel and unusual punishment proscribes the punishment of individuals for the status of suffering from disease. Punishment for drug delivery through the umbilical cord does not punish a specific behavior, but rather punishes for the status of being a pregnant addict. Inasmuch as addiction is wholly consistent with the term disease, such prosecutions should be considered to implicate a woman's right to be free from cruel and unusual punishment.

The right of privacy requires that persons be free from unwarranted governmental intrusion into aspects of their lives fundamental to their personhood. Decisions concerning reproduction have historically been central to the privacy theme. Prosecuting pregnant or newly-delivered women for drug delivery--given the realities of the addictive process and the lack of drug treatment for women in general and pregnant women in particular--results in the deterrence of childbirth by pressuring women to avoid becoming pregnant or to abort. The state must present a compelling state interest for a policy that pressures women to avoid reproduction or to abort, and must show that such a policy is narrowly tailored to achieve the stated interest.

Discrimination based upon pregnancy has not received

in that it will fail as a deterrent, will fail as a method of delivering punishment and social condemnation, and will create greater harm to children by erecting barriers to the delivery of services to all pregnant women.

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Constitutional inquiry, while useful in determining the threshold issue of whether or not the state may take a particular course of action in the pursuit of a given goal, does not address all variables important in the making of policy decisions. In addressing the problem of perinatal drug abuse states should take note of all the possible solutions to the problem, weighing carefully the benefits and costs of each. This has not occurred, however, as the nation's "drug was" has developed into a major political issue, charged with dogmatic and irrational rhetoric. The criminal justice system has been designated as the chief weapon in this war, while users, addicts, and dealers have been designated as the enemy.

The war metaphor has done little but divert attention and funds away from the development of real solutions to the larger problems that create demand for drugs. For example, drug treatment has received very little attention as a possible solution to the problem of perinatal drug exposure. Treatment programs are few, and those that do exist tend to deny access to women in general and pregnant women in