Taking Care of Two: Criminalizing the Ingestion of Controlled Substances during Pregnancy

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Jill is a seventeen-year-old mother of three children. Each Wednesday, she attends a Parents Too Soon program at a local YWCA. The goal of the program is to teach teenage mothers about abstinence and about having a healthy child under difficult circumstances. Jill attends each week, and it is a rare Wednesday that she has not been drinking before she arrives. She smokes throughout the meetings, and threatens to drop out of the program when she is asked to stop. Jill is pregnant with her fourth child.

Jill's companions in Parents Too Soon are very much like her—all have children, many are pregnant, and many smoke and drink regularly. Some have experimented with drugs, but few are addicts. Once their children are born, the students' parents raise the kids, leaving the teens free to continue their irresponsible lifestyles. Children whose grandparents cannot care for them are sent to day care centers that will accept them. Some in the program have given birth to deformed children, but none of the girls has openly expressed regret about her deformed child, and none has said that she will discontinue having sex while smoking and drinking. When asked, all have said that they are afraid of jail.

Previous studies on this topic have suggested a range of measures to combat the problem of women ingesting harmful substances while pregnant, from government funding for a “public health nurse” to a hands-off “mother knows best” approach. Such remedies are inadequate, as they allow the mother to continue her destructive behavior. Moreover, since only a small percentage of women who enroll in rehabilitative programs are able to remain

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1. This anecdote is based on the author's personal experience volunteering at the Harris YWCA on Chicago's South Side. Names were changed to retain confidentiality.


drug-free, these programs alone will not solve the problem. This Comment suggests a different solution. The only remedy that will consistently and thoroughly combat the problem is the same one prescribed for non-pregnant substance abusers and used so far by several courts—incarceration. While this proposal may be unpopular, it nevertheless is in the best interests of the thousands of children each year who are born from the wombs of addicted mothers.

Medical data now reveal an undisputed link between the use of controlled substances during pregnancy and birth defects. But current laws do not specifically or adequately protect a fetus from its mother's potentially harmful behavior. In response, prosecutors rely on civil tort statutes, neglect statutes, or broader criminal statutes in an effort to punish the mother for her destructive behavior. These statutes, however, were not written to remedy the problem. Lacking the necessary tools to protect the unborn, prosecutors often do not bring suit. Those who do often fail. Meanwhile, pregnant women continue to use drugs, and babies continue to bear the scars of their mothers' addictions.

This Comment argues that incarceration may be the only way to deter Jill

5. See, for example, 21 USC § 841(b)(1)(A) (1994) (requiring incarceration for offenders who manufacture, distribute, or dispense controlled substances).
7. See, for example, Note, Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses, 16 NYU Rev L & Soc Change 277 (1987-88) (arguing that legislatures should not use criminalization as a tool for encouraging healthy pregnancies).
8. The United States Code defines "controlled substance" as any "drug or other substance, or immediate precursor" that the United States Attorney General determines should be regulated, based on eight factors:
1. Its actual or relative potential for abuse
2. Scientific evidence of its pharmacological effect, if known
3. The state of current scientific knowledge regarding the drug or other substance
4. Its history and current pattern of abuse
5. The scope, duration, and significance of abuse
6. What, if any, risk there is to the public health
7. Its psychic or physiological dependence liability
8. Whether the substance is an immediate precursor of a substance already controlled under [21 USC § 811]
21 USC §§ 802(6), 811(c) (1981). The term does not include "distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1954." 21 USC § 802(6) (1981).
and other women from ingesting hazardous substances during pregnancy. If more women believed that ingesting hazardous substances while pregnant would result in imprisonment, more would discontinue using drugs. Maybe then more children could look forward to healthy lives.

This Comment first discusses the background surrounding the current debate. An examination of the problem will demonstrate that a significant number of women ingest controlled substances during pregnancy, and that these drugs harm a woman’s fetus. The Comment examines proposed legislative and judicial remedies and finds that they are not sufficient. It argues that the courts, in an effort to balance a mother's right to autonomy and a baby's right to a healthy life, have usurped the legislature's role and created inconsistent precedents. The lawmakers, on the other hand, have been slow to act, preferring to leave this issue to the courts.

This Comment then examines solutions to the current disarray and endorses a statute that criminalizes the ingestion of controlled substances during pregnancy. This proposal is better than the current scheme because it conveys a strong message to pregnant drug users and provides a single source of law upon which both mothers and judges can rely.

I. Background

A. Medical Data

Any behavior during pregnancy may affect the fetus. For example, some physicians warn their patients not to ride horses, play sports, or have intercourse during the later stages of pregnancy because these physicians believe these acts may cause irreparable harm to the fetus. There is no data to support these restrictions. On the other hand, physicians also warn against drug, alcohol, and tobacco use during pregnancy—activity which definitely has been shown to cause harm. Substance abuse during pregnancy may result in mental and physical deformities, slower fetal development, or premature birth, which may in turn lead to a higher risk of death after birth.

There is an undisputed connection between substance abuse during pregnancy and serious mental and physical defects in newborns. Different non-controlled substances cause varying degrees of deformity. Food additives such as

11. Interview with Kenneth L. Noller, M.D., Professor and Chair, Department of Obstetrics and Gynecology, University of Massachusetts Medical School (Jan 14, 1994).
12. Id.
14. Id at 973-76.
15. Cole, 264 JAMA at 2666-67 (cited in note 10). Cole's article cites several studies that prove the link between substance abuse and abnormalities in newborns.
saccharines, nitrites, and sulfites may affect a fetus. Some prescription drugs are more harmful. For example, the prescription drug tetracycline may ultimately discolor a baby's teeth. Cigarette smoking may cause "spontaneous abortion, premature birth, increased infant perinatal mortality, low birth weight, and negative effects on later growth and development in infants." Alcohol abuse increases the risk of abnormalities among newborns, including cardiac defects, prenatal growth retardation, and developmental delay, as well as "limb, skull and facial defects, impaired fine- and gross-motor function, and impaired intellectual functions.

Use of illegal drugs during pregnancy is of special concern. Experts estimate that eleven percent of women have used illegal drugs during pregnancy. Smoking marijuana even once leads to prolonged fetal exposure to the drug. The drug raises carbon monoxide levels in the fetus's bloodstream and impairs fetal oxygenation, which may lead to growth anomalies in weight, length, and head circumference. Physicians are even more concerned about maternal cocaine use, including ingestion of the street drug, "crack." Cocaine use is associated with newborns' smaller brain circumference, fetal hypoxia, and suppressed appetite. Cocaine use during pregnancy also increases the chance of intrauterine stroke, spontaneous abortion, abruptio placentae, and death during infancy. Children whose mothers used cocaine when they were fetuses are more likely to be physically deformed and are prone to suffer withdrawal symptoms that make them irritable and less eager to bond with those around them.

