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Assessing Legal Responses to Prenatal Drug Use: Can Therapeutic Responses Produce More Positive Outcomes than Punitive Responses

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ASSESSING LEGAL RESPONSES TO PRENATAL DRUG USE: CAN THERAPEUTIC RESPONSES PRODUCE MORE POSITIVE OUTCOMES THAN PUNITIVE RESPONSES?

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I. INTRODUCTION

Expressing a growing concern for fetal wellbeing, the 2006 Idaho Senate passed legislation that permits criminal charges to be brought against women who abuse illegal drugs while pregnant.[1] This bill allows for the potential incarceration of violators for up to five years, as well as a possible $50,000 fine.[2] In some locations, women have the option of choosing to go to drug court instead of serving time in jail or prison.[3] These drug courts provide drug treatment, case management, drug testing, and supervision, while requiring women who abuse illegal drugs to regularly report to scheduled status hearings before a judge.[4]

Legislators, such as Idaho Senator Kate Kelly, have criticized these laws for being punitive.[5] Such critics believe that addiction to methamphetamine is an illness and not a crime.[6] Some critics are also concerned about the law's effects on families. Senator Kelly also said, "[c]riminalization of substance abuse, [and] the separation of infants from their mother, is not in the best interest of Idaho families."[7] In other

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[1] *Idaho Senate Passes Bill Punishing Meth-Using Pregnant Women*, JOIN TOGETHER, Mar. 2, 2006, http://www.jointogether.org/news/headlines/inthenews/2006/idaho-senate-passes-bill.html [hereinafter *Idaho Senate Passes Bill*]; *see* S. Bill 1337, 58th Leg., 2d Reg. Sess. (Idaho 2006), *available at* http://www3.state.id.us/oasis/2006/S1337.html.

[2] S. Bill 1337, Statement of Purpose, 58th Leg., 2d Reg. Sess. (Idaho 2006), *available at* http://www3.state.id.us/oasis/2006/S1337.html (last visited June 4, 2007). "This bill creates a general felony crime, punishable by up to five (5) years in prison or a fifty thousand dollar ($50,000.00) fine." *Id.*

[3] S. Bill 1337, Sec. 1, 58th Leg., 2d Reg. Sess. (Idaho 2006), *available at* http://www3.state.id.us/oasis/2006/S1337.html (last visited June 4, 2007). "[T]he court shall first consider an order placing the defendant in drug treatment or drug court, if available, if appropriate and if the offender qualifies, provided however, that no person has a right to be placed in such drug treatment or drug court." *Id.*

[4] Carson Fox & West Huddleston, *Drug Courts in the U.S.*, ISSUES OF DEMOCRACY May 2003, *available at* http://usinfo.state.gov/journals/itdhr/0503/ijde/fox.htm.

[5] Dan Boyd, *'Meth Mom' Bill Clears Senate by 18-16 Vote: Get-Tough Measure Sparks Controversey*, IDAHO STATE JOURNAL.COM, http://www.idahostatejournal.com/articles/2007/04/03/legislature/news34.txt (last visited June 4, 2007).

[6] *Id.*

[7] *Idaho Senate Passes Bill*, *supra* note 1.

words, punitive measures are not necessarily the best policies; other options should be considered first.[8] Also, Senator Denton Darrington stated "[t]he goal of this legislation is to avoid the birth of meth babies."[9]

Idaho is not the first state to take this kind of action. Since the 1980s, when a large spread of cocaine use first prompted the concern for prenatal drug abuse,[10] other states have also taken steps to protect their citizens' unborn children from drug exposure.[11] The increase in cocaine use provoked medical researchers to study the negative affects that drugs have on the fetus.[12] The enhanced concern for fetal wellbeing prompted an increase in legal actions taken against prenatal drug abusers by controlling prenatal behavior and punishing women for using drugs while pregnant.[13]

While the current legal actions taken against prenatal substance abusers are intended to produce positive outcomes, such as healthier fetuses and mothers, negative results are possible. Avoidance of prenatal care, constitutional infringements, and discrimination are just a few of the possible negative effects. For example, while legislatures hope the new Idaho law will prevent prenatal drug abuse, experts fear that pregnant drug users will not seek prenatal care for fear of being prosecuted.[14]

Part II of this article focuses on the negative effects that prenatal drug abuse has on the fetus, the mother and society. Part III examines cases and laws that involve prenatal substance abuse, as well as avenues that are used to prosecute violators. Part IV suggests potential unintended consequences of prenatal drug abuse laws. Part V presents potentially more positive approaches to addressing the prenatal drug abuse problem. Finally, Part VI concludes that punitive measures are not the answer to this social problem; instead other more therapeutic options should be available to help mothers and their babies.

II. EFFECTS OF DRUG USE ON FETUSES

While the exact number of fetuses exposed to drugs is unknown, the United States Department of Health and Human Services estimates that 5.5% of all women use illegal drugs during pregnancy.[15] Further, the National Pregnancy and Health

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[8]*Cf. Id.*

[9]*Id.*

[10]Ferguson v. Charleston, 532 U.S. 67, 70 n.1 (2001).

[11]*See infra* Part III.

[12]Sarah Letitia Kowalski, *Looking for a Solution: Determining Fetal Status for Prenatal Drug Abuse Prosecutions*, 38 SANTA CLARA L. REV. 1255, 1255 (1998).

[13]*Id.* at 1257.

[14]*Idaho Senate Passes Bill*, *supra* note 1.

[15]U.S. DEP'T OF HEALTH & HUMAN SERV., EFFECTS OF DRUG AND ALCOHOL USE ON PERINATAL AND WOMEN'S HEALTH (1998) (citing E.S.L. Gomberg, A*lcoholic Women in Treatment: Early Histories and Early Problem Behaviors*, 8 ADVANCES IN ALCOHOL & SUBSTANCE ABUSE 133-147 (1989)).

Survey estimates that illegal drugs affect 221,000 babies each year.[16] These staggering numbers obviously cause great concern for fetal wellbeing. This concern has existed for many years. In 1989, it was estimated that ten to twenty-five percent of babies were born to drug users.[17] The very next year, in 1990, an estimated 100,000 to 375,000 women used drugs while pregnant.[18] These statistics prompted both medical research and legislation.

In the 1990s, the focus changed from cocaine to heroine. While there are a variety of illegal drugs used by prenatal substance abusers, a study conducted around that time found that approximately 10,000 infants were born every year having been exposed to heroin alone.[19] Of the babies exposed to heroine, sixty to ninety-five percent require medication to overcome withdrawal symptoms.[20]

More recently, the concern has shifted to methamphetamine. Some doctors have reported that ten percent of their patients are addicted to the drug.[21] Similarly, a 2006 study of women in areas with a high prevalence of methamphetamine abuse found that eleven percent of the women used illicit drugs while pregnant.[22]

Drug use has affected the number of children removed from their homes by child protective services. For instance, between March 1997 and August 1998, Sacramento California Child Welfare Services removed over 7000 children who were believed to be victims of prenatal drug abuse.[23] This problem has increased since that time. A 2005 study of thirteen states across the country indicated dramatic increases in out of home placements for children whose parents used methamphetamine in the previous three years.[24] This section focuses on the potential negative effects that prenatal substance abuse has on the child, the mother and society.

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[16]Robert Mathias, *NIDA Survey Provides First National Data on Drug Use During Pregnancy*, 10 NIDA NOTES 1 (1995), *available at* http://www.nida.nih.gov/NIDA_Notes/NNVol10N1/NIDASurvey.html (last visited June 4, 2007).

[17]INGER J. SAGATUN & LEONARD P. EDWARDS, CHILD ABUSE AND THE LEGAL SYSTEM 232 (1995).

[18]Barry Zuckerman, Deborah Frank & Elizabeth Brown, *Overview of the Effects of Abuse and Drugs on Pregnancy and Offspring*, 1995 NAT'L INST. ON DRUG ABUSE RESEARCH 16.

[19]Sydney L. Hans, *Developmental Consequences of Prenatal Exposure to Methadone*, 562 ANNALS N.Y. ACAD. SCI. 195 (1989).

[20]A.L. van Baar & Erik A.B. de Graaf, *Cognitive Development at Preschool-Age of Infants of Drug-Dependent Mothers*, 36 DEVELOPMENTAL MED. & CHILD NEUROLOGY 1063 (1994).

[21]Victoria Elliot, *Methamphetamine Use Increasing*, AMEDNEWS.COM, July 26, 2004, http://www.ama-assn.org/amed news/2004/07/26/hlsc0726.htm.

[22]*Study Looks at Methamphetamine Use Among Pregnant Women*, JOIN TOGETHER, Mar. 1, 2006, http://www.jointogether.org/news/research/summaries/2006/study-looks-at.html.

[23]John McCarthy, *The CPS Drug Use Dilemma: Balancing the Right of Children to Protection Against the Right of Children to Their Parents*, SACRAMENTO MED., Nov. 1998, at 11-12.

[24]NAT'L ASS'N OF COUNTIES, THE METH EPIDEMIC IN AMERICA: TWO SURVEYS OF U.S. COUNTIES: THE EFFECT OF METH ON COMMUNITIES, THE IMPACT OF METH ON CHILDREN (2005), *available at* http://www.naco.org/Content/ContentGroups/Publications1/Press_Releases/Documents/NACo-MethSurvey.pdf.

A. Effects of Drug Use by Pregnant Women on Children

The child of a prenatal drug abuser may experience a number of negative effects. Children of methamphetamine abusers may experience a lack of oxygen and essential nutrients prior to being born because the mother's blood vessels in the placenta will constrict due to methamphetamine use.[25] Drug exposed infants may suffer from Sudden Infant Death Syndrome (SIDS) and small head size,[26] as well as low birth weight and short body length.[27] Studies have also shown that fetuses that have been exposed to cocaine may experience reflex deficiencies and fussiness.[28] They may also experience tremors, agitation and be 'inconsolable.'[29] Researchers have discovered that cocaine exposed children are 4.89 times more likely to suffer from mental retardation than non-exposed children.[30] In addition, mothers who are infected with any of the serious viruses that sometimes come with drug use, such as HIV infection and sexually transmitted diseases, may pass these ailments to the fetus.[31] Death is the ultimate consequence to prenatal drug abuse. A study released in 1995 revealed that 14.9 out of every 1000 births to prenatal drug users resulted in infant mortality.[32] Non-abusers only experienced 10.7 deaths per 1000 births.[33]

The effects of prenatal drug use can follow a child throughout his life. Later in life, children who were exposed to drugs while in the fetal stage may become stereotypical "problem child(ren)" due to a lack of positive surroundings while growing up.[34] The medical complications that can come with prenatal drug exposure

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[25]KATHRYN WELLS, *Methamphetamine and Pregnancy*, *available at* http://www.colodec.org/decpapers/Documents/MethAnd Pregnancy.pdf (last visited June 2, 2007).

