

THE CONSTITUTIONALITY OF PUNISHING PREGNANT SUBSTANCE ABUSERS UNDER DRUG TRAFFICKING LAWS: THE CRIMINALIZATION OF A BODILY FUNCTION

Despite a recent government survey indicating a decline in drug use, cocaine abuse, especially in the form of crack, remains a national epidemic,¹ and a growing number of women are among its victims.² Yet government and media concern has recently focused

¹ According to the 1990 National Household Survey on Drug Abuse ("Survey"), "current" cocaine use has dropped 42% since 1988. HHS News Press Release, U. S. Dep't of Health and Human Serv. (Dec. 19, 1990). "Current" use is defined by the survey as "use at least once in the past month." Survey results recorded 2.9 million current cocaine users in 1988, as compared with only 1.6 million in 1990. *Id.* Although the number of *current users* has declined, the number of people who use cocaine daily, *i.e. abusers*, rose from 292,000 in 1988 to 336,000 in 1990. According to the survey, crack use has remained stable. *Id.*

The National Household Survey, conducted by the National Institute on Drug Abuse ("NIDA"), sampled 9,259 people aged twelve and over. People who are homeless, or who live in hospitals, prisons, nursing homes, dormitories or military bases were excluded from the survey. Some officials criticized the Survey as misleading, noting that drug use has declined among middle and upper class individuals, but remains an "intractable epidemic in poverty-ridden inner cities and . . . the number of hard-core cocaine users is increasing." *Some Battles Won in Drug War; Hard-Core Use Still on the Rise*, *Newsday*, City Edition, Dec. 20, 1990 at 7. Indeed, NIDA's chief statistician for the survey stated that the reported decline among cocaine users was statistically insignificant, because the estimate was derived from only 63 out of 9,259 responses. *U.S. Survey Shows Sharp Drop in Illegal Drug Use*, *Wash. Post*, Dec. 20, 1990, at A1. "It's a good chance it's just random error in the sample," the statistician said. *Id.*

In addition to the government's survey and media response, medical commentators also report that cocaine use remains an epidemic. *See, e.g., Hannan & Adler, Crack abuse: Do you know enough about it?*, 88 *POSTGRADUATE MED.* 141, 141 (1990). Because cocaine is an illicit drug and use is likely to be under-reported, it is difficult to estimate accurately the prevalence of cocaine use today. H. SHAFFER & S. JONES, *QUITTING COCAINE* 21 (1989), at 19-20. One commentator has estimated that in the United States, approximately 30 million people have tried cocaine, and about two million people are compulsive cocaine users. Digregorio, *Cocaine Update: Abuse and Therapy*, 41 *CLINICAL PHARMACOLOGY* 247, 247 (1990). Crack cocaine is particularly prevalent. *Id.* Cocaine in the intranasal form is hydrochloride salt. "Crack" is produced by adding an alkaline, such as sodium bicarbonate, to the hydrochloride. The mixture is then cooked in water. Small pieces separate from the water, forming "rocks" which are then smoked either separately or mixed in tobacco. Hannan & Adler, *supra*, at 141. Crack's prevalence stems from its intense "high," its convenience, and its low price (as low as one dollar per dose). *Id.*; *see also* Gawin, *Cocaine Abuse and Addiction*, 29 *J. FAM. PRAC.* 193, 193-94 (1989).

² NIDA figures estimate that 10% of pregnant women have used cocaine. *Pregnant Drug Abusers Find Hope in Program*, *N. Y. Times*, Dec. 17, 1990, at B3, col. 1. New York City's Health Commissioner states that "[t]he drug epidemic, particularly the crack cocaine epidemic, has hit New York City's women and their babies hard." *Id.* Pregnant women have

on the most vulnerable of cocaine's victims—those drug-exposed infants born to cocaine-addicted mothers.³ Treatment programs for pregnant addicts are almost non-existent,⁴ and the number of drug-exposed infants born to addicted mothers has reached frightening numbers.⁵ This escalation has prompted states to take punitive action against pregnant substance abusers in order to "protect" their unborn children.

In July, 1989, Jennifer Johnson, a crack cocaine addict, was convicted of delivering cocaine to a minor.⁶ The minor was Johnson's newborn daughter, and the drug was "delivered" through Johnson's umbilical cord.⁷ The conviction is noteworthy as the first prosecutorial success in a string of failed attempts to make pregnant addicts criminally responsible for harm to their unborn children.⁸ Prior to *State v. Johnson*, prosecutors had typically attempted to hold

traditionally been denied access to treatment facilities, although some specific programs are currently being established. *Id.*; see also Fink, *Effects of Crack and Cocaine Upon Infants: A Brief Review of the Literature*, 10 CHILDRENS LEGAL RIGHTS J. 2, 2 (1989) (citing a National Association for Perinatal Addiction Research and Education (NAPARE) survey showing that 11% of women use drugs during pregnancy).

³ As many as 375,000 infants annually could be affected. N. Y. Times, Dec. 17, 1990, at B3, col. 1; Fink, *supra* note 2, at 2-3.

⁴ *Drug Use in Pregnancy: New Issue for the Courts*, N.Y. Times, Feb. 5, 1990, at A14, cols. 1-2 [hereinafter *Drug Use in Pregnancy*]. Even where treatment centers exist, pregnant women are often denied access because of their pregnancy. McNulty, *Combating Pregnancy Discrimination in Access to Substance Abuse Treatment for Low-Income Women*, CLEARINGHOUSE REV., May 1989, at 21. McNulty states that "[m]ost drug treatment programs categorically do not admit pregnant addicts, because clinics lack obstetrical expertise, because a pregnant addict is considered 'high-risk' and drains away a disproportionate share of treatment resources, or because they fear obstetrical malpractice suits." *Id.* at 22. Another commentator refers to the absence of treatment facilities as a "serious public health problem." K. Moss, G. Guerrero, K. Kolbert, *Pregnant Addicts and Alcoholics: Legislative Proposals and Policy Considerations for State Legislators* 8 (1990) (unpublished memorandum on file at the Boston College Law Review).

⁵ It is estimated that 375,000 newborns are affected by maternal substance abuse. N. Y. Times, Dec. 17, 1990, at 3, col. 1. One survey of New York City drug treatment programs revealed that 87% did not accept pregnant crack addicts on Medicaid. Moss Memorandum, *supra* note 4.

⁶ Information about the *Johnson* case comes from the following sources: Trial Transcripts, *State v. Johnson*, No. 89-890-CFA, (Seminole County, Fla. 1989); *Newborn Drug Conviction a 'Drastic' First*, L.A. Times, July 31, 1989, at 1, col.1 [hereinafter *Newborn Drug Conviction*]; *Do Pregnant Women Lose Legal Rights?*, 2 CONG. Q. EDITORIAL RES. REP. 414, 419 (July 28, 1989) [hereinafter *Pregnant Women*]. The *Johnson* case is presently on appeal to the Florida District Court of Appeals. For a discussion of appellant's arguments on appeal, see generally Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L. J. 278 (1990) (citing Appellant's Initial Brief, *Jennifer Johnson v. State*, No. 89-1765 (Fla. Dist. Ct. App. brief filed Dec. 28, 1989)).

⁷ *Pregnant Women*, *supra* note 6, at 419.

⁸ See *id.*

pregnant substance abusers liable for fetal harm under statutes never intended to apply to fetuses, such as child abuse or involuntary manslaughter statutes. These attempts have been largely unsuccessful.⁹ Thus, the *Johnson* case is unique because it marks the first time a prosecutor has used a drug trafficking statute successfully against a woman who used drugs during pregnancy.¹⁰ This case provides prosecutors with the only successful strategy to date for holding pregnant women criminally responsible for harm to their unborn children.¹¹ Since the *Johnson* conviction, at least four other states have prosecuted pregnant substance abusers for umbilical cord drug "delivery" to their fetuses.¹²

⁹ *Id.*; see also *Drug Use in Pregnancy*, *supra* note 4, at A14, cols. 1-2. *In re Ruiz* is one of the few cases to hold that a viable fetus is a "child" under the state's child abuse statute, although the court did so in the context of removal proceedings. 27 Ohio Misc. 31, 35, 500 N.E.2d 935, 939 (1986). Courts are increasingly willing to find that prenatal substance abuse is grounds for removal proceedings. See, e.g., *In re Noah M.*, 212 Cal. App. 3d 30, 260 Cal. Rptr. 309, 314 (court upheld removal order for drug-exposed infant); *Department of Social Servs. v. Felicia B.*, 144 Misc. 2d 169, 171, 543 N.Y.S.2d 637, 638 (Fam. Ct. 1989) (newborn with positive cocaine toxicology report sufficient for finding of neglect); *In re Danielle Smith*, 128 Misc. 2d 976, 980, 492 N.Y.S.2d 637, 638 (Fam. Ct. 1989) (court held an unborn child is a "person" for purposes of the state's child neglect statute).

One of the earliest and most publicized attempts to criminalize a pregnant woman's behavior was *People v. Stewart*, No. M508197, slip op. (Cal. Mun. Ct. Feb. 23, 1987). In October 1986, after her baby was born with severe brain damage, Ms. Stewart was charged with violating California's child neglect statute. The state argued that Stewart failed to provide proper medical care for her baby by ignoring her doctor's advice not to take drugs and to discontinue sexual intercourse during her pregnancy, and for failing to seek prompt medical attention when she noticed problems during her pregnancy. See Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357, 358 (1989). In addition to drug trafficking charges, Jennifer Johnson was also charged with child abuse. Trial Transcripts at 7, *Johnson*, No. 89-890-CFA. Judge Eaton found Ms. Johnson not guilty of child abuse. Transcript of Motion for Rehearing and Sentencing, *Johnson*, No. 89-890-CFA. In Illinois, a prosecutor failed to win a manslaughter indictment against a woman for the alleged drug-related death of her newborn daughter. *Pregnant Women*, *supra* note 6, at 419.

¹⁰ *Newborn Drug Conviction*, *supra* note 6, at 1, col. 1; *Pregnant Women*, *supra* note 6, at 419.

¹¹ *Pregnant Women*, *supra* note 6, at 419. The *Johnson* case presents two conceptually different problems. On the one hand, the prosecution's argument focused on umbilical cord "delivery" immediately following birth. Yet the harmful conduct (smoking crack cocaine), and most of the "delivery," occurred before birth. This note concentrates on the maternal delivery prior to birth, viewing the prosecution's characterization of "delivery" as a fiction created to avoid the usual fetal rights controversy. See *infra* notes 219-28 and accompanying text for a discussion of umbilical cord delivery as a criminal "act."

¹² *Drug Use in Pregnancy*, *supra* note 4, at A14, cols. 1-2. For example, in Massachusetts, Josephine Pelligrini was indicted for unlawful (umbilical cord) delivery of cocaine to a minor. *Mother charged with Exposing Fetus to Cocaine*, Boston Globe, Aug. 22, 1989, Metro sec. at 1, col. 1. On October 15, 1990, the Superior Court for Plymouth County dismissed the charges, citing Ms. Pelligrini's constitutional right to privacy. *Commonwealth v. Pelligrini*, No. 87970,

Some commentators argue that efforts to criminalize maternal conduct are dangerous attempts to create "fetal rights" in conflict with a woman's constitutional right to privacy.¹³ Others advocate providing legal protection for the unborn.¹⁴ The *Johnson* approach, which would essentially make all pregnant substance abusers drug trafficking felons, raises issues distinct from the right to privacy arguments used by commentators to analyze previous "fetal rights" cases.¹⁵ By labeling an involuntary biological process (transfer of maternal blood through the placenta) a criminal "act," the *Johnson* case raises the question of what kind of "act" is sufficient to impose criminal responsibility.¹⁶

The United States Supreme Court addressed this substantive law issue in the context of addiction in *Robinson v. California*¹⁷ and *Powell v. Texas*.¹⁸ The Supreme Court in *Robinson* held that punish-

slip op. at 329 (Sup. Ct. Plymouth County, Mass., Oct. 15, 1990), cited in Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1407 n. 58 (1990). In Michigan, a state appeals court overturned a lower court decision which would have allowed prosecutors to try Kimberly Hardy for umbilical cord delivery of a controlled substance. *Fetal Drug-Delivery Case is Overturned*, Wall Street J., Apr. 3, 1991, at B6, col. 1. The court stated that the drug trafficking statute did not apply to pregnant drug users. *Id.* The prosecutor plans to appeal the ruling. *Id.* Similar cases are pending in South Carolina. See Comment, *supra*, at 1407 n.58 (1990).

