

Duquesne Law Review

Volume 59
Number 1 *A Century Since Suffrage: How Did
We Get Here? Where Will We Go? How Will We
Get There?*

Article 8

2021

Criminalizing Prenatal Opioid Use: The Creation of a Gender- Based Crime

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Hannah French, *Criminalizing Prenatal Opioid Use: The Creation of a Gender-Based Crime*, 59 Duq. L. Rev. 167 (2021).

Available at: <https://dsc.duq.edu/dlr/vol59/iss1/8>

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Criminalizing Prenatal Opioid Use: The Creation of a Gender-Based Crime

*Hannah French**

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INTRODUCTION

The opioid epidemic affects all generations—even those unborn.¹ Fetuses can be exposed *in utero* to substances that a pregnant woman ingests.² State courts are arriving at different conclusions about how to handle these expectant mothers' drug use: specifically,

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1. Julie Turkewitz, *The Pills Are Everywhere: How the Opioid Crisis Claims Its Youngest Victims*, N.Y. TIMES (Sept. 20, 2017), <https://www.nytimes.com/2017/09/20/us/opioid-deaths-children.html>.

2. Beth A. Logan et al., *Neonatal Abstinence Syndrome: Treatment and Pediatric Outcomes*, 56 CLINICAL OBSTETRICS & GYNECOLOGY 186, 187 (2013).

whether women should be held criminally liable.³ These women may not have started to use opioids for illicit purposes.⁴ In fact, they may have taken steps to mitigate the adverse effects of opioids on their fetus.⁵ However, courts are finding these women criminally liable without taking the disease of addiction or a woman's intent into account.⁶ Notably, fathers are not prosecuted.⁷ This crime is only being prosecuted against a single gender: women.⁸

This article proposes that prosecuting women for child endangerment to a fetus is a gender-based crime,⁹ violative of the Equal Protection Clause of the Constitution.¹⁰ Opening the door to litigation for opioid use during pregnancy can lead to the prosecution of women for their lack of prenatal care,¹¹ which disproportionately affects marginalized women from lower socioeconomic backgrounds.¹² Prosecuting women is not deterring them from abusing drugs during pregnancy; rather, it is forcing women to forego basic medical care for fear of serving prison time and losing custody of their unborn child.¹³ Part I of this article provides a brief history of the constitutional protections for women under the Equal Protection Clause and Due Process Clause. Part II gives an overview of the opioid epidemic. Part III discusses the dichotomy between state judicial and legislative approaches to women who give birth to children addicted to opioids. Part IV argues that prosecuting women for ingesting drugs during pregnancy creates a gender-based crime that perpetuates gender stereotypes. Finally, this article concludes that prosecuting women for prenatal conduct violates the Equal Protection Clause.

3. See generally *Kilmon v. State*, 905 A.2d 306 (Md. 2006); *State v. Louk*, 786 S.E.2d 219 (W. Va. 2016).

4. See, e.g., *N.J. Div. of Child Prot. & Permanency v. K.M.*, 133 A.3d 643, 645 n.2 (N.J. Super. Ct. App. Div. 2016) (noting that opioids were prescribed to a friend for knee pain).

5. *Id.* at 645–46.

6. *Id.* at 648.

7. Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. 947, 995 (2017) (“[L]egislators continue to disregard the significant role . . . the father’s own behavior play[s] in harms experienced by a developing fetus and child.”).

8. Vanessa Reid Soderberg, *More Than Receptacles: An International Human Rights Analysis of Criminalizing Pregnancy in the United States*, 31 BERKELEY J. GENDER L. & JUST. 299, 325 (2016). In this article, “women” refers to cisgender women and people with uteruses.

9. Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 772, 808 (2020).

10. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

11. See *Kilmon v. State*, 905 A.2d 306, 311 (Md. 2006).

12. See generally Bridges, *supra* note 9.

13. Livia Areas-Holmblad, *The Legal Consequences of Using Drugs While Pregnant*, ADDICTION NOW (Jan. 20, 2017), <https://www.drugaddictionnow.com/2017/01/20/legal-consequences-using-drugs-pregnant/3/>.

I. CONSTITUTIONAL PROTECTIONS

The United States Constitution was enacted to curtail government infringement of citizens' rights.¹⁴ Mothers, as well as all other citizens, are entitled to rights that protect them from government interference under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁵

A. *The Equal Protection Clause*

The Equal Protection Clause defends protected classes of individuals to ensure that similarly situated people are not treated differently.¹⁶ Equal Protection warrants judicial scrutiny at differing levels.¹⁷ Strict scrutiny requires that the law at issue be narrowly tailored to the accomplishment of a compelling government interest.¹⁸ Rational basis scrutiny requires only that a challenged statute be rationally related to a legitimate state purpose.¹⁹ The United States Supreme Court has also found an "intermediate scrutiny plus" standard for gender classifications.²⁰ This requires a state to provide an "exceedingly persuasive justification" that the challenged law is substantially related to some important governmental objective.²¹

Statutes that distinguish between males and females are subject to scrutiny under the Equal Protection Clause.²² In fact, the creation of a gender-based crime involving heightened sanctions must be substantially related to the achievement of its purpose.²³

In *United States v. Virginia*,²⁴ the United States Supreme Court held that the Constitution precludes public institutions from being accessible solely to men.²⁵ The Court found that "a party seeking to uphold [a] government action based on sex must establish an 'exceedingly persuasive justification' for the classification."²⁶ To

14. Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1235–36 (2000).

15. U.S. CONST. amend. XIV, § 1.

16. *Id.* (including race and gender).

17. Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 L. & INEQ. 239, 350 (1999).

18. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

19. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

20. James E. Fleming, "There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's *Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301, 2307 (2006).

21. *United States v. Virginia*, 518 U.S. 515, 533–34 (1996).

22. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

23. *Country v. Parratt*, 684 F.2d 588, 592 (8th Cir. 1982).

24. 518 U.S. 515 (1996).

25. *Id.* at 519.

26. *Id.* at 524 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

succeed in an action based on sex, the state must show “at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”²⁷ The Court soundly noted that sex classifications “may not be used, as they once were, . . . to create or perpetuate the legal, social, and economic inferiority of women.”²⁸ Just as states can have some role in the Due Process context,²⁹ states also control the “gates to opportunity” under Equal Protection.³⁰ However, states “may not rely on ‘overbroad’ generalizations to make ‘judgments about people that are likely to . . . perpetuate historical patterns of discrimination.’”³¹ The Court closed by reminding the courts below that gender-based classifications are subject to heightened scrutiny.³²

Notwithstanding, the Court has upheld gender classifications based on stereotypes.³³ To be upheld, the laws must satisfy an important governmental objective.³⁴ Reduction in economic disparity between men and women caused by “the long history of discrimination” has been recognized as such an objective.³⁵ However, “the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.”³⁶ Statutes that discriminate based on gender have been upheld, but the law must still satisfy the heightened standard.³⁷

Pregnancy discrimination, which has been reviewed by the United States Supreme Court, has seen an evolution of greater protection.³⁸ The Court began its analysis in *Geduldig v. Aiello*,³⁹ where it held that an employment insurance package was constitutional where it excluded pregnancy as a disability.⁴⁰ The Court stated that this was not in violation of the Equal Protection Clause

27. *Miss. Univ. for Women*, 458 U.S. at 724 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

28. *Virginia*, 518 U.S. at 534 (citation omitted).

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

30. *Virginia*, 518 U.S. at 541.

31. *Id.* at 542 (alteration in original) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994)).

32. *Id.* at 555.

33. *See, e.g., M. v. Superior Ct.*, 450 U.S. 464 (1981); *Rotsker v. Goldberg*, 453 U.S. 57 (1981).

34. *Craig v. Boren*, 429 U.S. 190, 199 (1976).

35. *Califano v. Webster*, 430 U.S. 313, 317 (1977).

36. *Id.* (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

37. *See Nguyen v. INS*, 533 U.S. 53, 73 (2001).

38. Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781, 868–69 (2014).

39. 417 U.S. 484 (1974).

40. *Id.* at 497.

because “[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”⁴¹ However, the Court did not comment on the decision of whether pregnancy discrimination was sex discrimination by opining that, “[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification”⁴²

Congress has since passed the Pregnancy Discrimination Act, which finds that for purposes of the Civil Rights Act of 1964,⁴³ pregnancy discrimination is sex discrimination.⁴⁴ Following the Act’s passage, the Court refined its prior holding in *Nashville Gas Co. v. Satty*.⁴⁵ In *Satty*, the Court found that pregnancy discrimination may be sex discrimination.⁴⁶ However, until the Supreme Court has held definitively that pregnancy discrimination is subject to heightened scrutiny, like gender discrimination, pregnancy discrimination may be subject only to a rational basis standard.⁴⁷

B. *The Due Process Clause*

The right of privacy is recognized as a “liberty” interest under the Due Process Clause of the Fourteenth Amendment.⁴⁸ Privacy is an implicit fundamental right that protects citizens from governmental intrusion.⁴⁹ Privacy has been interpreted to include the “interest in independence in making certain kinds of important decisions.”⁵⁰ Decisional privacy, such as when a mother chooses to continue or terminate her pregnancy,⁵¹ is designed to protect personal affairs, that are central to an individual’s person, from

41. *Id.* at 496 n.20.

42. *Id.*

43. 42 U.S.C. § 2000e.

44. 42 U.S.C. § 2000e(k).

45. 434 U.S. 136 (1977).

46. Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 407 (2008).

47. Monica Carusello, *Sentencing Pregnant Drug Addicts: Why the Child Endangerment Enhancement Is Not Appropriate*, 5 TENN. J. RACE, GENDER & SOC. JUST. 69, 79 (2016).

48. See *Roe v. Wade*, 410 U.S. 113, 152–56 (1973).

49. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 926–27 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

50. *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

51. Julia Epstein, *The Sacred Body in Law and Literature: The Pregnant Imagination, Fetal Rights, and Women’s Bodies: A Historical Inquiry*, 7 YALE J.L. & HUMAN. 139, 160 (1995).

governmental intrusion.⁵² Once an interest has been classified as a fundamental right, then the government must show a compelling reason to intervene in order to survive strict scrutiny.⁵³

The right of privacy was first established by the United States Supreme Court in a First Amendment case that held that parents have the right to educate their children as they choose.⁵⁴ Since then, the right of privacy has been contemplated and found in matters of marriage and family life.⁵⁵ “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and protects the person from unwarranted government intrusions into a dwelling or other private place.⁵⁶

There is considerable support for the right to privacy encompassing the right to procreate, but a fetus’ right of autonomy is part of ongoing dispute.⁵⁷ The decision to bear children is “at the very heart” of these constitutionally protected choices.⁵⁸ In *Griswold v. Connecticut*,⁵⁹ the United States Supreme Court recognized that married couples have a right to privacy in the context of contraception.⁶⁰ The Court emphasized that not only does the Fourteenth Amendment protect privacy, but that “the First Amendment has a penumbra where privacy is protected from governmental intrusion.”⁶¹ Further, the Fourth and Fifth Amendments have been described “as protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’”⁶² The Court concluded that the right of privacy is a protected right.⁶³

52. Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 446–67 (1983).

53. See *Roe*, 410 U.S. at 155.

54. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

55. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (holding same-sex couples have a fundamental right to marry); *Roe*, 410 U.S. 113 (recognizing a right to choose whether to terminate pregnancy); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that there is a right to choose one’s spouse irrespective of race); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing a right to procreate); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (holding there is a right to select the type of schooling of children in one’s custody).

56. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

57. Exploring the right of a fetus to bodily autonomy is beyond the scope of this article. Instead, the focus of this article is the autonomy of mothers to carry their pregnancy to full-term without being forced to face criminal charges.

58. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977).

59. 381 U.S. 479 (1965).

60. *Id.* at 485.

61. *Id.* at 483.

62. *Id.* at 484 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

63. *Id.* at 485; see also *id.* at 491 (“To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.”) (Goldberg, J., concurring).

The Supreme Court has continued to extend the right of privacy.⁶⁴ In *Eisenstadt v. Baird*,⁶⁵ the Court recognized a right to privacy for unmarried individuals to have contraceptives.⁶⁶ The Court emphasized that “[i]f the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁶⁷

In *Roe v. Wade*,⁶⁸ the court addressed that women have a right to privacy in their decision to terminate a pregnancy.⁶⁹ The Court began by stating the limits of personal privacy, yet acknowledged that the right has extended into marriage, procreation, and child rearing.⁷⁰ The Court concluded that the decision to have an abortion is a protected right of privacy, but it “is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.”⁷¹ Notably, however, “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn,”⁷² thus, fetuses are not entitled to Due Process rights and Equal Protection under the law.⁷³ Although fetuses do not receive this protection, the Court recognized that the state “does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and that it has still [another] important and legitimate interest in protecting the potentiality of human life.”⁷⁴ The state’s interest in both the pregnant woman and the fetus grows as the woman comes to term.⁷⁵

Later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷⁶ the Court refined its holding in *Roe*, and explained that although the State has an interest in preserving the life of both the born and unborn, “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the

64. See generally *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

65. *Id.*

66. *Id.* at 454.

67. *Id.* at 453.

68. 410 U.S. 113 (1973).

69. *Id.* at 164–67.

70. *Id.* at 152–53.

71. *Id.* at 155.

72. *Id.* at 158.

73. William E. Buelow III, *To Be and Not to Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus*, 71 TEMP. L. REV. 963, 986 (1998).

74. *Roe*, 410 U.S. at 162.

75. *Id.* at 163.

76. 505 U.S. 833 (1992).

procedure.”⁷⁷ The Court established that the liberty guaranteed by the Due Process Clause is a “rational continuum” and “includes a freedom from all substantial arbitrary impositions” such that it requires “particularly careful scrutiny” when a state attempts to abridge this right.⁷⁸

II. THE OPIOID EPIDEMIC

Every day, more than 130 people die in the United States from overdosing on opioids.⁷⁹ Use and abuse of opioids and opiates has transformed our society.⁸⁰ These opioids, consisting of prescription pain relievers, heroin, codeine, oxycodone, and synthetic opioids, like fentanyl, affect the youngest to oldest members of society.⁸¹ Prescriptions for opioids increased in the late 1990s and have since surged since the 2010s.⁸² The number of prescriptions becomes even more alarming upon discovering that approximately three out of four new heroin users say they abused prescription opioids before turning to heroin.⁸³ The Center for Disease Control (CDC) estimates that the “economic burden” of prescription opioid misuse, in the United States alone, is \$78.5 billion per year, including costs of healthcare and criminal justice involvement.⁸⁴

The Opioid Crisis is not new; rather, litigation has been ongoing since the early 2000s,⁸⁵ involving oxycodone (OxyContin).⁸⁶ Purdue Pharma, a manufacturer of OxyContin, produced documents during

77. *Id.* at 846.

78. *Id.* at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

79. *Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 19, 2020), <https://www.cdc.gov/drugoverdose/epidemic/>.

80. *Commonly Used Terms*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 5, 2020), <https://www.cdc.gov/drugoverdose/opioids/terms.html> (defining that opiates refers to natural opioids, like heroin, morphine, and codeine, and that opioids refer to all natural, semisynthetic, and synthetic opioids).

81. *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (May 27, 2020), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis#one>.

82. *Opioid Prescribing*, CTRS. FOR DISEASE CONTROL AND PREVENTION (July 6, 2017), <https://www.cdc.gov/vitalsigns/opioids/index.html>.

83. Mina Dixon Davis, “Bad Moms” and Powerful Prosecutors: Why a Public Health Approach to Maternal Drug Use Is Necessary to Lessen the Hardship Borne by Women in the South, 25 GEO. J. POVERTY L. & POL'Y 305, 308 (2018).