[26]U.S. DEP'T OF HEALTH & HUMAN SERV., EFFECTS OF DRUG AND ALCOHOL, *supra* note 15 (citing C. Coles, *Critical Periods for Prenatal Alcohol Exposure: Evidence from Animal and Human Studies*, 18 ALCOHOL HEALTH & RES. WORLD 22-29 (1994)).

[27]Seetha Shankaran et al., *Association Between Patterns of Maternal Substance Use and Infant Birth Weight, Length, and Head Circumference*, 114 PEDIATRICS e226, e226-e234 (2004).

[28]U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 90 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm.

[29]CYNTHIA R. DANIELS, AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS 113-115 (1993).

[30]CASE W. RESERVE UNIV., AT 2 YEARS, COCAINE BABIES SUFFER COGNITIVE DEVELOPMENT EFFECTS (2002), *available at* http://www.cocaine.org/crackbaby/cocaine-babies.html.

[31]U.S. DEP'T OF HEALTH & HUMAN SERV., EFFECTS OF DRUG AND ALCOHOL, *supra* note 15.

[32]L. SCHRAGER, J. JOYCE & L. CAWTHON, WASH. STATE DEPT. OF SOC. AND HEALTH SERV., SUBSTANCE ABUSE, TREATMENT, AND BIRTH OUTCOMES FOR PREGNANT AND POSTPARTUM WOMEN IN WASHINGTON STATE (1995).

[33]*Id.*

[34]SAGATUN & EDWARDS, *supra* note 17, at 232.

may also lead to their inappropriate behavior,[35] which may make education more difficult for the children.

In the toddler stage, drug exposed children have the tendency to be hyperactive, experience mood swings, and have short attention spans.[36] Children exposed to drugs may also suffer from attention and behavior disorders.[37] Each of these ailments can negatively affect a child's educational performance.

Researchers at Case Western Reserve University compared the intelligence of preschool children who were prenatally exposed to cocaine with the intelligence of children who were not exposed.[38] They discovered that the exposed children typically scored significantly lower on intelligence tests and were not as likely to score above average on their overall IQ as the non-exposed children.[39] Also, using the Wechsler Preschool and Primary Scales of Intelligence-Revised, it was discovered that exposed children scored lower in "information, arithmetic, and object assembly."[40] While the long-term effects of prenatal drug exposure on teenagers have not been sufficiently researched, teens tend to experience learning disabilities, abuse and neglect, and behavioral problems.[41]

Children born to parents who are drug addicts suffer greatly. These children tend to suffer from low self-esteem and behavioral problems, as well as anxiety and apprehension.[42] Also, children born to parents who abuse and neglect them are also more likely to commit criminal acts as both juveniles and adults.[43]

As this research demonstrates, children exposed to drugs before birth suffer from a number of ailments and disadvantages throughout life. In addition to the effects that the child may experience, drug use can have a number of negative effects on the mother as well.

B. Effects of Drug Use on the Mother

Drug use also affects the mother in a variety of ways. Post-pregnancy, the mother may experience hardships as a result of her prenatal and post-natal drug abuse. Mothers of drug exposed babies typically have a harder time caring for their

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[35]*Id.*

[36]NAT'L RES. CTR. FOR RESPITE & CRISIS CARE SERV., FACTSHEET NUMBER 49: CHILDREN WITH PRENATAL DRUG AND/OR ALCOHOL EXPOSURE, *available at* http://www.archrespite.org/archfs49.htm [hereinafter NAT'L RES. CTR.].

[37]NAT'L ASS'N OF COUNTIES, *supra* note 24.

[38]Lynn T. Singer et al., *Cognitive Outcomes of Preschool Children with Prenatal Cocaine Exposure*, 291 JAMA 2248, 2248-2456 (2004).

[39]*Id.*

[40]*Id.*

[41]NAT'L RES. CTR., *supra* note 36.

[42]M. M. Dore et al., *Psychosocial Functioning and Treatment Needs of Latency-Aged Children from Drug-Involved Families*, 67 FAMILIES IN SOC'Y: J. CONTEMP. HUM. SERVICES 596 (Dec. 1996).

[43]Suzette Fromm, *Total Estimated Cost of Child Abuse and Neglect in the United States: Statistical Evidence*, *available at* http://www.preventchildabuse.org/site/DocServer/cost_analysis.pdf?docID=144.

newborns because the babies tend to be more "irritable, tired, hard to feed, and poor sleepers."[44] Mothers of drug-exposed babies may also have a hard time becoming attached to their infants because of the infant's irritability and dislike of being touched.[45]

Post-birth, the mother's addiction may make it difficult to provide her baby with proper care.[46] For instance, methamphetamine can cause affects such as anger, paranoia, panic attacks, delusions, and hallucinations.[47] These emotions can make it difficult for the mother to care for a child, and could lead to neglect and abuse. For example, a mother may have hallucinations that someone is trying to poison her child; she may run away with the child to prevent this imagined event from occurring.[48] Methamphetamine use can also lead to shaky or jerky movement,[49] which could make it hard to hold a child.

Even when the mother is not high, she may neglect her child. When the drug wears off, the mother may sleep for days at a time, leaving her child unsupervised.[50] If a mother crashes, she will likely become depressed and lose interest in caring for the child.[51] Addiction is often very hard to break, making it hard for the mother to quit using the drug. Thus, drug use can make it difficult for a mother to care for a child, even if she has intentions of being a good mother.

Many female drug abusers suffer from ailments such as poor nutrition, high blood pressure, and sexually transmitted diseases[52] as a result of their drug abuse. Respiratory disorders and pulmonary diseases are also common among women who abuse marijuana.[53] Cocaine abuse may cause a female user to experience heart attacks, strokes, and seizures.[54] Psychological problems such as depression, anxiety, and low self-esteem are common among drug abusers.[55] Also, drug abuse may increase a person's chance of becoming homeless. About one-third of homeless

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[44]SAGATUN & EDWARDS, *supra* note 17, at 232.

[45]*Id.*

[46]Zuckerman, *supra* note 18, at 19.

[47]NAT'L ASS'N OF COUNTIES, *supra* note 24; AM. PROSECUTORS RES. INST., BEHIND THE DRUG: THE CHILD VICTIMS OF METH LABS (2002), *available at* http://www.ndaa-apri.org/ publications/news letters/update_volume_15_number_2_2002.html.

[48]AM. PROSECUTORS RES. INST., *supra* note 47.

[49]NAT'L ASS'N OF COUNTIES, *supra* note 24.

[50]AM. PROSECUTORS RES. INST., *supra* note 47.

[51]*Id.*

[52]U.S. DEP'T OF HEALTH & HUMAN SERV., EFFECTS OF DRUG AND ALCOHOL, *supra* note 15 (citing C. Coles, *Critical Periods for Prenatal Alcohol Exposure: Evidence from Animal and Human* Studies, 18 ALCOHOL HEALTH & RES. WORLD 22-29 (1994)).

[53]Luis B. Curet, & Andrew C. Hsi, *Drug Abuse During Pregnancy*, 45 CLINICAL OBSTETRICS & GYNECOLOGY 74 (2002).

[54]*Id.*

[55]*See* S. MURPHY & M. ROSENBAUM, PREGNANT WOMEN ON DRUGS: COMBATING STEREOTYPES AND STIGMA (1999); C.E. STERK, FAST LIVES: WOMEN WHO USE CRACK COCAINE (1999).

people abused drugs during their lifetime.[56] Domestic violence is also common among methamphetamine users.[57] All of the effects of drug abuse and the problems associated with drug abuse make it difficult for the mother to properly care for her child and herself. In addition to the negative effects that prenatal drug abuse has on the child and the mother, society is also negatively affected.

C. Effects of Drug Use by Pregnant Women on Society

The costs to society come in many forms and include both financial burdens and social ills. Because drug users tend to be poor parents, society often assumes the burden to care for their children. Many child welfare agencies estimate that the majority of their out of home placements involve parents who use methamphetamine.[58] The cost of caring for drug-exposed children is often quite high. For instance, the cost of caring for these low-birth-weight children is about $21,000 per year.[59] To complicate maters further, families affected by drug use are less likely to be reunified than families not affected by drugs;[60] thus, the state often must provide for the child throughout his childhood.

The Office of Justice Program of the Department of Justice has indicated that by the time a single drug-exposed child reaches the age of eighteen, tax payers may spend as much as $750,000 to cover his medical, education, and housing (e.g., foster care) needs.[61] The enormous financial costs may not end at age eighteen, as these individuals often require special services well into adulthood.[62] It is estimated that Medicare programs will pay one trillion dollars for substance abuse over the next twenty years.[63]

Society experiences a number of social ills because of prenatal drug abuse. Diseases that are prominent among drug abusers, such as HIV/AIDS and hepatitis C, may be spread from one drug user to another through the sharing of drug paraphernalia.[64] This fact may cause an epidemic of these diseases throughout society because of their ability to be transmitted through avenues other than drug use (such as blood and sexual intercourse). Increases in drug use may increase crime

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[56]S. Rep. No. 108-081 (2004), *available at* http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp108s0tv8&refer=&r_n=sr081.108&db_id=108&item=&sel=TOC_583494& (last visited Apr. 22, 2007) [hereinafter S. Rep. 2004].

[57]AM. PROSECUTORS RES. INST., *supra* note 47.

[58]NAT'L ASS'N OF COUNTIES, *supra* note 24.

[59]Physicians Comm. for Responsible Medicine, Research, Birth Defects Statistics, http://www.pcrm.org/resch/humres/birthdefects.html (last visited Apr. 22, 2007).

[60]NAT'L ASS'N OF COUNTIES, *supra* note 24.

[61]*See generally*, U.S. DEP'T OF JUSTICE, NEW SURVEY DOCUMENTS DRAMATIC RISE IN DRUG COURTS: SUBSTANTIAL PROGRESS REPORTED (1997), *available at* http://www.Ojp.usdoj.gov/pressreleases/1997/OJP98011.htm (last visited Nov. 24, 1997).

[62]SAGATUN & EDWARDS, *supra* note 17, at 232.

[63]S. Rep. 2004, *supra* note 56.

