Maternal Drug Use During Pregnancy as Child Neglect or Abuse

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# MATERNAL DRUG USE DURING PREGNANCY AS CHILD NEGLECT OR ABUSE

## I. Introduction

In the United States, an estimated eleven percent of children are born having been exposed to dangerous drugs. Children who have been prenatally exposed to drugs demonstrate tremulousness, irritability, and rapid mood swings for the first several months of life. Moreover, long-term effects, including mental retardation and learning disabilities, can also occur. These children are clearly victims. Yet the mothers, most of whom were drug addicts before becoming pregnant, are victims as well. An addict, by definition, exhibits an

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uncontrollable craving. Thus, drugs literally control an addict’s life, often to the detriment of her unborn child.

This note will examine the modern trend of equating fetal maltreatment, via maternal substance abuse, to child neglect or abuse. First, this note will discuss the implication of this trend in child custody determinations. Then, criminal liability for neglect or abuse, along with the constitutional implications of maternal liability, will be explored. Women have the constitutional rights of privacy and personal autonomy. On the other hand, the state has a compelling interest in protecting potential life, as well as the “quality” of that life. In maternal drug abuse cases, a woman’s fundamental right of privacy and personal autonomy becomes juxtaposed against the state’s compelling interest in protecting potential life. Courts across the nation are beginning to face these troublesome questions on an increasing basis as maternal substance abuse continues to rise.

II. Drug Use During Pregnancy as Child Neglect

The most common penalty imposed on mothers who use drugs during pregnancy is the removal of the newborn from the mother’s custody. When a newborn tests positive for a dangerous drug, many child-protection agencies automatically institute dependency proceedings against the mother.

A. Establishing Jurisdiction

A dependency proceeding to determine child custody is typically bifurcated. The court must first determine whether it has jurisdiction over the proceeding. In order to determine jurisdiction, the court examines whether the minor in question fits within its particular statutory description of a neglected or abused child. Most

2. See infra notes 66-84 and accompanying text.
3. See infra notes 85-92 and accompanying text.
4. See infra notes 66-92 and accompanying text.
6. Id.
8. Id.
statutory descriptions of neglected or abused children specify that a neglected or abused child is one in "imminent danger of harm" or who has sustained "actual physical impairment" or "substantial risk" thereof.\textsuperscript{10}

1. Imminent Danger of Harm to Newborn

\textit{In the Matter of Baby X}\textsuperscript{11} represented the first case to address the issue of dependency jurisdiction based solely upon the birth of an infant under the influence of dangerous drugs. In \textit{Baby X}, a mother gave birth to a child exhibiting drug withdrawal symptoms.\textsuperscript{12} The mother contended that under the applicable probate code, prenatal conduct cannot constitute neglect or abuse.\textsuperscript{13} However, the court reasoned that since prior treatment of one child is probative of how a parent will treat other soon-to-be-born siblings, prenatal treatment appears probative of a child's future neglect as well.\textsuperscript{14} Thus, holding that a newborn suffering narcotic withdrawal symptoms constituted a neglected child within the court's jurisdiction, the court based its finding upon "imminent danger of harm."\textsuperscript{15}

A New York case, \textit{In the Matter of Male R},\textsuperscript{16} also involved an infant suffering from mild withdrawal. The applicable neglect statute provided, in relevant part, that a neglected child is one whose "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired."\textsuperscript{17} Hospital records established

