

# STOP THE INJUSTICE: A PROTEST AGAINST THE UNCONSTITUTIONAL PUNISHMENT OF PREGNANT DRUG-ADDICTED WOMEN

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## INTRODUCTION

Beginning in the late 1970s, an innovative prosecutorial strategy arose: states began prosecuting pregnant women because of their criminal behavior and its effects on their unborn and newborn children.<sup>1</sup> Prior to this creative use of the criminal justice system, women had never been prosecuted, let alone punished, for this behavior during pregnancy.<sup>2</sup> States have primarily aimed their novel prosecutorial strategy at drug-addicted women, charging them with drug possession, child abuse, child neglect, and even murder in some cases, for allegedly exposing their fetuses to harm.<sup>3</sup> The states' purposes behind these prosecutions are to protect the fetus from abuse and to deter women from using drugs during pregnancy.<sup>4</sup> Instead of providing

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1. For purposes of this Note, "pregnant women's criminal behavior" refers to their drug use during pregnancy.

2. See Shona B. Glink, Note, *The Prosecution of Maternal Fetal Abuse: Is This the Answer?*, 1991 U. ILL. L. REV. 533, 556 (1991).

3. See generally *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992) (charging mother with delivering controlled substance to infant); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993) (charging mother with criminal child abuse, among other things); *In re Starks v. State*, 18 P.3d 342, 344 (Okla. 2001) (charging mother with child neglect due to involvement with methamphetamine during her pregnancy).

4. See Lynn Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1015–21 (1999) (arguing that pregnant women became appealing targets for prosecutors during war on drugs); Doretta Massardo McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 527–28, 534–35 (1990); Molly McNulty, 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, 290–91 (1987–88); Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357, 367 (1989).

drug-addicted mothers with drug treatment, the result of this prosecutorial strategy has been to send a considerable number of women to prison.<sup>5</sup>

*State v. Black*, a case in which the State of Florida charged Beverly Black, a thirty-two-year-old African-American woman, with delivery of cocaine to a minor, provides an example of such a strategy.<sup>6</sup> The State asserted that Black passed cocaine to her newborn through the umbilical cord.<sup>7</sup> The County Circuit Court sentenced Black to eighteen months in prison and three years of probation,<sup>8</sup> and the First District Court of Appeals affirmed Black's conviction.<sup>9</sup> As a result, Black became the first woman in Florida to be incarcerated for passing cocaine to her newborn through the umbilical cord.<sup>10</sup>

Legal scholars and women's reproductive rights organizations, as well as medical, public advocacy, and health groups, have attacked this prosecutorial strategy on both policy and constitutional grounds. They contend that these prosecutions will actually undermine women's and children's health because pregnant drug-addicted women will not seek health and prenatal care for fear that their doctors will turn them over to local enforcement authorities.<sup>11</sup> These critics further argue that such prosecutions violate a woman's constitutional due process rights, equal protection rights, and right to privacy.<sup>12</sup>

The manner in which this practice violates a drug-addicted woman's Eighth Amendment rights has not yet been fully explored. In *Robinson v. California*, the Supreme Court established the principle that it is cruel and unusual punishment to punish an individual solely for his or her status as a drug offender.<sup>13</sup> This Note offers a new perspective in analyzing the constitutional implications of punishing a pregnant drug-addicted woman for her behavior during pregnancy. It

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5. See *infra* Part I.

6. LYNN M. PALTRON, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW 18 (1992), available at <http://advocatesforpregnantwomen.org/file/1992%20State-by-State%20Case%20Summary.pdf> (citing *State v. Black*, No. 89-5325 (Fla. Cir. Ct. Jan. 3, 1990), *aff'd per curiam*, 642 So. 2d 1364 (Fla. Dist. Ct. App. 1994)).

7. *Id.*

8. *Id.*

9. *Black v. State*, 642 So. 2d 1364 (Fla. Dist. Ct. App. 1994) (*per curiam*).

10. PALTRON, *supra* note 6, at 18.

11. See Michelle D. Mills, Comment, *Fetal Abuse Prosecutions: The Triumph of Reaction Over Reason*, 47 DEPAUL L. REV. 989, 1037 (1998); Susan E. Rippey, Note, *Criminalizing Substance Abuse During Pregnancy*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 69, 88-89 (1991).

12. See *infra* Part II.B; see also, e.g., Mills, *supra* note 11, at 1020-36; Rippey, *supra* note 11, at 76-89.

13. See *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

will contend that a State's punishment of a drug-addicted woman for her actions during pregnancy violates the Eighth Amendment's Cruel and Unusual Punishment Clause because the State is penalizing the woman for her status as a drug addict.

Part I provides an overview of states' strategies for prosecuting pregnant drug-addicted women. States have primarily used child abuse, neglect, endangerment, controlled substance, homicide, and manslaughter statutes to punish pregnant drug-addicted women for allegedly exposing their fetuses to potential harm. Part II explores the constitutional and policy arguments most frequently made against criminalizing maternal substance abuse. Part III analyzes the Eighth Amendment argument against punishing pregnant drug-addicted women, including a brief overview of the origins of the Eighth Amendment, the purpose of the Amendment, and the Supreme Court's interpretation of the Cruel and Unusual Punishment Clause. Part III then builds on this information, applying it to the prosecution of pregnant drug-addicted women.

## I.

### STATE STRATEGIES FOR PROSECUTING PREGNANT DRUG-ADDICTED WOMEN

#### A. *The Reasons Behind the State's Prosecution of Pregnant Drug-Addicted Women*

A variety of factors have increased support for punitive intervention during pregnancy. One factor is medical knowledge. Over the years there has been an increase in medical knowledge about the injurious effects of pregnant women's prenatal drug use on fetal development.<sup>14</sup> A second factor is the media. The media has extensively reported on the growing drug problem in the United States, particularly among pregnant women, and regularly recounts stories concerning the problems of babies exposed to drugs while in their mothers' wombs.<sup>15</sup> A third factor is statistics. Statistics indicate that more than 500,000 babies each year are born to women who used illicit substances during pregnancy.<sup>16</sup> A fourth factor is American public opin-

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14. See McNulty, *supra* note 4, at 288.

15. See Glink, *supra* note 2, at 538.

16. See Marilena Lencewicz, Note, *Don't Crack the Cradle: Minnesota's Effective Solution for the Prevention of Prenatal Substance Abuse—Analysis of Minnesota Statute Section 626.5561*, 63 REV. JUR. U.P.R. 599, 601 (1994) (citing KAN. DEP'T OF SOC. & REHABILITATIVE SERVS., KAN. ALCOHOL & DRUG ABUSE SERVS., ALCOHOL AND OTHER DRUG EXPOSED BABIES: A PREVENTABLE TRAGEDY, DIRECTIONS, June 1990, at 1).

ion. As a result of the extensive media coverage, the American public has become aware of the devastating effects of prenatal drug use and has developed a disdain for pregnant women who use drugs.<sup>17</sup> One article reports that this disdain for pregnant drug users has led a substantial number of Americans to favor imposing criminal sanctions upon women whose prenatal drug use causes injury to the fetus.<sup>18</sup> A final factor is the fetal rights movement. The fetal rights movement has vehemently advocated that fetuses should be given legal status and hence be treated as persons.<sup>19</sup> Against the backdrop of these factors, state prosecutors began criminalizing the behavior of drug-addicted women during pregnancy.