[64]About.com: Alcoholism & Substance Abuse, What Are the Costs of Drug Abuse to Society?, http://alcoholism.about.com/cs/ drugs/f/drug_faq10.htm (last visited Apr. 22, 2007) (citing the National Institute on Drug Abuse).

rates and homelessness in neighborhoods.[65] This may cause a spread of drug use to "clean" neighborhoods where non-users may be subjected to the drug world, and thus increase the number of users. Also, an increase in drug use may cause death rates by overdose and other complications to increase.[66] Children raised in these circumstances may grow to adopt the same behaviors, repeating the drug abuse cycle. Thus, stopping the pattern of drug use is a concern to many policymakers and researchers.

D. Conclusion: Pregnant Women Who Use Drugs Affect All Members of Society

Women who use drugs while pregnant affect all members of society. They not only harm themselves, but their children as well. Society may then receive the burden of taking care of the children throughout their lives if they experience the negative effects of drug exposure or if their parents cannot provide a positive environment. Overall, prenatal drug abuse is damaging for all those involved. Because of these negative effects, legislatures have taken a number of legal actions.

III. LEGAL ACTIONS AGAINST PREGNANT WOMEN WHO USE DRUGS

The negative effects associated with prenatal drug abuse have encouraged lawmakers to take action against violators. This section focuses on court cases that have involved prenatal drug abuse and laws that have been established by various states to deter and punish violators. This section also examines various avenues currently used to prosecute violators.

A. Court Cases

In 1989, a Florida woman named Jennifer Johnson became the first woman to be prosecuted for prenatal drug abuse after she gave birth, on two separate occasions, to drug exposed infants.[67] She was charged with one count of child abuse and two counts contributing drugs to minors (her children).[68] This case prompted the state of South Carolina to require mandatory arrests of women who test positive for drugs directly after giving birth.[69] The Johnson case set a president and was a gateway for future cases regarding prenatal drug abuse.

Nearly ten years later, in 1997, the South Carolina Supreme Court in *Whitner v. State* found that the fetus is included in the meaning of the word "child" in child abuse statutes.[70] In this case, Cornelia Whitner gave birth to a cocaine-exposed baby,[71] which led to her conviction for child abuse.[72] After an appeal, the Supreme

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[65] *Id.*

[66] *Id.*

[67] Dorothy E. Roberts, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 162-63 (1997).

[68] *Id.* The child abuse charge was dropped due to insufficient evidence that Johnson's daughter was actually harmed by her mother's drug use. *Id.*

[69] *Id.* at 165.

[70] Whitner v. State, 492 S.E.2d 777, 779-81 (S.C. 1997).

Court agreed with the lower courts decision and upheld the conviction.[73] This was the first prenatal drug abuse case to be supported by the Supreme Court in the state of South Carolina.[74]

The South Carolina legal system went one step further in the fight against prenatal drug abuse when a woman named Regina McKnight was convicted of "homicide by child abuse"[75] and sentenced to twelve years in prison.[76] This decision was reached because her use of crack cocaine during her pregnancy allegedly led to the stillbirth of her child.[77] This landmark case of *State v. McKnight* was the first time a woman was successfully convicted of "homicide by child abuse" due to prenatal crack cocaine use.[78] In this case, the court deemed that the general public knows that cocaine use is detrimental to a person's health. Therefore, they determined that McKnight was fully aware of the damages her cocaine use could cause to her fetus, and held her criminally responsible for her child's injuries.[79]

More recently, in 2004, a woman in Oklahoma was charged with first-degree murder after her prenatal use of methamphetamines led to the stillbirth of her child.[80] These cases demonstrate the courts' willingness to hold pregnant women accountable for their actions prior to giving birth. Laws similar to the Idaho law that was discussed in the introduction are likely to increase such prosecutions.

B. Criminal Laws

Some states are implementing a recent federal policy, the Keeping Children and Families Safe Act of 2003.[81] This act requires health care professionals to notify social services if they believe an infant has been affected by illegal drug abuse or is

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[71]Lynn M. Paltrow, *Pregnant Drug Abusers, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALA. L. REV. 999, 1029-30 n.158 (1999) (quoting and discussing Arlene Levinson, *S.C. Law on Crack Moms May be Heard in High Court*, ROCK HEARLD (S.C.), Mar. 15, 1998, at 1A).

[72]*Id.* at 1030.

[73]*See Whitner*, 492 S.E.2d at 777-88.

[74]*Id.*

[75]State v. McKnight, 576 S.E.2d 168 (S.C. 2003) (stating that although women have been convicted for child abuse and involuntary manslaughter under child neglect and child abuse statutes, no one before McKnight had been convicted of murder under a "homicide by child abuse" statute); *see* DANIELS, *supra* note 29.

[76]*McKnight*, 576 S.E.2d at 171.

[77]*Id.* at 168.

[78]*Id.*

[79]*Id.* at 173.

[80]Ken Raymond, *Meth Death Raises Legal Questions*, THE OKLAHOMAN, Oct. 17, 2004, at 1A.

[81]STEVE CHRISTIAN, NAT'L CONFERENCE OF STATE LEGISLATURES, CHILDREN'S POLICY INITIATIVE, A COLLABORATIVE PROJECT ON CHILDREN AND FAMILY ISSUES, SUBSTANCE-EXPOSED NEWBORNS: NEW FEDERAL LAW RAISES SOME OLD ISSUES (2004), *available at* http://www.ncsl.org/print/cyf/newborns.pdf; *see* Keeping Children and Families Safe Act of 2003, 42 U.S.C. § 5106a (2006).

experiencing withdrawal symptoms.[82] While states do not have to change their existing prenatal drug abuse laws to comply with this new federal act, states must require health care professionals to identify and report children believed to be affected by prenatal drug abuse to child protective services.[83] The new federal law also requires that the states develop a "safe care" plan to address the needs of the drug-affected children.[84] New legislation may have to be developed in many states to adhere to the new federal law because many states might not currently have laws in place that comply with the requirements of the Keeping Children and Families Safe Act of 2003.[85]

While federal law is intended to protect children who are prenatally exposed to drugs, individual states are still given the discretion to design their own laws regarding prenatal drug abuse thanks to the case *Roe v. Wade*.[86] In this landmark case, the U.S. Supreme Court concluded that a fetus is not included in the definition of the word "Person" in the Fourteenth Amendment[87] nor is it protected by the Constitution.[88] The Court, however, did allow the individual states to make their

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[82]42 U.S.C. § 5106a(b)(2)(A) (2006).

> [A]n assurance in the form of a certification by the chief executive officer of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a Statewide program, relating to child abuse and neglect that includes--(i) provisions or procedures for the reporting of known and suspected instances of child abuse and neglect; (ii) policies and procedures (including appropriate referrals to child protection service systems and for other appropriate services) to address the needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure, including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition in such infants, except that such notification shall not be construed to. . . .

Id.

[83]*Id.*; *see* NAT'L CTR. ON SUBSTANCE ABUSE & CHILD WELFARE, NEW CHILD ABUSE PREVENTION AND TREATMENT ACT REQUIREMENTS CONCERNING INFANTS IDENTIFIED AS AFFECTED BY ILLEGAL SUBSTANCE ABUSE (2004).

[84]42 U.S.C. § 5106a(b)(2)(A).

> [A]n assurance in the form of a certification by the chief executive officer of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a Statewide program, relating to child abuse and neglect that includes . . . (iii) the development of a plan of safe care for the infant born and identified as being affected by illegal substance abuse or withdrawal symptoms. . . .

Id.

[85]*Cf. id.*

[86]Roe v. Wad*e*, 410 U.S. 113 (1973).

[87]*Id.* at 158.

[88]*See* Nova D. Janssen, Note, *Fetal Rights and the Prosecution of Women for Using Drugs During* Pregnancy, 48 DRAKE L. REV. 741, 749 (2000); *see* Caroline S. Palmer, *The Risks of State Intervention in Preventing Prenatal Alcohol Abuse and the Viability of an Inclusive Approach: Arguments for Limiting Punitive and Coercive Prenatal Alcohol Abuse Legislation in Minnesota*, 10 HASTINGS WOMEN'S L.J. 287, 304-305 (1999); *see* Deanna Rae Reitman, Note, *The Collision Between the Rights of Women, the Rights of the Fetus, and the Rights of*

own laws regarding the protection of the fetus when it is of an "important and legitimate interest."[89] With this freedom, state legislatures often use punitive approaches when addressing prenatal drug abusers.[90] These punitive approaches are designed to deter future drug abuse and punish those who do offend.[91]

Because each state is allowed to design its own laws regarding prenatal drug abuse, legislatures have passed a wide variety of laws. As discussed earlier in this article, the Idaho Senate recently passed a bill that will require criminal charges to be brought against women who use methamphetamines while pregnant.[92] This bill will result in offenders receiving monetary fines, as well as jail or prison sentences.[93]

Another example of a state designing its own unique law regarding prenatal drug abuse is the South Carolina "homicide by child abuse" law.[94] This law states that a person involved in "circumstances manifesting an extreme indifference to human life" that results in the death of children younger than eleven years of age can render a homicide prosecution.[95] This is the law that allowed for the successful prosecution of Regina McKnight in *State v. McKnight*.[96]

Unlike South Carolina, Minnesota has developed a statute that focuses more on treating drug abusers rather than punishing them through criminal prosecution. This statute, the Minnesota Emergency Admission Statute, states that "[a]ny person may be admitted or held for emergency care and treatment in a treatment facility [if] . . . the examiner is of the opinion, . . . that the person is . . . chemically dependent, and is in danger of causing injury to self or others if not immediately detained."[97] In this statute, a "chemically dependent person" includes "a pregnant woman who has engaged during the pregnancy in habitual or excessive use, for a non-medical purpose, of any of the following controlled substances or their derivative: cocaine,

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the State: A Critical Analysis of the Criminal Prosecution of Drug Addicted Pregnant Women, 16 ST. JOHN'S J. LEGAL COMMENT 267, 286-288 (2002).

[89]*Roe*, 410 U.S. at 162.

[90]*See* LYNN M. PALTROW, DAVID S. COHEN & CORINNE A. CAREY, WOMEN'S LAW PROJECT & NATIONAL ADVOCATES FOR PREGNANT WOMEN, YEAR 2000 OVERVIEW: GOVERNMENTAL RESPONSES TO PREGNANT WOMEN WHO USE ALCOHOL OR OTHER DRUGS, REPORT OF THE WOMEN'S LAW PROJECT AND NATIONAL ADVOCATES FOR PREGNANT WOMEN, *available at* http://advocatesforpregnantwomen.org/file/gov_response_review.pdf.

[91]Lisa Eckenwiler, *Why Not Retribution? The Particularized Imagination and Justice for Pregnant Addicts*, 32 J.L. MED. & ETHICS 89, 90 (2004).