\begin{flushright}
\textsuperscript{10} See infra notes 12, 16, 25, 28 and 31 and accompanying text.
\textsuperscript{11} 97 Mich. App. 111, 293 N.W.2d 736 (1980).
\textsuperscript{12} Id.
\textsuperscript{13} Id. at 114, 293 N.W.2d at 738. The probate code MICH. COMP. LAWS § 712A.2 (1979), in pertinent part, provides: "SEC. 2. [t]he juvenile division of the probate court shall have: (b) jurisdiction in proceedings concerning any child under 17 years of age . . . (i) whose parent . . . neglects or refuses to provide proper or necessary support."
\textsuperscript{14} Stephen W. at 116, 293 N.W.2d at 739.
\textsuperscript{15} Id.
\textsuperscript{16} 102 Misc. 2d 1, 422 N.Y.S.2d 819.
\textsuperscript{17} Id. at 5, 422 N.Y.S.2d at 822. Section 1012(f) of the Family Court Act, in relevant part, provides: "'Neglected Child' means a child less than eighteen years of age (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired." N.Y. Jud. Law § 1012(f) (McKinney 1983).
\end{flushright}
that the mother had excessively used drugs throughout her pregnancy and was most likely an addict.\textsuperscript{18} Moreover, withdrawal symptoms constituted evidence of drug use, at least during the latter part of pregnancy, as well as evidence creating a reasonable inference of continued use after birth.\textsuperscript{19} As was the case in \textit{Baby X}, the court predicated a neglect finding sufficient to confer jurisdiction upon the basis of imminent danger of impairment.\textsuperscript{20}

More importantly, the court refused to speculate whether withdrawal symptoms constituted "actual physical impairment."\textsuperscript{21} In doing so, the court asserted:

Even if . . . it were assumed that injury to the fetus or child \textit{in utero}, the effects of which come to light after the child is born, could, in some cases, be the basis for a finding of maternal neglect, additional troublesome questions remain. First, since it is clear that a child \textit{in utero} may be endangered or actually harmed by a broad range of conduct on the part of a pregnant woman, it would appear necessary to limit any application of the neglect statute to pre-natal maternal conduct to a narrow and clearly defined class of cases.\textsuperscript{22}

The court in \textit{Male R} appears to acknowledge the danger of unqualifiedly equating all prenatal harm to actual physical impairment. For example, even a maternal act as seemingly harmless as not eating "well" could prove detrimental to a developing fetus. If fetal injury, which becomes apparent after birth, can be the basis of a neglect finding, and if application of the neglect statute is not limited to a narrow class of maternal conduct, outrageous results such as custody deprivation based upon a mother's poor eating habits or use of cigarettes or alcohol could result.\textsuperscript{23} However unlikely and extreme the above example appears, if all prenatal harm constitutes "actual physical impairment," an overzealous child protection service could theoretically attempt to establish neglect using a similar theory.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Male R}, 102 Misc. 2d at 3-5, 422 N.Y.S.2d at 821.
\item \textit{Id.} at 6, 422 N.Y.S.2d at 823, n.12.
\item \textit{Id.} at 10, 422 N.Y.S.2d at 825.
\item \textit{Id.} at 9, 422 N.Y.S.2d at 824.
\item \textit{Id.} at 10, 422 N.Y.S.2d at 825, n.18.
\item These activities are among the ones cited as harmful to fetal development by those advocating the expansion of governmental regulation of pregnant women's behavior. Johnsen, \textit{From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster}, 138 U. Pa. L. Rev. 179 (1989).
\end{enumerate}
\end{footnotesize}
Many state legislatures have not specified the types of prenatal harm that are considered actual physical impairment to the newborn. Nevertheless, many state courts currently treat fetal harm caused by maternal substance abuse as actual physical impairment to the child.

2. Actual Physical Impairment or Substantial Risk of Impairment to Fetus

A recent New York case, In the Matter of Stefanel Tyesha C., held that a positive toxicology for cocaine in a newborn constitutes “actual impairment” for the purpose of withstanding a motion to dismiss. Furthermore, the court stated that even a “single [detrimental] act” committed during pregnancy could constitute neglect. Thus, Stefanel suggested that a court could predicate a finding of neglect on prenatal maternal conduct alone, even a single detrimental act.

Likewise, in the recent California case of In re Troy D., the birth of a child under the influence of a dangerous drug conferred jurisdiction. According to the court, a positive drug toxicology at birth constitutes a “detrimental condition” attributable to the mother’s “unreasonable” or neglectful acts. Again, the court based a finding of neglect, sufficient to confer jurisdiction, solely upon prenatal maternal behavior.