84. Curtis Florence et al., *The Economic Burden of Prescription Opioid Overdose, Abuse, and Dependence in the United States*, 54 MED. CARE 901 (2016).

85. Alexander C. Egilman et al., *Confidentiality Orders and Public Interest in Drug and Medical Device Litigation*, 180 [J]AMA INTERNAL MED. 292 (2019).

86. See *Medication Guide Oxycontin*, U.S. FOOD & DRUG ADMIN. (Aug. 2015), <https://www.fda.gov/media/78453/download> (“A strong prescription pain medicine that contains an opioid (narcotic) that is used to manage pain severe enough to require daily around-the-clock, long-term treatment with an opioid, when other pain treatments such as non-opioid pain medicines or immediate-release opioid medicines do not treat your pain well enough or you cannot tolerate them.”).

litigation detailing how the company down-played the drug's risk of abuse and addiction.⁸⁷ However, this leaked information is one of only few pieces revealed to the public due to drug companies pursuing settlement.⁸⁸ Though, the tides may change soon because the population harmed by opioids continues to grow and may lead to more class action lawsuits due to similar factual circumstances—for example, newborns with Neonatal Abstinence Syndrome (NAS).⁸⁹

NAS is a withdrawal symptom that “impacts newborns who were exposed to opioids in utero, and then are rapidly shut off from access to the drug at birth.”⁹⁰ Effects include “excessive high-pitched cry, reduced quality and length of sleep after a feeding, increased muscle tone, tremors, and convulsions . . . dysregulation ([including] sweating, frequent yawning and sneezing, increased respiration) and gastrointestinal signs ([such as] excessive sucking, poor feeding, regurgitation or vomiting, and loose or watery stools).”⁹¹ Hospitals are becoming inundated with babies born with NAS: citing a rise from 13,500 in 2009 to 25,000 in 2016.⁹² In Pennsylvania alone, NAS rates increased by over one thousand percent between 2000 and 2018.⁹³ Despite the severity of symptoms, there is little research discussing the impact of pregnant opioid use or NAS on long-term brain development.⁹⁴ The uncertainty of the long-term impact of NAS has generated much debate about whether pregnant women should be prosecuted for drug use.⁹⁵

Like all drug addiction, opioid addiction is a disease.⁹⁶ The World Health Organization promulgated an authoritative definition of

87. Egilman et al., *supra* note 85.

88. Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 NEW ENG. J. MED. 2301, 2302–03 (2017).

89. *Id.* at 2304.

90. Cara O'Connor, *A Guiding Hand or a Slap on the Wrist: Can Drug Courts Be the Solution to Maternal Opioid Use?*, 109 J. CRIM. L. & CRIMINOLOGY 103, 108 (2019).

91. *Id.* at 108–09 (alterations in original) (quoting Beth A. Logan et al., *Neonatal Abstinence Syndrome: Treatment and Pediatric Outcomes*, 56 CLINICAL OBSTETRICS & GYNECOLOGY 168 (2013)).

92. Sean Withington & Shannon M. Monnat, *The Increase in Neonatal Abstinence Syndrome from Opioids Affects Us All*, LERNER CTR. FOR PUB. HEALTH PROMOTION (Apr. 16, 2019), https://lernercenter.syr.edu/wp-content/uploads/2019/04/Withington_NAS_FINAL.pdf.

93. *Id.*

94. See Fran Smith, *Babies Fall Victim to the Opioid Crisis*, NAT'L GEOGRAPHIC (Sept. 2017), <https://www.nationalgeographic.com/magazine/2017/09/science-of-addiction-babies-opioids>.

95. See Cara Angelotta & Paul S. Appelbaum, *Criminal Charges for Child Harm from Substance Use in Pregnancy*, 45 J. AM. ACAD. PSYCHIATRY L. 193 (2017).

96. S. REP. NO. 92-1071, at 3 (1971) (expanding the Narcotic Addiction Rehabilitation Act to include methadone maintenance).

heroin addiction, which lists characteristics such as a “strong desire or need to continue taking the drug,” “a psychic dependence on the effects of the drug,” and “a physical dependence on the effects of the drug requiring its presence for maintenance of homeostasis and resulting in a definite, characteristic, and self-limited abstinence syndrome when the drug is withdrawn.”⁹⁷ Congress has also defined “addict” to include one “who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.”⁹⁸

The United States Supreme Court, in *Robinson v. California*,⁹⁹ held that addiction is not a crime; rather, it is an illness “which may be contracted innocently or involuntarily,”¹⁰⁰ and cannot be prosecuted. Justice Douglas concluded that addiction is not punishable as a crime¹⁰¹ because, “[i]f addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person.”¹⁰²

III. DICHOTOMY OF APPROACHES

Courts and legislatures have been working to identify the potential liability for drug use during pregnancy.¹⁰³ Their efforts show the vast difference in interpreting the requirements for pregnant women.¹⁰⁴

A. *Judicial Approach*

The most frequently relied upon case for fetal child abuse due to drug addiction deals with cocaine.¹⁰⁵ Regina Kilmon gave birth to a baby boy that had the presence of cocaine in his bloodstream.¹⁰⁶ Ms. Kilmon was charged with second degree child abuse, reckless endangerment, and possession of a controlled substance and pled guilty to reckless endangerment.¹⁰⁷ The Maryland Supreme Court looked to its child endangerment statute, where in relevant part

97. WORLD HEALTH ORG. [WHO], WHO TECHNICAL REPORT SERIES NO. 273: WHO EXPERT COMMITTEE ON ADDICTION-PRODUCING DRUGS 13–14 (1964).

98. 21 U.S.C. § 802(1).

99. 370 U.S. 660 (1962).

100. *Id.* at 667.

101. *Id.* at 674 (Douglas, J., concurring).

102. *Id.*

103. See Barry M. Lester et al., *Substance Use During Pregnancy: Time for Policy to Catch Up with Research*, HARM REDUCTION J., Apr. 20, 2004, at 3.

104. See *id.*

105. *Kilmon v. State*, 905 A.2d 306 (Md. 2006).

106. *Id.* at 307.

107. *Id.*

states, that a person recklessly “engage[s] in conduct that creates a substantial risk of death or serious physical injury to *another*.”¹⁰⁸ The court held that “another” meant another person.¹⁰⁹ As such, the person allegedly endangered by Ms. Kilmon’s conduct was not the fetus, but the child, after the child’s birth.¹¹⁰

The court recognized that an injury committed while a child is still *in utero* can produce criminal liability if the child is later born alive.¹¹¹ Distinguishing *Williams*, the court noted that reckless endangerment, not intent to injure, is the key element of the offense.¹¹² The court took issue that if the statute is applied to the effect of a pregnant woman’s conduct on the fetus she is carrying, it could be construed to include not just the ingestion of unlawful controlled substances “but a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature”¹¹³ The court then provided a list of the potentially reckless behavior that could be captured under the reckless endangerment statute:

everything from becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, to the continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary things as skiing or horseback riding could produce criminal liability.¹¹⁴

The court acknowledged that a pregnant woman, like anyone else, may be prosecuted for her own possession of controlled

107. *Id.*

108. MD. CODE ANN., CRIM. LAW § 3-204(a)(1) (emphasis added).

109. *Kilmon*, 905 A.2d at 308.

110. *Id.* at 309.

111. *Id.* at 310; *see, e.g., Williams v. State*, 561 A.2d 216, 219 (Md. 1989) (concluding that when a pregnant woman was shot with an arrow and child died shortly after birth that defendant could lawfully be convicted of manslaughter for the death of the child).