[92]S. Bill 1337, Statement of Purpose, 58th Leg., 2d Reg. Sess., (Idaho 2006), *available at* http://www3.state.id.us/oasis/2006/S1337.html (last visited June 4, 2007).

[93]*Id.* "This bill creates a general felony crime, punishable by up to five (5) years in prison or a fifty thousand dollar ($50,000.00) fine." *Id.*

[94]S.C. CODE ANN. § 16-3-85 (2003). "A person is guilty of homicide by child abuse if the person: (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life. . . ." § 16-3-85(A).

[95]*Id.*

[96]*Id.*; State v. McKnight, 576 S.E.2d 168 (S.C. 2003).

[97]MINN. STAT. ANN. § 253B.05 (West 2004).

heroin, phencyclidine, methamphetamine, or amphetamine."[98] There are a number of ways experts can verify that prenatal drug abuse took place. If the toxicology results of the mother or child taken directly after birth show that the child suffers from withdrawal symptoms at birth, or if the child shows medical signs of prenatal drug exposure within one year after its birth, the mother can be ordered into a treatment program.[99]

South Dakota has also adopted a statute that promotes therapy among prenatal drug abusers. This statute allows certain individuals to bring petitions to the court for the involuntary treatment of pregnant women who are believed to be abusing drugs.[100] The women's "spouse, guardian, relative, physician, and administrator of a treatment facility, or any other responsible person" are permitted to petition the court to have the woman committed.[101] After serving no longer than the maximum of

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[98] § 253B.02(2).

[99] MINN. STAT. ANN. § 626.556 (West 2004), *amended by* 2005 MINN. SESS. LAW SERV. 136 (West 2004) (amending only the child abuse reporting requirements).

> "Neglect" means: (6) prenatal exposure to a controlled substance, as defined in section 253B.02, subdivision 2, used by the mother for a nonmedical purpose, as evidenced by withdrawal symptoms in the child at birth, results of a toxicology test performed on the mother at delivery or the child at birth, or medical effects or developmental delays during the child's first year of life that medically indicate prenatal exposure to a controlled substance. . . .

§ 626.556(2)(f).

> A person who knows or has reason to believe a child is being neglected or physically or sexually abused, as defined in subdivision 2, or has been neglected or physically or sexually abused within the preceding three years, shall immediately report the information to the local welfare agency, agency responsible for assessing or investigating the report, police department, or the county sheriff. . . .

§ 626.556(3)(a).

> Upon receipt of a report, the local welfare agency shall determine whether to conduct a family assessment or an investigation as appropriate to prevent or provide a remedy for child maltreatment. . . . If the family assessment or investigation indicates there is a potential for abuse of alcohol or other drugs by the parent, guardian, or person responsible for the child's care, the local welfare agency shall conduct a chemical use assessment pursuant to Minnesota Rules, part 9530.6615. The local welfare agency shall report the determination of the chemical use assessment, and the recommendations and referrals for alcohol and other drug treatment services to the state authority on alcohol and drug abuse.

§ 626.556(10)(a).

[100] S.D. CODIFIED LAWS § 34-20A-70 (2004).

> A person may be committed by the circuit court upon the petition of the person's spouse or guardian, a relative, a physician, the administrator of any approved treatment facility or any other responsible person. . . . The petition shall allege that the person is an alcoholic or drug abuser who habitually lacks self-control as to the use of alcoholic beverages or other drugs and: . . . (3) Is pregnant and abusing alcohol or drugs.

Id.

[101] *Id.*

ninety days in treatment, an additional order may be sent to the court to extend the woman's treatment if needed.[102]

Wisconsin has adopted a law that is more concerned with the wellbeing of the child rather than the mother. The law is found in Wisconsin's revision of the Children's Code, and focuses on removing children from the mother's care if she is not fit to care for her own child.[103] The Wisconsin law states that the "court has exclusive original jurisdiction over an unborn child alleged to be in need of protection or services which can be ordered by the court whose expectant mother habitually lacks self-control in the use of . . . controlled substances or controlled substance analogs."[104]

Legal actors in some states use laws that are not specific to prenatal drug abuse in order to prosecute violators and protect the child's welfare. An example of a kind of law that has been used to prosecute prenatal drug abusers is contributing drugs to a minor through the umbilical cord.[105] In 2005, Colorado, Nevada, Louisiana, and Arizona added criteria to their definitions of child abuse.[106] Each of those states now considers drugs present in an infant's system at birth as child abuse.[107] For example, Arkansas has expanded its Child Maltreatment Act by adding "prenatal drug use that causes a child to be born with an illegal substance in its system or a drug-related health problem" to its definition of neglect.[108]

More states are increasing the rights of the fetus through new statutes each year; some are punitive, some are treatment-oriented, and some are designed to protect the fetus. The 2005 legislation session had an increase in "bills that would allow civil intervention and, in some instances, criminal prosecution of women for using illegal substances during their pregnancies."[109] As concern for the health of the fetus grows, more legislation will be proposed to the government to protect the fetus.

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[102] § 34-20A-81.

> Any person committed under § 34-20A-70 shall remain in for treatment for a period not to exceed ninety days unless sooner discharged. At the end of the ninety-day period, he shall be discharged automatically unless the administrator or an authorized designee of the facility to which the patient is committed prior to expiration of the period obtains a court order for recommitment upon the grounds set forth in § 34-20A-70 for a further period of ninety days unless sooner discharged.

Id.

[103] *See* WIS. STAT. ANN. §§ 48.01-.9985 (West 2004). "This chapter may be cited as 'The Childrens Code.' In construing this chapter, the best interests of the child or unborn child shall always be of paramount consideration." § 48.01(1).

[104] § 48.133.

[105] CTR. FOR REPROD. RIGHTS, 2005 MID-YEAR REPORT, *available at* http://www.crlp.org/st_leg_summ_midyear_05.html (last visited June 4, 2007).

[106] *Id.*

[107] *Id.*

[108] ARK. CODE ANN. § 12-12-501:519 (2007).

[109] CTR. FOR REPROD. RIGHTS, *supra* note 105.

C. Other Avenues of Prosecution

In addition to the criminal actions discussed above, there are a variety of angles that legal actors use in order to prosecute prenatal drug abusers. These angles include, but are not limited to, civil child welfare and abuse laws,[110] protective incarceration and forced treatment,[111] and mandatory reporting laws. A variety of legal theories exist for prosecuting prenatal drug abusers; three main approaches will be discussed here.[112] The first involves the woman's substance abuse causing harm to the child.[113] The second involves infants having substances present in their bodily fluids.[114] And, the third involves substances being transferred to the baby through the umbilical cord directly after birth or before the cutting of the cord.[115] The following section discusses each of these approaches to addressing the problem of prenatal drug use.

1. Civil Child Welfare and Abuse Laws

Child welfare and abuse laws are, theoretically, not designed to punish the parent, but rather to protect the child.[116] In some states, if toxicology tests show prenatal drug use, the mother is presumed to be unfit[117] and may result in the mother temporarily losing custody of the child.[118] Testing positive for drug use can also result in the permanent termination of the mother's parental rights.[119]

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[110]PALTROW, COHEN & CAREY, *supra* note 90, at 1-2.

[111]*See, e.g.*, Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1431 (1991) (discussing *United States v. Vaughn*, Crim. No. F 2172-88 B (D.C. Super. Ct. 1988)).

[112]James J. Hodge, Jr., Annotation, *Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child,* 70 A.L.R. 5th 461, at *1a (2004).

[113]*Id.*

[114]*Id.*

[115]*Id.*

[116]PALTROW , COHEN & CAREY, *supra* note 90, at 4.

[117]*See, e.g.*, 750 ILL. COMP. STAT. ANN. 50/1(1)(D)(k) (West 2004). "There is a rebuttable presumption that a parent is unfit under this subsection with respect to any child to which that parent gives birth where there is a confirmed test result that at birth the child's blood, urine, or meconium contained any amount of a controlled substance. . . ." *Id.*

[118]Roberts, *supra* note 111, at 1430-1431.

[119]PALTROW , COHEN & CAREY, *supra* note 90, at 2, n.20 (listing Arizona, Colorado, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, and Wisconsin as states in which testing positive for drugs can result in a permanent termination of a mother's prenatal rights).

Sixteen states use civil child welfare statutes to prosecute prenatal drug abusers.[120] For example, Illinois has a statute that defines a mother as unfit if the "child's blood, urine, or meconium shows traces of controlled substances and the mother is also a biological mother of another child previously adjudicated as a neglected minor."[121] A woman challenged this statute in the case called In re *O.R.*, claiming that the law was unconstitutional because it violated her rights to equal protection and substantive due process.[122] The court rejected this claim,[123] stating that "[t]he statute identifies the interest to be protected, provides a mother with notice after she harms a previous child by using drugs that passed to that child in utero, and provides an opportunity to correct the abuse before a mother passes drugs to another child through pregnancy."[124] This decision demonstrates the state's concern for the safety of the child over the rights of the mother.

Ohio has a similar statute that identifies what constitutes child abuse. This statute states that "an abused child includes any child who . . . because of the acts of his [or her] parents . . . suffers physical or mental injury that harms or threatens to harm the child's health or welfare."[125] In the case named *In re Baby Boy Blackshea*r, the Ohio court decided that a child is considered "per se an abused child" if illegal drugs are discovered in a toxicology test.[126]

Child welfare and abuse laws work to protect the child by deeming a drug-abusing mother as unfit. These laws can remove a child from its mother's care in an attempt to provide the child with more positive surroundings. While a child that has already been born can be removed from its mothers care, an unborn child cannot. However, an unborn child can be protected by protective incarceration which is discussed in the next section.

2. Protective Incarceration

Legal actors can also use protective incarceration to protect a fetus from prenatal drug exposure. Through protective incarceration, the pregnant woman can be held in confinement for the duration of her pregnancy in order to protect the fetus from drug exposure.[127] Statistics have shown that pregnant drug abusers are given longer sentences than non-pregnant drug abusers by some judges.[128] If the court has

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[120]Guttmacher Inst., State Policies in Brief, *Substance Abuse During Pregnancy*, as of April 1, 2007, *available at* http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf. (Jan. 1, 2007).

[121]750 ILL. COMP. STAT. ANN. 50/1-1(D)(K) (West 2004).

[122]*In re* O.R., 767 N.E.2d 872 (Ill. App. Ct. 2002).

[123]*Id.* at 877.

[124]*Id.* at 879.

[125]OHIO REV. CODE ANN. §2151.031(D) (West 2004).