One of the first cases in which the State prosecuted a drug-addicted woman because of her behavior during pregnancy was in 1977 in *Reyes v. Superior Court*.<sup>20</sup> Margaret Velasquez Reyes, a Latina woman, gave birth to twin boys who were addicted to heroin and suffered from withdrawal after birth.<sup>21</sup> Velasquez was prosecuted under the criminal child endangerment statute and faced a maximum of ten years in prison.<sup>22</sup> The California Court of Appeals dismissed the action and held that the child endangerment statute was not intended to cover conduct endangering an unborn child.<sup>23</sup> The court said that when the legislature intended for a criminal statute to include the protection of a fetus or unborn child, it had done so expressly.<sup>24</sup> Since the terms "fetus" or "unborn child" were not mentioned in California's criminal child endangerment statute,<sup>25</sup> the court concluded that the legislature did not intend for the statute to apply to prenatal conduct.<sup>26</sup>

Though the *Reyes* prosecution was unsuccessful, the decision did not discourage state prosecutors in California or elsewhere from bringing criminal charges against drug-addicted women for their behavior during pregnancy. Since *Reyes* in 1977, there have been a considera-

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17. See Glink, *supra* note 2, at 538–39.

18. See *id.*

19. See McNulty, *supra* note 4, at 289–90.

20. 141 Cal. Rptr. 912 (Cal. Ct. App. 1977).

21. *Id.* at 913.

22. *Id.*

23. *Id.* at 913–14.

24. *Id.* at 914.

25. Penal Code section 273a(1) as it existed at the time of the alleged offense read in pertinent part: "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 913 (citing CAL. PENAL CODE § 273a(1) (West 1976)).

26. *Id.* at 913–15.

ble number of cases in which states have successfully prosecuted drug-addicted women for exposing their fetuses to potential harm.<sup>27</sup> For example, in *In re Ruiz*, Nora Ruiz, a heroin-addicted Latina woman, gave birth prematurely to a baby boy.<sup>28</sup> The baby exhibited several symptoms of drug withdrawal such as irritability, diarrhea, jitteriness, and feeding difficulty.<sup>29</sup> The State of Ohio charged Ruiz with child abuse, and the Court of Common Pleas of Wood County found that Ohio's child abuse statute applied in this case.<sup>30</sup> The court pointed out that Ruiz's heroin use during pregnancy placed her child's health in danger,<sup>31</sup> thus establishing that the baby had been abused due to his mother's prenatal conduct.<sup>32</sup>

In *In re Unborn Child*, Sierra K., a drug-addicted mother of four children, gave birth to a fifth child who tested positive for cocaine.<sup>33</sup> After the fifth child tested positive, a court order was issued directing Sierra K. to participate in a drug rehabilitation program and refrain from using illegal substances.<sup>34</sup> At the time of the decision, Sierra K. had not yet complied with the order and was also pregnant with her sixth child.<sup>35</sup> Because she had admitted to Child Protective Services that she had used drugs during the sixth pregnancy, the Legal Aid Society of Suffolk County sought an order declaring this sixth but unborn child neglected within the meaning of the Family Court Act § 1012.<sup>36</sup> The New York Family Court recognized the State's interest in protecting potential life from harm that could come from prenatal drug use.<sup>37</sup> Consequently, the court held that Sierra K.'s unborn child was a "personality which is afforded the protection of [the] Family Court Act."<sup>38</sup> The court also found that a preponderance of the evidence established that Sierra K. derivatively neglected her unborn child.<sup>39</sup>

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27. See generally NATIONAL ADVOCATES FOR PREGNANT WOMEN STATE-BY-STATE SUMMARY OF PROSECUTIONS (2004) (unpublished report, on file with *NYU Journal of Legislation and Public Policy*) (listing cases in which women have been prosecuted for their behavior during pregnancy).

28. 27 Ohio Misc. 2d 31, 32 (Com. Pl. 1986).

29. *Id.* at 32.

30. *Id.* at 35.

31. *Id.*

32. *Id.*

33. 683 N.Y.S.2d 366, 367 (Fam. Ct. 1998).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 370.

38. *Id.* at 371.

39. *Id.* at 371-72.

State prosecutors cite two primary reasons for criminalizing the behavior of women like Ruiz and Sierra K. First, prosecutors hope that by charging drug-addicted women with child abuse, endangerment, neglect, possession of a controlled substance, or homicide, they will deter other women from taking drugs during pregnancy.<sup>40</sup> Prosecutors and other proponents of criminalization believe that the criminal justice system should provide severe punishments that act as disincentives to women who are likely to engage in drug use and other risky behaviors during pregnancy.<sup>41</sup> Prosecutors and other proponents of criminalization claim “that the creation of crimes that punish women who endanger their fetuses would educate the public through ‘the publicity accompanying the trial, conviction, and sentencing’ of the ‘proper distinctions between good and bad behavior.’”<sup>42</sup>

For example, Michigan prosecutor Tony Tague argued that underlying the general deterrence objective of the criminal prosecution of pregnant drug-addicted women is the hope that it will encourage women to seek drug treatment.<sup>43</sup> Tague asserted that “[w]hen physicians make suggestions, it doesn’t appear that’s enough for [drug-addicted women] to seek treatment. The possibility of prosecution is a strong incentive.”<sup>44</sup> Florida prosecutor Jeff Deen stated, in regard to a drug-addicted woman he was prosecuting for her behavior during pregnancy, that the State “need[s] to make sure this woman does not give birth to another cocaine baby. The message is that this community cannot afford to have two or three cocaine babies from the same person.”<sup>45</sup>

Second, prosecutors contend that punishing drug-addicted women protects the potential life from abuse and ensures the fetus’s right to bodily integrity.<sup>46</sup> The Supreme Court has held that the word

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40. See McGinnis, *supra* note 4, at 527.

41. See Note, *supra* note 4, at 367 (quoting Jeffrey A. Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97, 117 (1985)); see also Note, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 214 (1993) (arguing that criminal legislation would deter drug use during pregnancy).

42. Note, *supra* note 4, at 367 (quoting Jeffrey A. Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97, 117–18 (1985)).