¹³ See Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L.J. 599, 614-20 (1986); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994, 998-1002 (1988) [hereinafter Note, *Maternal Rights*]; Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277, 314-15 (1987-88) [hereinafter Note, *Pregnancy Police*].

¹⁴ See Parness & Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 267-70, 295-98 (1982); Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 99-104 (1984); Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1231-34 (1987).

¹⁵ See Johnsen, *supra* note 13, at 614-20; Note, *Maternal Rights*, *supra* note 13, at 995-1002. On technical grounds, the *Johnson* case does not raise the right to privacy analysis that is central to the usual "fetal rights" arguments. The prosecution focused on a point in time immediately after birth, but before the umbilical cord was cut. Thus, according to the prosecution, Ms. Johnson "delivered" cocaine to a minor person, not a fetus. Trial Transcripts at 26, *State v. Johnson*, No. 89-890-CFA, (Seminole County, Fla. 1989). In fact, the prosecution specifically characterized the case as a "child abuse case." *Id.*

Most commentators arguing in favor of women's reproductive rights view the fetal rights issue as one tied to the abortion debate, raising right to privacy issues. Although this argument is valid, this note suggests that the central issue cannot rest on a question of when life begins. Rather, the issue must be the status of addiction itself and whether pregnant drug addicts can be held criminally responsible for their addiction. See *infra* text accompanying notes 222-45 for a discussion of criminal responsibility and pregnant substance abusers.

¹⁶ See *infra* notes 222-32 and accompanying text for a discussion of what type of "act" is necessary to impose criminal liability for umbilical cord drug transfers.

¹⁷ 370 U.S. 660 (1962).

¹⁸ 392 U.S. 514 (1968).

ing someone for the "status" of being a drug addict, without any affirmative act, was a violation of the cruel and unusual punishments clause of the eighth amendment.¹⁹ Some commentators have argued that the *Robinson* Court carved out a substantive limit on criminal responsibility.²⁰

The Court in *Powell* rejected this argument and distinguished *Robinson* on factual grounds. The *Powell* Court stated that public drunkenness is an act and not a status, and therefore upheld the statute making public drunkenness a crime.²¹ The *Robinson* and *Powell* decisions define the constitutional limitations on state legislation with regard to addictive behavior, and are therefore applicable to cases where pregnant drug addicts are prosecuted under state drug trafficking statutes.²²

This note examines the problem of holding pregnant substance abusers criminally responsible for the harm that their addiction causes to their fetuses, and addresses the question of whether their addiction can be classified as a "status" protected under the cruel and unusual punishments clause of the eighth amendment. Section I briefly discusses the history and evolution of the "fetal rights" controversy, the context from which the *Johnson* case has arisen.²³ Section II examines the nature of cocaine and addiction.²⁴ Section III analyzes *Robinson* and *Powell* to explain how the Supreme Court has treated addiction under the criminal law. Section IV then analyzes addiction and criminal responsibility in the context of pregnant substance abusers charged under drug trafficking laws.²⁵ This note proposes that punishing pregnant substance abusers under drug trafficking laws, by characterizing the maternal-fetal placental exchange as a criminal act, actually punishes the woman for her status as a pregnant addict and therefore violates the eighth amendment.²⁶ This note suggests that although the state of Florida in the *Johnson* case purported to regulate drug trafficking, it was actually attempting to regulate Ms. Johnson's drug use.²⁷ This note concludes

¹⁹ *Robinson*, 370 U.S. at 666-67.

²⁰ See Cuomo, *Mens Rea and Status Criminality*, 40 S. CAL. L. REV. 463, 487 n.123 (1967). In *Powell*, Justice Marshall stated that under the Court's interpretation, "*Robinson* . . . brings this Court but a very small way into the substantive criminal law." 392 U.S. at 533.

²¹ *Powell*, 392 U.S. at 532.

²² See *infra* text accompanying notes 145-72 for a discussion of *Robinson*. For a discussion of *Powell*, see *infra* text accompanying notes 186-206.

²³ See *infra* notes 29-100 and accompanying text.

²⁴ See *infra* notes 102-36 and accompanying text.

²⁵ See *infra* notes 209-54 and accompanying text.

²⁶ See *infra* notes 219-32 and accompanying text.

²⁷ See *id.*

that even if the eighth amendment does not prohibit the criminalization of maternal drug use during pregnancy, Florida and other states should seriously consider the policy enunciated in *Robinson* before they punish pregnant addicts for drug use.²⁸

I. FETAL RIGHTS

A. Evolution and Expansion of Fetal Rights

The recent use of drug laws to hold pregnant substance abusers criminally responsible for fetal harm is part of a growing trend of recognizing rights in the unborn.²⁹ This trend, the "fetal rights controversy," encompasses a wide range of issues relating to maternal behavior during pregnancy.³⁰ Advocates of judicial or legislative intervention into a woman's pregnancy view the fetus as a person who has rights separate from the pregnant woman.³¹ Commentators who favor women's reproductive freedom argue that any such intervention amounts to an unconstitutional intrusion into a woman's right to privacy and bodily integrity.³² The controversy today pits mother against fetus.³³

²⁸ See *infra* notes 246-54 and accompanying text.

²⁹ See *Drug Use in Pregnancy*, *supra* note 9, at A14, col. 2; *Pregnant Women*, *supra* note 6, at 419; *Newborn Drug Conviction*, *supra* note 6, at 1, col. 1.

³⁰ See Comment, *The Fetal Rights Controversy: A Resurfacing of Sex Discrimination in the Guise of Fetal Protection*, 57 UMKC L. REV. 261, 273 (1989) (whether or not a pregnant woman should work in certain environments); see also *Mother Versus Child*, A.B.A. J., Apr. 1989, at 84-87 (whether or not a woman should be forced to deliver by caesarean section or undergo blood transfusions). Finally, some commentators worry that women may someday be constrained from eating certain foods or engaging in certain recreational activities. *Pregnant Women*, *supra* note 6, at 422-24; Johnsen, *supra* note 13, at 606-07.

³¹ See, e.g., Shaw, *supra* note 14, at 100-04. Describing "fetal abuse," Shaw goes so far as to advocate taking "custody" of the fetus to prevent harm. *Id.* at 100. Shaw also uses the word "children" to describe both the born and the unborn, which implies that a fetus has rights completely separate from the pregnant woman. *Id.* at 102; see also Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1230 (1987) (describing the conflict between the "rights of the mother" and the "rights of the fetus").

³² See, e.g., Johnsen, *supra* note 13, at 603-04.

³³ See, e.g., *Stallman v. Youngquist*, 125 Ill. 2d 267, 276, 531 N.E.2d 355, 359 (1988). In *Stallman*, the Illinois Supreme Court, overturning a decision recognizing a cause of action by a fetus against the mother, stated that if such an action were allowed,

[M]other and child would be legal adversaries from the moment of conception until birth The law will not now make an error with . . . enormous implications for all women who have been, are, may be, or might become pregnant. The law will not treat a fetus as an entity which is entirely separate from its mother.

Id. at 276-77, 531 N.E.2d at 359; see *Mother Versus Child*, A.B.A. J. Apr. 1989 at 84-88; Johnsen, *supra* note 13, at 603-04.

Historically, the law has been reluctant to recognize rights in the unborn.³⁴ Courts viewed the fetus and the woman as one individual, and only recognized the fetus for limited purposes, such as inheritance.³⁵ An historical prerequisite for recovery at common law was that the fetus be "subsequently born alive."³⁶ Thus, a child conceived prior to the death of a testator could inherit if born alive.³⁷

Despite an early recognition of fetal rights in property law, tort claims for prenatal injuries, such as those suffered during child birth, were denied on grounds that there could be no duty owed to a person not in existence at the time of the injury.³⁸ *Bonbrest v. Kotz*, decided in 1946 by the United States District Court for the District of Columbia, was the first case to hold that a child could sue for prenatal injuries sustained when the fetus was viable.³⁹ In *Bonbrest*, the fetus was injured by the physician during delivery.⁴⁰ The court stressed that the fetus was viable at the time of the injury, and reasoned that to deny recovery to a child for prenatal injuries would be to allow a wrong without a remedy.⁴¹ The court rejected the idea that the fetus was only a "part" of the mother for purposes of

³⁴ See, e.g., *Roe v. Wade*, 410 U.S. 113, 161-62 (1973). The Court in *Roe* stated that, except in the area of abortion,

the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth . . . [t]he unborn have never been recognized in the law as persons in the whole sense.

Id. But cf. Reproductive Health Serv. v. Webster, 109 S. Ct. 3040, 3050 (1990) (Court upheld Missouri statute stating that Missouri laws must be construed to grant unborn children all the "rights, privileges, and immunities available to other persons"); see also W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS*, § 55 (5th ed. 1984) [hereinafter *PROSSER & KEETON*]; Note, *Pregnancy Police*, *supra*, note 13 at 279.

³⁵ See, e.g., *Cowles v. Cowles*, 56 Conn. 240, 247, 13 A. 414, 417 (1888); *McLain v. Howald*, 120 Mich. 274, 279, 79 N.W. 182, 183 (1899).

³⁶ See, e.g., *McLain*, 120 Mich. at 279, 79 N.W. at 183; Johnsen, *Fetal Rights*, *supra* note 13, at 602.

³⁷ See *Cowles*, 56 Conn. at 247, 13 A. at 417; *McLain*, 120 Mich. at 279, 79 N.W. at 183.

³⁸ The leading case was *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (1884). Subsequent decisions relied heavily on this case. See *Stanford v. St. Louis S.F.R. Co.*, 214 Ala. 611, 612, 108 So. 566, 566 (1926); *Allaire v. St. Lukes Hosp.*, 184 Ill. 359, 367, 56 N.E. 638, 639 (1900); *Buel v. United States Rys. Co.*, 248 Mo. 126, 131, 154 S.W. 71, 72 (1913).

³⁹ 65 F. Supp. 138, 142 (1946). The *Bonbrest* court factually distinguished *Dietrich* as a case denying a cause of action for an injury transmitted to the fetus through "other intervening substances" (the mother). *Id.* at 140. In *Bonbrest*, however, the injuries occurred during the child's delivery, and were thus inflicted directly on the child. *Id.* at 139.

⁴⁰ *Id.* at 139.

⁴¹ *Id.* at 141 (citing *Montreal Tramways v. Leveille*, 4 D. L. R. 337 (Can. 1933)).

recovery against a third party.⁴² Despite the *Bonbrest* language describing the fetus as something more than a part of the mother, the court compensated the injured child and the parents without granting the prenatal child legal rights entirely separate from, or in conflict with, those of the pregnant woman.⁴³ Following *Bonbrest*, courts reversed previous decisions denying recovery,⁴⁴ and today every jurisdiction recognizes a cause of action for prenatal injuries.⁴⁵

Wrongful death statutes, which facially apply to infants who die due to prenatal injuries,⁴⁶ are consistent with common-law recognition of prenatal injuries as violations of parental rights.⁴⁷ A majority of jurisdictions, however, have interpreted the word "person" to include fetuses in wrongful death statutes, which in effect eliminates the live birth requirement.⁴⁸ One commentator has regarded these court decisions as compensating the parents for the loss of their expected child, and as protecting the pregnant woman's interests.⁴⁹ Thus, recognizing fetuses in wrongful death actions is consistent with earlier prenatal injury cases and is not a grant of separate fetal rights.⁵⁰

At common law, the first case to erode the live birth requirement by recognizing that the fetus can be the victim of a crime was

⁴² *Id.* at 140.