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

[127]Roberts, *supra* note 111, at 1431.

[128]K. MAGUIRE, & A. PASTORE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (1994); B. Becker & P. Hora, *The Legal Community's Response to Drug Use During Pregnancy in the Criminal Sentencing and Dependency Contexts: A Survey of Judges, Prosecuting Attorneys, and Defense Attorneys in Ten California Counties*, 2 S. CAL. REV. L. & WOMEN'S STUD. 527-

evidence that a particular woman is a drug abuser, the judge can sentence her to protective incarceration even if her charge is for something unrelated to prenatal drug abuse.

The case of a pregnant woman named Brenda Vaughn is one example of a judge enacting protective incarceration.[129] In Washington D.C., Vaughn was charged with forging checks; however, the judge sentenced her "to jail for the duration of her pregnancy" because of her known substance abuse problem, and not because of the forging charge.[130] The goal of protective incarceration is to confine the mother during her pregnancy in an attempt to prevent her from abusing drugs while pregnant. The chief initiative is to protect the fetus from drug exposure.

Anther way states have attempted to protect a fetus from prenatal drug use is through mandatory reporting laws. These laws require some professionals to report suspected prenatal drug abuse.

3. Mandatory Reporting Laws

Mandatory reporting laws are in effect in nearly half of the states in the United States.[131] These laws require certain professionals, such as medical and law enforcement, to report any children whom they believe have been exposed to illegal drugs.[132] Health care professionals in twelve states are required to report alleged prenatal drug abusers.[133]

Because each state has the right to design its own mandatory reporting laws, each state's statute is different. Part of the Virginia statute states that mandatory reporting should occur if "A finding made by an attending physician within seven days of a child's birth that the results of a blood or urine test conducted within 48 hours of the birth of the child indicate the presence of a controlled substance not prescribed for the mother by a physician."[134] The Washington D.C. statute is broader and also requires law enforcement to report. The statute states, "Any licensed health professional or a law enforcement officer…shall report immediately . . . that the law enforcement officer or health professional has reasonable cause to believe that a child is abused as a result of inadequate care, control, or subsistence in the home environment due to drug-related activity."[135] Both of these examples promote the safety of children who are victims of drug abuse. The health care or law enforcement professional has the legal obligation to report any mother who they believe abuses drugs while pregnant.

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575 (1993); P. Hora &, B. Becker, *Judicial Considerations When Sentencing Pregnant Substance Abusers*, 35 THE JUDGES' J. 3-9, 45-53 (1996)

[129]Roberts, *supra* note 111, at 1431 (discussing *United States v. Vaughn*, Crim. No. F 2172-88 B (D.C. Super. Ct. Aug. 23, 1988)).

[130]*Id.*

[131]National Clearinghouse on Child Abuse and Neglect Information, *Child Abuse and Neglect State Statutes Series, Ready Reference Reporting Laws: Drug Exposed Infants, available at* http://nccanch.acf.hhs.gov/index.cfm (last visited Apr. 22, 2007).

[132]*Id.*

[133]Guttmacher Inst., *supra* note 120.

[134]VA. CODE ANN. § 63.2-1509 (B) (2003).

[135]D.C. CODE ANN. § 4-1321.02(d) (2003).

Some states do not allow mandatory reporting to be used for prosecution purposes.[136] For example, California law states that "a report based on risk to a child which relates solely to the inability of the parent to provide the child with regular care due to the parent's substance abuse shall be made only to a county welfare or probation department, and not to a law enforcement agency."[137] Therefore, abuse may only be reported to support agencies other than law enforcement.

Mandatory reporting laws are responsible for many prenatal drug abuse investigations. For example, many of the 141,199 referrals by medical personnel[138] and the 257,974 referrals by criminal justice personnel in 2000[139] were a result of mandatory reporting laws.[140] Obviously, mandatory reporting laws are widely used to refer prenatal drug abusers to law enforcement and child welfare services in order to protect their children and unborn fetuses.

D. Conclusion: Existing Laws Do Not Provide the Best Results Possible

While each avenue of prosecution discussed above is used with the intentions of protecting the children of drug abusers, they may not ultimately produce the best results possible. The next section discusses the negative effects that may come with the current avenues of prosecution used.

IV. POTENTIAL NEGATIVE EFFECTS OF EXISTING LAWS

This section focuses on potential negative effects that may occur as a result of the legal actions taken against prenatal drug abusers. These negative effects may include, but are not limited to, avoidance of prenatal care, constitutional infringements, discrimination, poor prison conditions, and ineffectiveness of punitive measures. This section examines each of these possible negative effects.

A. Avoidance of Prenatal Care

The potential for laws to deter pregnant drug abusers from seeking prenatal care causes great concern for the health of the fetus. Lack of prenatal care can even be more damaging to the fetus than drug exposure.[141] A 2003 study indicated that prenatal care greatly reduced the negative effects of drug use during pregnancy.[142]

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[136]*See, e.g.*, CAL. PENAL CODE § 11165.13 (West 2004); ME. REV. STATE ANN. tit. 22, § 4011-B (West 2005); MINN. STAT. ANN. § 626.5561 (West 2005).

[137]CAL. PENAL CODE § 11165.13.

[138]U.S. DEPT. OF HEALTH & HUMAN SERV., ADMINISTRATION ON CHILDREN, YOUTH, AND FAMILIES, CHILD MALTREATMENT 2000: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (2002).

[139]*Id.*

[140]M. Suzanne Kerney-Quillen, *Fetal Abuse: The Societal Impact of Drug-Exposed Infants and the State's Interest in Preventing Child Abuse and Neglect by Expectant Mothers*, 3 APPALACHIAN J.L. 81 (2004).

[141]C.J. Sovinski, *The Criminalization of Maternal Substance Abuse: A Quick Fix to a Complex Problem*, 25 PEPP. L. REV. 107-139 (1997).

[142]Ayman El-Mohandes et al., *Prenatal Care Reduces the Impact of Illicit Drug Use on Perinatal Outcomes*, 23 J. PERINATOLOGY 354-360 (2003).

Specifically, drug exposed infants who received prenatal care were less likely to be premature, have low birth weight or be small for their gestational age as compared to drug exposed infants who did not get prenatal care.[143] Thus, policies that deter women from seeking prenatal care are potentially harmful for the child.

Observations and surveys have been made to determine if legal actions can lead to avoidance of prenatal care. For example, Poland, Ager and Olsen conducted a study that revealed that about half of the 142 post-birth women they surveyed believed that prenatal substance abuse laws would discourage many women from getting proper prenatal care.[144] In addition, a law criminalizing prenatal substance abuse in South Carolina led to an eighty percent reduction in prenatal drug abusers who sought treatment.[145] Lack of prenatal care could be extremely detrimental to the fetus as well as the mother because of the extreme importance of health care and guidance during pregnancy.[146]

A number of factors may cause drug users to avoid prenatal care. For instance, because existing laws allow prosecution of prenatal drug abusers,[147] a pregnant drug user may be deterred from seeking prenatal care if she thinks that she will be arrested if her doctor finds drugs in her body. The current avenues used to obtain prosecution, such as mandatory reporting laws, may cause a decrease of trust in health care professionals,[148] thus leading to avoidance of prenatal care.[149] A prenatal drug abuser's personal lifestyle also may be the cause for her lack of prenatal care. It is believed that many pregnant drug abusers suffer from "ignorance, poverty, lack of available services, and fear of criminal prosecution which may lead addicted women to conceal their drug use from medical providers and further jeopardize the pregnancy outcome".[150] Her personal ills and ignorance may cause this avoidance if she is not informed of what to do.

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[143]*Id.*

[144]M. L. Poland, J. W. Ager & J. M. Olson, *Barriers to Receiving Adequate Prenatal Care*, 157 AM. J. OBSTETRICS & GYNECOLOGY 297-303 (1987).

[145]*Idaho Senate Passes Bill*, *supra* note 1.

[146]Margaret P. Spencer, *Prosecutorial Immunity: The Response to Prenatal Drug Use*, 25 CONN. L. REV. 407 (1993); *see also* Page McGuire Linden, *Drug Addiction During Pregnancy: A Call for Increased Social Responsibility*, 4 AM. U. J. GENDER & L. 105, 134 (1995) (stating negative effects of substance abuse during pregnancy are improved by providing prenatal care and drug treatment).

[147]Emily Figdor & Lisa Kaeser, *Concerns Mount over Punitive Approaches to Substance Abuse Among Pregnant Women*, 1(5) The Guttmacher Report on Public Policy (1998), *available at* http://www.guttmacher.org/pubs/journals/gr010503.html.

[148]David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN'S L.J. 252 (2001).

[149]Cheryl M. Plambeck, *Divided Loyalties Legal and Bioethical Considerations of Physician Patient Confidentiality and Prenatal Drug Abuse*, 23 J.L. MED. 22 (2002).

[150]U.S. DEP'T OF HEALTH & HUMAN SERV., EFFECTS OF DRUG AND ALCOHOL, *supra* note 15 (citing N. FINKELSTEIN, C. KENNEDY, K. THOMAS & M. KEARNS, GENDER-SPECIFIC SUBSTANCE ABUSE TREATMENT (1997)).

As these examples demonstrate, there are a number of reasons that the existing laws may deter drug users from seeking prenatal care. As a result, the fetus may suffer more from lack of prenatal care than the drug exposure. The next section discusses the possibility of constitutional infringements against prenatal drug abusers as a result of the current legal actions.

B. Constitutional Infringements

The prosecution of women for using drugs while pregnant may violate women's Constitutional rights. Because states are free to develop and expand their own statutes regarding prenatal drug abuse, there is potential for constitutional violation[151] due to a lack of set boundaries on what a law can and cannot include. Statutes can be unconstitutionally expanded in order to gain prosecution against prenatal drug abusers.[152] For example, mandatory reporting laws can potentially violate a woman's confidentiality and privacy rights when health care professionals report possible prenatal drug abusers to law enforcement officials.[153]

The United States Supreme Court, in *Linder v. United States*, decided that drug addicts should receive treatment and not punishment because addiction is an illness.[154] Similarly, in *Robinson v. California*, the court found that criminalizing drug use violates the Eighth and Fourteenth Amendments because drug addiction is an illness.[155] Because each of these cases found addiction to be an illness, punishing an addict would be cruel and unusual punishment. Also, these laws may not have the intended deterrent effect; [156] drug abusers may not have the ability weigh costs and benefits of their actions because of their addictions.[157] These examples reveal that some states are recognizing drug addiction as an illness. Therefore, criminalizing prenatal drug abuse would be considered cruel and unusual, thus making it unconstitutional.