43. See Julie Petrow, Note, *Addicted Mothers, Drug-Exposed Babies: The Unprecedented Prosecution of Mothers Under Drug-Trafficking Statutes*, 36 N.Y.L. SCH. L. REV. 573, 599 (1991) (quoting Tony Tague in Jan Hoffman, *Pregnant, Addicted—and Guilty?*, N.Y. TIMES, Aug. 19, 1990, § 6 (Magazine), at 34).

44. *Id.*

45. *Id.* at 604 (quoting Jeff Deen in Mark Curriden, *Holding Mom Accountable*, A.B.A. J., Mar. 1990, at 51).

46. See Paltrow, *supra* note 4, at 1014.

“person” as used in the Fourteenth Amendment does not include the unborn.<sup>47</sup> Although the unborn are therefore not entitled to constitutional protection, state prosecutors argue otherwise, claiming that the fetus is a person entitled to legally recognized rights such as bodily integrity and the right to life.<sup>48</sup> For example, South Carolina Attorney General Charles Condon asserted that the fetus is a “fellow South Carolinian.”<sup>49</sup> California Deputy District Attorney Henry Elias contended that “fetuses are people too” and that the fetus has a “right to life.”<sup>50</sup>

### B. *Child Abuse, Endangerment, and Neglect Statutes*

State prosecutors have sought to accomplish the objectives of deterrence and protection of potential life by prosecuting drug-addicted women under an array of criminal statutes.<sup>51</sup> Child abuse, neglect, and endangerment statutes are types of criminal statutes that states have used to punish drug-addicted women for their behavior during pregnancy. For example, in *Whitner v. State*, Cornelia Whitner, a thirty-three-year-old African-American woman, was arrested at the hospital where she gave birth because a drug test detected cocaine in her newborn’s urine.<sup>52</sup> Whitner pled guilty to criminal child neglect and was sentenced to eight years in prison.<sup>53</sup> She then filed a petition for post-conviction relief, pleading that the circuit court lacked subject matter jurisdiction to accept her guilty plea.<sup>54</sup> Whitner also pled that she received inadequate legal representation because her legal counsel neglected to inform her that the felony child neglect statute might not encompass prenatal drug use.<sup>55</sup>

Although the lower court granted the petition on both grounds, the South Carolina Supreme Court reversed the lower court’s decision and restored Whitner’s conviction.<sup>56</sup> The court held that viable fe-

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47. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

48. See Paltrow, *supra* note 4, at 1014; McNulty, *supra* note 4, at 290.

49. Paltrow, *supra* note 4, at 1014 (quoting Charles Condon in Rick Bragg, *Defender of God, South and Unborn*, N.Y. TIMES, Jan. 13, 1998, at A14).

50. *Id.* (quoting Points and Authorities in Opposition to Defendant’s Demurrer and Motion to Dismiss at 26–30, *People v. Stewart*, No. M508197 (San Diego, Cal. Mun. Ct. Feb. 13, 1987)).

51. See Glink, *supra* note 2, at 546.

52. NATIONAL ADVOCATES FOR PREGNANT WOMEN STATE-BY-STATE SUMMARY OF PROSECUTIONS, *supra* note 27, at 68 (citing *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998)).

53. *Whitner v. State*, 492 S.E.2d 777, 778–79 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998)).

54. *Id.* at 779.

55. *Id.*

56. *Id.* at 786.

tuses are persons under the state's child abuse statutes.<sup>57</sup> The court based its reasoning on the fact that South Carolina law has traditionally recognized that viable fetuses are persons entitled to certain legal rights and privileges.<sup>58</sup> Moreover, the court noted that in the prior case of *State v. Horne*, it had held that the word "person" used in criminal statutes includes fetuses.<sup>59</sup> Therefore, the court did not think that it would make sense to treat a viable fetus as a person under homicide laws and wrongful death statutes but not under child abuse statutes.<sup>60</sup>

### C. Manslaughter Statutes

Manslaughter statutes are another mechanism that states use to prosecute drug-addicted women for their behavior during pregnancy. In *State v. Grubbs*, Geraldine Grubbs, a twenty-three-year-old white woman, allegedly used cocaine during her pregnancy and delivered a son who died soon after birth.<sup>61</sup> An autopsy indicated that the infant suffered from a heart attack as a result of his mother's prenatal cocaine use.<sup>62</sup> According to one source, Grubbs' boyfriend beat her and supplied her with drugs.<sup>63</sup> The State charged Grubbs with manslaughter, and she pled no contest to a lesser charge of criminally negligent homicide.<sup>64</sup> She was sentenced to five years in prison, with the final four and half years suspended.<sup>65</sup>

### D. Homicide Statutes

One final mechanism that states use to prosecute drug-addicted women's behavior during pregnancy is homicide statutes. In *State v. McKnight*, Regina McKnight, a twenty-two-year-old African-American woman, was charged with homicide by child abuse after experiencing a stillbirth.<sup>66</sup> The State contended that McKnight's cocaine

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57. *Id.* at 780.

58. *Id.* at 779–80.

59. *Id.* at 780 (citing *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984)).

60. *Id.*

61. See PALTROW, *supra* note 6, at 9 (citing *State v. Grubbs*, No. 4FA S89-415 (Alaska Sup. Ct. Oct. 2, 1989)).

62. *Id.*

63. *Id.*

64. NATIONAL ADVOCATES FOR PREGNANT WOMEN STATE-BY-STATE SUMMARY OF PROSECUTIONS, *supra* note 27, at 2.

65. *Id.*

66. *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003); NATIONAL ADVOCATES FOR PREGNANT WOMEN STATE-BY-STATE SUMMARY OF PROSECUTIONS, *supra* note 27, at 78.



use during pregnancy caused her fetus's death.<sup>67</sup> The South Carolina Supreme Court held that under South Carolina law, a viable fetus is a "child" within the meaning of the child abuse statute.<sup>68</sup> The court affirmed McKnight's conviction and sentence of twenty years in prison, suspended to service of twelve years.<sup>69</sup>

## II.

### CONSTITUTIONAL AND POLICY ARGUMENTS AGAINST THE PUNISHMENT OF PREGNANT DRUG-ADDICTED WOMEN

The opponents of criminalizing maternal substance abuse include legal scholars, women's reproductive rights organizations, and medical, public advocacy, and health groups. Such opponents make numerous policy arguments, including the claim that the prosecution of drug-addicted women is not an effective method of child protection. They maintain that the maternal substance abuse issue is best addressed through education and drug treatment, not through the criminal justice system. Moreover, these opponents raise several constitutional arguments against the punishment of drug-addicted women for their behavior during pregnancy. They contend that the states' prosecutorial strategies violate the constitutional guarantees to due process, equal protection, and right to privacy.

#### A. Policy Arguments

Several policy arguments are made against the punishment of pregnant drug-addicted women. One is that the threat of criminal

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67. *McKnight*, 576 S.E.2d at 172.

68. *Id.* at 174–75 (interpreting S.C. CODE ANN. § 16-3-85 (2000)).