⁴³ *Id.*; Johnsen, *supra* note 13, at 602 n.10; see also *Stallman v. Youngquist*, 125 Ill. 2d 267, 280, 531 N.E.2d 355, 361 (1988) (holding that there is no cause of action by a fetus, subsequently born alive, against its mother for prenatal injuries). The *Stallman* court reasoned that, although the law recognizes the fetus as more than a part of the mother, "the law will not treat a fetus as an entity which is entirely separate from its mother." 125 Ill. 2d at 276-77, 531 N.E.2d at 359. If such a tort were created, the court reasoned, "[m]other and child would be legal adversaries from the moment of conception." *Id.* at 276, 531 N.E.2d at 359.

⁴⁴ See, e.g., *Leas v. C.C. Pitts Sand and Gravel, Inc.*, 419 S.W.2d 820, 821 (Texas 1967) (allowing cause of action for prenatal injuries); *Steggall v. Morris*, 363 Mo. 1224, 1233, 258 S.W.2d 577, 581 (1953) (holding that a viable fetus had a cause of action for negligence inflicted by a third party).

⁴⁵ PROSSER & KEETON, *supra* note 34, at 368.

⁴⁶ Wrongful death statutes apply to "persons." Therefore, if an infant is born and then dies, the statute is automatically invoked. The problem arises when a fetus is injured and dies before birth.

⁴⁷ Johnsen, *supra* note 13, at 603.

⁴⁸ See, e.g., *Eich v. Town of Gulf Shores*, 293 Ala. 95, 100, 300 So. 2d 354, 358 (1974); *Gorke v. LeClerc*, 23 Conn. Supp. 256, 262, 181 A.2d 448, 451 (1962); *Mone v. Greyhound Lines*, 368 Mass. 354, 361, 331 N.E.2d 916, 920 (1975). Only a few states have specifically included the unborn in the state's wrongful death statute. See, e.g., ILL. REV. STAT. ch. 70, para. 2.2 (1985); S.D. CODIFIED LAWS ANN. § 21-5-1 (1987); see also Note, *No Liability for the Wrongful Death of Unborn Children—The Florida Legislature Refuses to Protect the Unborn*, 16 FLA. ST. U.L. REV. 835, 847 (1988).

⁴⁹ Johnsen, *supra* note 13, at 603 n.15.

⁵⁰ *Id.* at 603.

Commonwealth v. Cass, decided by the Supreme Judicial Court of Massachusetts in 1984.⁵¹ The *Cass* court held that a viable fetus was a person under the state's vehicular homicide statute.⁵² In *Cass*, the defendant's motor vehicle struck a woman who was eight and one-half months pregnant.⁵³ Her fetus died from internal injuries caused by the accident. The court reasoned that viability, rather than live birth, was a better standard for determining personhood under the state's vehicular homicide statute.⁵⁴

One commentator perceived the erosion of the live birth requirement as a dangerous step towards holding pregnant women accountable for their actions during pregnancy.⁵⁵ Indeed, the trend has been towards increased judicial intervention in the lives of pregnant women.⁵⁶ The *Cass* decision, which held a third party liable for the death of a woman's fetus, has provided the foundation for one state to institute charges against a pregnant woman for the death of her fetus under the state's vehicular homicide statute.⁵⁷ Such a prosecution extends beyond mere compensation for parents, and contradicts the policy behind early prenatal recovery.⁵⁸

⁵¹ 392 Mass. 799, 808, 467 N.E.2d 1324, 1330 (1984). Prior to *Cass*, the common law rule in criminal law was the same as for civil recovery. *Id.* at 805, 467 N.E.2d at 1328. Some states include the unborn in general homicide statutes. See CAL. PENAL CODE § 187(a) (West Supp. 1988) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought"); N.Y. PENAL LAW § 125.00 (McKinney 1987) ("Homicide means conduct which causes the death of a person or an unborn child with which a woman has been pregnant for more than twenty-four weeks. . . ."). A few states have enacted specific feticide statutes making the destruction of a fetus a homicide or manslaughter. See, e.g., ILL. ANN. STAT. ch. 38, para. 9-1.1(a) (Smith-Hurd Supp. 1984-85). The Illinois statute states:

A person commits the offense of feticide who causes the death of a fetus if, in performing the acts which caused the death, he, without lawful justification: (1) either intended to kill or do great bodily harm to the mother carrying the fetus or knew that such acts would cause the death or great bodily harm to the mother

Id.

⁵² *Cass*, 392 Mass. at 808, 467 N.E.2d at 1330.

⁵³ *Id.* at 799-800, 467 N.E.2d at 1325.

⁵⁴ *Id.* at 807, 467 N.E.2d at 1329. The *Cass* court cited to its decision in *Mone v. Greyhound Lines*, 368 Mass. 354, 331 N.E. 2d 916 (1975) (holding that a viable fetus is a person under the Massachusetts's wrongful death statute). In *Mone*, the court reasoned that there is no sound reason to choose live birth over viability when deciding whether an action for prenatal injuries can lie. *Id.* at 360-61, 331 N.E.2d at 919.

⁵⁵ Johnsen, *supra* note 13, at 603-04.

⁵⁶ See *Pregnant Women*, *supra* note 6, at 419.

⁵⁷ A Waltham, Massachusetts woman was arrested on July 14, 1989, and charged with vehicular homicide for the death of her eight and one half month old fetus. The woman was allegedly driving drunk. *Fetal Endangerment Cases on the Rise*, Boston Globe, Oct. 3, 1989, at 1, col. 1. The charges were eventually dropped.

⁵⁸ See *infra* notes 59-90 and accompanying text for other examples of actions creating

B. *The Present State of Fetal Rights Law*

As concern for fetal welfare grows, courts and state officials have increasingly scrutinized women's conduct during pregnancy. To protect the interests of the fetus, pregnant women have been incarcerated,⁵⁹ forced to undergo medical treatment,⁶⁰ and more recently, criminally prosecuted.⁶¹ Cases in which a woman is forced to submit to a caesarean birth,⁶² or undergo a forced blood transfusion,⁶³ treat the mother and fetus as completely independent entities, with opposing rights.⁶⁴ Similarly, punitive measures, such as taking protective custody of the fetus by incarcerating the pregnant woman, also pit mother against fetus, with the "rights" of the fetus prevailing.⁶⁵

an adversarial relationship between mother and fetus; see also Johnsen, *supra* note 13, at 604, 607 (Ms. Johnsen predicts that the *Cass* holding may be expanded to apply to pregnant women rather than third parties).

⁵⁹ See *D.C. Judge Jails Woman as Protection for Fetus*, Wash. Post, July 23, 1988, at A1, col. 1.

⁶⁰ See, e.g., *In re A.C.*, 533 A.2d 611 (D.C. App. 1987), *vacated and reh'g granted*, 539 A.2d 203 (D.C. App. 1988); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 424, 201 A.2d 537, 538, *cert. denied*, 377 U.S. 985 (1964).

⁶¹ See *infra* notes 70, 75 and 83 and accompanying text for a discussion of the criminal prosecution of pregnant women for alleged harm to their fetuses.

⁶² *In re A.C.*, 533 A.2d 611 at 617. In this case, the Court of Appeals for the District of Columbia upheld a trial court's authorization for the George Washington Hospital to perform a caesarean operation on a dying woman, against the woman's wishes. *Id.* The child died two hours after the caesarean birth and the mother died two days later. In *Jefferson v. Griffin Spaulding County Hosp. Auth.*, the Georgia Supreme Court upheld a court ordered caesarean. 247 Ga. 86, 89, 274 S.E. 2d 457, 460 (1981). In another case, a court ordered a caesarean when a Nigerian woman refused based on her Muslim religion and her preference for natural childbirth. See *In re Maydun*, 114 Daily Wash. Rptr. 2233 (D.C. Super. Ct. July 26, 1986), cited in *Mother v. Child*, A.B.A. J., Apr. 1989, at 84; see also *Mother v. Fetus—The Case of "Do or Die:"* *In re A.C.*, 5 J. CONTEMP. HEALTH L. & POL. 319, 330 n.65 (1989). In 1984, another Nigerian woman was restrained with wrist and ankle cuffs after refusing to voluntarily submit to a caesarean. See *Pregnant Women*, *supra* note 6 at 417.

⁶³ *Raleigh Fitkin-Paul Morgan Memorial Hosp.*, 42 N.J. at 424, 201 A.2d at 538 (court authorized blood transfusions that pregnant woman rejected on religious grounds); *In re Jamaica Hosp.*, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985) (blood transfusions ordered against pregnant woman's wishes).

⁶⁴ See *Pregnant Women*, *supra* note 6, at 416–17. Mother and fetus are treated as persons with conflicting rights because the mother refuses treatment or caesarean birth, and a court orders the treatment in the best interests of the fetus. Note, *Rethinking (M)Otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1333–37 (1990).

⁶⁵ See *infra* text accompanying notes 78–81 for a discussion of the *Vaughn* case, in which a judge jailed a pregnant woman in order to protect her fetus from her drug use. See also *Stallman v. Youngquist*, 125 Ill. 2d 267, 531 N.E.2d 355 (1988), for another example of a court action that pits mother against fetus. In denying a cause of action by a child against his mother for prenatal injuries, the court reasoned that:

[I]t would be a legal fiction to treat the fetus as a separate legal person with rights hostile to and assertable against its mother. The relationship between a

The 1977 California Court of Appeals case of *Reyes v. Superior Court*⁶⁶ provides an early example of a prosecutor's attempt to apply a child abuse statute to a woman's prenatal substance abuse. In *Reyes*, a pregnant heroin addict was charged with felony child endangerment under a California statute because her twins were born addicted to heroin and suffering from withdrawal symptoms.⁶⁷ A public health nurse had warned the mother that continued use of heroin and her failure to seek prenatal care would endanger the fetus. Based on the legislative intent and the language of the California statute, the judge held the statute inapplicable to prenatal conduct.⁶⁸ The judge also reasoned that the statute required that the offender be responsible for the care and custody of a *child*, which assumes that there exists a living child "susceptible" to care and custody.⁶⁹

In 1987, a San Diego municipal court judge reached a similar decision in the much-publicized case of *People v. Stewart*,⁷⁰ where a woman was unsuccessfully prosecuted for prenatal conduct that allegedly caused the death of her newborn son.⁷¹ Ms. Stewart sought prenatal care during her third trimester when she learned her pregnancy was complicated by placenta previa, a condition that blocks the cervical opening.⁷² During her last month of pregnancy, Ms. Stewart began bleeding, was rushed to the hospital, and submitted to a caesarean section. Her son was born with severe brain damage, and died shortly after birth. Eight months later, Ms. Stewart was charged with criminal child neglect under a child support statute,⁷³ for failing to follow her doctor's instructions not to engage

pregnant woman and her fetus is unlike any other plaintiff and defendant No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an *adversary* into the world.

Id. at 278, 531 N.E.2d at 360 (emphasis added).

⁶⁶ 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977).

⁶⁷ *Id.* at 216, 141 Cal. Rptr. at 912-13.

⁶⁸ *Id.* at 216, 141 Cal. Rptr. at 912. At the time of the alleged offense, section 273(a) of the California Penal Code stated "any person who, under circumstances or conditions likely to produce great bodily harm or death, . . . having the care or custody of any child, . . . willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment . . ." *Id.* at 216, 141 Cal. Rptr. at 913 (quoting CAL. PENAL CODE § 273(a) (West 1988)).

⁶⁹ *Id.* at 217-18, 141 Cal. Rptr. at 913-14.

⁷⁰ No. M508197, slip op. (San Diego Ct. Feb. 1987) (cited in Note, *Maternal Rights*, *supra* note 13, at 994).

⁷¹ *Pregnancy Police*, *supra* note 13, at 287.

⁷² *Id.* at 286 n.58.