21. Id at 2666.
23. Id.
24. Id at 766. Fetal hypoxia is a deficiency of oxygen reaching the tissues. During a fetus's development, a lack of oxygen may cause severely deformed tissues and limbs, and it may permanently damage some organs. Andrew C. Revkin, Crack in the Cradle, Discover 63, 68 (Sept 1986).
They may also suffer learning disabilities. A more recent concern is the increased risk of mothers transmitting AIDS to newborns through intravenous drug use. It is estimated that fifty percent of mothers with the AIDS virus will transmit it to their fetuses and that half of these babies will die within the first fifteen months of their lives.

B. LEGISLATIVE REMEDIES

Recently, politicians have directed more attention to the elimination of drugs from our society. In 1989, President Bush created the position of "Drug Czar" to call attention to and combat the problem of drug abuse in America. Since 1984, Congress has enacted harsher penalties for drug users and distributors. In addition, some state legislatures have recognized the dangers inherent in drug abuse by pregnant women and addressed the problem with legislation directed specifically at this issue.

1. Drug treatment, education, and counseling.

Several states have enacted measures that create educational programs designed to provide preventative counseling and education. These measures are designed to deter drug and alcohol abuse during pregnancy. One of the most comprehensive programs exists in Illinois, where the following services may be obtained:

28. Revkin, Discover at 68 (cited in note 24). Maternal drug use may also affect the environment in which a newborn is raised. One study concluded that, "opiate and other psychoactive drug use during pregnancy has serious consequences for the mother and fetus." Public Health Service, US Department of Health and Human Services, Caring for Our Future: The Content of Prenatal Care 20 (HHS, 1989). Drug use can contribute to a poor parenting environment and inadequate maternal care. Id.


30. Id, § 2 at 6. The US Public Health Service says that most of the newest cases of AIDS are among newborns who received the virus from their infected mothers. Public Health Service, US Dept of Health and Human Services, Caring For Our Future at 20 (cited in note 28).

31. See, for example, the recent changes in 21 USC § 844 (1984, 1986, 1988, 1990, 1994).

32. It appears that, since legislators have increased the number of drug-related offenses, local law enforcement officials have increased the number of arrests for drug-related crimes. See Thomas Clavin, Growing Number of Drunk Drivers Proving Elusive to Police, NY Times, Long Island Edition § 13 at 1 (Aug 28, 1994).

a range of educational or counseling services. . . . [c]omprehensive and
costed social services, including substance abuse therapy groups,
family therapy groups for the treatment of alcoholism and other drug abuse
and dependency; family therapy groups; programs to develop positive self-
awareness; parent-child therapy, and residential support groups.34

Illinois statutes also create referral agencies that are designed to provide services
to pregnant women and to encourage them to enroll in any of the following
programs: Drug Free Families in the Future, Families With a Future, Prenatal
Care Program, and Parents Too Soon.35 Each program is designed to convey
information regarding the dangers of abusing controlled substances during
pregnancy and to prevent their use during future pregnancies. Unfortunately,
these services are mandated only for pregnant women and children living in
special “residences or recovery areas.”36 No compulsory education programs
exist, so women not living under the state's care are unlikely to receive these
rehabilitative services.

Women not enrolled in a program must find one on their own. This is not
a simple task. It is estimated that there are more than one million addicts who
would like drug abuse counseling but are unable to get it.37 It is extraordinarily
difficult for those without private insurance to obtain treatment; they must
sometimes wait several months for an opening.38 The situation is even worse for
pregnant addicts. In 1989, Michelle Oberman, a professor at Loyola University
School of Law in Chicago, telephoned drug treatment centers in Chicago,
claiming to be interested in finding treatment for a pregnant, drug-addicted
friend. Professor Oberman discovered that it was difficult for her “friend” to
receive counseling or rehabilitative services. The Illinois Department of Alcohol-
ism and Substance Abuse had available a list of licensed treatment facilities, but
the list was being updated and would cost twenty-five dollars when it became
available (a six-month wait).39 The in-patient treatment centers that Oberman
contacted on her own averaged twelve thousand dollars per month, and none
accepted Medicaid or offered financial assistance.40 Outpatient treatment centers
also offered no or limited financial assistance and often referred Oberman away
from their facilities.41 This combination of costly services and a limited number

34. Ill Comp Stat Ann ch 20 § 305/35-5(i)(4)(C)-(D) (Smith-Hurd 1994). For examples
of similar state programs, see Cal Health & Safety Code § 11757.59 (West 1991) and
36. Id.
Times § 1 at 1, 34 (Nov 19, 1989).
38. Id.
39. Michelle Oberman, Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems
40. Id.
41. Id.
of treatment slots means that many pregnant addicts will not receive the treatment they need to begin healthier lifestyles and deliver healthy babies.

Even if drug treatment facilities had more beds, the facilities would be reluctant to admit pregnant addicts for several reasons. First, pregnant women tend to skip their appointments. Consequently, it is expensive to maintain these women on an active enrollment roster. Second, treatment centers wish to avoid legal liability and know that pregnant addicts are more likely to have complicated pregnancies. Third, many pregnant addicts are at a high risk of contracting HIV and might spread the disease to other patients; both of these factors add to the centers' liability concerns. Fourth, pregnant addicts require more care than other addicts. For example, the treatment center employees must address not only the mother's concerns, but also those of the fetus, who may also be a drug addict. In practice, this means that drugs and other treatments prescribed to help cure a mother of her addiction must be checked to ensure that they will not harm the fetus. The centers may also be primarily responsible for providing normal, but essential, prenatal care to the mother and the fetus. Many treatment centers may also turn away pregnant addicts for simple efficiency reasons. Drug treatment does not always succeed. Treatment centers will have a larger number of successes if they serve several non-pregnant patients rather than devote time and resources to a single pregnant addict. Moreover, insufficient reimbursement from state-run health care plans such as Medicaid make pregnant drug abusers unattractive patients since centers will not be fully compensated for their efforts.