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

113. *Id.*

114. *Id.*

substances.¹¹⁵ Despite being importuned on numerous occasions, the Maryland General Assembly has “chosen not to impose additional criminal penalties for the effect that her *ingestion* of those substances might have on the child, either before or after birth.”¹¹⁶ Recognizing an anomaly in the jurisprudence, the court proffered that it would be nonsensical that a pregnant woman who, by ingesting drugs and recklessly causing the death of a viable fetus, would suffer no criminal liability for manslaughter, but, if the child survived, she could be imprisoned for five years for reckless endangerment.¹¹⁷

Subsequently, New Jersey addressed whether a pregnant woman seeking treatment for her opioid addiction can be held criminally responsible for her child being born with NAS.¹¹⁸ At a routine doctor’s appointment, Y.N. learned that she was four months pregnant.¹¹⁹ During the preceding four months, Y.N. had been taking Percocet¹²⁰ for injuries from a car accident and became dependent on the medication.¹²¹ Hospital staff advised her not to stop taking Percocet abruptly because it could endanger her pregnancy.¹²² Instead, hospital staff recommended that Y.N. enter a methadone maintenance treatment program, which she did four months later, just a month before she gave birth to her son.¹²³ Y.N.’s son suffered methadone withdrawal symptoms at birth and remained hospitalized for about seven weeks.¹²⁴

Y.N. was found strictly liable for abuse and neglect.¹²⁵ The New Jersey Supreme Court reversed and held “absent exceptional circumstances, a finding of abuse or neglect cannot be sustained based solely on a newborn’s enduring methadone withdrawal following a mother’s timely participation in a bona fide treatment program prescribed by a licensed healthcare professional to whom she has made

115. *Id.* at 314.

116. *Id.*

117. *Id.*

118. N.J. Div. of Child Prot. and Permanency v. Y.N., 104 A.3d 244 (N.J. 2014).

119. *Id.* at 246.

120. Percocet contains oxycodone, an opioid, and is used to treat moderate to severe pain. See *Percocet (Oxycodone and Acetaminophen Tablets, USP)*, ENDO PHARMS. (July 2018), https://www.endo.com/File%20Library/Products/Prescribing%20Information/PERCOCET_prescribing_information.html. The FDA warns that there has been not been established study indicating that Percocet is safe to use during pregnancy. *Id.*

121. Y.N., 104 A.3d at 246.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* But see N.J. Dep’t of Child. & Families, Div. of Youth & Fam. Servs. v. A.L., 59 A.3d 576, 590 (N.J. 2013) (holding that mother had not abused or neglected her child when the infant was born with cocaine metabolites in her system because the record revealed little about any future degree of harm).

full disclosure.”¹²⁶ The court referenced the United States Department of Health and Human Services and concluded that methadone maintenance treatment can save the lives of newborns.¹²⁷ Although the infant may experience methadone withdrawal, ultimately, it is better than the infant being addicted to heroin.¹²⁸ The court reasoned that, finding a mother liable of abuse or neglect as a result of her newborn’s NAS diagnosis, after the mother made an informed medical decision to undergo methadone maintenance treatment, would discourage women from entering detoxification programs that may improve their child’s health.¹²⁹

The Vermont Supreme Court addressed a similar issue regarding whether a woman should continue her use of opioids during pregnancy.¹³⁰ In that case, the pregnant woman revealed to a nurse that she had been using street buprenorphine.¹³¹ The nurse educated that she should continue to use the drug to avoid intrauterine damage to the fetus and herself if she were to suddenly stop.¹³² The nurse prescribed Subutex (buprenorphine),¹³³ but her son was born opioid-dependent and required two months of treatment.¹³⁴ The court held that because the mother was suspended from treatment, accessed un-prescribed Subutex off the street, and did not return to a medically monitored program until a month before the birth of her child, the mother was guilty of child abuse towards the fetus.¹³⁵

Justice Beth Robinson, concurring in part and dissenting in part, noted that the court “should not presume that *every* child born opioid-dependent is by definition [abused] on account of the fact that the child developed an opioid dependence in utero.”¹³⁶ Child-protection statutes are not designed to punish prepartum conduct.¹³⁷ Although a parent’s conduct prior to a child’s birth may support inferences about the parent’s ability to care for the child upon birth, Justice Robinson did not believe that an abuse finding is predicated

126. *Y.N.*, 104 A.3d at 246.

127. *Id.* at 255–56.

128. *Id.* at 256.

129. *Id.*

130. *In re M.M.*, 133 A.3d 379 (Vt. 2015).

131. *Id.* at 382.

132. *Id.*

133. Subutex is used to treat opioid dependence. See *Subutex (Buprenorphine Sublingual Tablets) for Sublingual Administration*, U.S. FOOD & DRUG ADMIN. (Feb. 2018), https://www.accessdata.fda.gov/drugsatfda_docs/label/2018/020732s018lbl.pdf. Subutex can result in NAS. *Id.*

134. *In re M.M.*, 133 A.3d at 382.

135. *Id.* at 386.

136. *Id.* at 389 (Robinson, J., concurring in part and dissenting in part).

137. *Id.* at 390.

based on harm inflicted on a fetus before birth.¹³⁸ Studies have shown that fear of punitive responses and loss of custody is a deterrent to pregnant women seeking treatment for drug addiction.¹³⁹ A policy, presumptively holding that a child born with NAS is abused, would deter pregnant opioid-addicted women from taking steps to protect both their own health and that of their fetus.¹⁴⁰

The West Virginia Supreme Court handled the novel situation of whether a pregnant woman could be convicted of child neglect resulting in death, when a child is born addicted to methamphetamines and consequently dies.¹⁴¹ Stephanie Louk intravenously injected methamphetamines when she was thirty-seven weeks pregnant.¹⁴² Within a few hours of the injection, Ms. Louk began experiencing breathing problems and went to the hospital.¹⁴³ Doctors diagnosed Ms. Louk with acute respiratory distress which, when pregnant, displaces the blood that usually goes to the fetus and diverts it back to the woman.¹⁴⁴ Doctors performed an emergency cesarean, and upon delivery, the child was pronounced brain dead.¹⁴⁵ The child died eleven days later.¹⁴⁶ Ms. Louk was convicted of one felony count of child neglect resulting in death and sentenced to three to fifteen years' incarceration.¹⁴⁷

Citing to *Kilmon*, the West Virginia Supreme Court expressed concerns that numerous prenatal activities could harm the fetus, such as poor nutrition, poor prenatal care, and caffeine consumption.¹⁴⁸ The court was concerned about the same anomaly, that prenatal ingestion of drugs resulting in the birth of a surviving child would be criminalized but the same conduct resulting in the fetus dying *in utero* would not be criminalized.¹⁴⁹ The court overturned Ms. Louk's conviction, but stated that with the rising opioid epidemic, the legislature would need to rewrite the statute if they wanted prenatal conduct criminalized.¹⁵⁰

Most recently, the Pennsylvania Supreme Court addressed whether a woman's use of opioids while pregnant, which results in

138. *Id.*

139. *Id.*

140. *Id.* at 394.

141. *State v. Louk*, 786 S.E.2d 219 (W. Va. 2016).

142. *Id.* at 220.

143. *Id.*

144. *Id.* at 221.

145. *Id.* at 222.

146. *Id.*

147. *Id.*

148. *Id.* at 225–26.

149. *Id.* at 226.

150. *Id.* at 228.

a child born suffering from NAS, constitutes child abuse.¹⁵¹ The woman was released from incarceration and relapsed into drug addiction, specifically using opioids and marijuana.¹⁵² Upon learning she was pregnant, she sought treatment for her addiction, first through a methadone maintenance program, and then with Subutex.¹⁵³ She relapsed, and a couple of weeks before giving birth, she tested positive for opiates, benzodiazepines, and marijuana—none of which were prescribed to her.¹⁵⁴ Within three days of her child being born, the child began exhibiting symptoms of NAS.¹⁵⁵ Child and family services filed a dependency petition alleging, among other things, that the child was a victim of child abuse by a perpetrator, and the mother caused bodily injury to the child through a recent act.¹⁵⁶

The case was decided based on the unambiguous language of the Pennsylvania child abuse statute.¹⁵⁷ Although the opinion primarily focused on whether the fetus was considered a child *in utero* and whether the woman was considered a mother prior to birth, the court held that the woman was not a perpetrator of child abuse.¹⁵⁸ In addition, the court opined that labeling a woman as a perpetrator of child abuse does not prevent her from becoming pregnant, and it does not ensure that the same woman will not use illegal drugs if she becomes pregnant again.¹⁵⁹ Once given the label of a perpetrator of abuse, the likelihood that a new mother will be able to assimilate into the workforce and participate in activities in the child's life would be diminished.¹⁶⁰

Contrasting with the preceding cases, the Tennessee Court of Appeals did not consider any privacy or policy considerations in favor of the mother and, rather, focused on the child when deciding prenatal opioid use.¹⁶¹ The appellate court addressed whether a woman's drug use during pregnancy constituted severe child abuse where she had previously given birth to a child who was harmed by drug abuse.¹⁶² In this case, the mother had previously given birth to a child suffering from NAS, and she had been referred to a

151. *In re L.J.B.*, 199 A.3d 868, 870 (Pa. 2018).