The courts have made attempts to prevent Constitutional infringement. For example, the United States Supreme Court, in *Ferguson v. Charleston*, discussed the legality of testing women for drug use when they go to hospitals.[158] The Court decided that testing for traces of drugs in the urine of pregnant women is protected under the "general standard for searches" in the Fourth Amendment,[159] which states that people have a right to be free from illegal searches or seizures. More

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[151]Louise Marlane Chan, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 209-210 (1993).

[152]*Id.*

[153]Michelle D. Mills, *Fetal Abuse Prosecutions: The Triumph of Reaction Over Reason*, 47 DEPAUL L. REV. 989, 1022 (1998).

[154]Linder v. United States, 268 U.S. 5, 18 (1925).

[155]*See* Robinson v. California, 370 U.S. 660, 666 (1962).

[156]Marcy Tench Stovall, *Looking for a Solution: In re Valerie D. and State Intervention in Prenatal Drug Abus*e, 25 CONN. L. REV. 1265, 1279 (1993).

[157]*Id.*

[158]Ferguson v. Charleston, 532 U.S. 67, 69-70 (2001).

[159]*Id.* at 67.

specifically, the Court stated the "Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applie[d] to [the hospital] policy."[160] Therefore, a woman's Fourth Amendment right is violated if she does not give consent to the urine testing.[161] While drug testing a woman prior to her giving birth would typically be considered a violation to her constitutional right to freedom from illegal searches, it would be considered constitutional to test the baby after birth.[162] This is because a woman's newborn child is not included in the definition of the mother's privacy.[163]

Many of the women who are prosecuted do not have the funds or adequate representation to challenge the constitutionality of their prosecution. However, they do have the right to challenge these laws; thus, they are not fully unprotected. Ultimately it is up to the courts to determine the constitutionality of these laws. Legal actors and medical personnel need to be very careful when deciding how to treat prenatal drug abusers because there is a possibility of Constitutional violations. A woman's right to be free from cruel and unusual punishment, illegal searches, and her right to confidentiality with health care professionals can all be violated by the laws discussed here.

C. Discrimination

In addition to the potential Constitutional violations discussed above, prosecution of women for prenatal drug use has the potential for discrimination. Racial and social discrimination can occur when health care professionals and law enforcement have discretion in choosing whom to test and investigate. Trends show that the majority of women who are subjected intervention by the state are of color and live in poverty.[164] Commentators believe this to be true because legislation "unfairly target[s] minority women as fetal abusers."[165] A study has shown that the probability of an African American woman being reported to law enforcement for prenatal drug use is about ten times greater than a Caucasian woman who is also using drugs.[166] Eighty percent of the women who are prosecuted for "delivering drug-exposed babies" are African American or Latina.[167] Critics have argued that a large number of legislative acts

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[160]*Id.* at 86.

[161]*Id*. at 67.

[162]Ferguson v. Charleston, 308 F.3d 380, 395 (4th Cir. 2002).

[163]*Id*. (finding that a woman has no "reasonable expectation of privacy in her newborn child's bodily fluids").

[164]Roberts, *supra* note 111, at 1432; *see generally* Christine M. Bulger, *In the Best Interests of the Child? Race and Class Discrimination in Prenatal Drug Use Prosecutions*, 19 B.C. THIRD WORLD L.J. 709 (1999).

[165]*Mills*, *supra* note 153, at 1031; *see also* Paltrow, *supra* note 71, at 1023-1029.

[166]Ira J. Chasnoff et al., *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1204 (1990).

[167]Andrew Racine et al., *The Ass'n Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 JAMA 1581, 1585-86 (1993); INST. OF MED., PREVENTING LOW BIRTH WEIGHT SUMMARY (1985) *reprinted in* BARRY ZUCKERMAN, DRUG EXPOSED INFANTS: UNDERSTANDING THE MEDICAL RISK 1, CENTER FOR THE FUTURE OF

target women who are low socioeconomic status and minorities.[168] The disproportionate trends cause concern among critics because testing to reduce prenatal drug use may not be as effective as possible if a certain population is being overlooked.[169] The apparent bias negatively affects both women of the majority and minority groups. Women of minority groups are being unfairly targeted, and women of majority groups are not getting the treatment they need.

A possible cause for the racially and socially disproportionate number of women being tested and arrested for drug use during pregnancy could be a result of the 1986 Anti-Drug Abuse Act. This act established the 100-to-1 rule,[170] which increased the punishment for crack cocaine use 100-to-1 compared to powder cocaine use.[171] The rule gave crack offenders jail or prison sentences that were typically sixty percent longer than those given to powder cocaine offenders.[172] During the time that this act was initiated, Congress believed that the effects of crack cocaine were much worse than powder cocaine; thus, use of crack was punished more harshly.[173] While the powder form of cocaine tends to be used equally by both Caucasians and African Americans, the majority of crack users are African American.[174] Because the minority group (African Americans) is more likely to use the more "serious" crack form of cocaine, they are viewed more negatively, and are more often targeted by law enforcement. In fact, the NAACP found that ninety-seven percent of defendants in crack cocaine cases are African American or Latino.[175] Similarly, women of African American and Latina decent are more likely to be prosecuted for prenatal substance abuse.[176] These statistics indicate some of the reasons why minority women are more likely to be targets of prenatal substance abuse laws.

Women are being treated differently because of race. While women of minority races are being unfairly targeted and prosecuted because of their race, women of

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CHILDREN, DRUG EXPOSED INFANTS 2728 (1991) [hereinafter INST. OF MED.]; SUSAN C. BOYD, MOTHERS AND ILLICIT DRUGS: TRANSCENDING THE MYTHS 75 (1999).

[168]REVA B. SIEGEL, ABORTION AS A SEX EQUALITY RIGHT: ITS BASIS IN FEMINIST THEORY, IN MOTHERS IN LAW: FEMINIST THEORY AND THE REGULATION OF MOTHERHOOD 56 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

[169]*See, e.g.*, Ferguson v. Charleston, 532 U.S. 67, 84 n. 23 (2001) (recognizing "a near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health").

[170]U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS TBL.34 (2001), *available at* http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm.

[171]*Id.*

[172]*Id.*

[173]*Id.* at 90.

[174]*Id.* at 170.

[175]Memorandum from Kweisi Mfume, President & CEO, NAACP, & Hillary O. Shelton, Director, NAACP Washington Bureau, to NAACP Membership (Aug. 7, 2003) (discussing statistics from the Office of National Drug Control Policy), *available at* http://www.naacp.org/work/washington_bureau/CocaineSent080703.html (last visited Mar. 11, 2004).

[176]Racine et al., *supra* note 167; INST. OF MED., *supra* note 167; BOYD, *supra* note 167.

majority races are not receiving the help that they need because they are not being targeted as frequently. Ultimately, this could lead to a violation of equal protection because the laws are being applied differently to two groups based on race.

D. Prison Conditions

Another concern raised by prenatal drug use laws concerns the conditions of the jails and prisons that violators and their fetuses may experience. Prisons are typically designed for male inmates, perhaps due to the fact that women only makeup about ten percent of the prison population.[177] Even though male and female prisoners are generally held in separate facilities, prison policies, programs, and procedures often neglect the health needs of female inmates.[178] This oversight can be especially harmful to the health of pregnant inmates. Incarcerated pregnant women have claimed that they do not "receive regular pelvic exams or sonograms . . . [or] education about prenatal care and nutrition."[179] Prisons often do not provide female prisoners (and the fetuses they may be carrying) with proper nutrition, physical activity, and inadequate healthcare.[180] To further complicate the situation, prisoners can still access drugs while incarcerated;[181] therefore, without intense supervision pregnant abusers may continue to abuse drugs.

On occasion, women may even have to give birth while incarcerated. In fact, roughly 1300 infants are born while their mothers are under prison supervision.[182] After giving birth, the infant does not typically have the opportunity to bond with its mother during the first important months of its life[183] because the mother is usually only given between twenty-four to seventy-two hours after delivery to spend with her child.[184] After delivery, the child is often sent to live with a foster family or a family member. Thus, the mother cannot spend time with her child even if she wishes to do so.[185]

The infant is also denied health benefits. For instance, an infant cannot breastfeed if his mother is incarcerated.[186] Assuming the mother is not actively using drugs,

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[177]Women's Health, *Understanding Prison Health Care*, *available at* http://movement building.org/prisonhealth/womens.html (2002).

[178]*Id.*

[179]*Id.*

[180]J. W. Steverson, *Stopping Fetal Abuse With No-Pregnancy and Drug Treatment Probation Conditions*, 34 SANTA CLARA L. REV., 295-359 (1994); Barrie L. Becker, *Order in the Court: Challenging Judges Who Incarcerate Pregnant, Substance-Dependant Defendants to Protect Fetal Health*, 19 HASTINGS CONST. L.Q. 235-259 (1991)

[181]*Id.*

[182]Amnesty International, *"Not Part of My Sentence": Violations of the Human Rights of Women in Custody* 22 (1999); *see* CATHERINE CONLY, U.S. DEP'T OF JUSTICE, THE WOMEN'S PRISON ASSOCIATION: SUPPORTING WOMEN OFFENDERS AND THEIR FAMILIES 3 (1999).

[183]R. G. Madden, *State Actions to Control Fetal Abuse: Ramifications for Child Welfare Practice*, 72 CHILD WELFARE 129-140 (1993).

[184]Women's Health, *supra* note 177.

[185]*Id.*

[186]*Id.*

breast milk would be superior to the formula he would receive in foster care. While some programs for pregnant inmates do exist, there are not enough of them in place to help all women in need.[187] All of these negative aspects of incarceration illustrate that the confinement of prenatal drug abusers is not necessarily in the best interest of the mother or the child.

E. Ineffectiveness of Current Legal Actions

While punitive measures are designed to deter future offenders, only assigning punishment to offenders may not necessarily solve the prenatal drug abuse issue. For example, while civil punishments attempt to protect children by removing them from the mother's care,[188] they do not attempt to resolve the problem of prenatal drug abuse.[189] According to the United States Supreme Court and health care officials, drug addiction requires treatment rather than punishment because it is an illness. [190] The Supreme Court determined that treatment should be given to drug addicts to help them with their illness in the case of *Linder v. United States*.[191] Because a drug addict may not have the rationality to weigh costs and benefits, there is little chance that punishment will have a deterrent effect.[192] In regards to Mandatory Reporting Laws, critics say "[W]hile we all feel sympathy for infants born addicted to drugs and damaged from birth, punishing the mother for the prenatal conduct is not going to help the child nor improve the mother's health care."[193] Solely punishing an offender or taking her children away from her does not teach her new or better life skills. Therefore, her behavior is not likely to improve as a result of punishment-only policies.