Education and counseling programs administered by drug treatment facilities or other sources are not very successful. Given the difficulty that pregnant addicts have seeking private care services, the state faces an uphill task if it strives to replace these programs with state-managed ones, since the state may not have any more money available than do private groups. Furthermore, state-managed programs may be unsuccessful for other reasons. Participants in such programs are often required to enroll because of a state mandate; therefore, they may not be enthusiastic about attending sessions regularly. Also, since participants are often not spending their own money, they may not try to get the most “bang for their buck.” For example, Parents Too Soon, one of the referral services specifically listed in an Illinois counseling statute, is supposed to discourage teen mothers from bearing more children and from ingesting hazardous substances during pregnancy. Many of the program's participants are either substance abusers (including alcohol) or drug addicts, and most of the teen enrollees have

42. Id at 518.
43. Id.
44. Id at 519.
45. Id.
46. Id at 518.
more than one child.\textsuperscript{49} The women appear at the program's headquarters weekly and are bombarded with information designed to accomplish the program's purpose.\textsuperscript{50} Unfortunately, the information does not seem to improve their behavior from week to week. Many of the program's administrators frequently complain that their attempts to educate and counsel are ineffective.\textsuperscript{51} This dissatisfaction may explain the high turnover rate among the paid counselors responsible for the program. Given such programs' failures, it is no surprise that the number of babies born addicted to drugs is not decreasing, and in fact the number may be steadily increasing.\textsuperscript{52}

2. Mandatory reporting.

Several states mandate that physicians administer toxicology tests to pregnant women who have obstetrical complications that the physician suspects may be due to nonmedical ingestion of a controlled substance.\textsuperscript{53} Such tests may determine whether there is evidence that the mother has ingested a controlled substance, and the state may use this information to treat the mother and her newborn. For example, in Minnesota, "if the test results are positive, the physician shall report the results as neglect under [the state child abuse and neglect statute].\textsuperscript{54} Social service agencies may then investigate the level of care that the mother will be able to give to her newborn, and if they find that the level of care is inadequate, the state may assume custody of the child until the mother's condition stabilizes.\textsuperscript{55}

Other states instruct physicians who suspect that a pregnant woman has used drugs to test her newborn for the presence of controlled substances.\textsuperscript{56} Still other states mandate that agencies report the number of addicted pregnant women living in the state.\textsuperscript{57} To accurately report this number, physicians would seemingly have to administer toxicology tests to all women who seek their care.

There are two major problems with these mandatory testing statutes. First, the statutes are more remedial than preventative. Intervention should occur before the child is born. Currently, statutes provide for testing after a mother's drug use has likely harmed the fetus (for example, heavy drinking has the greatest developmental effect during the first trimester of pregnancy\textsuperscript{58}). To maximize the preventive benefit to the fetus, physician testing would have to be

\textsuperscript{49} This information is based on the author's volunteer experience at the Harris YWCA on Chicago's South Side, including interviews with program participants and administrators.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Bill Barol, et al, \textit{Cocaine Babies: Hooked at Birth}, Newsweek 56 (Jul 28, 1986); Revkin, Discover at 63-64 (cited in note 24).
\textsuperscript{53} See, for example, Minn Stat Ann § 626.5562(1) (West 1994).
\textsuperscript{54} Minn Stat Ann § 626.5562(2) (West 1994).
\textsuperscript{55} Minn Stat Ann § 626.556(10) (West 1994).
\textsuperscript{56} See, for example, Wis Stat Ann § 146.0255 (West 1993).
\textsuperscript{57} See, for example, Ohio Rev Code Ann § 3793.15(B)(1) (Baldwin 1993).
administered earlier in the pregnancy. Second, after a mother has been reported for drug use, many statutes do not mandate treatment for her substance abuse problem. If the abuser is not cured of her addiction or adequately deterred from continuing to ingest drugs, she may continue to use drugs or drink alcohol. This practice will not result in her bearing fewer children with defects, since the testing often happens after the newborn's birth.

3. Legislative protection of the fetus.

A few states have criminalized certain behavior that harms the fetus. Many state statutes add aborting a fetus to the list of crimes punished under murder and manslaughter statutes. For example, § 187(a) of the California Penal Code provides, "... murder is the unlawful killing of a human being, or of a fetus, with malice aforethought." Additionally, chapter 720 of the Illinois Penal Code criminalizes the murder of a fetus. In Minnesota this idea has been extended to include not just death but also less severe injuries to the fetus. For example, injury resulting from vehicular operation, murder of an unborn child, manslaughter of an unborn child, assault of an unborn child, and injury or death to an unborn child in the commission of a crime are all punishable under the Minnesota penal code. Unfortunately, several of these statutes only apply to harm to a viable fetus. For example, in Minnesota, if the fetus could not have survived outside the mother at the time of its death, then its killer cannot be punished under these statutes.

Perhaps a more important limitation is the fact that no state has criminalized a mother's actions toward the fetus while it is still living in her womb. This

59. See, for example, Minn Stat Ann § 626.556(2)(c) (West 1994), which defines negligent behavior by a mother to include ingestion of controlled substances during pregnancy. However, the statute specifically does not mandate that a mother has a duty to provide non-negligent care for her child. See also Minn Stat Ann § 626.556(10) (West 1994), which outlines reporting procedures but never mandates treatment.

60. See, for example, Cal Penal Code § 187(a) (West 1988); Ill Comp Stat Ann ch 720 §§ 5/9-1.2, 5/9-2.1, 5/9-3.2, 5/12-3.1, 5/12-4.4 (Smith-Hurd 1993); Minn Stat Ann § 609.266 et seq (West 1987).


62. Ill Comp Stat Ann ch 720 § 5/9-1.2(a)(1) (Smith-Hurd 1993) ("[a] person commits the offense of intentional homicide of an unborn child if, in performing the acts which cause the death of an unborn child, he, without lawful justification: ... either intended to cause the death of or do great bodily harm to the pregnant woman or her unborn child or knew that such acts would cause death or great bodily harm to the pregnant woman or unborn child . . . .")


64. Minn Stat Ann §§ 609.2661, 609.2662, 609.2663 (West 1987).


68. See, for example, Minn Stat Ann §§ 609.21(4), 609.267, 609.2671 (West 1994), 609.268 (West 1987) (injured unborn child must "subsequently be born alive" for injury to be subject to statutory penalties).
means that prosecutors must creatively manipulate statutes that do not expressly address the issue in order to charge mothers whose drug addiction harms the fetus. Cases prosecuted in this ad hoc manner leave the state without consistent precedent on which to rely when prosecuting these cases. Another problem the state faces is that women charged under the existing statutes can plead a lack of notice, since the statutory language does not clearly prohibit ingestion of controlled substances during pregnancy. Further, it is not clear that the lawmakers who wrote the statutes anticipated their use to prosecute pregnant addicts. Where this is the case, legislative intent may be construed in the mother's favor, and not the fetus's.