152. *Id.* at 871.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. 23 PA. CONS. STAT. § 6386.

158. *In re L.J.B.*, 199 A.3d at 877.

159. *Id.*

160. *Id.*

161. *In re Benjamin M.*, 310 S.W.3d 844 (Tenn. Ct. App. 2009).

162. *Id.* at 845.

methadone clinic.¹⁶³ She was expelled from the methadone clinic due to her use of methamphetamine—a violation of the clinic's rules.¹⁶⁴ About a year later, she was taken to a hospital for a possible drug overdose when she discovered she was pregnant.¹⁶⁵ Subsequently, she used methadone purchased illegally and failed to receive prenatal care.¹⁶⁶ Her son was born prematurely and exhibited signs of opiate withdrawal.¹⁶⁷ The court held that severe child abuse can be found where a child is born injured from exposure to opiates during pregnancy.¹⁶⁸

Although the facts of each case are unique, the courts, overall, seem to be coming to nearly the same conclusion: pregnant women cannot be found criminally responsible for their prenatal use of opioids.¹⁶⁹ Courts are concerned with the woman's fundamental right to privacy.¹⁷⁰ If the courts follow Tennessee's lead and issue a finding of child abuse whenever a child is born with injuries sustained from the mother's prenatal opioid use, it can potentially open the door to a wider range of conduct that the courts can control.¹⁷¹ However, courts have opined that the decision of criminal culpability may not be an issue for the judicial branch to handle; rather, it should be decided by the legislatures.¹⁷² As the West Virginia Supreme Court stated, it is for the legislature to define what constitutes child abuse and whether that includes specific prenatal conduct, including consumption of illegal substances.¹⁷³

B. Legislative Approach

Maryland has created a statute that specifically addresses reporting on substance-exposed newborns.¹⁷⁴ Therein, Maryland defines controlled substances to include all substances on Schedules I through V.¹⁷⁵ Newborn is also defined as "a child under the age of 30 days who is born or who receives care in the State."¹⁷⁶ The

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 845–46.

167. *Id.* at 846.

168. *Id.* at 850.

169. *See, e.g.,* *Kilmon v. State*, 905 A.2d 306, 314 (Md. 2006); *State v. Louk*, 786 S.E.2d 219, 228 (W. Va. 2016).

170. *See Kilmon*, 905 A.2d at 311.

171. *Id.*; *see In re Benjamin M.*, 310 S.W.3d at 844.

172. *See Louk*, 786 S.E.2d at 228.

173. *Id.*

174. MD. CODE ANN., FAM. LAW § 5-704.2.

175. *Id.* § 5-704.2(a)(2).

176. *Id.* § 5-704.2(a)(4).

statute states that a new born is “substance-exposed” where the newborn:

(1) displays a positive toxicology screen for a controlled drug as evidenced by an appropriate test after birth; (2) displays the effects of controlled drug use or symptoms of withdrawal resulting from prenatal controlled drug exposure as determined by medical personnel; or (3) displays the effects of a fetal alcohol spectrum disorder.¹⁷⁷

Thus, the statute addresses not only prenatal drug use but also prenatal alcohol use.¹⁷⁸ Most importantly, the statute states that “[a] report made under this section does not create a presumption that a child has been or will be abused or neglected,” thus, expressing the intent that expectant women are not subject to strict liability for prenatal conduct.¹⁷⁹ The Legislature is leaving it to the courts to determine whether the prenatal conduct of the mother is indicative of abuse.¹⁸⁰

New Jersey has yet to pass a statute specifically addressing newborns and instead relies upon its general child abuse statute.¹⁸¹ Under the New Jersey statute, a child is defined as “any child alleged to have been abused or neglected.”¹⁸² An abused or neglected child is “a child less than 18 years of age whose parent or guardian . . . inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement”¹⁸³ The statute is quite broad and allows courts to interpret the statute as they see fit.¹⁸⁴ However, the New Jersey legislature has introduced multiple bills in the last few years seeking to address substance-exposed newborns, indicating that the legislature may, in a few years, more strictly define abuse in this context.¹⁸⁵

West Virginia views controlled substance use during pregnancy as falling under its child neglect statute.¹⁸⁶ Therein, the statute simply refers to whether a parent, guardian, or custodian, neglects

177. *Id.* § 5-704.2(b).

178. *Id.*

179. *Id.* § 5-704.2(i).

180. *Id.*

181. N.J. STAT. ANN. § 9:6-8.21.

182. *Id.* § 9:6-8.21(b).

183. *Id.* § 9:6-8.21(c).

184. *Id.*

185. *See, e.g.*, Assemb. B. 926, 217th Gen. Assemb., Reg. Sess. (N.J. 2016).

186. W. VA. CODE ANN. § 61-8D-4a.

a child under his or her custody or control.¹⁸⁷ This is one of the broadest statutes and makes no reference to what constitutes neglect or abuse.¹⁸⁸ This provides courts with broad discretion in their decision-making.¹⁸⁹ The West Virginia Supreme Court in *Louk* called for a stricter statute due to this broad power. Because West Virginia is the leader in opioid overdoses,¹⁹⁰ it is likely that a stricter statute will be created.¹⁹¹

Similarly to New Jersey and West Virginia, Pennsylvania also does not have a statute specifically addressing newborns affected by NAS.¹⁹² Integral in the decision of *In re L.J.B.*, was the definition of perpetrator of abuse, postulating that it must be, among others, the parent of the child.¹⁹³ Child abuse is defined as “intentionally, knowingly[,] or recklessly . . . [c]ausing bodily injury to a child through any recent act or failure to act.”¹⁹⁴ In the case, the opinion turned upon the definition of parent and child, which in the statute, does not specifically address whether a fetus is a child and at what point one becomes a parent.¹⁹⁵

Tennessee, although not possessing a statute solely addressing prenatal conduct, does have provisions dealing with child abuse resulting from consumption of illegal substances.¹⁹⁶ A child is defined as anyone under eighteen years of age.¹⁹⁷ Severe child abuse is defined as “[t]he knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death”¹⁹⁸ Severe child abuse can also be found where a parent knowingly allows a child “to be present within a structure where the act of creating methamphetamine . . . is occurring”¹⁹⁹ Furthermore, severe child abuse exists where a parent “[k]nowingly or with gross negligence allow[s] a child under eight

187. *Id.* § 61-8D-4a(a).

188. *Id.*

189. *Id.*

190. *West Virginia: Opioid-Involved Deaths and Related Harms*, NAT'L INST. ON DRUG ABUSE (Apr. 3, 2020), <https://www.drugabuse.gov/drug-topics/opioids/opioid-summaries-by-state/west-virginia-opioid-involved-deaths-related-harms>.

191. See generally Nathan R. Hamons, *Addicted to Hope: Abating the Opioid Epidemic and Seeking Redress from Opioid Distributors for Creating a Public Nuisance*, 121 W. VA. L. REV. 257 (2018).

192. Compare *In re L.J.B.*, 199 A.3d 868 (Pa. 2018), with 23 PA. CONS. STAT. § 6303.

193. 23 PA. CONS. STAT. § 6303.