⁷³ *Id.* Ms. Stewart was charged under section 270 of the California Penal Code, which provides that:

in sexual intercourse during her pregnancy and for allegedly taking illegal drugs. A San Diego judge ruled the statute inapplicable and dismissed the charges.⁷⁴

In another attempt to hold a pregnant woman criminally responsible for harmful prenatal conduct, the Illinois State Attorney in 1989 filed involuntary manslaughter charges against a woman whose cocaine use allegedly caused the death of her child two hours after birth.⁷⁵ The prosecutor alleged that the mother's cocaine use during pregnancy was reckless and showed disregard for her child's life.⁷⁶ The indictment failed and the court dismissed the charges.⁷⁷

Although attempts to prosecute women criminally under child abuse statutes have failed, other measures to protect the fetus have been successful. In 1988, for example, in the District of Columbia Superior Court, a judge jailed a pregnant woman to protect her fetus from the pregnant woman's cocaine use.⁷⁸ The woman, a first-time offender, was arrested for second-degree theft.⁷⁹ Because she tested positive for cocaine, the judge sentenced her to 180 days in prison, despite the United States Attorney's recommendation of probation.⁸⁰ The judge reasoned that the mother had an addictive personality and her fetus would be protected in jail.⁸¹

If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars, or by imprisonment in the county jail not exceeding one year

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

CAL. PENAL CODE § 270 (West 1988).

⁷⁴ Chambers, *Charges Against Mother are Thrown Out*, N.Y. Times, Feb. 27, 1987, at A25, col. 1. The legislative history behind section 270 shows that the statute's purpose was to require fathers to provide financial support to women pregnant with their children. *Id.*

⁷⁵ *Mother Charged After Her Baby Dies of Cocaine*, N.Y. Times, May 10, 1989, at A18, col. 1. An autopsy report found that oxygen deprivation, which is linked to cocaine use late in pregnancy, caused the infant's death. *Id.*; see also *Pregnant Women*, *supra* note 6, at 419.

⁷⁶ *Pregnant Women*, *supra* note 6, at 419.

⁷⁷ *Id.*

⁷⁸ See *D.C. Judge Jails Woman as Protection for Fetus*, Wash. Post, July 23, 1988, at A1, col. 1 [hereinafter *D.C. Judge*]. The judge was quoted as saying "I'm going to keep her locked up until the baby is born because she's tested positive for cocaine when she came before me [I]'ll be darned if I'm going to have a baby born that way." *Pregnant? Go Directly to Jail*, A.B.A. J., Nov. 1, 1988 at 20, [hereinafter *Directly to Jail*]; see also *Pregnant Women*, *supra* note 6, at 422 (citing to other instances where pregnant women have been incarcerated in the interest of the fetus).

⁷⁹ *Pregnant Woman*, *supra* note 6, at 419.

⁸⁰ *Directly to Jail*, *supra* note 78, at 20; *D.C. Judge*, *supra* note 78, at A1, col. 1.

⁸¹ *Directly to Jail*, *supra* note 78, at 20. In addition to cases where judges sentence in

In contrast to previous cases in which prosecutors have unsuccessfully attempted to apply child abuse statutes to fetuses, *State v. Johnson* stands out as the first criminal conviction in the United States of a mother giving birth to a drug-exposed infant.⁸² In *Johnson*, decided in 1989 in the Florida Circuit Court for Seminole County, a judge held that Florida's drug trafficking statute applied to the placental exchange between a pregnant woman and her fetus.⁸³ According to testimony, Ms. Johnson, an admitted cocaine addict, smoked crack the morning of her labor.⁸⁴ Her newborn tested positive for cocaine metabolites.⁸⁵ Ms. Johnson was then charged with delivery of a controlled substance to a minor⁸⁶ and child abuse.⁸⁷

Although Ms. Johnson was prosecuted for cocaine delivery to both her newborn and a child born fourteen months earlier, the case focused on her most recent childbirth. The prosecution alleged that Ms. Johnson delivered cocaine to her infants through the umbilical cord, focusing on the moment immediately following birth, but before the umbilical cord was cut.⁸⁸ The prosecution was thus able to argue that, in each birth, cocaine was delivered to a child and not a fetus.⁸⁹ During her most recent pregnancy, Ms. Johnson sought admittance to an outpatient drug treatment program, but was denied enrollment because she was pregnant.⁹⁰ On another occasion, Ms. Johnson summoned an ambulance because she be-

order to protect the unborn, pregnant substance abuse is also grounds for removing custody of the infant. See, e.g., *In re Baby X*, 97 Mich. App. 111, 116, 293 N.W.2d 726, 741 (1980). See also *supra* note 9 and accompanying text for a discussion of other removal cases.

⁸² *Newborn Drug Conviction*, *supra* note 6, at 1, col. 1.

⁸³ Trial Transcripts at 365-66, *State v. Johnson*, No. 89-890-CFA (Seminole County, Fla. 1989). Judge O.H. Eaton stated to Ms. Johnson, "I'm not here to put you in prison, nor do I think that is an appropriate sentence in this case, but *I feel that you and others like you need to come into compliance with the law.* That's the reason I think this prosecution is justified. That's the reason I've felt it was justified all along." Transcript of Motion for Rehearing and Sentencing at 10, *Johnson*, No. 89-890-CFA (emphasis added).

⁸⁴ Trial Transcripts, at 15, *Johnson*, No. 89-890-CFA.

⁸⁵ *Id.* at 74-75. It should be noted that if Ms. Johnson had not used cocaine 72 hours prior to giving birth, the baby's urine would have contained no traces of cocaine. This is because cocaine will only remain in the blood stream for between 48 and 72 hours. *Id.* at 155.

⁸⁶ See FLA. STAT. ANN. § 893.13(1)(c)(1) (West 1976).

⁸⁷ See FLA. STAT. ANN. § 827.04 (West 1976). Ms. Johnson was found not guilty of the child abuse charge due to lack of evidence. Trial Transcripts, at 366, *Johnson*, No. 89-890-CFA.

⁸⁸ Motion to Dismiss at 27, *Johnson*, No. 89-890-CFA.

⁸⁹ Trial Transcripts, at 6-7, *Johnson*, No. 89-890-CFA. The prosecutor was thus able to avoid the right to privacy arguments associated with the abortion debate.

⁹⁰ *Newborn Drug Conviction*, *supra* note 6, at 1, col. 1.

lieved she might have overdosed on crack cocaine.⁹¹ The prosecutor used these facts to show that Ms. Johnson had knowledge that she was harming her fetus by using cocaine during her pregnancy.⁹²

The *Johnson* defense attempted to introduce testimony explaining crack addiction and its effect on Ms. Johnson's volition.⁹³ The judge sustained the prosecution's objection that the testimony was outside the witness's expertise.⁹⁴ Thus, the *Johnson* court never entertained arguments linking crack abuse to a loss of control or lack of volition.

Judge Eaton sentenced Ms. Johnson to fifteen years probation on each of the two counts of delivering cocaine to a minor.⁹⁵ The first year of probation was to be served on "community control" for added supervision.⁹⁶ In addition, Judge Eaton stipulated that Ms. Johnson enter a drug counseling program, supplemented with mental health treatment and educational and life skills courses.⁹⁷ Judge Eaton's sentence also required that Ms. Johnson submit to monthly drug and alcohol tests, remain gainfully employed, and perform 200 hours of public service work. Finally, Ms. Johnson was required to report to her probation officer any future pregnancies. The scope of Judge Eaton's sentence thus exemplifies the power of using a criminal statute to punish pregnant substance abuse.

As community concern grows over the effects of the drug problem, drug abuse is increasingly the target of criminalization.⁹⁸ The erosion of the live birth rule and the expansion of fetal rights, combined with the growing problem of prenatal drug abuse, has convinced some commentators that criminalization is feasible.⁹⁹ Indeed, state prosecutors and legislators are currently focusing on the criminal process as a means to eradicate substance abuse during

⁹¹ *Id.*

⁹² Trial Transcripts at 116-17, *Johnson*, No. 89-890-CFA.

⁹³ *Id.* at 237-41.

⁹⁴ *Id.* at 241.

⁹⁵ Transcript of Motion for Rehearing and Sentencing, at 21, *Johnson*, No. 89-890-CFA.

⁹⁶ *Id.*

⁹⁷ *Id.* at 23.

⁹⁸ *Ideas and Trends, Punishing Pregnant Addicts: Debate, Dismay, No Solution*, N.Y. Times, Sept. 10, 1989, at E5, col. 1 [hereinafter *Punishing Pregnant Addicts*]; *Pregnant Women*, *supra* note 6, at 419, 423. Media attention has focused on substance abuse during pregnancy, and such behavior seems to be the impetus behind most prosecutions for "fetal abuse." See, e.g., *Directly to Jail*, *supra* note 78, at 20; *Fetal Endangerment Cases on the Rise*, Boston Globe, Oct. 3, 1989 at 1, col. 1.

⁹⁹ See, e.g., Johnsen, *supra* note 13, at 606.

pregnancy.¹⁰⁰ Addiction, however, is a complex biological and psychological condition.¹⁰¹ To determine whether the state can achieve its goals of eradication and deterrence through criminalization, one must understand this complexity.

II. COCAINE AND ADDICTION

Although cocaine has been in use for centuries, it is only recently that the drug and its effects have caused widespread concern.¹⁰² Cocaine dependency, once thought to be a predominately male problem, is on the rise in women of childbearing age.¹⁰³ A recent survey of thirty-six United States hospitals found that approximately eleven percent of the women treated had used dangerous substances during pregnancy.¹⁰⁴ In New York City, health officials have estimated that drug-exposed births have increased 3000%.¹⁰⁵ The problem is not limited to large cities, however, given the recent prosecutions of pregnant substance abusers in such places as Laramie, Wyoming and Muskegon, Michigan.¹⁰⁶ Thus, substance abuse during pregnancy has become a national problem.

A. *The Nature of Cocaine*

Derived from the Erythroxylon coca plant, cocaine was used in South America for thousands of years.¹⁰⁷ It made its European debut in 1860, when a scientist extracted the alkaloid and gave it its present name.¹⁰⁸ The history of the drug reveals a lack of un-

¹⁰⁰ *Punishing Pregnant Addicts*, *supra* note 98, at E5, cols. 1-6.

¹⁰¹ *Id.* See *infra* text accompanying notes 122-36 for a discussion of addiction.

¹⁰² Gold, Galanter & Stimmel, *Editorial, Cocaine: A New Epidemic*, 6 *ADVANCES ALCOHOL & SUBSTANCE ABUSE*, Winter 1986, at 2.

¹⁰³ *DRUG USE IN PREGNANCY: MOTHER AND CHILD* 17 (Ira J. Chasnoff, ed. 1986) [hereinafter Chasnoff]; H. SHAFFER & S. JONES, *supra* note 1, at 21. A 1987 NIDA survey indicated that 30% of women between the ages of 18 and 24 used illicit drugs, which, according to one commentator, was "a number reflecting the increased prevalence of crack use among women." Fink, *supra* note 2, at 2.

¹⁰⁴ *Birth of a Bad Idea; Jailng Mothers for Drug Abuse*, *The Nation*, May 1, 1989, at 585; Fink, *supra* note 2, at 2 (quoting a 1988 survey by the National Association of Perinatal Addiction Research and Education (NAPARE)).

¹⁰⁵ Fink, *supra* note 2, at 2.

¹⁰⁶ *Case Against Pregnant Woman Is Dismissed*, *N.Y. Times*, Feb. 3, 1990, at 10, col. 3 (Wyoming child abuse case against pregnant woman using alcohol is dismissed); *Mother to Stand Trial in "Crack Baby" Case*, *UPI*, Feb. 2, 1990 (Nexis 1990) (Michigan prosecution of pregnant crack cocaine addict for "umbilical cord" drug delivery).

¹⁰⁷ H. SHAFFER & S. JONES, *supra* note 1, at 13.