Similarly, an Ohio court in In re Ruiz held that a viable fetus represents a “child” under the existing child abuse statute and harm

24. See infra notes 26-31 and accompanying text.
25. See infra notes 24-31 and accompanying text.
27. The applicable Family Court Act defines a neglected child as one whose “physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired . . . .” N.Y. JUD. LAW § 1012(f)(i)(B).
30. Section 355.1(a) of the California Code, in pertinent part: “Where the court finds . . . that an injury, injuries or detrimental condition sustained by a minor of such a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts . . . that evidence shall be prima facie evidence” that a child is neglected. CAL. WELF. & INST. CODE § 355.1 (Deering 1988).
to it may be considered abuse.\textsuperscript{33} In using heroin so close to the birth of the child, the mother clearly created the requisite "substantial risk" to the health of the child.\textsuperscript{34} Thus, this court merely required "substantial risk" of fetal impairment, rather than actual harm. The court in \textit{Ruiz} applied an even less demanding standard of neglect than "actual physical impairment."

Various state courts agree that a child born with drug withdrawal symptoms, or a positive toxicology, constitutes a neglected child. However, the applicable state statutes used to reach this conclusion vary. The future significance of these cases depends upon the language and application of the particular state statute. If courts predicate neglect findings only upon "imminent danger of harm" to the child, they will most likely limit neglect findings to cases where the continuation of harmful prenatal maternal conduct, which the court infers is likely, will prove detrimental to the newborn. Drug abuse, of course, falls squarely within this category.

On the other hand, if "actual" or "substantial risk" of impairment to the fetus represents the basis of a neglect finding, then \textit{any} prenatal maternal conduct which harms or could harm the fetus might sufficiently establish neglect. Thus, theoretically, a mother's poor eating habits or use of cigarettes or alcohol could constitute the basis for a neglect finding. Since these activities say nothing about fitness as a mother, a neglect finding appears unwarranted.

Unfortunately, most neglect statutes fail to mention fetuses.\textsuperscript{35} Courts, however, often apply these statutes to unborn children. Since most neglect statutes provide little guidance concerning fetuses, courts

\begin{itemize}
\item \textsuperscript{33} \textbf{Ohio Rev. Code Ann.} prohibits any parent from creating "a substantial risk to the health or safety of the child by violating a duty of care, protection, or support." \textbf{Ohio Rev. Code Ann.} § 2919.22(A) (Anderson 1987).
\item \textsuperscript{34} \textit{Ruiz}, 27 Ohio Misc. 2d at 35.
\item \textsuperscript{35} A few state statutes treat newborns with a dependency for a controlled substance as neglected children. \textbf{Fla. Stat. Ann.} § 415.503 (West 1991) (provides that a neglected child includes a newborn dependent upon a controlled substance); \textbf{Ill. Ann. Stat.} ch. 23 para. 2053 (Smith-Hurd 1990) (provides that a neglected child includes a newborn infant whose blood or urine contains any amount of a controlled substance); \textbf{Minn. Stat. Ann.} § 626.556 (West 1991) (provides that neglect includes prenatal exposure to a controlled substance); \textbf{Okla. Stat. Ann.} tit. 21, § 846A (West 1991) (requires all health care professionals to file a report with the Department of Human Services, when a newborn displays symptoms of drug dependency).
\end{itemize}
may possibly apply these statutes in a manner not contemplated by the legislature. In order to avoid these undesirable results, legislatures must restructure neglect statutes to apply to a "narrow and clearly defined"\textsuperscript{36} class of prenatal maternal behavior such as drug use. In the meantime, courts will likely continue to apply child neglect statutes to the unborn. Consequently, if a newborn tests positive for a drug at birth, many state courts will exercise jurisdiction under either the "imminent danger of harm" to the newborn standard or the "actual physical impairment" or "substantial risk" of harm to the fetus theory.