194. *Id.* § 6303(b.1).

195. The definitions of when one becomes a parent and when one is considered a child is a major issue when discussing whether mothers should be held liable for their prenatal conduct, but it will not be addressed here.

196. TENN. CODE ANN. § 37-1-102.

197. *Id.* § 37-1-102(b)(5)(A).

198. *Id.* § 37-1-102(b)(27)(A)(i).

199. *Id.* § 37-1-102(b)(27)(D).

(8) years of age to ingest an illegal substance or a controlled substance that results in the child testing positive on a drug screen, except as legally prescribed to the child.”²⁰⁰ As the court found in *In re Benjamin M.*, a child also includes a fetus.²⁰¹ Although the statute does not specifically address fetal conduct, the statute can be construed to a finding of child abuse.²⁰²

Florida has specifically addressed substance exposure in newborns.²⁰³ Harm is found where a child has been exposed to a controlled substance or alcohol.²⁰⁴ This can be determined by “[a] test, administered at birth, which indicate[s] that the child’s blood, urine, or meconium contained any amount of alcohol or a controlled substance or metabolites of such substances, the presence of which was not the result of medical treatment administered to the mother or the newborn infant.”²⁰⁵ Florida has specifically carved out that a mother has harmed her child, but this is not a presumptive finding of child abuse.²⁰⁶ Florida, like the states above, has left it to the discretion of the courts.²⁰⁷

States have implemented new statutes and regulations to better protect babies born with NAS and get care for women addicted to opioids.²⁰⁸ Twenty-five states and the District of Columbia require health care professionals to report suspected prenatal drug use.²⁰⁹ Eight states require health care professionals to test for prenatal drug exposure if they suspect drug use.²¹⁰ Nineteen states have either created or funded drug treatment programs specifically targeting pregnant women,²¹¹ and an additional seventeen states and the District of Columbia provide pregnant women with priority access

200. *Id.* § 37-1-102(b)(27)(E).

201. *In re Benjamin M.*, 310 S.W.3d 844, 850 (Tenn. Ct. App. 2009).

202. *Id.*

203. FLA. STAT. ANN. § 39.01.

204. *Id.* § 39.01(35)(g).

205. *Id.* § 39.01(35)(g)(1).

206. *Id.*

207. *Id.*

208. *See generally* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, NO. 711, OPIOID USE AND OPIOID USE DISORDER IN PREGNANCY (Aug. 2017).

209. *Substance Use During Pregnancy*, GUTTMACHER INST. (Dec. 1, 2020), <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy> (Alaska, Arizona, Arkansas, California, District of Columbia, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, and Wisconsin).

210. *Id.* (Indiana, Iowa, Kentucky, Louisiana, Minnesota, North Dakota, Rhode Island, and South Dakota).

211. *Id.* (Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kentucky, Maryland, Minnesota, Missouri, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Washington, and Wisconsin).

to state-funded drug treatment programs.²¹² Moreover, ten states prohibit publicly funded drug treatment programs from discriminating against pregnant women.²¹³

State legislatures are taking a wide array of approaches to address the opioid epidemic's effect on newborns.²¹⁴ As the opioid epidemic continues, more legislation specifically addressing substance exposure in newborns, like in Maryland, will likely be written.²¹⁵ As seen in Maryland and Florida, the statutes not only address opioids but other illegal substances and alcohol.²¹⁶ As other states write or amend their legislation, opioids, alcohol, and possibly other prenatal conduct may be introduced as a finding of harm to a fetus.²¹⁷

IV. CRIMINALIZING PREGNANCY CREATES A GENDER-BASED CRIME

Most states, and the federal government, criminalize “substance possession, not use, criminalizing substance use during pregnancy represents an expansion of the criminal law.”²¹⁸ This expansion of criminal law will only be prosecuted against those people who can become pregnant: women.²¹⁹ Thus, because pregnancy is a necessary element of substance use during pregnancy, this criminalization creates a gender-based crime.²²⁰

These statutes have treated pregnancy as an essential element for criminal prosecution, thereby exclusively crafting a statute that applies to women and no one else.²²¹ Looking at a study between 1973 and 2005, most of the more than 400 interventions of pregnant women for substance use during pregnancy,²²² “pregnancy provided

212. *Id.* (Alabama, Arizona, Arkansas, Delaware, District of Columbia, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Missouri, Ohio, Oklahoma, Tennessee, Utah, West Virginia, and Wisconsin).

213. *Id.* (Alabama, Florida, Illinois, Iowa, Kansas, Kentucky, Missouri, Ohio, Oklahoma, and Tennessee).

214. *See* Bridges, *supra* note 9, at 810–14.

215. *See id.*

216. FLA. STAT. ANN. § 39.01; MD. CODE ANN., FAM. LAW § 5-704.2.

217. *See* Kilmon v. State, 905 A.2d 306, 311 (Md. 2006).

218. Bridges, *supra* note 9, at 808.

219. *Id.*

220. *Id.* This article recognizes the implications of criminalizing pregnancy, and specifically looks at how this disproportionately affects minorities. This is a valid argument, but it is beyond the scope of this article.

221. Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1167 (2017).

222. *See generally* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299 (2013).

a 'but for' factor, meaning that but for the pregnancy, the action taken against the woman would not have occurred."²²³

The most common response to why substance use should be criminalized during pregnancy is that the criminal justice system operates as an effective deterrent to convince pregnant women with substance use disorder to get treatment.²²⁴ The idea is that a pregnant woman suffering from drug dependence will choose treatment, thereby increasing the probability that she will stop abusing drugs and give birth to a healthy child.²²⁵

However, criminalizing substance use during pregnancy opens the door to a slippery slope for the criminalization of other activities—even legal activity—that can pose a risk to fetuses.²²⁶ This is far from a novel idea: women have historically been refused the opportunity to have certain jobs²²⁷ and equal employment benefits.²²⁸ Today, new legislation has been proposed to criminalize cigarette smoking by pregnant women,²²⁹ but this may just be the beginning. This endangers not only women who use opioids during pregnancy, but even women who fail to obtain prenatal care.²³⁰ Lynn Paltrow, program director of National Advocates for Pregnant Women, states that “according constitutional rights to fetuses would not only jeopardize women’s lives and health by denying them access to legal abortion[s], but would also undermine substantially their status as constitutional persons including their ability to participate as full and equal citizens in our society.”²³¹ If a woman is held criminally responsible, then she may be listed on a child abuse registry

223. *Id.* at 301.

224. Bridges, *supra* note 9, at 804.

225. Erin D. Kampschmidt, *Prosecuting Women for Drug Use During Pregnancy: The Criminal Justice System Should Step Out and the Affordable Care Act Should Step Up*, 25 HEALTH MATRIX 487, 501–02 (2015).

226. See *Kilmon v. State*, 905 A.2d 306, 311 (Md. 2006).

227. See *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (holding that legislation is justified to protect women from the greed and passion of man); *Bradwell v. Illinois*, 83 U.S. 130, 132 (1872) (recognizing that God created different sexes and that they are to belong to separate roles).

228. See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 127 (1976) (challenging private insurance plans that excluded pregnancy); *overruled by* Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k).

229. Timor Faber et al., *Smoke-Free Legislation and Child Health*, 26 PRIMARY CARE RESPIRATORY MED. 16067 (2016).

230. See, e.g., Antonia Noori Farzan, *Yes, You Can Fail a Drug Test by Eating a Poppy Seed Bagel, as a Maryland Mother Learned*, WASH. POST (Aug. 8, 2018, 6:22 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/08/08/yes-you-can-fail-a-drug-test-by-eating-a-poppy-seed-bagel-as-a-maryland-mother-learned/> (explaining that mothers have been reported to state services for testing positive for opiates without allowing mothers to explain that they had eaten a poppy seed bagel).

231. Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1009 (1999).

which can result in potential reputational harms, such as impeding the ability to obtain employment.²³² Thus, the more rights and protections that are given to fetuses, the fewer that remain for the woman who carries the fetus.²³³

Although violating the fundamental right to bear children is, on its own, enough to trigger strict scrutiny under Equal Protection, the protected status of addiction is also subject to heightened scrutiny.²³⁴ If “drug use by pregnant women is [a crime], then pregnancy constitutes ‘a necessary element of a remarkable new status-based criminal offense: [p]regnancy by a drug-dependent person, or drug use by a pregnant woman.’”²³⁵ It is the “coexistence of two unpunishable statuses—a drug addiction and pregnancy”—that results in the creation of a “new status crime.”²³⁶

Moreover, prosecuting pregnant women violates Equal Protection because this robs women of the fundamental right to bear children.²³⁷ The right to procreate is “one of the basic civil rights”²³⁸ *Skinner* clearly held that the right to beget a child is a fundamental right that cannot be abridged without satisfying strict scrutiny.²³⁹ Punishing mothers who are drug-addicted burdens their right to bear children.²⁴⁰ Here, although there is a state interest in protecting the life of fetuses,²⁴¹ there is currently not enough research to determine how much opioid use during pregnancy will affect the fetus, or even if there will be any long-term effects.²⁴² Moreover, states are only recognizing the woman’s role in fetal health, and failing to recognize the male role.²⁴³ By prosecuting women for their prenatal conduct, courts are punishing

232. See *Kane v. Comm’r of Dep’t of Health & Hum. Servs.*, 960 A.2d 1196, 1202 (Me. 2008) (holding that “[t]he stigma of being listed as ‘substantiated’ for child abuse combined with the adverse professional and social consequences of being listed in the database implicates a fundamental liberty interest.”).

233. Ehrlich, *supra* note 46, at 382–83.

234. *Id.* at 412.

235. Doretta Massardo McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 520 (1990) (alteration in original).

236. *Id.*

237. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

238. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

239. *Id.*

240. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1464 (1991).

241. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

242. Smith, *supra* note 94.

243. See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 997 (1984).

women for addiction and opening the floodgates to future litigation for other conduct.²⁴⁴

A. *Criminalizing Pregnancy Perpetuates Gender Stereotypes*

Legislators focus exclusively on the pregnant woman's role in the health of the fetus, while failing to recognize that men also have an impact.²⁴⁵ The United States Supreme Court opined that male health may have just as much influence on the fetus as the expectant woman's health.²⁴⁶ A man's exposure to toxins in his workplace can be potentially damaging to fetal development.²⁴⁷ There is even a similarly proposed potential harm linking paternal drug use and fetal health.²⁴⁸ Both male and female alcohol consumption decreased the chance of a live birth and increased the risk of a miscarriage.²⁴⁹

Smoking can also damage sperm DNA.²⁵⁰ For example, heavy smoking by a man at the time of conception "increases the child's risk of childhood leukemia and shortens [the] reproductive lifespan of daughters."²⁵¹ Beyond the effect that exposure to toxins, smoking, and drinking alcohol have on a man's sperm, his "drug use in the presence of a pregnant partner could potentially further impact fetal health . . ."²⁵² Legislators' refusal to incorporate the male's role in fetal health merely continues the stereotypes of parenthood.²⁵³

B. *Prosecuting Women Fails to Deter Drug Use*

Women are being treated as incubators for new life while their fundamental interests in liberty and freedom of autonomy are

244. See *Kilmon v. State*, 905 A.2d 306, 311 (Md. 2006).

245. See, e.g., Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 447 (2010).

246. Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 188 (1991).

247. *Id.* at 198.

248. Collier, *supra* note 245, at 447.

249. Gill Homan, *Effects of Caffeine, Alcohol, and Smoking on Fertility*, FERTILITY SOC'Y OF AUSTL. (Oct. 2015), [https://www.yourfertility.org.au/sites/default/files/201808/FSA%20Effects%20of%20caffeine,%20alcohol%20and%20smoking%20on%20fertility%20\(2016\).pdf](https://www.yourfertility.org.au/sites/default/files/201808/FSA%20Effects%20of%20caffeine,%20alcohol%20and%20smoking%20on%20fertility%20(2016).pdf).

250. *Id.*

251. *Id.*

252. Ehrlich, *supra* note 46, at 390.

253. Law, *supra* note 243, at 997 ("When the [c]ourt upholds a statutory scheme because it considers fatherhood solely in terms of 'opportunity,' and motherhood in terms of 'unshakable responsibility,' it reinforces stereotypes and perpetuates male irresponsibility.").

constrained.²⁵⁴ Five states have enacted laws that authorize the civil commitment and detainment of pregnant women for their use of drugs and alcohol.²⁵⁵ These laws have been criticized as permitting an unconstitutional deprivation of liberty.²⁵⁶ Specifically, Wisconsin's statute²⁵⁷ was struck down as violative of the Due Process Clause because it "affords neither fair warning as to the conduct it prohibits nor reasonably precise standards for its enforcement."²⁵⁸ Paltrow commented that the continued enforcement of civil commitment law:

takes away from a pregnant woman virtually every right associated with constitutional personhood—from the most basic right to physical liberty to the right to refuse bad medical advice . . . [t]his kind of dangerous, authoritarian state-action, is exactly what happens when laws give police officers and other state actors the authority to treat fertilized eggs, embryos, and fetuses as if they are already completely separate from the pregnant woman.²⁵⁹

The American College of Obstetrics and Gynecologists argues that "punitive policies are potentially counterproductive because they are likely to discourage prenatal care and successful treatment while undermining the patient-physician relationship."²⁶⁰ Instead, legislators, judges, and prosecutors are choosing to criminalize pregnancy and push opioid-using women away from prenatal care.²⁶¹

Courts acknowledge that prosecuting pregnant women potentially incentivizes abortion because the law better protects a drug addicted woman who chooses to terminate her fetus than a woman who gives birth to a child after abusing substances during her pregnancy.²⁶² This does not deter women from stopping consumption of

254. Goodwin, *supra* note 38, at 814.

255. MINN. STAT. § 253B.02(2); N.D. CENT. CODE § 12.1-04.1-22; OKLA. STAT. tit. 63, § 1-546.5; S.D. CODIFIED LAWS § 34-20A-63; WIS. STAT. § 48.193.

256. Amnesty Int'l, Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA 21–22 (2017), <https://www.amnesty.org/download/Documents?AMR5162032017ENGLISH.pdf>.

257. WIS. STAT. § 48.193.

258. *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 906 (W.D. Wis. 2017).

259. Press Release, Nat'l Advoc. for Pregnant Women, First Federal Challenge to Pregnant Woman's Arrest under "Personhood"-Like Measure Filed in Wisconsin (Oct. 2, 2013), <https://www.nationaladvocatesforpregnantwomen.org/first-fed-challenge-to-pregnant-womans-arrest-under-personhood-like-measure/>.

260. See generally AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, NO. 664, REFUSAL OF MEDICALLY RECOMMENDED TREATMENT DURING PREGNANCY (June 2016).

261. Ehrlich, *supra* note 46, at 392.

262. *State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991).

opioids; rather, these prosecutions deter pregnant women from seeking prenatal care and drug counseling.²⁶³

C. *Women and Fetal Rights*

Fetal rights have been recognized by Congress under the Unborn Victims of Violence Act (UVVA).²⁶⁴ The UVVA makes conduct causing the death or injury of a fetus a separate offense, punishable by the same sentence, such as in cases of murder or assault.²⁶⁵ The UVVA applies where the individual killed was a pregnant woman, regardless of the actor's intent and whether or not the actor knew the woman was pregnant, effectively making the Act strict liability.²⁶⁶ However, the UVVA does not apply to prosecutions of pregnant women for giving birth to a child while addicted to opioids.²⁶⁷ In fact, the language of the UVVA specifically exempts any act a woman undertakes regarding her fetus.²⁶⁸

There is limited information regarding what impact, if any, pregnant opioid use or NAS has on long-term brain development.²⁶⁹ Some studies suggest that elementary school children who were exposed to opioids *in utero* may exhibit “motor and cognitive impairments,” including higher instances of Attention-Deficit/Hyperactivity Disorder.²⁷⁰ However, the little amount of research that does exist was completed prior to the widespread use of highly potent synthetics, such as fentanyl.²⁷¹

Although the long-term effects are unknown, it is undisputed that the majority of newborns exposed to opioids *in utero* will experience withdrawal.²⁷² Treating a fetus suffering from withdrawal—not considering the other physical ailments—increases the costs of the health system.²⁷³ An analysis done by the Pennsylvania Health Care Cost Containment Council found that the hospital care for all

263. Lia A. Mandaglio, *The Punitive Pregnancy Matrix: Thinking Critically About the Patriarchal Motivations Behind Child Abuse Prosecutions for Prenatal Drug Use Among American Mothers*, 19 DIG. 27, 34 (2011).