¹⁰⁸ *Id.* at 14.

derstanding of its true properties.¹⁰⁹ For instance, cocaine was a popular additive in tonics and other non-prescription remedies, and was even an ingredient in Coca-Cola.¹¹⁰ Although cocaine was outlawed as a "narcotic,"¹¹¹ it did not until recently receive any concentrated attention as a dangerous drug.¹¹² As recently as 1973, in fact, cocaine was hardly mentioned in a well-known report by the National Commission on Marijuana and Drug Abuse.¹¹³

Cocaine is a stimulant that affects the central nervous system by increasing electrical activity in the brain.¹¹⁴ It is typically associated with feelings of intense euphoria, competency, and well-being.¹¹⁵ These reactions, however, are all dependent on many different factors, including the individual drug-user, the frequency of drug use, and the method of administration.¹¹⁶ The method of administration, in particular, is relevant to cocaine addiction.¹¹⁷ Intranasal administration, referred to as snorting, was formerly the most common way to use cocaine.¹¹⁸ Smoking cocaine, however, especially "crack" cocaine,¹¹⁹ has become increasingly popular and this method of administration is more toxic and addictive than the intranasal method.¹²⁰ Not only is crack thought to be more depen-

¹⁰⁹ Gold, Galanter & Stimmel, *supra* note 102, at 2.

¹¹⁰ SHAFFER & JONES, *supra* note 1, at 14.

¹¹¹ *Id.* at 29. Although cocaine is not a narcotic, it was erroneously classified as a narcotic under the Harrison Tax Act. Under federal law, punishment for cocaine trafficking and use is the same as for narcotics.

¹¹² See Gold, Galanter & Stimmel, *supra* note 102, at 2.

¹¹³ H. SHAFFER & S. JONES, *supra* note 1, at xv. In the early period of the cocaine epidemic, medical knowledge about the drug was sparse, and few treatment programs existed. See Washton & Gold, *Recent Trends in Cocaine Abuse: A View for the National Hotline, "800-COCAINE"*, 6 ADVANCES ALCOHOL & SUBSTANCE ABUSE, Winter 1986, at 32.

¹¹⁴ See G. BENNETT, C. VOURAKIS & D. WOOLF, SUBSTANCE ABUSE, PHARMACOLOGIC, DEVELOPMENTAL AND CLINICAL PERSPECTIVES 57 (1983).

¹¹⁵ Numerous commentators report that users liken the cocaine high to sexual orgasm. See, e.g., Gawin & Ellinwood, *Cocaine and Other Stimulants*, 318 NEW ENG. J. MED. 1173, 1174 (1989); McLaughlin, *Cocaine: The History and Regulation of a Dangerous Drug*, 58 CORNELL L. REV. 537, 551 (1973).

¹¹⁶ H. SHAFFER & S. JONES, *supra* note 1, at 15.

¹¹⁷ *Id.* at 18. Comparing routes of cocaine administration, one commentator states that "[s]moking (crack and freebase) and intravenous use . . . all create more rapid, intense highs Casual or recreation use is virtually unknown for the rapid-absorption smoking or intravenous rapid administration routes." Gawin, *supra* note 1, at 194.

¹¹⁸ *Id.* at 15.

¹¹⁹ "Crack" is the common term for a crystalline form of cocaine freebase. Freebase is the process by which the pure part of cocaine is extracted from its chemical base. This can be accomplished in a relatively simple process using sodium bicarbonate, water and heat. Washton, *Crack, the Newest Lethal Addiction*, MED. ASPECTS HUM. SEXUALITY, Sept. 1986, at 49.

¹²⁰ See H. SHAFFER & S. JONES, *supra* note 1, at 16; Hannan & Adler, *supra* note 1, at 141; Gawin & Ellinwood, *supra* note 115, at 1174, 1175; Gawin, *supra* note 1, at 194. When

dence-inducing, it is cheaper and more convenient than powder cocaine.¹²¹ Thus, crack appears to be one of the present drugs of choice in the abuser community.

B. *The Meaning of Cocaine Addiction*

Until recently, the majority view of experts was that cocaine was psychologically but not physically addictive.¹²² Some researchers now suggest that cocaine may indeed create physical dependence by affecting the brain's neurotransmitter system.¹²³ Although divergent opinions still exist on whether cocaine is addictive, the overall research suggests that cocaine is physically addictive for some people.¹²⁴ In fact, recent data suggests that chronic cocaine use may actually cause neurophysiological brain damage.¹²⁵ One of the major problems confronting any attempt to classify cocaine as addictive is the lack of consensus on the definition of "addiction" itself. Although there are many theories of addiction, the biological model

cocaine is smoked, the cocaine crosses the blood-brain barrier more swiftly. Thus, the highs are more intense, and the lows, or crashes, are lower. *Id.* Jennifer Johnson was addicted to crack cocaine.

¹²¹ Crack is more convenient in that it is easier for the dealer to handle, prepare and transport. H. SHAFFER & S. JONES, *supra* note 1, at 16; Washton, *supra* note 119, at 49.

¹²² See McLaughlin, *supra* note 115, at 552 (stating that cocaine "does not cause physical dependence"). A cursory explanation of psychological addiction is that the user *thinks* he or she is dependent whereas physical addiction refers to a chemical process whereby the user develops a tolerance to the drug, and will become physically ill if the drug is withdrawn. See H. SHAFFER & S. JONES, *supra* note 1, at 41. Many researchers now dispute the view that cocaine is only psychologically addicting. See, e.g., Cloud, *Cocaine, Demand and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725, 744-46 (1989) (describing cocaine as a "self reinforcer" that indicates physical dependence); see also H. SHAFFER & S. JONES, *supra* note 1, at 42 (stating that cocaine, unlike heroin, was not thought to produce physical withdrawal symptoms because the symptoms are difficult to document); Cregler, *Adverse Health Consequences of Cocaine Abuse*, 81 J. NAT'L. MED. A. 27, 33 (1989) (stating that "[t]he myth that cocaine is not addicting because it does not induce physical dependence has been an important factor in fostering widespread acceptance" while noting that "[t]he issue of physical dependence due to cocaine is still somewhat controversial"). See also *infra* notes 127-36 and accompanying text for a more extensive discussion of the "biological" model of addiction.

¹²³ Dackis, Gold & Pottash, *Central Stimulant Abuse: Neurochemistry and Pharmacotherapy*, 6 ADVANCES ALCOHOL & SUBSTANCE ABUSE, Winter 1986 at 7-8; Gawin & Ellinwood, *supra* note 115, at 1178; *Cocaine Reinforcement and Extracellular Dopamine Overflow in Rat Nucleus Accumbens: An In Vivo Microdialysis Study*, 498 BRAIN RES. 199, 199-203 (1989).

¹²⁴ Gawin and Ellinwood, *supra* note 115, at 1173-78; see also Cloud, *supra* note 122, at 740-41; Cregler, *supra* note 122, at 27, 33; It should be emphasized, however, that cocaine is not addictive for everyone. According to one researcher, "[a]n estimated 95% of the 20 to 30 million individuals who have used cocaine have thus far avoided dependence, promoting the illusion that cocaine can be used safely." Gawin, *supra* note 1, at 193.

¹²⁵ Gawin & Ellinwood, *supra* note 115, at 1178.

is increasingly cited as a credible explanation for cocaine addiction.¹²⁶

The biological model of addiction focuses on the effects of a drug on the brain's chemistry.¹²⁷ Generally, any type of drug alters the brain's chemistry.¹²⁸ Once the drug enters the user's blood stream, it then crosses the "blood-brain" barrier, which means that it joins with the chemicals found in the brain.¹²⁹ Located in the brain are chemical messengers called neurotransmitters. These neurotransmitters are responsible for carrying information from one nerve cell (neuron) to another. When activated by an electrical impulse in the brain, the neurotransmitters carry their chemical message to the synapse, the gap between neurons where the neurotransmitter releases its message. The neurotransmitter can then be taken back to the original neuron. This is known as the "re-uptake" mechanism.¹³⁰

Continued cocaine use interferes with the neurotransmission of dopamine by inhibiting the re-uptake process.¹³¹ This interference causes the dopamine to stay in the synapse rather than be taken back to the original neuron.¹³² By blocking dopamine's re-

¹²⁶ A discussion of the numerous models of addiction is beyond the scope of this note. See generally H. SHAFFER & S. JONES, *supra* note 1, at 45-62. Even the use of the term "biological" addiction is arbitrary, as it is the term favored by one particular researcher. An equivalent term might be "drug tolerance" or "physical dependence." Cloud, *supra* note 122, at 739. There is continuing disagreement about the proper terminology of addiction. For example, a U.S. Surgeon General report equated the terms "drug addiction" and "drug dependence." *Id.* at 738 n. 50. The World Health Organization, on the other hand, replaced the term "drug addiction" with "drug dependence." *Id.* at 742 n. 77. Despite the disagreement, many researchers agree that addiction is a combination of many factors, such as "psychological, physiological and chemical processes." *Id.* at 738.

¹²⁷ H. SHAFFER & S. JONES, *supra* note 1, at 73. The term "biological" model of addiction is only one researcher's term for physical addiction or dependence. It is used throughout this article because it is relatively straightforward. Many medical researchers have referred to this model as the "dopamine depletion hypothesis." See *infra* notes 127-35 and accompanying text. See, e.g., Cregler, *supra* note 122, at 29 ("The dopamine depletion hypothesis states that the pathophysiology underlying repeated cocaine administration is the drug's ability to increase synaptic dopamine transiently. Chronic cocaine use appears to deplete brain dopamine. Alterations in dopamine neurotransmission may be responsible for the development of compulsive use patterns." (emphasis added)).

¹²⁸ See, e.g., G. BENNETT, C. VOURAKIS & D. WOOLF, *supra* note 114, at 57.

¹²⁹ H. SHAFFER & S. JONES, *supra* note 1, at 73.

¹³⁰ *Id.*; see also Dackis, Gold & Pottash, *supra* note 123, at 14-15.

¹³¹ H. SHAFFER & S. JONES, *supra* note 1, at 73; see Holloway, *Rx For Addiction*, SCI. AM., Mar. 1991, at 97-8.

¹³² H. SHAFFER & S. JONES, *supra* note 1, at 74. As one scientist explained, "[cocaine] hops on board the [re-uptake transporter] shuttle, leaving no room for the dopamine, which continues to bombard its receptors, causing heightened feelings of pleasure . . ." Holloway, *supra* note 131, at 98.

uptake, chronic cocaine use eventually inhibits the brain's ability to manufacture dopamine on its own, which in turn results in dopamine depletion.¹³³ Because dopamine is the neurotransmitter associated with pleasure, dopamine depletion is what researchers believe causes chemical depression and a craving for cocaine.¹³⁴ Thus, the addict needs cocaine to maintain a normal mood and chemical balance in the brain.¹³⁵ This addiction model helps explain why cocaine becomes central to some users' lives despite serious repercussions.¹³⁶

III. CONSTITUTIONAL LIMITS ON STATE REGULATION OF ADDICTIVE BEHAVIOR

In 1925, the United States Supreme Court recognized narcotics addiction as a disease.¹³⁷ Today, drug abuse and addiction is one of the most dangerous societal problems facing our country.¹³⁸ The United States is now engaged in a "War on Drugs," characterized by a call for stiff criminal penalties and more prison space.¹³⁹ Although a general consensus exists that the drug epidemic needs serious attention, debate over the best way to approach the problem continues.¹⁴⁰ Many policymakers favor criminal penalties as the obvious way to attack drug-related behavior, yet many commentators question whether the threat of incarceration will deter those involved.¹⁴¹

¹³³ H. SHAFFER & S. JONES, *supra* note 1, at 74.

¹³⁴ *Id.* at 73-74; Dackis, Gold & Pottash, *supra* note 123, at 16.

¹³⁵ H. SHAFFER & S. JONES, *supra* note 1, at 74.

¹³⁶ Cloud, *supra* note 122, at 740. Describing addiction, Cloud states "cocaine is addicting for some users. This fact presents policymakers with special problems because addicts continue to consume cocaine despite the possible catastrophic consequences of their behavior, including arrest, imprisonment, and loss of employment, families, friends, and physical health." *Id.* at 736. Another researcher states that "during binges, cocaine addicts have no interest in sex, nourishment, sleep, safety, survival, money, morality, loved ones, or responsibilities." Gawin, *supra* note 1, at 194.

¹³⁷ *Linder v. United States*, 268 U.S. 5, 18 (1925).