Instead of criminalizing a mother's conduct toward the fetus, the existing statutes prompt abuse and neglect proceedings or offer rehabilitative services. However, these statutes are also problematic. One can imagine a case in which a third party harms the fetus by injecting the mother with heroin (and is held criminally liable when the fetus subsequently dies), but, absurdly, a mother who does the same act goes unpunished under the same state statutes. These laws should be rewritten to remedy this inconsistent result.

Of course, fetuses are harmed through other acts not caused by the mother, which have arguably worse results than those mentioned above. For example, in United States v Spencer, a man was convicted of homicide for kicking and stabbing a pregnant woman in the abdomen. The baby died ten minutes after he was born. If the defendant in Spencer could be convicted for harming a fetus, a mother who behaves in a manner that also causes a baby to die shortly after its birth should face similar consequences.

While state legislatures are making a good faith effort to grant increased protection to fetuses, they do not go far enough toward protecting all possible harm that may befall an unborn child. Minnesota aside, state penal codes do not punish those who harm the fetus but do not kill it. Ironically, in order to receive any protection from state penal codes, a fetus must often be aborted. It

69. See, for example, Minn Stat Ann § 626.5561 (West 1994). Since abuse and neglect proceedings are generally civil penalties, mothers do not face incarceration or heavy fines. The state may choose to prosecute under these statutes, instead of criminal statutes, for two reasons. First, abuse and neglect proceedings are commonly used to punish parents who cannot, or do not, adequately care for their children. Their frequent use means that established precedent exists for handling these cases, so creative statutory interpretation is less often necessary for the state to successfully prosecute. Second, many people are opposed to criminal sanctions for drug abuse during pregnancy. See notes 7, 128-39 and accompanying text. To the extent that prosecutors agree, they may seek lesser penalties under civil abuse and neglect statutes.

70. See, for example, Cal Health and Safety Code § 11757.59 (West 1991).


72. 839 F2d 1341, 1342-43 (9th Cir 1988).

73. Id at 1342-43.

74. Id at 1342.

75. Comment, 92 Dickinson L Rev at 703 (cited in note 71).
does an unborn child little good to punish the person who kills it, but not the person who causes it permanent, irreparable damage.

II. Case Law

So far, courts have been the most active supporters and granters of fetal protection. Courts in several circuits have responded to fetal injury with a variety of punishments, many of which are severe and apply to both third parties and mothers. Additionally, many courts have dealt directly with cases in which pregnant women ingest hazardous substances during pregnancy.

In Grodin v Grodin, a child sued his mother for damages to his teeth which resulted from her use of tetracycline during pregnancy. In the civil negligence suit, the trial court granted summary judgment for the mother. The appellate court remanded for a decision whether or not the mother's conduct (tetracycline use during pregnancy) was reasonable. In making its decision, the trial court was to examine whether the mother exercised reasonable judgment by continuing to take tetracycline during pregnancy—despite her physician's instructions to the contrary. What makes the decision most unique is its holding that a mother could be prosecuted for minor damages resulting from casual use of a prescription drug. If the Michigan court prosecuted this minor injury to a fetus, it might also convict women for using more dangerous substances. In fact, under the Grodin court's reasonableness test, a pregnant drug user would likely never escape liability. The court measures the risk of harm in the context of the defendant's conduct. If there is a great risk of severe harm, the jury may decide the mother's conduct is unreasonable and hold her liable for damages. In a case where the pregnant mother uses controlled substances, this risk analysis would surely be decided in the fetus's favor more often than in the mother's.

In In re Stefanel Tyesha C., a New York court held that mothers who bear children with positive toxicology readings may have their newborns removed from their custody because of neglect. The court asserted that “an isolated detrimental act during pregnancy” may constitute neglect if the statutory standard has been met. Furthermore, the court held that the use of cocaine

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76. This is not to say, however, that all courts support fetal protection. When such protection is in direct conflict with a mother's rights, courts are especially tentative. I merely note that courts appear to be more willing than legislatures to protect the fetus or punish the mother.
78. 301 NW2d at 870.
79. Id at 870-71.
80. Id at 871.
81. A Westlaw search reveals that the Michigan Appellate Court has not heard any more cases of this type, so my assumption has not yet been tested.
82. Grodin, 301 NW2d at 871.
84. 556 NYS2d at 283.
85. Id. The statute at issue in this case defines a “neglected child” as one “whose
two days before the birth of a baby constituted neglect within the meaning of the statute. Hearings to determine whether the mother should retain custody of her child were to begin immediately. This type of prosecution under child abuse and neglect statutes is common, as courts seek to punish women for their actions without resorting to the more serious penalties that usually accompany criminal statutes.

Other courts consider a drug addict's pregnancy to be a factor in sentencing for other crimes. In the District of Columbia, for example, a superior court sentenced one pregnant cocaine addict to 180 days in prison for second-degree theft. This sentence was appropriate because it prevented the mother from continuing her drug habit during her pregnancy. The defendant in that case had admitted that she was an addict and that she had smoked marijuana on the day of her first sentencing.

In ordering the maximum sentence, the court considered the mother's addictive behavior as a factor relevant to the felony she had committed. The sentencing judge further commented, "I'm going to keep her locked up until the baby is born because she's [sic] tested positive for cocaine when she came before me. . . . She's apparently an addictive personality and I'll be darned if I'm going to have a baby born that way."

More recently, a court interpreted a statute to require criminal sanctions for ingesting controlled substances during pregnancy. In Johnson v Florida, a state appellate court creatively interpreted a drug trafficking statute to prosecute a pregnant woman for transmitting drugs to her fetus. Since there was no Florida statute under which a woman could be punished directly for taking drugs while pregnant, the prosecutor relied on an alternative statute which allowed prosecution for "delivering" drugs to a minor. The statute had never been held applicable to fetuses; however, the prosecutor claimed that the mother delivered drugs to a minor, arguing that delivery occurred after birth but before the umbilical cord was cut. The court agreed, noting that it was unimpressed with the

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physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of a failure of his parent . . . to exercise a minimum degree of care


87. United States v Brenda A. Vaughn, No F2172-88 ([DC] Sup Ct, June 24, 1988).

88. Id.

89. Id.

90. Id.

91. 578 So2d 419 (Fla App 1991), rev'd, 602 So2d 1288 (Fla 1992).