69. *Id.* at 171, 179. In addition to child abuse, manslaughter, and homicide statutes, controlled substance statutes are another mechanism that states use to prosecute drug-addicted women for their behavior during pregnancy. However, states have not been successful in convicting women under these statutes.

To illustrate, in *Johnson v. State*, Jennifer Johnson, a twenty-three-year-old African-American woman, smoked marijuana and crack cocaine three to four times every day throughout her pregnancy. 602 So. 2d 1288, 1291 (Fla. 1992); NATIONAL ADVOCATES FOR PREGNANT WOMEN STATE-BY-STATE SUMMARY OF PROSECUTIONS, *supra* note 27, at 11. After delivering two healthy children in 1987 and 1988, Johnson was convicted of delivering a controlled substance to persons under age eighteen. *Johnson*, 602 So. 2d at 1290–91.

The Florida Supreme Court held, however, that the statute did not authorize prosecutions of those mothers who took illegal drugs close enough in time to childbirth that a doctor could testify that a tiny amount passed from mother to child in the few seconds before the umbilical cord was cut. *See id.* at 1296. The court based its reasoning on public policy concerns, asserting that prosecuting pregnant women for "delivering" drugs to their newborns is counterproductive because the prosecution will deter pregnant women from seeking prenatal or medical care. *See id.* at 1295–96.

prosecution does not protect the health of the fetus<sup>70</sup> or tackle pregnant drug-addicted women's drug dependency problems.<sup>71</sup> The states' prosecutorial strategies discourage a pregnant drug-addicted woman from seeking pre- and post-natal care because of the fear that she will be punished for her behavior's potential effect on her fetus.<sup>72</sup> Without proper prenatal care, however, a drug-addicted woman and her fetus are likely to suffer more health problems and are more likely to die.<sup>73</sup> A pregnant drug-addicted woman may also be dissuaded from carrying her pregnancy to term for fear of being reported as a drug user. She might believe that the most feasible way to avoid criminal punishment for her prenatal drug use is to have an abortion.<sup>74</sup> Hence, the prosecution of pregnant drug-addicted women, presumably done to protect the fetus, may have the opposite effect of increasing the number of abortions.<sup>75</sup> Leading medical organizations, including the American Medical Association, the American College of Obstetricians and Gynecologists, the American Psychiatric Association, the American Public Health Organization, and the March of Dimes, argue that the most effective way to tackle pregnant drug-addicted women's drug dependency problems is through education and community-based treatment.<sup>76</sup>

Another policy argument revolves around the doctor-patient relationship. The use of child abuse, neglect, controlled substance, manslaughter, and homicide statutes to combat maternal substance abuse could have the effect of imposing a legal obligation upon doctors to

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70. See Deanna Rae Reitman, Note, *The Collision Between the Rights of Women, the Rights of the Fetus and the Rights of the State: A Critical Analysis of the Criminal Prosecution of Drug Addicted Pregnant Women*, 16 ST. JOHN'S J. LEGAL COMMENT. 267, 302–03 (2002).

71. See Note, *supra* note 4, at 368–69.

72. See National Advocates for Pregnant Women, Over 50 Public Health Organizations, Experts, and Related Advocates Condemn the Prosecution of Pregnant Woman (Oct. 30, 2003), [http://www.advocatesforpregnantwomen.org/issues/pr\\_ltr\\_gilligan.htm](http://www.advocatesforpregnantwomen.org/issues/pr_ltr_gilligan.htm).

73. Note, *supra* note 4, at 370.

74. See Reitman, *supra* note 70, at 303–04.

75. See *id.*

76. National Advocates for Pregnant Women, Over 70 Child Welfare and Public Health Organizations, Expert, and Advocates Condemn the Prosecution of Pregnant Women in Texas (Mar. 1, 2005), <http://www.advocatesforpregnantwomen.org/issues/texasprosecute.htm>; see also National Advocates for Pregnant Women, Medical, Public Health, and Public Advocacy Groups: Excerpted Statements, <http://www.advocatesforpregnantwomen.org/issues/medsupp.htm> (last visited Jan. 21, 2006) [hereinafter National Association for Pregnant Women, Excerpted Statements].

report their pregnant drug-addicted patients' prenatal misbehavior.<sup>77</sup> The partnership between doctors and law enforcement would result in the loss of trust between the pregnant drug-addicted patient and her doctor.<sup>78</sup> Numerous public health organizations, experts, and advocates maintain that in order for health and prenatal care to be effective, the pregnant drug-addicted patient must be able to trust that her doctor will not disclose her confidences and report her to local enforcement authorities.<sup>79</sup> Additionally, imposing a legal obligation on doctors to report the failure of the patient to adhere to medical advice forces a doctor to focus less on the health care of his pregnant drug-addicted patient and to prioritize the medical needs of the fetus.<sup>80</sup>

A final policy concern for critics involves the relationship between the mother and her family. The punishment of a drug-addicted woman for her behavior during pregnancy has both emotional and financial consequences on her family.<sup>81</sup> Imprisonment separates a woman from her family, thereby preventing her from attending to their needs. A woman cannot ensure that her children and other family members are bathed, clothed, fed, and have shelter.<sup>82</sup> Additionally, defending against charges stemming from substance abuse during pregnancy may cost a large sum of money which puts a financial burden on the woman and her family.<sup>83</sup> Moreover, imprisonment inhibits the woman from providing the physical, emotional, and mental care that newborns generally receive from their mothers.

### B. Constitutional Arguments

In addition to the various policy arguments just discussed, several constitutional arguments based on due process, equal protection, and

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77. *Id.* at 370 (arguing that criminal laws aimed at punishing risky maternal conduct would impose duty upon doctors to report patients who did not heed their medical advice).

78. Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL'Y 1, 48 (2002) ("Breach of doctor-patient trust is likely to have particularly ill effects on patients' future trust in physicians, willingness to seek medical help, and willingness to follow doctors' directives.").

79. See National Association for Pregnant Women, Excerpted Statements, *supra* note 76 (contending that health risks to women and their fetuses can be minimized through care, counseling, and continued medical supervision, but for it to be effective patients have to be able to trust that their doctors will keep their secrets and not turn them in to local enforcement authorities).

80. See Note, *supra* note 4, at 370.

81. *Id.* at 371.

82. See *id.*

83. See *id.* (asserting that imprisonment and fines diminish limited resources that drug-addicted women have to support themselves and their families).

the right to privacy are made against the punishment of pregnant drug-addicted women.