¹³⁸ See, e.g., *A National Attack on Addiction is Long Overdue*, N.Y. Times, Sept. 23, 1986, at B6, col. 1 [hereinafter *National Attack*]. According to one commentator, "the National Institute on Drug Abuse has called cocaine 'the drug of greatest national public health concern', estimating there are two million addicts—four times the number of heroin addicts." Gawin, *supra* note 1, at 193.

¹³⁹ *National Attack*, *supra* note 138, at B6, col. 1; H. SHAFFER & S. JONES, *supra* note 1, at xiv-xv; Cloud, *supra* note 122, at 733 n.34.

¹⁴⁰ See generally Cloud, *supra* note 122.

¹⁴¹ *Id.* at 735, 777 n.228; see also *Punishing Pregnant Addicts*, *supra* note 98, at E5, cols. 1-6.

In an early example of state criminalization directed at drug abuse, the Supreme Court in the 1962 case of *Robinson v. California* interpreted the cruel and unusual punishments clause of the eighth amendment as limiting state action against a drug addict.¹⁴² In *Robinson*, the Court held that a state could not punish the mere status of being an addict, in the absence of some criminal act.¹⁴³ In the 1968 case of *Powell v. Texas*, however, the Supreme Court stated that the crime of public drunkenness was not a status under *Robinson*, but rather was an act for which criminal responsibility could be imposed.¹⁴⁴ These two cases, because they deal with addiction and criminal responsibility, provide a framework for analyzing the criminal responsibility of pregnant addicts charged under drug trafficking laws.

A. *Robinson v. California*

In *Robinson v. California*, the United States Supreme Court held that punishing a person for the status of being a narcotics addict, when the person engaged in no criminal act, violated the cruel and unusual punishments clause of the eighth amendment.¹⁴⁵ The defendant, Robinson, was standing on a Los Angeles street when he was arrested.¹⁴⁶ He was not arrested for selling, using, or being under the influence of narcotics.¹⁴⁷ He was simply arrested for being a narcotics addict. Evidence at trial stipulated that a Los Angeles police officer noticed scars, alleged needle marks, and a scab on Robinson's arm. Thus, pursuant to a California statute that made it a misdemeanor to "be addicted to the use of narcotics,"¹⁴⁸ Robinson was arrested, tried by jury in Los Angeles Municipal Court, and convicted.¹⁴⁹ After losing an appeal in the Appellate Depart-

¹⁴² See 370 U.S. 660, 666 (1962).

¹⁴³ *Id.* at 667.

¹⁴⁴ 392 U.S. 514, 532 (1968).

¹⁴⁵ 370 U.S. at 667.

¹⁴⁶ *Id.* at 661.

¹⁴⁷ *Id.* at 661-62.

¹⁴⁸ The statute, section 11721 of the California Health and Safety Code, provides: "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics." *Robinson*, 370 U.S. at 660 (citing CAL. HEALTH & SAFETY CODE § 11721 (West)).

It should be noted that Robinson could have been convicted of narcotics use. There was evidence at trial that he admitted to using narcotics. The trial judge, however, instructed the jury that they could convict if they found that Robinson *either* used narcotics or was an addict. *Id.* at 665.

¹⁴⁹ *Id.* at 661.

ment of the Los Angeles County Superior Court, the United States Supreme Court noted jurisdiction for possible unconstitutionality under the eighth and fourteenth amendments.¹⁵⁰

The Court, in holding that the state could not punish a person for the status of being an addict, noted that the states, through exercise of the police power, have the right to regulate drug traffic.¹⁵¹ This power, the Court reasoned, is an important component of a state's ability to protect the public health and welfare. The Court noted, for example, that it would be appropriate for a state to ban the sale, purchase, manufacture or possession of narcotics. Similarly, the Court stated that states have the power to compel treatment for addicts, with incarceration as a penalty for non-compliance.¹⁵² In addition, the Court noted that states could institute educational and social programs to combat the drug problem on a wider scale.¹⁵³

The *Robinson* Court stated, however, that the California statute did not punish the use, purchase, sale or possession of narcotics.¹⁵⁴ Rather, the Court reasoned, the statute criminalized the "status" of addiction for which an offender could be continuously guilty.¹⁵⁵ The Court cited to precedent establishing that narcotics addiction is a disease.¹⁵⁶ The Court reasoned that imprisonment for such an affliction would be akin to punishing someone for having a "common cold."¹⁵⁷ Length of punishment was immaterial, the Court reasoned, because imprisonment for an illness, for any length of time whatsoever, would be cruel and unusual punishment.¹⁵⁸

Justice Douglas, in a concurring opinion, clarified the reasons why criminally punishing a drug addict was cruel and unusual punishment under the eighth amendment.¹⁵⁹ Justice Douglas used mental illness and insanity as an analogy to narcotics addiction, tracing the history of the violent punishment of the mentally ill.¹⁶⁰

¹⁵⁰ *Id.* at 664.

¹⁵¹ *Id.*

¹⁵² *Id.* at 665.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 666.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 667 n.8.

¹⁵⁷ *Id.* at 667. The Court further analogized: "It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease." *Id.* at 666.

¹⁵⁸ *Id.* at 667.

¹⁵⁹ *Id.* at 668 (Douglas, J., concurring).

¹⁶⁰ *Id.* Justice Douglas stated that "in Sixteenth Century England one prescription for

Justice Douglas also explored drug addiction, quoting a medical report describing what it means to be physically dependent on drugs.¹⁶¹ After a description of an addict as one of the "walking dead," Justice Douglas concluded that although it is understandable that communities are afraid of addicts and that their first response might be to punish them, punishment is only justified when the addict commits a criminal act.¹⁶² He stated that it is unjust to make simply being an addict a crime in itself.¹⁶³ Justice Douglas reasoned that if addicts could be punished for their addiction, then so too could the insane be punished for their affliction. Justice Douglas viewed both the addict and the insane person as being afflicted with a disease, and thus worthy of being treated as sick persons.¹⁶⁴

Justice Clark, in dissent, did not agree that punishing someone for being addicted to the use of narcotics was a cruel and unusual punishment.¹⁶⁵ Rather, Justice Clark viewed the California statute as providing the type of compulsory treatment and involuntary confinement that the majority would condone.¹⁶⁶ Justice Clark noted that section 11721, under which Robinson was convicted, punished "volitional" addiction, which differs from the type of compulsive addiction with which the majority was concerned.¹⁶⁷ If an addict was found to have lost self-control, California provided for rehabilitation governed by a civil proceeding. Moreover, even if the California scheme was interpreted as punitive rather than therapeutic, Justice Clark argued that addiction is a threat to the public. Thus, it is reasonable that a state may choose to outlaw addiction.¹⁶⁸

Justice White also dissented, arguing that the California statute punished Robinson for his regular use of narcotics.¹⁶⁹ Justice White stated that it was impossible to separate drug use from the mere status of addiction, because the very definition of "addiction" re-

insanity was to beat the subject 'until he had regained his reason' In America 'the violently insane went to the whipping post and into prison dungeons or, as sometimes happened, were burned at the stake or hanged.'" *Id.*

¹⁶¹ *Id.* at 671 (Douglas, J., concurring). Justice Douglas quoted from a report on narcotics addiction from the American Medical Association, which described the "physiological disturbance" of the drug addict. *Id.*

¹⁶² *Id.* at 672, 674 (Douglas, J., concurring).

¹⁶³ *Id.* at 674 (Douglas, J., concurring).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 679 (Clark, J., dissenting).

¹⁶⁶ *Id.* at 682 (Clark, J., dissenting).

¹⁶⁷ *Id.* at 681 (Clark, J., dissenting).

¹⁶⁸ *Id.* at 685 (Clark, J., dissenting).

¹⁶⁹ *Id.* at 686 (White, J., dissenting).

quires repeated use of drugs.¹⁷⁰ Justice White viewed the majority's protection of the addict as logically including protection for drug use.¹⁷¹ Justice White argued, therefore, that the majority's decision limited a state's power to regulate narcotic use.¹⁷²

Although the *Robinson* Court concluded that a person could not be held criminally liable for his or her "status," the Court never enunciated specific criteria as to what constitutes a "status" and what constitutes an "act."¹⁷³ The Model Penal Code, however, provides guidance as to what constitutes an "act" for which criminal liability can be imposed.¹⁷⁴ According to the Model Penal Code, an act must be voluntary before a person can be found criminally responsible.¹⁷⁵ If an action is involuntary, the deterrent goal of the criminal law would not be effectuated, because involuntary actions cannot be deterred. Thus, according to the Model Penal Code, non-volitional actions, such as a reflex, convulsion, or actions during sleep, are not the type of "acts" punishable under the criminal law.¹⁷⁶ Similarly, bodily movements which are not the result of a person's effort or determination are excluded from the definition of "voluntary act."¹⁷⁷

Although a voluntary act is required for criminal responsibility, not every act leading to the harm must be volitional.¹⁷⁸ For example, if a person has knowledge that she is prone to fainting spells while driving, she will be subject to criminal liability for any harm resulting if she faints while driving. Liability will be imposed, not for the non-volitional fainting spell, but for the volitional act of driving a car with knowledge of her likelihood of suffering a fainting spell.¹⁷⁹ The Model Penal Code's definition of "act" complements the *Robinson* Court's distinction between a non-punishable "status" and a punishable "act."¹⁸⁰

¹⁷⁰ *Id.*; see also Cuomo, *supra* note 20, at 487-88.

¹⁷¹ *Robinson*, 370 U.S. at 688 (White, J., dissenting); see Cuomo, *supra* note 20, at 487-88.

¹⁷² *Robinson*, 370 U.S. at 689 (White, J., dissenting). See generally Cuomo, *supra* note 20, at 487-88.

¹⁷³ See *Robinson*, 370 U.S. at 667-74.

¹⁷⁴ See W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.2 (2d ed. 1986) (discussing the Model Penal Code, section 2.01(1), and what constitutes an "act" in the criminal law).

¹⁷⁵ *Id.* § 3.2, at 197 & n.23.

¹⁷⁶ *Id.* at 198.

¹⁷⁷ MODEL PENAL CODE, § 2.01(d).

¹⁷⁸ *Id.* at 199.

¹⁷⁹ *Id.*

¹⁸⁰ See *supra* notes 145-62 and accompanying text for a discussion of the facts of *Robinson* and the Court's language regarding "status."

In summary, the *Robinson* majority recognized the inequity of punishing people for their status.¹⁸¹ Yet Justice Stewart, writing for the majority, reiterated that the Court did not intend to interfere unnecessarily with the state's police power.¹⁸² Justice White, however, argued in dissent that the majority was leaving open the possibility of a dangerous expansion of a possible constitutional protection for addicts.¹⁸³ Justice White argued that the Court went too far in limiting the state's power in this area, and pointed out that the majority opinion explicitly did not include the right to punish for use of narcotics in the list of allowable state actions.¹⁸⁴ In *Powell v. Texas*,¹⁸⁵ the Court was faced with just such an attempt, and had to explain further its decision in *Robinson*.

B. *Powell v. Texas*

In 1968, six years after *Robinson*, the Supreme Court in *Powell v. Texas* took a narrow view of the *Robinson* Court's protection of status crimes, lest the Court become the country's ultimate arbiter of criminal standards through a broad application of the cruel and unusual punishments clause of the eighth amendment.¹⁸⁶ In a five to four opinion, the *Powell* Court held that a state could criminally punish a person for being drunk in public.¹⁸⁷ The defendant in *Powell* was convicted of public drunkenness, with no other act to establish criminal responsibility.¹⁸⁸

At the trial level, the defense offered evidence that alcoholism is a disease that inhibits a person's ability to stop using the drug; that an alcoholic's appearance in public is a non-volitional compulsion stemming from his or her disease; and finally, that the plaintiff was a chronic alcoholic.¹⁸⁹ The trial court accepted these facts, but ruled nevertheless that alcoholism was not a defense to the defendant's crime.¹⁹⁰ The *Powell* Court rejected the trial court's accep-

¹⁸¹ *Robinson*, 370 U.S. at 665.

¹⁸² *Id.* at 666.

¹⁸³ *Id.* at 688-89 (White, J., dissenting).