92. Johnson, 578 So2d at 419, citing Fla Star Ann § 893.13(4) (West 1994) (" . . . it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years . . . ").

93. Id at 419.
mother's arguments concerning her right to privacy.\textsuperscript{94} Johnson, however, was overturned on appeal.\textsuperscript{95}

In neither the District of Columbia case nor in Johnson v Florida was there a statute on point pertaining to the ingestion of drugs by pregnant women. At first blush, the punishments these women received may appear harsh. However, without laws that mandate a specific sentence (or no sentence at all), courts are left with a great deal of discretion. This predicament will likely produce ad hoc judgments and ineffective sentencing. The ultimate result is underdeterrence.

The District of Columbia Superior Court, which ordered the maximum sentence for a pregnant drug addict convicted of theft, attempted to remedy the problem by taking a strict stand. The court's decision is noteworthy for two reasons. First, while other courts decide in favor of mothers unless there is demonstrated harm to a newborn, the District of Columbia Superior Court acted in response to possible harm to a fetus. Here, the court noted that criminal penalties should help the fetus recover from prenatal harm.\textsuperscript{96} This approach is notably different from that of other courts, which act only after the newborn shows signs of addiction or deformities. Second, the court's decision is significant because it imposed a sentence of incarceration, albeit ostensibly for the commission of a felony. Perhaps the court realized that rehabilitation and treatment programs are ineffective. Alternatively, the court may have understood that women who are merely fined could still return home to their drug supply. Whatever its rationale, the court sought to free the fetus from the drugs that endangered its life.

Inconsistency is the most troubling aspect of the courts' approaches to these cases. While defendants are to some extent always subject to the whims of judges, consistent precedent nevertheless encourages pregnant mothers to act legally—if a woman knows that there is a good chance that she will be jailed for ingesting drugs during pregnancy, she may positively alter her behavior. On the other hand, if a woman knows that the chance of being severely sanctioned for her behavior is roughly equal to the chance that a judge will ignore her actions, then she has no incentive to change her behavior. A consistent set of precedents, crafted with a clear legislative mandate, would guide judges in their decisions and more effectively alter pregnant drug users' behavior, since these women would act with better knowledge of the consequences of their behavior.

III. Alternative Legislative Strategies

Prosecutors lack the statutory tools necessary to argue these cases in a manner that protects fetuses. Similarly, courts are ill-equipped to decide these cases so that fetuses consistently benefit. Congress must enact a law that elimi-
nates this ad hoc prosecution and inconsistent precedent.

Neither the executive nor the judiciary can effect the changes necessary to solve the problem. The president is unlikely to make punishing pregnant women a priority. Moreover, it takes time for executive branch agencies to study the problem, propose solutions, and implement change. The judiciary also lacks the tools necessary to solve the problem. Absent clear statutes protecting fetuses, courts have broad discretion in deciding cases involving drug use by pregnant women. Thus, courts have often read state statutes creatively to punish pregnant drug users.\(^7\) Since most pregnant, addicted defendants do not appeal their cases,\(^8\) trial courts decide these cases according to their fancy, and that decision becomes law.

On the other hand, representative groups around the country could lobby Congress and state legislatures, seeking fetal protection. Although this proposal would take a long time to implement, it may nevertheless be the best means for changing the status quo. As Judge Harding of the Florida Supreme Court asserted "neither judges nor prosecutors can make criminal laws. This is the purview of the Legislature. If the Legislature wanted to punish the uterine transfer of cocaine from a mother to her fetus, it would be up to the Legislature to consider the attending public policy and constitutional arguments and then pass its legislation."\(^9\)

In an environment where courts promulgate inconsistent legislation, and where attorneys prosecute similar cases differently, a precisely crafted statute could offer valuable guidance. Furthermore, statutes would provide effective notice to potential defendants that their behavior will be monitored. With effective notice, more mothers will change their behavior to comport with the clear statute. Thus, there would be fewer cases and therefore fewer inconsistent precedents. In fact, several authors note that the worst characteristic of the current state of affairs is that courts may interfere in cases where the situation could be better resolved by the actors involved.\(^10\)

At the very least, a statute that addresses drug abuse by pregnant mothers in a specific and tough manner would send an unequivocal message to all persons: drug use by pregnant women will not be tolerated. In order to achieve this goal, however, more than precision and fair notice are required. The statute must be accompanied by a clear legislative history, which would justify the new approach. That approach should also embrace punishment that will fit all possible circumstances.

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97. See, for example, Johnson, 578 S2d at 419-20.

98. Many of these defendants are simply too poor to afford the legal resources necessary for a proper defense and are even less likely to be able to afford an appeal. Interview with Mary Becker, Professor, University of Chicago Law School, in Chicago, IL (Jan 12, 1994).


100. See, for example, Cole, 264 JAMA at 2665 (cited in note 10); Goldberg, 41 Rutgers L Rev at 622 (cited in note 3).
Several statutory schemes satisfy these requirements. First, a statute could impose civil sanctions on women who engage in negligent behavior that is likely to harm their fetuses. This approach would simply be a variation of existing child abuse and neglect statutes. In order to be most effective, this proposed law would have to specifically punish harm to the fetus that is causally related to a mother's drug use. At least two states have already passed similar laws. In Minnesota, “[child] neglect includes prenatal exposure to a controlled substance . . . used by the mother for a non-medical purpose . . .”101 Likewise, in Florida, harm to a child's welfare includes “[p]hysical dependency of a newborn infant upon any [controlled substance].”102

There are two benefits to civil sanctions. First, civil penalties for fetal neglect are consistent with child neglect statutes. If the mother is only required to pay a civil penalty, (e.g., a fine or submission to a child abuse and neglect investigation103), she can thereafter remain with her child. It is arguably better to raise a child in a home where drugs are commonly used than in an environment where there is no mother at all. Second, statutes that give custody to the state let the mother have access to the neglected child while the state properly cares for the child. Assuming that a mother's maternal instincts may encourage her to recover so she may care for the infant by herself, frequent visits may be beneficial to the mother, and the infant may also benefit from proper care that is not interrupted by problems associated with drug abuse.