B. Disposition of the Child

Once a court determines that it has jurisdiction over the neglect proceedings, it must decide on the appropriate disposition of the child. In at least one case, \textit{Matter of Baby X}, a probate court took temporary custody of a newborn suffering narcotic withdrawal symptoms.\textsuperscript{37} The Michigan Court of Appeals affirmed the decision.\textsuperscript{38} However, the appellate court did not decide whether such prenatal conduct alone would suffice to permanently deprive a mother of custody.\textsuperscript{39} Accordingly, the court would not permanently deprive the parents of custody until the dispositional phase of the proceeding, where prenatal conduct could be considered along with postnatal conduct.\textsuperscript{40}

In a recent California case, \textit{In re Stephen W.},\textsuperscript{41} the court indicated that drug use during pregnancy, coupled with continued use after birth, could possibly suffice to permanently deprive parents of custody. In \textit{Stephen W.}, an infant born with opiates in his system displayed drug withdrawal symptoms.\textsuperscript{42} The mother was a heroin addict who admitted to having a long standing substance abuse prob-

\textsuperscript{36} Male R, 102 Misc. 2d at 10, 422 N.Y.S.2d at 825 n.18.
\textsuperscript{37} Baby X, 97 Mich. App. at 113, 293 N.W.2d at 739.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} 221 Cal. App. 3d 629, 271 Cal. Rptr. 319 (1990).
\textsuperscript{42} Id.
lem. At the jurisdictional hearing the court took temporary custody of the infant. Following the jurisdictional hearing, the trial court ordered that both parents submit to drug testing to prove they could remain drug free until the dispositional hearing. If the parents could remain drug free for two weeks, the court indicated that custody could possibly be returned. Thus, the court gave the parents adequate opportunity to avoid custody deprivation.

Because neither parent provided drug-free tests, the court placed the child with his paternal grandparents following the dispositional hearing. Custody rights could be returned to the parents only if they successfully completed a "family reunification" program. The court did not specify what the program would consist. However, enrollment in a detoxification program would undoubtedly be required. Likewise, periodic drug tests to determine the parents' progress would likely be required.

Permanent separation of parents and child would be a last resort. However, even though permanent custody was not specifically taken and would be a last resort, permanent loss of custody appears realistically possible given the parents' severe drug addition. Consequently, at least one court has exhibited a willingness to permanently deprive parents of custody when drug use during pregnancy combines with continued use subsequent to birth.

While threat of custody deprivation represents the most common "punishment" for pregnant drug users, courts have increasingly implemented a more stringent method of punishment during the past few years. In an effort to win the "drug war," prosecutors have fervently prosecuted persons involved with drugs. Pregnant drug users have not escaped the wrath of these prosecutions. Therefore, the remainder of this note will examine the relatively modern trend of

43. Id. at 634, 271 Cal. Rptr. at 321.
44. Id.
45. Id. at 635, 271 Cal. Rptr. at 321.
46. Id. at 636, 271 Cal. Rptr. at 322.
47. Id.
48. Id. at 637, 271 Cal. Rptr. at 322.
49. Id. at 637, 271 Cal. Rptr. at 321.
criminally prosecuting women who use drugs during pregnancy.

III. CRIMINAL LIABILITY

Criminal prosecution and conviction of pregnant drug users became a reality on July 13, 1989, when Jennifer Johnson became the first woman in the United States to be convicted of exposing a baby to drugs during pregnancy.50

Public outcry against this criminalization of prenatal maternal conduct exists. However, public outcry does not appear widespread.51 Possibly, many Americans simply do not realize that these charges are being brought. Because the abortion issue, also dealing with fetal and maternal rights, has received extensive media coverage in the past few years, fetal abuse cases, which are relatively few in number, have possibly gotten inadequate media attention. Public concern, as well as outrage about drug related problems, including children born to addicts, could also explain the lack of public response.