### 1. *Due Process*

The due process argument claims that a woman does not have fair notice that child abuse, neglect, endangerment, homicide, manslaughter, and controlled substance statutes apply to her maternal behavior's potential, and actual, effects on her fetus.<sup>84</sup> Due process requires that "[w]hen an individual's life, liberty or property is to be curtailed by the government, that individual must receive notice from the government, which usually occurs through the publication of laws passed by the legislature."<sup>85</sup> The State violates the fair notice requirement of due process when it fails to warn a drug-addicted woman that her fetus will be treated as a child or victim and that she will be regarded as a criminal offender for "harming" her fetus for purposes of child abuse, neglect, endangerment, homicide, manslaughter, and controlled substance abuse statutes.<sup>86</sup>

While many women are surely unaware that their behavior during pregnancy may be punishable, the due process argument is nevertheless weakened because states have been prosecuting drug-addicted women for their behavior during pregnancy since the late 1970s.<sup>87</sup> It therefore becomes difficult to accept the claim that these women lack fair notice.<sup>88</sup> Moreover, due to extensive media coverage reporting on the numerous problems that may be experienced by babies exposed to drugs in the womb, it is fair to say that women are put on some notice that their behavior could potentially harm their fetuses.<sup>89</sup>

### 2. *Equal Protection*

The equal protection arguments are premised on sex and racial discrimination. One equal protection argument is, in effect, that the

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84. Margaret Phillips, Comment, *Umbilical Cords: The New Drug Connection*, 40 *BUFF. L. REV.* 525, 540, 551 (1992).

85. *Id.* at 540; see also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 529-30 (4th ed. 1992).

86. See Phillips, *supra* note 84, at 540.

87. See *supra* Part I.A.

88. See, e.g., *Whitner v. State*, 492 S.E.2d 777, 785 (S.C. 1997) ("[I]t is common knowledge that use of cocaine during pregnancy can harm the viable unborn child. Given these facts, we do not see how Whitner can claim she lacked fair notice that her behavior constituted child endangerment as proscribed in section 20-7-50. Whitner had all the notice the Constitution requires.")

89. See Glink, *supra* note 2, at 538-39 (explaining how media's extensive coverage of growing drug problem in United States, particularly among pregnant women, has contributed to public's awareness of effects of drug use on fetuses).

criminalization of maternal substance abuse singles out women for punishment.<sup>90</sup> State prosecutors do not punish the men who help conceive the children and who give pregnant women drugs, yet there have been studies which suggest that the sperm of male substance abusers can lead to health risks for the fetus.<sup>91</sup> Even if the substance-abusing boyfriend or husband of a pregnant drug-addicted woman has an offspring who is born with defects, the boyfriend or husband is not prosecuted for the harm he may have caused to his child.<sup>92</sup> A pregnant drug-addicted woman who gives birth to a healthy baby, however, may still be charged under various criminal statutes for exposing her fetus to “harm.” Critics argue that such differential, gender-based treatment is discrimination in violation of the Equal Protection Clause.<sup>93</sup>

The problem with the sex discrimination argument under the Equal Protection Clause is that in some situations, pregnancy-based classifications may only receive deferential rational basis review.<sup>94</sup> Although gender-based classifications are subject to a heightened, intermediate level of scrutiny,<sup>95</sup> pregnancy-based classifications are not necessarily gender-based classifications and thus do not necessarily require this same high level of scrutiny.<sup>96</sup> Instead, the Court applies a

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90. Julia Elizabeth Jones, Comment, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1166–67 (1992).

91. *Id.* at 1167 & n.52 (citing Janny Scott, *Study Finds Cocaine Can Bind to Sperm*, L.A. TIMES, Oct. 9, 1991, at A1, and noting that study’s results were not conclusive that paternal drug use could harm fetuses).

92. *Cf.* Josephine Gittler, Commentary, *The American Drug War, Maternal Substance Abuse and Child Protection: A Commentary*, 7 J. GENDER RACE & JUST. 237, 252 (2003) (noting that pregnant female drug users began to be singled out for prosecution in mid-1980s); Kary Moss, Recent Development, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN’S L.J. 278, 286 (1990) (“[P]regnant women are being singled out for criminal liability while similar behavior engaged in by men or non-pregnant women remains immune.”).

93. *See, e.g.*, Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 526–31 (1992) (concluding that Minnesota law regarding reporting of prenatal exposure to controlled substances would fail intermediate scrutiny, given that government interest in pre-viable fetal life is not sufficient to permit state regulation of mothers’ bodies).

94. *See Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

95. *United States v. Virginia*, 518 U.S. 515, 555 (1996). *See also* Ellen Marrus, *Crack Babies and the Constitution Ruminations About Addicted Pregnant Women After Ferguson v. City of Charleston*, 47 VILL. L.REV. 299, 325 (2002) (explaining that intermediate standard of equal protection analysis requires states to have “exceedingly persuasive justification[s]” for gender-based classifications) (quoting *Virginia*, 518 U.S. at 531).

96. *Geduldig*, 417 U.S. at 496 n.20 (“While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy

rational basis test to these types of classifications.<sup>97</sup> Under the rational basis test, the State only has to demonstrate that the classification is rationally related to a legitimate governmental interest.<sup>98</sup> The State would probably be successful in arguing that ensuring that the fetus is born free from the temporary or permanent physical or mental impairments that can arise from maternal substance abuse is a legitimate governmental interest.<sup>99</sup> One persuasive argument for subjecting only women to criminal prosecution in these situations is that “[s]ince the mother is in the best situation to protect her infant, controlling her behavior would be substantially related to the protection of the child.”<sup>100</sup> Therefore, singling out women for prosecution for pregnancy-related harms to fetuses would probably survive an equal protection attack premised on sex discrimination.

The other equal protection argument concerns racial discrimination. Poor African-American women have borne the brunt of state prosecutors’ punitive approach, to the point that some critics assert that states are targeting African-American women.<sup>101</sup> Studies indicate that approximately the same percentage of white women and African-American women use drugs during pregnancy; one study reports that “‘15.4 percent of white women and 14.1 percent of African-American women use[ ] drugs during pregnancy.’”<sup>102</sup> Another study indicates that a pregnant African-American woman is almost ten times more likely than a pregnant white woman to be reported to health authorities

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is a sex-based classification . . . .”); *see also* *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 327 (1993) (interpreting *Geduldig*).

97. *See* Note, *supra* note 41, at 223.

98. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); *see also* Note, *supra* note 41, at 224.

99. *See* Note, *supra* note 41, at 224.

100. Jones, *supra* note 90, at 1168.

101. *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARV. L. REV.* 1419, 1452–55 (1991); *see also* Kathleen R. Sandy, Commentary, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria Over Crack*, 54 *ALA. L. REV.* 665, 690 (2003) (“By both design and implementation, the policy led inevitably to the identification and punishment of drug use by pregnant, low-income women of color, leaving other pregnant users free of the threat of warrantless, suspicionless, nonconsensual drug testing.”) (quoting American Civil Liberties Union, Supreme Court Preview: 2000 Term, *Ferguson v. City of Charleston* (No. 99-936), Background: Social and Legal Contexts (Oct. 1, 2000), <http://www.aclu.org/scotus/2000/22364prs20001001.html>).