There are, however, three significant problems with a statute that relies on civil sanctions. First, the money a mother uses to pay fines is money that could be better used to buy clothes and food for her newborn. Moreover, if an addicted mother is required to pay a fine, one should worry about the measures she will take to obtain the “drug money” that she no longer has. Second, civil statutes do not protect a fetus during pregnancy. Fines imposed after a child is born cannot ensure that the child will be born without abnormalities. Third, punishment under civil statutes may prove to be too lenient. In Johnson, for example, the defendant continued to use drugs during her pregnancy, despite the existence of the Florida fetal neglect statute.104 If a legislature decides to combat drug use during pregnancy, it must enact a statute with a more powerful deterrent effect.

A second legislative option would be a statute requiring mothers to engage in helpful behavior during pregnancy, while at the same time restricting behavior

103. For example, fines are a possible punishment for violation of Minn Stat Ann §§ 609.267, 609.2671 (West 1994) (providing for ten thousand dollar fine or five-year imprisonment for second-degree assault on an unborn child). Fines may also be assessed under Minn Stat Ann § 609.268 (West 1987) (providing for thirty-thousand dollar fine or fifteen-year imprisonment for death of an unborn child during commission of a crime).
104. Johnson, 578 S2d at 420. The prosecutor for this case probably agreed that the punishment imposed by Florida's civil code was not severe enough, since Ms. Johnson was charged with violation of a criminal statute.
that could harm the fetus. For example, pregnant women could be required to
drink orange juice and refrain from sexual intercourse. This alternative ap-
proach was tested in a California case in which a drug-abusing pregnant woman
was charged with neglect for failure to go to a hospital after experiencing vaginal
bleeding and for failure to follow her physician's order to refrain from sexual
intercourse. The court dismissed the charges, stating that it would not re-
strict a pregnant woman's behavior absent a clear causal connection between
action and harm.

The Stewart case was decided correctly for two reasons. First, illegal behav-
ior does more damage to fetuses than behavior that is currently legal. Stewart
therefore properly emphasizes the need for a clear causal connection between
a mother's action and serious fetal harm before her actions may be punished.
Instead of forcing women to engage in positive behavior that may help the fetus,
a statute should work to eliminate harmful behavior that definitely does damage
the fetus. Legislators should focus on eliminating the clear problem, instead of
tinkering with a lesser one. Second, Stewart correctly implies that banning legal
behavior does nothing to eliminate the harmful effects resulting from illegal
behavior.

A third type of statute would criminalize behavior that has a clear causal
link to fetal injury but which is otherwise legal. The best example of a law
falling into this category would be a statute that punishes women who drink
alcohol during pregnancy. As noted above, studies demonstrate that alcohol
significantly affects fetal development, so there is clearer justification for
punishing this behavior than for punishing a woman who engages in sexual in-
tercourse, which risks injuring the fetus only in the last four weeks of pregnan-

\[\text{Note 105.}\] Obstetricians sometimes advise pregnant women to follow both of these instruc-
tions. Interview with Kenneth L. Noller, M.D., Professor and Chair, Department of
Obstetrics and Gynecology, University of Massachusetts Medical School, (Jan 14, 1994).
See also the physician's instructions given to Pamela Rae Stewart in People v Pamela Rae
Stewart, No M508197 ([Cal] Mun Ct, 1987), cited in Mary Becker, Cynthia Grant Bow-
man, and Morrison Torrey, eds, Cases and Materials on Feminist Jurisprudence: Taking
Women Seriously 426-27 (West, 1994).

\[\text{Note 106.}\] Stewart, No M508197 (Cal Mun Ct 1987), cited in Becker, Bowman, and Torrey,

\[\text{Note 107.}\] Id. The court also dismissed the charges against Stewart on equal protection
grounds, noting that the legislature cannot make illegal a woman's otherwise legal behavior
(e.g., sexual intercourse) merely because she is pregnant. Compare Geduldig v Aiello, 417
US 484 (1974) (holding that state statute which withholds certain benefits from pregnant
women does not violate the Equal Protection Clause of the Fourteenth Amendment).

\[\text{Note 108.}\] See notes 10-28 and accompanying text.

\[\text{Note 109.}\] See, for example, Ouellette, et al, 297 N Eng J Med at 528 (cited in note 19)
(finding that thirty-two percent of infants born to heavy drinkers suffered congenital
abnormalities, as compared to nine percent among women who abstained from alcohol
during pregnancy). See also Sterling K. Clarren and David W. Smith, The Fetal Alcohol
Syndrome, 298 N Eng J Med 1063 (1978) (describing the physical and mental deformities
that result from prenatal exposure to alcohol).
Furthermore, a statute that punishes otherwise legal behavior that is causally linked to fetal injury also has significant drawbacks. First, as with the statute restricting sexual intercourse, the harm is less severe than the harm which results when a pregnant woman ingests illegal substances—the conduct that Congress should really target. Second, the statute would have to distinguish between heavy drinkers and casual drinkers, because a statute that criminalizes all drinking would have to pass strict constitutional scrutiny, since it punishes a class of persons based on a physical characteristic. It would be ridiculous to incarcerate a pregnant woman who has a sip of champagne on New Year's Eve. Instead, the legislature will have to draw a line at the point where alcohol use approaches abuse and therefore endangers the fetus. It would be necessary, but impossible, for the legislature to draw this line. Third, line-drawing would be difficult because women with different physical characteristics are affected differently by the amount of alcohol they drink.

IV. A Proposal

To remedy the concerns addressed in this Comment, I propose a statute calling for strict criminal penalties for women who ingest controlled substances during pregnancy. To improve the current law, such a statute would prescribe a simple approach to punishment by legislating incarceration for a period of time comparable to what is prescribed by drug possession and distribution statutes. Such a statute would also survive an equal protection challenge, since it merely clarifies the application of a statute that already applies to everyone: under current laws, no one may legally manufacture, dispense, or possess controlled substances. Furthermore, it would be consistent with public policy goals already articulated by the federal and state legislatures.

The existing drug criminalization statute should be supplemented with


113. 21 USC § 841 (West 1994). For a clear statement that a statute which treats pregnant women differently from other persons does not violate the Equal Protection Clause of the Fourteenth Amendment, see Geduldig, which states the following:

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is [an unconstitutional] sex-based classification. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . on any reasonable basis, just as with respect to any other physical condition.

417 US at 496-97 n 20 (emphasis added).
provisions for a rehabilitation program to enable women to care for their children after their behavior improves and funding for medical treatment to ensure that women receive adequate prenatal care from a physician. Penalties are based on Title 21 of the United States Code and build from its provisions.