Moreover, some courts and commentators appear willing to adopt any possible solution, including one which potentially infringes upon women’s constitutional rights.52 At least one Florida court has adopted a novel and possibly unconstitutional solution to the “drug baby” problem.53

A. State v. Johnson: The First Maternal Drug Use Conviction

Jennifer Johnson, a crack addict, gave birth to two children, a son in 1987 and a daughter in 1989.54 Both children tested positive

50. Roberts, supra note 5, at 56. Pamela Rae Stewart was the first woman prosecuted for allegedly neglecting her fetus through drug use, as well as other unhealthy behavior. Id. at 58. The court, however, dismissed the case finding that the state criminal statute did not extend to the defendant’s alleged actions. The applicable statute provided that it was a crime for a parent to willfully omit, without lawful excuse, to furnish clothing, food, shelter or medical attendance for a child. CAL. PENAL CODE § 270 (Deering 1985).
51. Roberts, supra note 5, at 56.
52. See infra notes 66-84 and accompanying text.
53. See infra notes 50-62 and accompanying text.
54. Roberts, supra note 5, at 56.
for cocaine at birth.\textsuperscript{55} Florida prosecutor, Jeff Deen, did not set out to prove "fetal abuse."\textsuperscript{56} Instead, he based his case upon the sixty second period that a cocaine metabolite may have passed through the infants’ umbilical cords after they were delivered.\textsuperscript{57} In order to support this novel theory, Deen elicited the testimony of the obstetricians who had delivered the children.\textsuperscript{58} Both physicians testified that, for approximately sixty seconds after delivery, blood circulates between mother and child via the umbilical cord.\textsuperscript{59} Furthermore, the physicians testified that once a child is delivered, it is a person and no longer a fetus, even though the umbilical cord is still attached.\textsuperscript{60} Consequently, Johnson had delivered a controlled substance to a "minor" rather than a fetus.

The trial judge accepted the prosecution’s novel theory.\textsuperscript{61} The judge reasoned that the defendant assumed the responsibility to deliver drug-free children.\textsuperscript{62} A thirty year prison term was possible.\textsuperscript{63} Nevertheless, the judge followed the prosecution’s sentencing recommendation and gave Johnson fifteen years of probation.\textsuperscript{64} Johnson’s sentence also included an extensive drug rehabilitation program.\textsuperscript{65}

Johnson has appealed her conviction.\textsuperscript{66} Undoubtedly, one of her main arguments on appeal will concern procedural due process. Procedural due process requires that the accused receive fair notice that her conduct is criminal. Johnson will most likely contend that she did not receive fair notice that her conduct during pregnancy was prohibited under the applicable Florida statute, the purpose of which was to punish drug pushers who give or sell drugs to minors.\textsuperscript{67}

\textsuperscript{55} Id.
\textsuperscript{57} Roberts, supra note 5, at 56.
\textsuperscript{58} Id. at 60.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 61.
\textsuperscript{62} Id.
\textsuperscript{63} Curriden, supra note 56, at 51.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Roberts, supra note 5, at 56 (referring to Johnson v. Florida, No. 89-1765 (Fla. Dist. Ct. App. filed Dec. 28, 1989)).
\textsuperscript{67} Id. at 60.
To circumvent this possible procedural due process problem, the Florida legislature could create a statute specifically making drug use during pregnancy a crime. In other words, the Florida Legislature could give women fair notice that drug use during pregnancy is punishable conduct. The remainder of this note will explore the constitutional rights criminal fetal abuse statutes would possibly impair, as well as the interests they would potentially serve.

B. Statutory Prohibition of Drug Use During Pregnancy: The Constitutional Implications

If a "fundamental right" is impaired by statute, the state's objective in enacting the statute must be compelling. Likewise, the statute must be the least restrictive method of protecting the compelling state interest.

1. The Fundamental Right of Privacy

The United States Supreme Court first delineated the right of privacy in matters relating to marriage and procreation in Griswold v. Connecticut. The statute in Griswold was a Connecticut law which made the use of contraceptives a criminal offense. In striking down the statute, the Supreme Court found that several of the Bill of Rights guarantees create "penumbral rights of privacy." The Court held that intimate family decisions fall within this penumbra of privacy and merit protection from government intervention.


In California, more than a dozen different bills concerning prenatal maternal drug use have been proposed. These bills "would allow a manslaughter charge for illicit drug use causing a baby born alive to die, require that infants who test positive for drugs at birth be reported to child welfare authorities, and include fetuses under state child abuse law." Roberts, supra note 5, at 56.