¹⁸⁴ *Id.* at 688 (White, J., dissenting). Justice White believed that *Robinson's* use of narcotics was well-established in the factual record. He explained that the very definition of "addiction" rests upon repeated use of drugs. *Id.* at 686. Justice White viewed the omission of any language concerning "use" as important. *Id.* at 688.

¹⁸⁵ 392 U.S. 514 (1968).

¹⁸⁶ *See id.* at 533.

¹⁸⁷ *Id.* at 535.

¹⁸⁸ *Id.* at 517.

¹⁸⁹ *Id.* at 521.

¹⁹⁰ *Id.* at 517.

tance of these facts, reasoning that they were not findings of fact in the true sense, but only suggestions made by the defense so that the case could be brought under the *Robinson* Court's ruling.¹⁹¹

In holding that a state could criminally punish a person for public drunkenness, Justice Marshall, writing for the Court, noted that the factual record in Powell's case did not establish whether Powell suffered from chronic alcoholism.¹⁹² The Court reasoned that if Powell's drinking was not the result of alcoholism, it would not fit into the *Robinson* model, and thus would not support the expansion of the constitutional protection.¹⁹³ The Court also noted the lack of consensus in the medical community regarding the definition of alcoholism and compulsion.¹⁹⁴

Justice Marshall also distinguished the facts of *Powell* from those in *Robinson*.¹⁹⁵ In *Powell*, the criminal act was public drunkenness. The Court construed this as different from the mere status of being a narcotics addict. Justice Black, in his concurring opinion, viewed this distinction as central to the decision.¹⁹⁶ Justice Black stressed that public drunkenness is an offense in every state, and has been proscribed throughout history.¹⁹⁷ Justice Black viewed the appellant's position as one with vast potential to limit dangerously the state's power to deal effectively with a widespread social problem.¹⁹⁸

For Justice White, also concurring, the deciding factor was the inadequacy of the factual record.¹⁹⁹ Acknowledging that some criminal acts cannot be excused just because a person is afflicted with a disease,²⁰⁰ Justice White suggested that he would allow certain chronic alcoholics to use their alcoholism as a defense to a charge of public intoxication.²⁰¹ In this case, however, the record did not establish that Powell could not avoid being in public.²⁰²

¹⁹¹ *Id.* at 521.

¹⁹² *Id.* at 521-22.

¹⁹³ *Id.* at 532.

¹⁹⁴ *Id.* at 534-36.

¹⁹⁵ *Id.* at 532.

¹⁹⁶ *Id.* at 542 (Black, J., concurring).

¹⁹⁷ *Id.* at 538 (Black, J., concurring).

¹⁹⁸ *Id.* at 537 (Black, J., concurring).

¹⁹⁹ *Id.* at 549 (White, J., concurring).

²⁰⁰ *Id.* at 550 (White, J., concurring). Justice White uses as examples a person with smallpox, a contagious disease, breaking quarantine, or an epileptic driving a car. *Id.*

²⁰¹ *Id.* at 551 (White, J., concurring).

²⁰² *Id.* at 552-53 (White, J., concurring).

Justice Fortas, in dissent, construed the issue as one of punishment for the "condition" of being drunk in public.²⁰³ First detailing documentation of chronic alcoholism as a disease, Justice Fortas gave a broad reading to *Robinson*.²⁰⁴ Though admitting that Powell was convicted for more than a mere status, Justice Fortas nevertheless argued that the same constitutional principle was involved in both cases, namely that the Constitution places a substantive limit on the state's power to define crimes.²⁰⁵ Viewing chronic alcoholism as causing the afflicted person to lose all volition regarding his or her actions, Justice Fortas argued that Powell's act of public intoxication fit within the constitutional protection defined in *Robinson*.²⁰⁶

Since deciding *Robinson* and *Powell*, the Supreme Court has routinely denied certiorari to cases raising similar issues.²⁰⁷ Thus, the Court has made no recent application of the *Robinson* status defense to the criminalization of addiction.²⁰⁸

IV. CONSTITUTIONAL LIMITS TO CRIMINAL RESPONSIBILITY FOR PREGNANT ADDICTS PROSECUTED AS DRUG TRAFFICKERS

Until recently, states wishing to punish pregnant drug addicts for potential harm to their fetuses have attempted to do so through child abuse statutes.²⁰⁹ These attempts have been unsuccessful, usually because courts have deemed child abuse statutes to apply only to born, rather than unborn, children.²¹⁰ To date, no legislature has

²⁰³ *Id.* at 559 (Fortas, J., dissenting).

²⁰⁴ *Id.* at 567-68 (Fortas, J., dissenting). Although conceding that the defendant Powell was convicted for more than a status, Justice Fortas nevertheless argues that *Robinson's* holding would also proscribe punishment for a chronic alcoholic's public drunkenness. Justice Fortas characterizes *Robinson* as standing for a prohibition on punishing a person for "being in a condition which he had no capacity to change." *Id.* at 567 (Fortas, J., dissenting).

²⁰⁵ *Id.* at 566 (Fortas, J., dissenting).

²⁰⁶ *Id.* at 567-68 (Fortas, J., dissenting).

²⁰⁷ See, e.g., *United States v. Moore*, 486 F.2d 1139 (D.C. Cir.) (addict with fifteen previous convictions contended, under *Robinson*, that it was unconstitutional to punish a non-trafficking addict for simple possession), *cert. denied*, 414 U.S. 980 (1973); *Hutcherson v. United States*, 345 F.2d 964, (D.C. Cir.) (ten year sentence for heroin possession not unconstitutional under *Robinson*), *cert. denied*, 382 U.S. 894 (1963); *United States ex rel. Swanson v. Reincke*, 344 F.2d 260 (2d. Cir.) (affirming denial of habeas corpus petition by an addict charged with self-administration of heroin, where the addict had argued that the statute violated the cruel and unusual punishment clause under *Robinson*), *cert. denied*, 382 U.S. 869 (1965).

²⁰⁸ But cf. *Traynor v. Turnage*, 108 S. Ct. 1372, 1383 (1988) (although not citing to *Robinson* or *Powell*, and without deciding whether or not alcoholism is a disease, the Supreme Court upheld a determination that primary alcoholics would not be excused from a ten year limit on using G.I. Bill benefits).

²⁰⁹ See *supra* notes 9, 70-78 and accompanying text for a discussion of child abuse cases.

²¹⁰ *Id.*

enacted a statute specifically criminalizing a pregnant woman's conduct that does harm to the fetus, although such bills are currently pending.²¹¹ An inherent difficulty with any such statute would be possible unconstitutionality under right to privacy arguments.²¹²

Rather than waiting for legislative action, an increasing number of states are using drug trafficking laws to effectuate what a specific statute would do, namely, punish pregnant substance abusers for their drug use. *State v. Johnson* was the first such conviction.²¹³ By characterizing the maternal/fetal exchange through the placenta as a drug "delivery," and focusing on the moment immediately following birth (before the umbilical cord is cut),²¹⁴ Florida argued that there was drug delivery to a "child," rather than a fetus.²¹⁵ Thus, the court in the *Johnson* case was technically able to avoid deciding whether the drug trafficking statute applied to unborn children. In a case such as *Johnson*, then, where the prosecution was able to circumvent the maternal rights arguments, one must examine more than the traditional maternal versus fetal rights arguments when discussing whether drug laws are the appropriate vehicles for state action against pregnant addicts.

First, this note proposes that the criminal prosecution of pregnant drug addicts under drug trafficking statutes is unconstitutional under the cruel and unusual punishments clause of the eighth amendment. It argues that the maternal-fetal blood exchange through the placenta is a non-volitional bodily function rather than a volitional "act" for which criminal responsibility can be imposed.

²¹¹ See Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 30 EMORY L. J. 1401, 1428 (1990) (compiling data cited in an American Civil Liberties Union Memorandum). The Georgia legislature defeated a proposed bill that would have made drug use during pregnancy a felony. K. Moss, G. Guerrero, K. Kolbert, Update of State Legislation Regarding Drug Use During Pregnancy 5 (May 22, 1990) (unpublished memorandum on file at the Boston College Law Review). A bill pending in Ohio provides that women who use drugs during pregnancy may be guilty of a felony and subject to mandatory tubal ligation. *Id.* at 10. Similar bills are pending in Indiana and Hawaii. See S. 598, 107th Ind. Gen. Assembly, 1st Reg. Sess. (introduced Jan. 23, 1991,) and S.B. 332, 16th Leg., Reg. Sess. (Hawaii, Jan. 25, 1991.)

²¹² See *supra* note 13 and accompanying text for a discussion of commentators on the right to privacy issues inherent in "fetal rights" cases.

²¹³ *Newborn Drug Conviction*, *supra* note 6, at 1, col. 1.

²¹⁴ *Pregnant Women*, *supra* note 6, at 419. It should be noted that the *Johnson* prosecution strategy, where cocaine metabolites were found in the newborn's urine, has very limited application. The prosecution's contention that a drug exchange occurred at the moment immediately following birth, but before the umbilical cord was severed, would only be possible in cases where the pregnant woman used cocaine within 72 hours of giving birth. Trial Transcripts, at 155-60, *State v. Johnson*, No. 89-890-CFA (Seminole County, Fla. 1989).

²¹⁵ *Id.*

Therefore, the placental transfer of drugs from mother to fetus is a function of the pregnant woman's status of being a pregnant addict. The criminalization of this status is a form of cruel and unusual punishment that violates the eighth amendment as interpreted in *Robinson*.²¹⁶

Second, this note argues that the state of Florida, although convicting Ms. Johnson for drug *delivery*, was actually attempting to punish Ms. Johnson for her cocaine *use* during pregnancy. Based on the Court's reasoning in *Robinson* and the research characterizing cocaine as physically addictive, this note suggests that a basis exists for holding that a statute punishing pregnant drug use is unconstitutional under the eighth amendment.²¹⁷ Finally, this note concludes that even if the cruel and unusual punishments clause does not proscribe a state from punishing a pregnant addict's drug use, compelling policy arguments urge against using the criminal process to punish pregnant substance abusers.²¹⁸

A. *The Criminal Act*

At first glance, a statute criminalizing the delivery of drugs to a minor appears to fall completely outside any discussion of whether the statute is punishing a "status" or an "act."²¹⁹ Drug trafficking, usually for profit, is clearly a volitional act, and the *Robinson* Court specifically listed it as an act that a state can criminalize.²²⁰ Florida's characterization in the *Johnson* case of a pregnant woman's placenta as the delivery method changes the analysis, however, because the functioning of the placenta is not the usual type of act that criminal statutes punish.²²¹

The Court in *Robinson*, interpreting the cruel and unusual punishments clause of the eighth amendment as prohibiting punishment for a *status*, did not set any criteria as to what really constitutes an *act* sufficient to establish criminal liability.²²² The Model Penal Code, however, states that the criminal act must be volitional.²²³

²¹⁶ See *infra* text accompanying notes 219-32.

²¹⁷ See *infra* text accompanying notes 233-44.

²¹⁸ See *infra* text accompanying notes 246-54.

²¹⁹ See *Robinson v. California*, 370 U.S. 660, 664 (1962) (listing "acts" that states can constitutionally punish).

²²⁰ *Id.* The Court refers to "sale" of narcotics.

²²¹ See W. LAFAVE & A. SCOTT, *supra* note 174, § 3.2 (citing the MODEL PENAL CODE § 2.02(1) (1962)).

²²² See *supra* notes 151-55 and accompanying text for a list of acts punishable by the state without any accompanying definition of "status."

²²³ W. LAFAVE & A. SCOTT, *supra* note 174, § 3.2 (citing MODEL PENAL CODE § 2.01(1)).