A. PENALTIES

Current drug laws do not deter women from taking drugs while pregnant. This is partly due to the fact that addiction is a disease that is difficult to cure. Further, current laws do not deter because the penalties are not strong enough to alter behavior. A woman who knows that discovery of her drug use will only result in a penalty such as mandatory enrollment in drug treatment, education, and counseling programs is not likely to change her behavior in order to avoid her “sentence.” For example, in Massachusetts, a state with no specific civil or criminal penalties for ingesting a controlled substance during pregnancy, twenty-seven percent of women studied used marijuana during pregnancy, and eighteen percent used cocaine. These numbers are not decreasing.

In response to the reality that pregnant women are not now deterred from drug use, Congress should enact tough penalties which address this issue, using the “Offenses and Penalties” section of Title 21 of the United States Code as a starting point. As a punitive measure, 21 USC § 844 punishes simple possession of a controlled substance with a one-year prison term or a fine of up to one thousand dollars. Repeat offenders are subject to increased jail sentences or fines. Under 21 USC § 849, distribution of a controlled substance to a minor merits a doubled sentence. In the case of pregnant women, this double sentence and a two- to ten-thousand dollar fine should also apply to in utero “distribution” of a controlled substance to a fetus. Prosecutors have never successfully argued that ingesting drugs during pregnancy is analogous to “distributing” controlled substances to a minor. To correct this inadequacy, 21 USC § 844 should specifically note that pregnant drug users “distribute” drugs to their fetuses and thus are subject to the statute’s penalties. The only difference between the punishments in this proposal and those set out in § 849 is that pregnant drug users would be sent to rehabilitative institutes rather than penitentiaries.

It is likely that Congress intended 21 USC § 849 to deter young persons from becoming addicted to drugs. Thus, the same logic that compelled Congress to enact this statute should apply to fetuses, which if carried to term will someday become addicted children. At the very least, the United States criminal justice system seeks to deter drug use. Current laws reflect the belief that prison is an effective deterrent. Assuming that pregnant and non-pregnant people are

115. Id.
116. 21 USC § 844(a) (1994).
117. Id.
118. 21 USC § 849 (West 1994).
119. See, for example, Johnson, 578 S2d at 419.
similarly deterred by the threat of a prison sentence, consistency demands that both be subject to the same punishment. Thus, by imposing a jail sentence and a large fine commensurate with that mandated by 21 USC § 849, Congress could more effectively deter drug use by women during pregnancy.\footnote{Empirical evidence about whether imprisonment actually deters criminals is inconclusive. See Johannes Andenaes, \textit{Punishment and Deterrence} 9 (Michigan, 1974); Franklin Zimring, \textit{Perspectives on Deterrence} (Public Health Service, 1971); Alfred Blumstein, et al, \textit{Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates} 6-7 (Natl Acad Sci, 1978). However, authors have argued that if the threat of punishment is severe and credible, the criminal being punished is more likely to be deterred from engaging in delinquent behavior in the future. See Johannes Andenaes, \textit{General Prevention: A Broader View of Deterrence}, in Rudolph J. Gerber and Patrick D. McAnany, eds, \textit{Contemporary Punishment: Views, Explanations and Justifications} 108-19 (Notre Dame, 1972).}

The doubled sentence applying to distribution to minors can also be justified through retributive theories of criminal punishment.\footnote{Some commentators argue that subjecting criminals to certain deprivations because they deserve it is the soundest way to restore peace of mind to noncriminals and to command respect for the law from criminals. See Jack P. Gibbs, \textit{Crime, Punishment and Deterrence} 82-83 (Elsevier, 1975); Andrew Von Hirsch, \textit{Doing Justice: The Choice of Punishments} 51-55 (Hill and Wang, 1976). Since a fetus is defenseless and should not be subjected to deformities arising from its mother's drug use, retributive punishment against the mother may be the only way to restore the balance between the two beings.} When a woman decides not to abort her pregnancy, she assumes a duty not to harm her fetus.\footnote{For a fuller explanation of this idea, see John A. Robertson, \textit{Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth}, 69 Va L Rev 405, 438 (1983).} Those who believe in retributive punishment will likely want to see the mother who does harm her fetus pay a similar price by punishing her for the use of drugs. This category doubtless includes some Congressmen who vote for the drug laws.

\section*{B. REHABILITATION AND PRENATAL CARE}

To be most effective, punishment for ingestion of a controlled substance during pregnancy should include a rehabilitative element that will better enable mothers to care for their children. If legislatures do not require treatment for pregnant drug users, women will be severely punished over and over again for the same behavior. The babies born to these women will continue to suffer the effects of their mothers' drug use. Further, a rehabilitative element will also work toward pleasing those who argue for education and counseling programs and who object to a criminal statute.

Additionally, rehabilitation does more than please scholars. A 1991 study conducted by the American College of Obstetricians and Gynecologists shows that intensive prenatal care can help a woman become drug free \textit{while} she is pregnant.\footnote{Teri Randall, "Intensive" Prenatal Care May Deliver Healthy Babies to Pregnant Drug Abusers, 265 JAMA 2773, 2773 (1991).} The study showed that constant obstetric care and nutrition counseling resulted in an increased number of healthy births and drug-free deliver-
ies. This intensive prenatal care is important because while most existing statutes focus on punishing the mother, this one would focus on improving the life of the fetus. A statute that addresses this issue would sentence the women it punishes to a rehabilitation center, not jail. However, unlike a prison, it would be partially staffed by physicians who would administer intensive prenatal care. This program would be expensive. However, if Congress is serious about curbing drug use by pregnant women, it should support this proposal. It would not only decrease existing drug use, but it would also help prevent the birth of addicted babies.

V. Objections and Responses

There are two possible objections to a statute that criminalizes a mother's ingestion of drugs during pregnancy: such a statute interferes with a mother's right to reproductive freedom, and it may deter her from seeking adequate medical treatment.