69. 381 U.S. 479 (1965).
70. Id. at 485.
71. Id.
The Supreme Court expanded *Griswold* in *Eisenstadt v. Baird*\(^73\) by striking down a statute which prohibited the distribution of contraceptives to unmarried individuals. The Court stated that "[i]f the right of 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."\(^74\)

A year later, the Court decided the landmark case of *Roe v. Wade*.\(^75\) The Court based its decision, once again, upon the right of privacy.\(^76\) A woman's decision whether or not to terminate her pregnancy was part of the right to privacy encompassed within "liberty" guaranteed by the Fourteenth Amendment.\(^77\) In addition, the Court held that a woman's interest in deciding whether or not to abort the fetus is a "fundamental right," which can only be outweighed if there is a "compelling state interest" in forbidding abortion.\(^78\) Moreover, the state statute must be "narrowly drawn" so as to fulfill only that legitimate interest.\(^79\)

If the above mentioned fundamental right standards were placed on a "spectrum," *Griswold*’s and *Eisenstadt*’s fundamental right to decide whether to procreate would appear at one end. *Roe*’s fundamental right to terminate pregnancy,\(^80\) although already in the process of procreating, would fall at the opposite end of the spectrum. Somewhere between these two extremes the right to determine "how" one procreates would exist. Because the Supreme Court recognizes as fundamental the right not only to decide whether to procreate, but also the right to terminate the procreation process,\(^81\) it

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\(^{73}\) 405 U.S. 438 (1972).

\(^{74}\) Id. at 453 (emphasis in original).

\(^{75}\) 410 U.S. 113 (1973).

\(^{76}\) Id. at 153.

\(^{77}\) Id.

\(^{78}\) Id. at 155.

\(^{79}\) Id.

\(^{80}\) A woman's right to terminate her pregnancy is not unqualified. Once the fetus becomes viable at the beginning of the third trimester, the state has a compelling interest in protecting potential life. *Roe v. Wade*, 410 U.S. 113, 162-4 (1973). Therefore, the state may prohibit all third trimester abortions except those which preserve maternal life or health. *Id.*

\(^{81}\) See infra note 80.
would likely recognize as fundamental the right to live as one wishes during the procreation process. Therefore, decisions concerning "how" one procreates likely merit protection unless the state has compelling reason to interfere.

2. Right of Personal Autonomy and Bodily Integrity

Laws criminalizing maternal drug use not only infringe upon the fundamental right of privacy, but they also impair the right to personal autonomy and bodily integrity. "Every individual enjoys the basic rights to 'autonomy over [his or her] own body,' freedom 'from nonconsensual invasion of . . . bodily integrity' and preservation of the inviolability of the person." These rights, protected by the Fourteenth Amendment, empower a woman to resist governmentally imposed regulation of her conduct during pregnancy.

When the right to privacy combines with the right to personal autonomy, it becomes evident that a strong fundamental right is involved. Furthermore, because state regulation of fetal abuse also implicates the traditional rights of the parent to decide how to balance the interests of various family members, the fundamental right to be free from governmental intrusion becomes strongest in this context.

82. "Living as one wishes" does not include the right to violate drug laws. Pregnant women should not be exempt from criminal drug laws. Johnson, supra note 23, at 191. However, a law which singles out women for "special penalties" solely because they are pregnant implicates the fundamental rights to privacy and bodily integrity. Id. (referring to Gallagher, Prenatal Invasion and Intervention; What's Wrong with Fetal Rights, 10 Harv. Women's L.J. 9 (1987); Rhoden, The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans, 74 Cal. L. Rev. 1951 (1986)).

83. In July of 1989, the United States Supreme Court decided another abortion case, Webster v. Reproductive Health Services, 492 U.S. 490 (1989). Although not overruling Roe, Webster demonstrates that several members of the Court would limit Roe's application under certain circumstances. For a detailed discussion of Webster and its potential impact upon prenatal maternal drug use, see Johnson, supra note 23, at 179.