264. Unborn Victims of Violence Act (Laci and Conner's Law), 18 U.S.C. § 1841.

265. *Id.* § 1841(a)(1)–(2)(B).

266. *Id.*

267. Ehrlich, *supra* note 46, at 396.

268. 18 U.S.C. § 1841(c).

269. Smith, *supra* note 94.

270. Emily J. Ross et al., *Developmental Consequences of Fetal Exposure to Drugs: What We Know and What We Still Must Learn*, 40 NEUROPSYCHOPHARMACOLOGY REVS. 61, 68 (2015).

271. Smith, *supra* note 94.

272. O'Connor, *supra* note 90, at 109.

273. Noah Addis, *Pregnant on Opiates: When Following Doctors' Orders Breaks the Law*, NBC NEWS (May 9, 2014, 4:42 AM), <https://www.nbcnews.com/news/us-news/pregnant-t-opiates-when-following-doctors-orders-breaks-law-n100781>.

babies born with substance abuse issues added 27,385 hospital days in Pennsylvania alone.²⁷⁴ This cost Medicaid an additional \$20.3 million dollars.²⁷⁵ These numbers may sound astronomical, but the average length of a hospital stay for a baby with NAS is thirty days.²⁷⁶ Once these babies do go home, they are at a higher risk of neglect or abuse under the care of mothers still battling addiction.²⁷⁷

Current therapies, such as opioid agonist therapy,²⁷⁸ may increase the number of NAS cases.²⁷⁹ Currently, there is no way to know whether the infants exposed to NAS *in utero* were exposed to opioid agonist therapy or to illicit opioids.²⁸⁰ What was discovered, however, is that women with opioid use disorder undergoing opioid agonist therapy showed improved outcomes for the mother and child.²⁸¹

D. *Women Should Not Be Prosecuted for Addiction*

In 1962, the United States Supreme Court held that drug addiction is an illness that cannot be criminally punished.²⁸² Opioid addiction rewires the brain.²⁸³ The first stage, known as intoxication, involves opioids producing a reward sensation in the brain.²⁸⁴ The second stage, known as negative affect, causes the brain to need more of the opioid to experience the reward sensation, and withdrawal begins when the drug is not obtained.²⁸⁵ Finally, the brain enters preoccupation-relapse, which involves chronic relapse, often

274. Marie McCullough & Don Sapatkin, *Report: More Pa. Babies Are Born Addicted to Opioids*, PHILA. INQUIRER (Sept. 27, 2016, 4:00 AM), <https://www.inquirer.com/philly/health/addiction/Report-More-Pa-babies-are-born-addicted-to-opioids.html>.

275. *Id.*

276. *Id.*

277. Marie McCullough & Dylan Purcell, *Babies Addicted to Opioids: A Crisis Crying for a Count*, PHILA. INQUIRER (Feb. 23, 2018, 5:00 AM), <https://www.inquirer.com/philly/health/addiction/opioid-addiction-crisis-babies-mothers-data-20180223.html>.

278. Jonathan Giftos & Lello Tesema, *When Less Is More: Reforming the Criminal Justice Response to the Opioid Epidemic*, 57 JUDGES' J. 28 (2018) ("Buprenorphine and methadone . . . mimic short-acting opioids such as heroin or oxycodone by binding to the same receptors in the brain . . . [I]t prevents onset of withdrawal symptoms and . . . block[s] the euphoric response to additional opioids the patient may take, thereby reducing the incentive to use.").

279. Davida M. Schiff & Stephen W. Patrick, *Treatment of Opioid Use Disorder During Pregnancy and Cases of Neonatal Abstinence Syndrome*, 171 [J]AMA PEDIATRICS 707, 707 (2017).

280. *Id.*

281. *Id.*

282. *Robinson v. California*, 370 U.S. 660, 667 (1962).

283. Gary Peltz & Thomas C. Südhof, *The Neurobiology of Opioid Addiction and the Potential for Prevention Strategies*, 319 [J]AMA 20, 2071 (2018).

284. *Id.*

285. *Id.*

triggered by external cues.²⁸⁶ Although these brain modifications occur in other addictions, such as alcoholism, the “women targeted for prosecution based on addiction do not engage in any act other than giving birth.”²⁸⁷

The National Institute on Drug Abuse suggests that treatment success should be holistic and include a combination of approaches that address the entire patient, such as her “age, race, culture, sexual orientation, gender, pregnancy, housing and employment, as well as physical and sexual abuse.”²⁸⁸ In July of 2016, Congress passed the Comprehensive Addiction and Recovery Act (CARA), a bipartisan effort to help curb the opioid crisis.²⁸⁹ CARA outlines a number of harm reduction efforts, including a stipulation that treatment for pregnant women should be prioritized.²⁹⁰ This legislation is certainly a step in the right direction for women to obtain treatment, but this may still result in them losing custody of their children.²⁹¹

Furthermore, the United States Supreme Court has consistently drawn a distinction between a state requiring a benefit for pregnant women and a state imposing a burden on pregnant women.²⁹² The passage of the Pregnancy Discrimination Act showed Congress’ intent that pregnant women are a protected class under the Civil Rights Act of 1964.²⁹³ The Court has also held that prosecuting pregnancy and drug addiction, both of which are independently protected statuses, violates the Equal Protection Clause.²⁹⁴ Although there is no constitutionally recognized right to use illicit drugs,²⁹⁵ one does have a constitutionally protected right not to be punished simply for being addicted.²⁹⁶

286. *Id.*

287. Ehrlich, *supra* note 46, at 413.

288. NAT’L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE 13 (1999).

289. Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695.

290. *Id.* § 501, 130 Stat. at 701–02.

291. See Stephanie Tabashneck, *Family Drug Courts: Combating the Opioid Epidemic*, 52 FAM. L.Q. 183, 195–96 (2018) (arguing that Adoption and Safe Families Act “time limits are considerably shorter than the period of time most individuals take to enter stable recovery. Thus, even for parents receiving effective, evidence-based treatment, the goal of operating within the timeframe is often unreachable.”).

292. Ehrlich, *supra* note 46, at 399–400.

293. 42 U.S.C. § 2000e(k).

294. Ehrlich, *supra* note 46, at 412.

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

296. *Robinson v. California*, 370 U.S. 660, 667 (1962).

CONCLUSION

Although the opioid epidemic is sending shock waves through society, the answer to this crisis does not lie in prosecuting women for the prenatal use of illicit substances. This punishment tactic does not deter women from taking opioids; rather, it encourages pregnant women to not seek prenatal care. Due to the possibility of facing criminal punishment, women may even feel pressured to terminate their pregnancy. States have created a gender-based crime, arguably violating Equal Protection, when states should instead be seeking new treatment methods for all that have fallen victim to the disease of addiction.

State legislatures and courts need to work together to better protect children born with NAS, without punishing an expectant woman's prenatal conduct. States could potentially hold expectant fathers' criminally responsible for their role in fetal health; however, courts would still be penalizing individuals for their addiction. Thus, instead of prosecuting women for their role in fetal health, courts and legislators should seek to better help women by providing rehabilitation and counseling.