Movements that are involuntary, such as a reflex, convulsion, or movements during sleep, are insufficient to establish criminal liability.²²⁴ Thus, according to the Model Penal Code, the maternal-fetal blood exchange during pregnancy would be an involuntary reflex reaction rather than an act.²²⁵ Theoretically, a woman has control over whether she becomes pregnant. Once pregnant, however, she has no control over the maternal-fetal exchange. The placental exchange, then, is just a function of the status of pregnancy.²²⁶ This is analogous to the *Robinson* Court's distinction between act and status, in which the Court likened punishment for being an addict to punishment for a disease.²²⁷ Bodily functions more closely resemble a status than a volitional act, which is necessary for criminal liability under *Robinson*.²²⁸

Another factor arises, however, in the Model Penal Code's definition of "act."²²⁹ Under the Code, if a person has knowledge that he or she is prone to certain involuntary reflexes, and engages in an act that may result in harm if that reflex occurs, then criminal responsibility can be imposed on the person *for the act, not the reflex*.²³⁰ For example, suppose a person prone to fainting spells gets behind the wheel of a car despite knowledge that fainting is likely to occur. The person does faint, and an accident occurs, harming a third party. The volitional act of driving the car, not the involuntary act of having fainted, will be deemed the necessary act for criminal liability.²³¹

Using the Model Penal Code analysis, one could argue that a pregnant woman who takes drugs knowing that she is pregnant, or knowing that she will exchange drugs with her fetus through the placenta, can be held liable, just as the driver in the above example. The placental exchange, however, because it is an involuntary occurrence during a healthy pregnancy, is not the cause of criminal responsibility; it is the act of taking drugs during pregnancy that satisfies the Model Penal Code definition of "act."²³² The act, in

²²⁴ *Id.*

²²⁵ *See id.*

²²⁶ *Id.*

²²⁷ *Robinson v. California*, 370 U.S. 660, 666 (1962).

²²⁸ *See supra* notes 174-80.

²²⁹ *See supra* notes 173-80 and accompanying text for a discussion of the Model Penal Code's definition of "act."

²³⁰ W. LAFAVE & A. SCOTT, *supra* note 174, § 3.2 (citing MODEL PENAL CODE § 2.01(1) (1962)).

²³¹ *Id.*

²³² *Id.*

effect, is shifted from the involuntary reflex (fainting spell or placental transfer) to the act preceding the reflex (driving the car or taking the drugs).

Thus, criminal responsibility can only be imposed for the act of taking drugs, rather than the placental delivery, because placental drug delivery from mother to fetus is a non-volitional bodily function, not the type of act required under *Robinson* or the Model Penal Code. The placental exchange only results from the physical condition of pregnancy. Therefore, punishment for drug delivery through the placenta is actually punishing a woman for *being* a pregnant drug addict. Florida's prosecution of a pregnant woman for placental drug delivery is therefore an unconstitutional criminalization of the status of maternal drug addiction.

B. Regulation of a Pregnant Woman's Drug Use

Because criminal responsibility can only be imposed for the act of taking drugs during pregnancy, rather than for placental delivery alone, Florida and other states prosecuting pregnant drug addicts under drug trafficking statutes are really punishing the women for their drug use, coupled with the status of pregnancy. Although this note argues that punishing a pregnant addict under drug trafficking laws is an unconstitutional criminalization of status under *Robinson*, the question remains whether a state may specifically legislate against a pregnant addict's drug use.

The *Robinson* Court, in holding that punishment for the status of addiction constituted cruel and unusual punishment, noted that narcotics addiction is a disease.²³³ The Court stated that punishing someone for the disease of addiction is the same as punishing people with leprosy or venereal disease.²³⁴ Cocaine addiction should be treated in the same manner as narcotics addiction, especially when smoking is the method of administration.²³⁵ The biological model of addiction suggests that cocaine affects the brain's chemistry in a manner that causes addicts to develop a physical need for the drug.²³⁶ Other data shows that addicts continue to use cocaine despite catastrophic consequences, suggesting that an addict has no control over cocaine consumption.²³⁷ This data indicates that the

²³³ *Robinson v. California*, 370 U.S. 660, 667 (1962).

²³⁴ *Id.* at 666.

²³⁵ See *supra* notes 115-36 and accompanying text.

²³⁶ See *supra* notes 127-36 and accompanying text.

²³⁷ See *supra* notes 124 & 136 and accompanying text.

effects of cocaine are similar to the effects of narcotics, enough to justify applying the *Robinson* protection to cocaine addicts.

Further, the *Robinson* decision was inconsistent regarding the constitutionality of punishing an addict for drug use.²³⁸ Although the Court reiterated that a state could constitutionally *regulate* drug use, the Court did not specifically include *use* in its list of punishable offenses.²³⁹ Noting this omission in his dissent, Justice White argued that addiction is defined as the regular use of drugs, and that if it is cruel and unusual to punish someone for their status as an addict, it would be difficult to justify punishing the addict for drug use.²⁴⁰ Thus, Justice White was concerned that the constitutional protection of the status of addiction would include the protection of drug use.²⁴¹

Given that drug addiction cannot occur without drug use, and the *Robinson* Court's less than explicit language concerning use, a statute punishing pregnant drug use might raise issues of unconstitutionality under the eighth amendment. The *Powell* Court seemed to deny such a broad reading of *Robinson* by holding that punishment for public drunkenness is not cruel and unusual.²⁴² The *Powell* Court stated that public drunkenness is an act, not a status.²⁴³ Thus, the Court indicated that the Constitution does not protect actions stemming from addiction, reasoning that such protection would include protection for murder, if an addiction-related compulsion caused the murder.²⁴⁴

This potential for expansion is absent from cases such as Jennifer Johnson's. If the constitutional protection for status were interpreted to include a pregnant addict's drug use, the only thing protected is her personal consumption of the drug, rather than any act resulting from that consumption. Given the *Robinson* Court's prohibition on punishing someone for a disease, the nature of cocaine addiction as a disease for some users, and the lack of the expansion problem noted in *Powell*, there is a basis for holding that punishing a pregnant addict for drug use is cruel and unusual under the eighth amendment. Fetal rights advocates would argue,

²³⁸ See *supra* notes 169-72 and accompanying text.

²³⁹ *Robinson*, 370 U.S. at 664.

²⁴⁰ *Id.* at 686, 688 (White, J., dissenting). See Cuomo, *supra* note 20, for a discussion of the *Robinson* Court's treatment of "use."

²⁴¹ *Robinson*, 370 U.S. at 686 (White, J., dissenting).

²⁴² *Powell v. United States*, 392 U.S. 514, 535 (1967).

²⁴³ *Id.* at 532.

²⁴⁴ *Id.* at 534.

however, that fetal harm or death that is caused by the pregnant addict's drug use is the equivalent of battery or murder. Considering the state's interest in protecting human life and the Supreme Court's recent decision in *Reproductive Health Services v. Webster*,²⁴⁵ it is unlikely that courts would interpret *Robinson* and *Powell* as constitutionally protecting a pregnant drug addict's drug use. Nevertheless, there are policy reasons why states should not criminalize pregnant drug abuse.

C. Policies Against Criminalizing Maternal Drug Use Under Drug Trafficking Laws

Criminalization of maternal substance abuse, either through drug laws or specific statutes, will not effectuate state goals of deterrence and eradication. First, even if states can constitutionally legislate against pregnant drug use, there has as yet been no such legislation and no case law interpreting it. Instead of waiting for legislative action, state prosecutors are inappropriately applying drug trafficking laws to pregnant drug users.²⁴⁶ These statutes were not meant to apply to distribution through the placenta. No other drug trafficker first has to ingest and metabolize the drug in order to effectuate the "delivery." Thus, the *Johnson* approach actually punishes a pregnant woman for her drug use. Drug delivery, however, is different from drug use. In fact, the Florida statute under which *Johnson* was convicted has a separate clause proscribing drug use, yet the state did not charge Ms. *Johnson* with drug use.

Not only is the statute inapplicable, but its use against pregnant drug users establishes a dangerous precedent that may make women liable for using legal substances as well as illegal drugs such as cocaine. For example, many substances that may be legally used by an adult are illegal if given to a minor. Using the *Johnson* case as a model, if a pregnant woman drank one glass of wine, she could be prosecuted under existing law proscribing delivery of alcohol to a minor.²⁴⁷ If the same woman took a prescription drug, she could be found guilty of administering the drug to someone (the fetus) without a prescription. These examples employ the logic of the

²⁴⁵ 109 S. Ct. 3040, 3050 (1989) (Court upheld Missouri statute stating that Missouri laws must be construed to grant unborn children all the "rights, privileges, and immunities available to other persons").

²⁴⁶ See *supra* note 11 and accompanying text.

²⁴⁷ The mother would be transferring alcohol through her umbilical cord. This is the same logic that the *Johnson* prosecution employed.

Johnson prosecution, namely, that there is a statute against these "deliveries" or "administrations," and it does not matter that their application to pregnant women is novel.²⁴⁸ The above examples illustrate the danger of giving a broad reading to statutes enacted for situations other than the regulation of maternal conduct during pregnancy. It is the legislature that must speak to this issue, not prosecutors and the courts.

Finally, criminalization in general, whether through drug trafficking or other statutes, will not further a state's interest in this area.²⁴⁹ If a state truly wishes to protect the potential life and health of fetuses, then legislators, prosecutors, and judges should examine the practical effects of criminalization. Many factors indicate that criminalization is not the answer.²⁵⁰ First, for many individuals, cocaine addiction is a disease which requires treatment, not punishment.²⁵¹ It is widely believed that the threat of prison will not deter pregnant addicts, because a person cannot be deterred from having a disease.²⁵² Second, the threat of prosecution may not prevent a pregnant woman from taking drugs, but it will probably deter her from seeking prenatal care for fear of discovery.²⁵³ This will not serve the state's interest in promoting fetal well-being. Some addicts, upon discovering that they are pregnant, may even seek to terminate the pregnancy to avoid becoming criminals.

Finally, because criminalization is prospective, it will not prevent harm to the fetus.²⁵⁴ The harm will be inflicted by the time the mother is punished, and the state will be left with a damaged child and an incarcerated mother. If state officials concentrate their efforts on criminalization, rather than education and treatment, pregnant drug addicts will continue to give birth to drug-exposed children. The victim, the drug-exposed infant, will only be further victimized by having his or her mother jailed. The very nature of addiction and pregnancy, therefore, suggests that criminalization will not advance the state's interests in protecting fetal welfare.

²⁴⁸ Motion to Dismiss at 27, *State v. Johnson*, No. 89-890-CFA (Seminole County, Fla. 1989).

²⁴⁹ See *supra* notes 136, 140-41 and accompanying text.

²⁵⁰ *Id.*

²⁵¹ See *supra* notes 124-36 for a discussion of addiction.

²⁵² See *supra* notes 136, 140-41 and accompanying text for a discussion of whether criminal sanctions would deter a pregnant drug addict from using drugs.

²⁵³ See *Punishing Pregnant Addicts*, *supra* note 98, at E5, col. 1; *Pregnancy Police*, *supra* note 7, at 308.

²⁵⁴ See *Punishing Pregnant Addicts*, *supra* note 98, at E5, col. 1; *Pregnancy Police*, *supra* note 13, at 308.

CONCLUSION

Pregnant drug use is on the rise. Newspapers depict the horrors of cocaine-exposed babies. Something must be done about this growing problem, yet the answer does not lie in characterizing pregnant women as drug trafficking felons. The biological realities of both pregnancy and cocaine abuse dictate against criminalization of pregnant substance abuse. First, the maternal-fetal exchange through the placenta is an involuntary act which occurs solely as a result of a woman's pregnancy. This biological exchange is not the type of volitional act necessary to invoke criminal responsibility. Second, strong evidence suggests that cocaine abuse is physically addictive for some individuals. Thus, punishing a pregnant addict for delivering drugs to a minor through her umbilical cord is a violation of the cruel and unusual punishments clause of the eighth amendment, because the pregnant woman is being punished for the status of pregnancy, coupled with the condition of addiction.

In addition, criminalization will not effectuate the state goal of protecting the fetus. Criminalization will only encourage pregnant drug addicts to avoid prenatal care in order to hide their "crime." With the dearth of treatment centers able or willing to admit pregnant women, pregnant addicts may even turn to abortion rather than face later prosecution. Further, punishing a pregnant addict after she has harmed her fetus will not help drug-afflicted children. States need to develop educational and treatment programs, so that mothers and children both will be free of addiction.

DAWN MARIE KORVER