A. A Mother's Autonomy Right

Women have long argued that the Constitution grants a right to privacy. As the Supreme Court explained in Roe v Wade, the right to privacy includes a mother's qualified decision to terminate her pregnancy. By extension, women argue that their actions during pregnancy (at least during the first trimester, when the decision whether to abort is left to the woman and her attending physician) should also be under their discretion. This privacy argument is well-grounded in the Fourteenth Amendment of the Constitution. It is the mother, not the fetus, who is protected by the right to privacy. Thus, the mother has a right to procreative decisionmaking that the fetus does not enjoy. Supporters of this argument also note that individual states have a greater interest in ensuring that fetuses are born than in ensuring that they have the highest quality of life

124. Id at 2773-74.
125. Currently, many drug rehabilitation programs are unavailable to pregnant women. See Allen study, cited in id. See also notes 37-46 and accompanying text.
126. This may help address problems inherent in programs like Illinois's Parents Too Soon, discussed in note 1.
127. However, treatment of alcohol- or drug-affected infants is also extremely expensive. For example, the California State Department of Health Services estimates that the average cost of each child entering a neonatal intensive care unit is nineteen thousand dollars. California Health and Safety Code §§ 1157.59(b)(5), 1157.59(b)(9) (West 1991). In fiscal year 1986-87, the State of California spent $104,000,000 on neonatal care for alcohol- and drug-affected infants, prompting passage of the Alcohol and Drug Affected Mothers and Infants Act of 1990. California Health and Safety Code §§ 1157.5 et seq (West 1991).
129. This aspect of Roe is explained in greater detail in Note, 101 Harv L Rev at 996-98 (cited in note 112).
possible. Therefore, the “compelling state interest” argument relied upon in Roe is less applicable in this context.\textsuperscript{130}

There are two notable objections to the privacy argument. First, Roe and later Supreme Court decisions do not hold that the rights of the mother are absolute. As presently interpreted, Roe permits several restrictions on a woman's right to seek an abortion. In a recent decision on abortion rights, \textit{Webster v Reproductive Health Services},\textsuperscript{131} the Supreme Court stated that it did “not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.”\textsuperscript{132} Likewise, most judicial decisions concerning this issue speak of a “compelling state interest” in protecting the rights of the fetus, which can only be outweighed in situations where the rights of the mother are clearly more compelling (e.g., to save her life). Here, where the presumption is in favor of the fetus, a mother's “right” to ingest controlled substances is insufficient to outweigh the fetus' right to a healthy life.

A second objection to the privacy argument is that a woman's right to an abortion does not include the right to mistreat her fetus. In fact, some scholars, such as Professor John Robertson, argue that once a woman chooses not to have an abortion, she has consented to give her fetus the best care possible.\textsuperscript{133} Robertson asserts that “[t]he mother has, if she conceives and chooses not to abort, a legal and moral duty to bring the child into the world as healthy as is reasonably possible. She has a duty to avoid actions or omissions that will damage the fetus and child, just as she has a duty to protect the child's welfare once it is born unless she transfers this duty to another.”\textsuperscript{134} Accordingly, if Congress ever chooses to accept Robertson's argument, it could easily justify enacting a law that punishes a woman for negligent behavior during pregnancy.

B. DETERRENCE FROM SEEKING MEDICAL TREATMENT

Other opponents to criminalizing the ingestion of controlled substances during pregnancy argue that criminal penalties for drug use during pregnancy will deter those who fear potential prosecution from seeking prenatal care.\textsuperscript{135} This fear is not unreasonable, as hospitals are required to report abusive or neglectful behavior, which often includes drug abuse by pregnant women.\textsuperscript{136} Furthermore, the reports that a physician provides to the state may be used

\textsuperscript{130} Id.
\textsuperscript{131} 492 US 490 (1989).
\textsuperscript{132} Id at 519.
\textsuperscript{133} Robertson, 69 Va L Rev at 437 (cited in note 122) (“Once [a woman] decides to forgo abortion and the state chooses to protect the fetus, the woman loses the liberty to act in ways that would adversely affect the fetus.”).
\textsuperscript{134} Id at 438.
\textsuperscript{135} Cole, 264 JAMA at 2667-68 (cited in note 10).
\textsuperscript{136} Id.
either to prosecute abusive women for crimes, such as possession of narcotics, or to impose penalties for abuse and neglect. Moreover, both situations involve an illegal act that results in statutorily prescribed penalties.

While this fear of imprisonment is not unfounded, reliance on that fear may be exaggerated. A study conducted by the Community Service Society in New York has found several other possible explanations for why women refuse to seek prenatal care. One explanation is that "the use of such substances, especially addiction to alcohol and drugs, interferes with the women's ability to control their lives and to seek care and adhere to routines. Still another explanation may be that substance abuse is one of many poor health habits, which include not seeking care when appropriate." Two more explanations should be noted. First, women who realize that they have a moral duty to care for their fetuses may be ashamed by the fact that they are not living up to their expected obligations. Rather than allow their physician to see their neglect, they decline medical care or "treat" themselves throughout their pregnancies. Second, women who use their income to buy drugs may not have the money to seek medical care. Like all low-income persons who cannot afford treatment, these women will most likely wait until the last minute to seek prenatal care. In short, women who cannot afford care or who neglect to seek care will not be deterred from visiting their physicians simply because they may be prosecuted for drug use. Thus, while the argument that women should not be prosecuted for using drugs during pregnancy has some merit, it is nevertheless an insufficient reason for not implementing a new statute.

VI. Conclusion

Fetal abuse law is currently in a state of disarray. While pregnant women negligently ingest controlled substances, legislators tinker with child neglect and abuse statutes. The result is a set of laws that rarely protects fetuses (as opposed to children) and almost never specifically penalizes drug use by pregnant women. Left to creative interpretation, prosecutors, defense attorneys, and judges have created inconsistent judicial precedent that, for the most part, fails as well.

A statute that criminalizes all controlled substance use during pregnancy would provide a consistent approach to the problem of fetal abuse. This statute should include strict penalties to deter drug use, a rehabilitation program to teach women how to care more effectively for their children, and funding for

137. See, for example, ACLU, 3 Reproductive Rights Update 7 (Sept 13, 1991) (describing a case in which a pregnant woman reported her drug use to her obstetrician, who in turn told the state of Virginia, which prosecuted the woman for criminal child abuse).

138. Francis G. Caro, et al, Barriers to Prenatal Care: An Examination of Use of Prenatal Care among Low-Income Women in New York City 24 (Community Service Society of NY, 1988).

139. See Donald B. Binsacca, et al, Factors Associated with Low Birthweight in an Inner-City Population: The Role of Financial Problems, 77 Am J Pub Health 505 (1987). Drug use aside, women with "financial problems," including a lack of money for bus fare to the hospital, are at the highest risk of bearing a low birthweight baby. Id.
intensive prenatal care that provides newborns the chance to recover from their mothers' harmful behavior.

It is not too late to prevent thousands of babies from being born with physical and mental defects. Enacting this new statute would send a strong message to pregnant women: use of controlled substances during pregnancy will not be tolerated.