102. Sandy, *supra* note 101, at 687 (quoting American Civil Liberties Union, Supreme Court Preview: 2000 Term, *Ferguson v. City of Charleston* (No. 99-936), Background: Social and Legal Contexts (Oct. 1, 2000), <http://www.aclu.org/scotus/2000/22364prs20001001.html>).

for drug use.<sup>103</sup> This gross racial disparity in the reporting and subsequent prosecution of drug-addicted women leads critics to believe that a discriminatory purpose motivates state prosecutors' desire to make maternal substance abuse a crime.

For example, Professor Dorothy Roberts reports that "over *ninety percent* of Florida prosecutions for drug abuse during pregnancy have been brought against [b]lack women," even though a study found that only about twenty-six percent of drug users in one Florida county were African-American.<sup>104</sup> Similarly, Lynn Paltrow, Executive Director of National Advocates for Pregnant Women, confirms Roberts's racial discrimination argument by referring to a program at the Medical University Hospital in Charleston, South Carolina.<sup>105</sup> Under the program, hospital staff members reported those pregnant patients who tested positive for cocaine to the police, who then arrested the women.<sup>106</sup> The majority of the women tested for drugs and arrested by the police were African-American; indeed, "[a]ll but one of the thirty women arrested pursuant to the policy were African-American."<sup>107</sup>

Such disparities do not prove that such prosecutions are unconstitutional, however, because the Supreme Court has interpreted racial discrimination under the Equal Protection Clause narrowly. The Court has held that a racial discrimination claim under the Equal Protection Clause cannot be based upon disparate impact alone; it also requires proof of discriminatory intent.<sup>108</sup> It is difficult to prove that the State, in its prosecutions for maternal substance abuse, actually intended to discriminate against pregnant, drug-addicted, African-American women.<sup>109</sup> In order to prove such a claim, a litigant would most likely have to show evidence indicating a pattern of disparate treatment that is unexplainable on grounds other than race, historical

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103. Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1990); see also Roberts, *supra* note 101, at 1433–34 (citing Chasnoff et al.); Lorraine Schmall, *Addicted Pregnancy as a Sex Crime*, 13 N. ILL. U. L. REV. 263, 295 (1993).

104. Roberts, *supra* note 101, at 1453 (citing Chasnoff et al., *supra* note 103, at 1204).

105. Paltrow, *supra* note 4, at 1024–25.

106. *Id.*

107. *Id.* at 1025.

108. *Washington v. Davis*, 426 U.S. 229, 239–45 (1976); see Roberts, *supra* note 101, at 1452.

109. *United States v. Armstrong*, 517 U.S. 456, 463–64 (1996) ("A selective-prosecution claim is . . . an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. . . . [T]he showing necessary to obtain discovery should itself be a significant barrier to the litigation . . . .").

background of the State's decision to criminalize maternal substance abuse with the idea that this would primarily affect African-American women, or departures from the normal procedures for bringing charges against drug-addicted women.<sup>110</sup>

### 3. *Right to Privacy*

Another constitutional argument is based on the right to privacy: the prosecution of a pregnant drug-addicted woman infringes upon a woman's right to privacy, as established in *Roe v. Wade*.<sup>111</sup> In *Roe*, the Supreme Court held that the right to privacy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>112</sup> Advocates of the right to privacy contend that a woman does not lose her right to privacy simply because she becomes pregnant, and the constitutional right to privacy "extends to both women and men, regardless of their biological differences."<sup>113</sup> Advocates therefore contend that because the Constitution does not differentiate among persons who are able to enjoy the right to privacy, the pregnant woman remains a "person" as defined and protected under the Constitution.<sup>114</sup> Hence, the State's mechanisms—prosecution by child abuse, endangerment, controlled substance abuse, manslaughter, and homicide statutes—infringe upon a drug-addicted woman's fundamental right to privacy because these mechanisms punish her simply for exercising her constitutional right to procreate.<sup>115</sup>

Additionally, advocates assert that drug-addicted women make no claim to a right to drug or alcohol dependence or a right to harm their fetuses. Rather, it is a woman's constitutional right "to become pregnant and to give birth despite her drug dependence . . . that the [criminal] prosecution violates."<sup>116</sup> Punishing a woman for her behav-

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110. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (discussing factors that are relevant to proving racially discriminatory purpose, such as "a clear pattern, unexplainable on grounds other than race," "[t]he historical background of the decision," "legislative or administrative history" of official state actions, and "departures from the normal procedural sequence").

111. 410 U.S. 113 (1973); Reitman, *supra* note 70, at 276.

112. *Roe*, 410 U.S. at 153.

113. Reitman, *supra* note 70, at 276.

114. See *id.* at 277.

115. See *id.* at 278–79.

116. Brief for American Public Health Association et al. as Amici Curiae Supporting Defendant's Motion to Dismiss, *People v. Gilligan*, No. 2003-1192 (N.Y. Sup. Ct. Nov. 4, 2003), [http://www.nyclu.org/rrp\\_gilligan\\_amicus\\_110503.html](http://www.nyclu.org/rrp_gilligan_amicus_110503.html).



ior during pregnancy infringes upon her personal autonomy by interfering with her body while she is pregnant.<sup>117</sup> The right to personal autonomy enables a woman to be free “from interference by others and the ability to flourish among and in relation to others.”<sup>118</sup> Accordingly, there is rarely, if ever, a context in which the State is justified in using the criminal justice system to interfere in a woman’s child-bearing decisions.<sup>119</sup>

The right to privacy argument, however, is limited by the State’s interest in protecting the life of the unborn, and thus the right to privacy is not absolute.<sup>120</sup> It must be balanced against the State’s interest in protecting the potential life that the pregnant drug-addicted woman is carrying.<sup>121</sup>

### III.

#### THE EIGHTH AMENDMENT ARGUMENT AGAINST PUNISHING PREGNANT DRUG-ADDICTED WOMEN

Another constitutional argument against criminalizing maternal substance abuse that critics have not fully explored is grounded in the Eighth Amendment’s guarantee against cruel and unusual punishment.<sup>122</sup> Punishing a drug-addicted woman for her behavior during pregnancy is arguably unconstitutional because she is being punished solely due to her status as a drug addict. The Supreme Court in *Robinson v. California* held that it is cruel and unusual to punish an individual for his or her status as a drug addict, absent a criminal act.<sup>123</sup> Based on this reasoning, punishing drug-addicted women for their drug use during pregnancy violates the Eighth Amendment since a large number of these women were drug addicts before they became pregnant, they did not engage in overt misconduct or commit a crimi-

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117. Reitman, *supra* note 70, at 280.

118. *Id.* at 279.

119. *See id.* at 278.

120. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 869 (1992) (“The woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.”); *see also* *Roe v. Wade*, 410 U.S. 113, 154 (1973) (finding that right to privacy is subject to some limitations, including State’s interest in “safeguarding health, in maintaining medical standards, and in protecting potential life.”).

121. *See Roe*, 410 U.S. at 155 (“[A]t some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.”).

122. *See* U.S. CONST. amend. VIII.

123. 370 U.S. 660, 667 (1962) (holding that imprisoning person “even though he has never touched any narcotic drug . . . or been guilty of any irregular behavior . . . inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment”).

nal act,<sup>124</sup> and they did not intend to harm their fetuses. Thus, the State subjects these women to punishment simply because of their status as drug addicts. In order to appreciate a potential Eighth Amendment prohibition of the criminalization of maternal substance abuse, the history of the Amendment's Cruel and Unusual Punishment Clause must first be analyzed.

A. *The Origins and Meaning of the Cruel and Unusual Punishment Clause of the Eighth Amendment*

The authority to define criminal offenses and establish punishments for committed offenses has generally rested with the states. However, the Eighth Amendment limits states' unfettered discretion in defining criminal offenses and setting punishments.<sup>125</sup> The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>126</sup>

The Eighth Amendment was derived from the 1689 English Bill of Rights.<sup>127</sup> The English Bill of Rights "was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties."<sup>128</sup> Despite this prohibition on such punishments, however, English courts continued to sentence individuals to "horrific and cruel ends."<sup>129</sup>

The Framers, by contrast, interpreted the cruel and unusual punishment clause of the English Bill of Rights to prohibit torture and barbaric treatment.<sup>130</sup> George Mason, one of the most outspoken

124. See *infra* notes 172–176 and accompanying text (discussing elements of criminal act).

125. See *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 433–34 (2001) (citing *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) and noting that Due Process Clause of Fourteenth Amendment makes Eighth Amendment applicable to states).

126. U.S. CONST. amend. VIII.

127. See Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted:*" *The Original Meaning*, 57 CAL. L. REV. 839, 840, 852–53 (1969).

128. *Id.* at 860.

129. Michael P. DeGrandis, Casenotes, *Atkins v. Virginia: Nothing Left of the Independent Legislative Power to Punish and Define Crime*, 11 GEO. MASON L. REV. 805, 813 (2003). For example, the drawing and quartering of male criminals was not abolished until 1814, when disemboweling was eliminated by statute; beheading and quartering were not eliminated until 1870; and the burning of female felons did not end until 1790. Granucci, *supra* note 127, at 855–56.

130. Granucci, *supra* note 127, at 841–42. The Framers relied on Blackstone's *Commentaries*, the only legal treatise at the time that discussed punishment, in understanding what types of punishments were cruel and unusual. See *id.* at 862. The

Framers, was instrumental in shaping the Framers' view of the United States Constitution's Cruel and Unusual Punishment Clause. Mason included verbatim the English Bill of Rights' Cruel and Unusual Punishment Clause in the Virginia Declaration of Rights in 1776.<sup>131</sup> When Virginia delegates met to consider the United States Constitution, Mason clarified that he interpreted the clause as prohibiting torture.<sup>132</sup> Eight states followed Mason's lead and included the cruel and unusual punishment clause in their state constitutions.<sup>133</sup> Then, in 1787, the federal government incorporated the clause into the Northwest Ordinance.<sup>134</sup> Finally, in 1791, the Framers affixed the Cruel and Unusual Punishment Clause to the Eighth Amendment of the United States Constitution.<sup>135</sup>

In addition to prohibiting torture and barbaric modes of punishment, the Framers wanted the Cruel and Unusual Punishment Clause to limit government's power in defining crimes.<sup>136</sup> Some Framers feared that if Congress was not restricted in the types of punishments it could impose upon those who were convicted of crimes, there was no telling what types of punishments it could create.<sup>137</sup> Congress could fashion punishments for criminals at its whim.

Besides protecting against torturous and barbaric punishment and limiting the legislature's exercise of power, the Framers wanted the Eighth Amendment to stand for the principle of equality. The Cruel and Unusual Punishment Clause is also a prohibition against the selective and arbitrary application of penalties against minorities, outcasts, and unpopular groups.<sup>138</sup> This principle stems from the idea that when the State singles out minorities and others for punishment for committing particular crimes but does not punish mainstream, socially integrated or acceptable groups for engaging in the same or similar

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*Commentaries* gave examples of extreme modes of punishment such as disemboweling alive, public dissection, quartering, beheading, mutilation, and branding. *Id.* at 862–64 (citing 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 369–72 (1st. ed. 1769)).

131. *Id.* at 840.

132. *Id.* at 841–42 (citing 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1881)).

133. *Id.* at 840.

134. *Id.*

135. *Id.*

136. See *Furman v. Georgia*, 408 U.S. 238, 260–63 (1972) (Brennan, J., concurring).

137. See *id.* at 260.

138. See *id.* at 245 (Douglas, J., concurring) (citing W. FORSYTH, HISTORY OF TRIAL BY JURY 367–68 (2d ed. 1971)).

acts, the State violates standards of human dignity.<sup>139</sup> Concurring in the Court's opinion in *Furman v. Georgia*, Justice Douglas stated:

Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination. In those days the target was not the blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the people. But the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. One cannot read this history without realizing that the desire for equality was reflected in the ban against "cruel and unusual punishments" contained in the Eighth Amendment.<sup>140</sup>

Thus, the purpose of the Eighth Amendment was also to establish a criminal justice system based on equality.

### *B. The Supreme Court's Understanding of the Cruel and Unusual Punishment Clause*

The Supreme Court first interpreted the meaning of the Cruel and Unusual Punishment Clause in the 1878 case of *Wilkerson v. Utah*.<sup>141</sup> Utah territory laws stated that the punishment for first-degree murder was the death penalty, unless the jury suggested a life sentence of hard labor.<sup>142</sup> After his conviction for first-degree murder, Wilkerson contended that the territorial court erred in ordering death by shooting instead of death by hanging, the penalty under a federal statute.<sup>143</sup> The Court disagreed and held that the territorial government had the power to impose such a sentence,<sup>144</sup> declaring that "organized [t]erritories are invested with legislative power which extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."<sup>145</sup> Accordingly, the territorial government could define criminal conduct and create punishments for engaging in prohibited behavior as long as the punishments did not violate

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139. *Id.* at 274 (Brennan, J., concurring); *id.* at 245 (Douglas, J., concurring) ("But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is 'cruel and unusual' to apply the death penalty—or any other penalty—selectively to minorities . . . whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.")

140. *Id.* at 255 (Douglas, J., concurring) (citation omitted).

141. 99 U.S. 130 (1878).

142. *Id.* at 132.

143. *Id.* at 131.

144. *Id.* at 137.