Recidivism is likely for drug abusers who do not receive treatment. A study showed that seventy-five percent of prisoners who were not involved in a drug treatment program while incarcerated returned to prison within three years, while only twenty-seven percent of inmates who were involved in a program returned to prison.[194] Without proper help and guidance, the woman may continue with her previous behavior and repeat the cycle of producing drug-exposed infants. Helping women with their addiction problems is needed to produce more positive futures for the mothers and their children.[195]

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[187] *Id.*

[188] PALTROW, COHEN & CAREY, *supra* note 90, at 1-2; Linden, *supra* note 146, at 121-134.

[189] Linden, *supra* note 146, at 120.

[190] PALTROW, COHEN & CAREY, *supra* note 90, at 6; *see, e.g.*, Linder v. United States, 268 U.S. 5, 18 (1925); Robinson v. California, 370 U.S. 660, 666-667 (1962).

[191] *Linder*, 268 U.S. at 18.

[192] Stovall, *supra* note 156, at 1279.

[193] SAGATUN & EDWARDS, *supra* note 17, at 243.

[194] American Psychological Association Online, *Prison Substance Abuse Treatment with Aftercare Reduces Recidivism* (2007), *available at* http://www.psychologymatter.org/prison_drugabuse.html (last visited Apr. 22, 2007).

[195] *See generally* Monica K. Miller, *Avoiding Policies that Unnecessarily Harm Women, Children and Society: Promoting Comprehensive Justice*, 2 RESTORATIVE DIRECTIONS J. 75 (2006).

As these negative side effects demonstrate, punishment focused approaches may cause further harm to both the child and the mother. They are not likely to be successful at deterring a woman or preventing the birth of more drug-exposed babies.

F. Conclusion

While legal actors have good intentions, the actions they often take may not produce the most positive results possible. Avoidance of prenatal care is of great concern due to the negative health effects that inadequate prenatal care can have on the fetus. Constitutional violations are highly possible, as a woman's right to be free from illegal searches and cruel and unusual punishment may be violated. Women of minority groups are unfairly targeted and prosecuted because of their race, while women of majority groups are being overlooked and, therefore, are not getting help with their addiction problems. Incarcerated pregnant abusers experience many negative conditions while confined, such as poor nutrition, inadequate health care, and poor living conditions. These punitive methods may also be ineffective at deterring mothers from using drugs and giving birth to future drug exposed children. The next section describes a non-punitive approach, which is more likely to produce positive outcomes.

V. A BETTER APPROACH

Because there are many negative results associated with punitive measures, legal actors should investigate alternative, non-punitive means of handling prenatal substance abuse. Approaches based on the principles of therapeutic jurisprudence are particularly promising. This section innumerates some therapeutic jurisprudence principles, describes some of the non-punitive programs that have been initiated, discusses the prevalence of treatment programs, and explains how therapeutic approaches promote the health of the fetus, the mother and society.

A. Therapeutic Jurisprudence and Drug Use During Pregnancy

Therapeutic jurisprudence suggests that law is a social entity that can affect behavior and wellbeing. The idea behind therapeutic jurisprudence is that legal actors should favor actions that will lead to the psychological and physical wellbeing of all of the individuals involved.[196] In order to determine the best possible approach for prenatal drug abuse, legal actors must look at the unique circumstances surrounding each individual case. Social science research[197] should be consulted to establish approaches that would produce the best possible outcome for each individual case and circumstance. Utilizing the framework of therapeutic jurisprudence can potentially provide a more positive future for prenatal substance abusers and their children.[198]

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[196]D. B. WEXLER, AN INTRODUCTION TO THERAPEUTIC JURISPRUDENCE (1990) [hereinafter WEXLER 1990]; D. B. WEXLER, & B. J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996) [hereinafter WEXLER & WINICK 1996].

[197]B. J. Winick, D. B. Wexler & E. A. Dauer, *Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education*, 5 PSYCHOL. PUB. POL'Y & L., 795-799 (1999).

[198]Linden, *supra* note 146, at 120.

According to the National Institute on Drug Abuse, "Through treatment tailored to individual needs, people with drug addiction can recover and lead productive lives."[199] As opposed to punitive approaches, these alternative approaches that promote the psychological and physical wellbeing of all individuals involved[200] may reduce prenatal drug abuse. The 2004 Senate report states that female drug abusers and their children "require distinct, family-oriented treatment services that address the injuries of sexual and physical violence, major depression and other underlying issues."[201] Therefore, treatment programs should be developed specifically for prenatal drug abusers and their children.

An example of a drug treatment model that uses the ideas of therapeutic jurisprudence is a program that uses court monitoring, drug treatment, and criminal procedures.[202] The first aspect, court monitoring, requires all legal actors including "the judge, prosecution, defense counsel, drug treatment providers, and probation representative" to monitor the offender's progress in her treatment program.[203] When all of these legal actors come together for the common goal of therapy, the court becomes more "therapeutic while remaining a legal institution."[204] The second aspect is the drug treatment program. A drug treatment program may include "group counseling, individual counseling, acupuncture treatments, and relapse prevention."[205] Finally, there are three "court processes and rules" that should be followed by the court to help an offender.[206] The first is the "time between arrest and starting the program."[207] This refers to the fact that an offender should be brought before a judge as soon as possible so her treatment can begin quickly. [208] The second process is the "drug charge."[209] This process is important because the type of charge the offender receives determines if the individual is eligible for treatment or not.[210] The third process is "time in program."[211] This refers to the length of time an

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[199]National Institute on Drug Abuse, *Treatment Approaches for Drug Addiction* (2006), *available at* http://www.nida.nih.gov/Infofacts/TreatMeth.html [hereinafter NIDA].

[200]*See* WEXLER 1990, *supra* note 196; WEXLER & WINICK 1996, *supra* note 196.

[201]S. Rep. 2004, *supra* note 56.

[202]Scott Senjo & Leslie A. Leip, *Testing Therapeutic Jurisprudence Theory: An Empirical Assessment of the Drug Court Process*, 3 W. CRIMINOLOGY REV. 1 (2001), *available at*: http://wcr.sonoma.edu/v3n1/senjo.html.

[203]*Id.*

[204]P. F. Hora, W.G. Schma & J. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439-527 (1999).

[205]*Id.*

[206]*Id.*

[207]*Id.*

[208]*Id.*

[209]*Id.*

[210]*Id.*

[211]*Id.*

offender must stay in a particular drug treatment program to complete her treatment.[212] A program organized like this supports the rehabilitation and treatment of a drug abuser rather than only punishing her.

A program framework that incorporates the ideas of therapeutic jurisprudence can produce positive results. The following subsection describes a variety of general drug treatment programs.

B. Treatment Programs

The therapeutic jurisprudence principle of finding a solution that will result in the most positive outcome for all people involved can be applied to drug treatment programs. Drug treatment programs help prenatal drug abusers with their addictions and other troubles. This section examines treatment models, some of the current programs utilized, and their results.

According to Karol L. Kumpfer, Ph. D., there are four major types of treatment models[213] that legal actors should consider when assigning prenatal drug abusers to treatment programs: (1) residential, therapeutic communities, (2) residential, drug treatment centers, (3) outpatient-intensive, and (4) outpatient.[214]

The most severe drug users are referred to "Residential, Therapeutic Communities."[215] In this type of program, the user is taken out of her environment and put into a program facility.[216] She may stay in the program for as long as a year, during which time she is given rewards and punishments for her actions.[217] While this type of program is appropriate for a prenatal substance abuser who needs intense treatment, this program may not be appropriate for a woman who has other children at home because these institutions do not typically allow children to stay at the treatment center.[218]

The second type of program is "Residential, Drug Treatment Centers."[219] These programs are very similar to "Therapeutic Communities," but usually only last tenty-eight days or less.[220] The same kinds of activities typically take place in this type of program as in the first. Again, this type of program is not necessarily the best for prenatal drug abusers who have responsibilities at home.

The next type of program is "Outpatient- Intensive." These are typically reserved for those patients who cannot live at a center for one reason or another.[221] These programs are convenient for women who have to care for their children at home

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[212] *Id.*

[213] Karol L. Kumpfer, *Treatment Programs for Drug-Abusing Women*, 1 THE FUTURE OF CHILDREN 50, 51 (1991).

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

because children are often not allowed to stay at treatment facilities.[222] The negative side to these programs is that they are only available to patients who live near a facility.[223] Although the woman would spend a great deal of time at the center, she is allowed to live in her own home. While this program is potentially the best option for prenatal drug abusers with other children at home, it is not the best option for serve drug abusers.

The most diverse types of programs are "Outpatient" programs.[224] These programs are typically the least expensive, are geared toward users with the least severe problems, and are the most widely used.[225] Programs include drop-in centers, community-based mental health treatment programs, self-help support groups, clergy-based programs, and private counseling programs.[226] In 1987, the *National Drug and Alcoholism Treatment Utilization Survey* found that eighty-six percent of the 263,000 people in drug/alcohol treatment programs were involved in outpatient programs.[227] These types of programs are convenient for prenatal drug abusers who have other responsibilities because the time commitment is not as great as the other programs.

An example of a drug treatment program specifically designed to help prenatal drug abusers is the state of California's Department of Alcohol and Drug Program's (ADP).[228] The state's Office of Perinatal Substance Abuse (OPSA) coordinates nearly 300 treatment programs, including some specifically designed for pregnant drug users.[229] Pregnant women and women with children under eighteen are eligible for the program.[230] The programs provide drug treatment and services,[231] which may include "self-help recovery groups; pre-recovery and treatment support groups; sources for housing, food, and legal aid; case management; children's services; medical services; and Temporary Assistance to Needy Families (TANF)."[232]

As these examples demonstrate, there are a wide variety of treatment programs available. Therefore, at least one should typically be effective for each prenatal drug

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[222]*Id.*

[223]*Id.*

[224]*Id.*

[225]*Id.*

[226]*Id.*

[227]Inst. of Med., Comm. for the Substance Abuse Coverage Study, Div. of Health Care Services, *A Study of the Evolution, Effectiveness, and Financing of Public and Private Drug Treatment*, 1 TREATING DRUG PROBLEMS 209 (1990).

[228]Cal. Dep't of Alcohol & Drug Programs, Fact Sheet: Perinatal Programs: Alcohol and Drug Services, *available at* http://www.adp.cahwnet.gov/factsheets/Perinatal_Programs_Alcohol_and_Drugs_Services.pdf (last visited Apr. 22, 2007).