84. See supra note 82.


86. Id.

87. Id. at 59.


89. Myers, supra note 85, at 59.
3. Compelling State Interest

Because fetal abuse laws impair fundamental rights, courts can sustain them only if they serve a compelling state interest and utilize the least restrictive means available to serve the interest. In Roe v. Wade, the state had two compelling interests: (1) protecting the health of the mother and (2) protecting the viability of the fetus. Protecting the mother’s health becomes compelling after the first trimester when the dangers of abortion outweigh the dangers of child birth. The Court rejected the argument that a fetus is a person deserving protection prior to viability under the Fourteenth Amendment.

a. Maternal Health

Laws criminalizing prenatal maternal drug use could arguably protect maternal health by inducing pregnant women to forego drug use or seek treatment for addiction. However, Molly McNulty, a reproductive law expert, criticizes the deterrence argument. According to McNulty, “[d]rug use is already illegal, and if it doesn’t deter people, then what’s another law aimed at pregnant women going to do?” She feels another law, aimed at pregnant women, is useless. Most likely, such a law would do nothing to deter an addict with an uncontrollable urge for drugs. Thus, a court possibly would not accept an asserted compelling interest involving protection of maternal health.

b. Quality of Potential Life

Professor John Myers has argued that the state’s “interest in potential life should extend to protection of the quality of life.”

91. Id. at 163.
92. Id. at 160.
93. Drug use does imperil the mother’s health. For instance, cocaine use can cause hypertension, as well as other complications, which can lead to a stroke or seizure. MacGregor, Keith, Chasnoff, Rosner, Chisum, Shaw, Minogue, Cocaine Use During Pregnancy: Adverse Perinatal Outcome, 157 AM. J. OBSTET. GYNECOL. 689 (1987).
94. Curriden, supra note 57, at 52.
95. Id.
96. Id.
97. Myers, supra note 80, at 19.
Since a state can mandate that a woman complete her pregnancy once the fetus becomes viable, it follows that the state has the obligation and power to protect the fetus from abuse or neglect by its parents.98

As a society, we place a premium upon "quality of life." Children born with birth defects or mental retardation caused by irresponsible maternal conduct can never enjoy life in its fullest. Prevention of a lifetime of suffering, due to birth defects, mental retardation, and other problems caused by maternal drug use, may arguably represent as compelling an interest as saving the fetus upon viability. Consequently, the state likely has a compelling interest in protecting quality of potential life.

3. Least Restrictive Alternative

While women have fundamental rights of privacy and bodily integrity which are likely impaired by fetal abuse laws,99 the state possibly has a compelling interest in protecting the quality of potential life.100 Thus, the determining factor as to the constitutionality of fetal abuse laws becomes whether such laws are the least restrictive method of protecting the quality of potential life.101

As stated before, the most widely accepted and implemented "punishment" for pregnant drug users has been the threat of losing custody of the child. Because drug problems have worsened, a more effective solution may be needed. However, criminalization of maternal drug use may not be the least restrictive solution to the "drug baby" problem. For example, a Roe v. Wade "trimester" approach appears less restrictive than a law criminalizing drug use throughout pregnancy.

According to Roe, a state does not have a compelling interest during the first trimester of pregnancy.102 Therefore, the state may

99. See supra notes 66-84 and accompanying text.
100. See supra notes 85-92 and accompanying text.
not regulate first trimester abortions. During the second trimester, the state’s interest in protecting maternal health becomes compelling. Thus, in the second trimester, the state may regulate abortion procedure in ways that are reasonably related to maternal health. When the fetus becomes viable at the beginning of the third trimester, the state has a compelling interest in protecting potential life. Consequently, the state may prohibit all third trimester abortions, except those which preserve maternal life or health.

In Roe, “potential life” merited protection only after reaching the point of viability. Likewise, “quality of potential life” may arguably merit protection only after viability. Thus, if courts hold women criminally liable for prenatal maternal drug use, they should possibly limit liability to cases of third trimester drug use.

The trimester approach appears less restrictive than criminal prohibition of drug use throughout pregnancy. However, “Roe’s trimester framework may be simply illogical in the context of fetal abuse because it permits increasing regulation as pregnancy progresses whereas fetuses are most vulnerable in the earliest stages of pregnancy.”

Another suggested less restrictive alternative to criminal prohibition of drug use throughout pregnancy consists of mandatory enrollment for pregnant drug users in a residential drug treatment program. Moreover, this requirement “may be the only way to force these drug centers to open their doors to pregnant women.”

For instance, a recent survey of seventy-eight drug-treatment programs in New York City found that eighty-seven percent excluded crack-addicted pregnant women on Medicaid. The handful of programs in this country for pregnant addicts have inadequate funds

103. *Id.*
104. *Id.* at 163.
105. *Id.* at 162.
106. *Id.* at 162-4.
107. *Id.*
109. Curriden, *supra* note 56, at 52. A drawback to the mandatory enrollment approach might be the difficulty in creating an effective screening system for addicts who do not seek prenatal care.
110. *Id.*
to treat the majority of women who seek help.\textsuperscript{112} Thus, a less restrictive, and possibly more effective means of protecting "drug babies" would be to not only require treatment at these centers, but also to provide adequate funds to enable these centers to operate.

Furthermore, the method of preserving a compelling state interest must actually serve the interest, as well as be the least restrictive one possible.\textsuperscript{113} Criminalization of maternal conduct quite possibly will not serve the state's compelling interest. The threat of prosecution has already scared pregnant drug users away from public hospitals and health-care programs.\textsuperscript{114} Thus, the fetus' well-being may be even more at risk. Another criticism of criminalization is that once an addict discovers she is pregnant, the only way she can definitely avoid punishment is by choosing to abort the fetus.\textsuperscript{115} Possibly causing pregnant women to forgo prenatal care or opt for an abortion, laws criminalizing maternal conduct may not serve the state interest in protecting fetal well-being.\textsuperscript{116}

Because fetal abuse laws are not likely the least restrictive alternative and possibly do not serve a compelling state interest, they may not pass the strict scrutiny test. Thus, laws which criminalize maternal drug use could quite possibly be unconstitutional.

IV. CONCLUSION

Although most child neglect statutes do not mention the unborn, courts frequently apply them to fetuses. Undesirable "misuse" of these statutes may occur if they are not limited to a narrow and clearly defined class of prenatal maternal conduct bearing directly upon a mother's ability to care for her newborn child. Undoubtedly, drug abuse falls within this category while other "harmless" prenatal

\textsuperscript{112} Id.

\textsuperscript{113} Note, supra note 88, at 1008 (referring to Thornburgh v. American College of Obstetricians \& Gynecologists, 106 S. Ct. 2169, 2181-82 (1986)).

\textsuperscript{114} Roberts, supra note 5, at 58.

\textsuperscript{115} Curriden, supra note 56, at 52.

\textsuperscript{116} The United States Catholic Conference also opposes special punitive measures specifically aimed at pregnant drug users. Johnsen, supra note 23, at 212. The Conference does not believe drug laws aimed at pregnant women serve the government's purpose of protecting unborn children. Id.
behavior would not be punishable conduct. This is a valid and reasonable distinction between prenatal maternal conduct which if continued after birth would harm the newborn and that which would not.

Because courts treat prenatal maternal drug use as child neglect, courts must make custody determinations. Temporary, as well as permanent loss of custody, has become realistically possible.

While custody deprivation appears reasonable and in the child's best interest, laws criminalizing prenatal maternal drug use are possibly unconstitutional. Women have fundamental rights of privacy and personal autonomy. Likewise, the state has a compelling interest in the protection of the quality of potential life. However, criminalization of drug use during pregnancy is most likely not a least restrictive alternative. Furthermore, even if criminalization were a least restrictive alternative, it would probably not serve the state's interest. Instead, women may forego prenatal care or abort the fetus to avoid detection and punishment. Therefore, laws criminalizing prenatal maternal drug use may well be unconstitutional.

Obviously, a solution must be found for the tragic epidemic of children born addicted to drugs. An adequate solution can be discovered only when time, effort and money are spent to create effective treatment facilities for pregnant addicts.

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