[229]*Id.*

[230]*See* CAL. DEP'T OF ALCOHOL & DRUG PROGRAMS, PERINATAL SERVICES NETWORK GUIDELINES 2004, *available at* http://www.adp.cahwnet.gov/perinatal/perinatal.shtml (last visited June 4, 2007).

[231]*Id.* at 6-7.

[232]*Id.* at 2-3.

abuser who is motivated to stop using drugs. If assigned to the appropriate type of treatment program, a woman may have a chance at overcoming her addiction; thus, becoming a better mother.

C. Prevalence of Treatment Programs

Some states have created programs to help prenatal drug abusers address their addictions and other social troubles. Nineteen states have created treatment programs specifically for pregnant abusers.[233] Also, seven states give pregnant drug abusers priority access to regular drug treatment programs.[234] However, fewer than eleven percent of the 675,000 prenatal drug abusers who need drug treatment actually receive help.[235] Additional programs for prenatal drug abusers should be established to help more of the women who are in need of help.

While drug treatment programs benefit the fetus, the abuser, and society, there are not enough programs established to help every person in need. Of the 22.5 million substance abusers who needed treatment in 2004, only 3.8 million actually received help.[236] Another report found that the number of drug abusers in need of treatment who do not receive help is estimated between thirteen to sixteen million.[237] Only nineteen states have drug treatment programs that are designed exclusively for prenatal drug abusers,[238] and only twenty-one percent of the facilities in those states have programs designed specifically for prenatal abusers.[239] Members of the Departments of Labor, Health and Human Services, and related agencies believe that more program availability needs to be established for prenatal drug abusers.[240]

In addition to the insufficient number of drug treatment programs available to prenatal drug abusers, improvements need to be made to existing programs. According to John Lovell of the California Narcotics Officers Association, improvements can be made in programs if post-treatment drug testing, probation, and the option to spend only partial time in jail were available.[241] Specific improvements need to be made to assist pregnant drug abusers. Prenatal care is offered in only about six percent of treatment programs, and childcare is offered in only about twelve percent of programs.[242] Improvements and advancements are needed to make programs even more effective.[243]

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[233]Guttmacher Inst., *supra* note 120.

[234]*Id.*

[235]Racine et al., *supra* note 167

[236]NIDA, *supra* note 199.

[237]S. Rep. 2004, *supra* note 56.

[238]Guttmacher Inst., *supra* note 120.

[239]S. Rep. 2004, *supra* note 56.

[240]*Id.*

[241]Find Law, *US Study: Drug Treatment Much Cheaper Alternative to Prison Time* (2006), *available at* http://news.findlaw.com/ap/o/51/04-05-2006/b75900174498ddb1.html (2006).

[242]S. Rep. 2004, *supra* note 56.

[243]Guttmacher Inst., *supra* note 120.

Additional programs need to be initialized so that more women can get the help that is necessary for their recovery. Program designers need to make improvements to existing programs to ensure the best treatment possible. After successful completion of a drug treatment program, the woman, her fetus and society can reap the benefits of successful treatment. While treatment programs specific to prenatal substance abuse are not common, existing programs have produced some positive outcomes. The benefits of treatments programs specific to prenatal substance abuse are discussed in the following subsections.

D. Benefits of Therapy for the Child

Drug treatment programs are more likely than punitive-only measures to produce positive outcomes for children. Some treatment programs have decreased the number of addicted infants, the amount of time children spend in foster care, and the amount of time children spend in hospital care.[244] Seventy-one percent of women who are involved in prenatal treatment programs give birth to babies who are born without drugs or alcohol in their system.[245] Also, therapeutic programs may result in "fewer school dropouts, less truancy, and reduced juvenile delinquency" later in the lives of the children born to prenatal drug abusers[246] because the mother is taught skills in treatment to help her be a better parent.

Therapeutic programs also decrease the child's time spent in foster care and welfare programs, and increase time spent with his/her mother.[247] After learning life skills and parenting skills, the mother can be a better parent to her child. Also, the child will have the opportunity to be raised by his birth mother rather than be raised in foster homes, assuming that the mother has made positive changes and can adequately provide for her child.

E. Benefits of Therapy for the Mother

The drug-abusing mother can also benefit from a therapeutic approach by receiving the help that she needs to take responsibility for her life and her baby. If treatment was the typical solution for prenatal drug abuse rather than confinement, addicts may be more likely to obtain proper prenatal care[248] because they will not have the fear of going to prison.

In addition, the mother's chance of obtaining employment increases after she receives treatment.[249] One study indicated that drug abusers who were involved in therapeutic communities have about a fifty percent increase in the possibility of finding employment after completing treatment.[250] Also, individuals who were involved in therapeutic communities have a one to two-thirds decrease in the

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[244]Spencer, *supra* note 146, at 406

[245]Cal. Dep't of Alcohol & Drug Programs, Fact Sheet, *supra* note 228.

[246]*Id.* at 2.

[247]CAL. DEP'T OF ALCOHOL & DRUG PROGRAMS, PERINATAL SERVICES NETWORK GUIDELINES, *supra* note 230.

[248]Plambeck, *supra* note 149, at 22

[249]S. Rep. 2004, *supra* note 56.

[250]Kumpfer, *supra* note 213.

likelihood that they will commit crime after completing treatment.[251] Once she learns healthier life skills through a therapeutic program, the woman can establish a better life for herself and her child.

A recent study found that alcohol and illicit drug use by a mother is reduced by about two-thirds after involvement in treatment programs.[252] She is likely to improve mentally and physically as well.[253] An evaluation of both the Residential Women and Children program and the Pregnant and Postpartum Women program confirmed that women involved in treatment programs decreased their drug use, criminal activity, and alcohol use.[254] Return to the old way of life may be prevented if the mother is taught how to address her addiction and how to properly care for her child through a residential treatment program.[255]

F. Benefits of Therapy for Society

Society can benefit from the use of a therapeutic approach in a number of ways. Saving taxpayer's money is one such benefit because the amount of money needed from society to care for prenatal drug abusers and their children will be reduced. Money would be better spent on treating the women rather than incarcerating her.[256] The cost to society to care for drug-exposed infants has actually been reduced as a result of drug court programs.[257] After 300 babies were born drug-free to women who were involved in drug court programs, the Department of Justice estimated in its Office of Justice Program that each child would have cost about $250,000 to care for.[258]

A therapeutic approach can also lead to a reduction in the necessities that come with punitive measures such as parole, probation, and confinement. A study conducted by UCLA's Semel Institute for Neuroscience Human Behavior discovered that for every dollar spent by tax payers, $2.50 can be saved if treatment were given rather than incarceration.[259] Therefore, about $250 million dollars would be saved per year.[260] Other reports also indicate monetary savings resulting from treatment programs. The reduction in drug use, crime, homelessness, and behaviors that

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[251]*Id.*

[252]U.S. DEP'T OF HEALTH & HUMAN SERV., EFFECTS OF DRUG AND ALCOHOL, *supra* note 15 (citing NAT'L WOMEN'S RESOURCE CTR. BRIEFING DOCUMENT, A REASON FOR HOPE: SUBSTANCE ABUSE TREATMENT DURING PREGNANCY HAS LONG TERM BENEFITS. (National Women's Resource Center, Alexandria, VA. 1997)).

[253]S. Rep. 2004, *supra* note 56.

[254]*Id.*

[255]SAGATUN & EDWARDS, *supra* note 17, at 242

[256]Spencer, *supra* note 146, at 406.

[257]U.S. DEP'T OF JUSTICE, *supra* note 61; *see infra* Part I (describing drugs courts).

[258]U.S. DEP'T OF JUSTICE, *supra* note 61.

[259]Find Law, *supra* note 241.

[260]*Id.*

commonly transmit HIV can save society seven dollars for every dollar spent on drug treatment programs.[261]

With an expansion of therapeutic program use, society can save even more money. M. Douglas Anglin, Co-author of Proposition 36, which allocates funding to drug treatment programs, said that "with increased system accountability measures and improved offender management . . . they [savings] could rise even higher."[262] A therapeutic approach does not only help the mother and fetus; it saves society money.

The social ills that drug abuse can spread to society are also reduced when therapy is utilized. The spread of drug related diseases, homelessness, and crime rates can all be reduced if therapy was utilized to help more drug abusers end their addiction problems.

VI. CONCLUSION

Prenatal drug abuse is not something that should be overlooked by legal actors. Prenatal drug abuse negatively affects the fetus, mother, and society.[263] The courts have expressed concern for prenatal drug abuse, as demonstrated by past cases and the various criminal statutes that have been established by some states.[264] The establishment of various avenues of prosecution, such as child welfare and abuse laws, protective incarceration, and mandatory reporting laws, show the court's willingness to protect the fetus and children of drug abusers.[265] While civil measures are not designed to punish the mother (they are meant to protect the child), they are essentially punitive because they take the child away from the mother. Such punitive measures do not necessarily produce the best possible outcomes. Avoidance of prenatal care, constitutional infringements, discrimination, negative prison conditions, and ineffectiveness of current legal actions are just some of the possible negative effects of the current legal measures.[266] An alternative approach should be considered to avoid such negative outcomes and produce more positive outcomes for mothers, children, and society.

Through an approach based on the principles of therapeutic jurisprudence, prenatal substance abusers can get the therapy and help that they need to recover from their addiction and build skills to lead a better life.[267] There are four treatment models that should be considered for prenatal substance abusers: (1) residential, therapeutic communities; (2) residential, drug treatment centers; (3) outpatient-intensive; and (4) outpatient programs.[268]

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[261] *Id.*

[262] Find Law, *supra* note 241.

[263] *See infra* Part II.

[264] *See infra* Part III.A-B.

[265] *See infra* Part III.C.

[266] *See infra* Part IV.

[267] *See infra* Part V.A.

[268] *See infra* Part V.B.

Using therapy to address prenatal drug abuse has a number of benefits.[269] The fetus benefits from treatment programs when his mother stops abusing drugs and is able to provide him with a more positive home life. The mother benefits from treatment programs by obtaining the life skills required for her to lead a better life. Society benefits by reducing the amount of money taxpayers must contribute to the care of drug abusers and their children. While drug treatment programs produce positive results when assigned to prenatal drug abusers, there are not enough programs currently in place to support the large number of women in need;[270] therefore, more programs need to be established.

Treatment programs will not work for every woman, as some may not desire to change their behavior. However, those who are willing to change their behavior ought to have the chance to do so through drug treatment programs. Through the increased utilization of treatment programs, all individuals involved can experience more positive outcomes.

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[269]*See infra* Part V.D-F.

[270]*See infra* Part V.C.