145. *Id.* at 133.

the Eighth Amendment's ban on cruel and unusual punishment.<sup>146</sup> In this case, the Court maintained that Wilkerson's sentence of death by shooting was not in violation of the Eighth Amendment. While acknowledging the difficulty in defining cruel and unusual punishment, the Court determined that torturous punishments such as emboweling alive, beheading, quartering, burning alive and "all others in the same line of unnecessary cruelty" were types of punishment prohibited by the Eighth Amendment.<sup>147</sup>

Twelve years later, in keeping with the principles of *Wilkerson*, the Court in *In re Kemmler* interpreted the Cruel and Unusual Punishment Clause narrowly by restricting its meaning to prohibiting "inhuman and barbarous" punishments.<sup>148</sup> Kemmler, who was convicted of murder and sentenced to death, challenged New York's death penalty, which called for death by electrocution.<sup>149</sup> Kemmler claimed that death by electrocution was cruel and unusual.<sup>150</sup> The Court rejected this argument, deferring to the determination of the New York legislature that death by electrocution was not cruel and unusual.<sup>151</sup> The Court found that "[p]unishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies . . . something inhuman and barbarous, something more than the mere extinguishment of life."<sup>152</sup>

It was not until 1910 that the Supreme Court moved away from its original understanding that cruel and unusual punishment referred only to torture and barbaric treatment and toward a more dynamic, contemporary understanding of the phrase. In *Weems v. United States*, the Court construed the Cruel and Unusual Punishment Clause as encompassing more than the types of punishments that were considered atrocious at the time of the Founding.<sup>153</sup> The Philippines Supreme Court had sentenced Weems, an American government official working in the Philippines, to fifteen years of "hard and painful labor" during which he "shall always carry a chain at the ankle, hanging from the wrist."<sup>154</sup>

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146. *See id.*

147. *Id.* at 135–36.

148. 136 U.S. 436, 447 (1890).

149. *Id.* at 437.

150. *Id.* at 439.

151. *See id.* at 449.

152. *Id.* at 447.

153. 217 U.S. 349, 373 (1910).

154. *Id.* at 357–58, 381.

Weems argued that the punishment was cruel and unusual and the Court agreed, holding that his punishment was cruel and unusual because it was not proportionate to his offense.<sup>155</sup> The Court acknowledged that the Framers' intention in drafting the Eighth Amendment was to prevent legislative abuse of power, but the Court also suggested that the meaning of cruel and unusual punishment could not be static or confined to the period of the Founding.<sup>156</sup> According to the Court, "a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions."<sup>157</sup> Even though the legislature had the primary role in defining crimes and punishments, it was nevertheless for the courts to determine whether the legislature overstepped the bounds of constitutionality and, if so, to overrule the legislative acts.<sup>158</sup>

In *Trop v. Dulles* in 1958, the Court reaffirmed the notion that the meaning of cruel and unusual punishment must be interpreted according to contemporary standards.<sup>159</sup> The Court held that denationalization of a native-born American convicted by court-martial for wartime desertion was cruel and unusual punishment.<sup>160</sup> To the Court, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."<sup>161</sup> The Court noted that the Eighth Amendment ensures that the State's authority to punish be exercised within the bounds of "civilized standards."<sup>162</sup> The State may impose fines, imprisonment, and even execution so long as the punishment is proportionate to the offense, "but any technique outside the bounds of these traditional penalties is constitutionally suspect."<sup>163</sup> The Court referred to *Weems*, explaining that the words of the Eighth Amendment are not fixed in time, that their "scope is not static," and that "the Amendment must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society."<sup>164</sup>

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155. *See id.* at 381.

156. *See id.* at 372–73.

157. *Id.* at 373.

158. *See id.* at 379.

159. 356 U.S. 86, 101 (1958).

160. *Id.* at 87, 101.

161. *Id.* at 100.

162. *Id.*

163. *Id.*

164. *Id.* at 100–01 (emphasis added).

C. *Robinson v. California*

In *Robinson v. California*, the Court further refined its Eighth Amendment jurisprudence.<sup>165</sup> California had established a statute which made it an offense for an individual to “be addicted to the use of narcotics.”<sup>166</sup> The appellant in the case was convicted based on testimony from two police officers.<sup>167</sup> One officer testified that he “observed ‘scar tissue and discoloration on the inside’ of the appellant’s right arm, and ‘what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow’ on the appellant’s left arm.”<sup>168</sup> The officer also testified that during questioning the appellant admitted that he occasionally used narcotics.<sup>169</sup>

The Court acknowledged the broad power of the State to regulate narcotic drugs within its jurisdiction, but still found that the California statute imposed a cruel and unusual punishment under the Eighth Amendment.<sup>170</sup> First, the Court based its finding on the status/act distinction,<sup>171</sup> leading to an inference that California’s statute violated the fundamental principle of criminal law that a culpable mens rea and criminal actus reus are required in order for a criminal offense to occur.<sup>172</sup> If mens rea and actus reus are not present, then by definition there is no crime.<sup>173</sup>

The Court in *Robinson* appeared troubled by the fact that the jury was instructed that even if they disbelieved evidence indicating that appellant used drugs unlawfully in California, as long as they believed that the appellant’s “status” or “chronic condition” was “that of being addicted to the use of narcotics,” he could be convicted.<sup>174</sup> Effectively, California had created a law in which a person could be contin-

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165. 370 U.S. 660 (1962).

166. *Id.* at 662.

167. *Id.* at 661.

168. *Id.*

169. *Id.*

170. *Id.* at 665–67. The Eighth Amendment was applied to the state via the Fourteenth Amendment. *See id.* at 667; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947).

171. *See Robinson*, 370 U.S. at 666.

172. *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980). Mens rea refers to a wrongful intent, *see State v. Crisp*, 855 P.2d 795, 797 (Ariz. Ct. App. 1993), or culpable mental state. *See United States v. Bailey*, 444 U.S. 394, 403–04 (1980) (discussing approach used in Model Penal Code, which moves away from intent). Actus reus “must have its origin in some willed activity or omission on the part of the defendant.” *United States v. Muzii*, 676 F.2d 919, 920 (2d Cir. 1982).

173. *See Garnett v. State*, 632 A.2d 797, 800 (Md. 1993).

174. *Robinson*, 370 U.S. at 665.

uously in violation of the statute, regardless of whether he or she had ever used or possessed any narcotic in California.<sup>175</sup> The statute criminalized behavior that did not contain the two fundamental components of a crime, *mens rea* and *actus reus*. Thus, *Robinson* stands for the proposition that it is cruel and unusual punishment under the Eighth Amendment for states to punish people solely because of their status.<sup>176</sup>

Another reason why the *Robinson* Court may have thought the California statute was cruel and unusual was because California “punished a status that the defendant could not change.”<sup>177</sup> Inherent in criminal law is the assumption that there must be a volitional act or cognizant omission before an individual can be charged with a crime.<sup>178</sup> Drug addiction, however, is a condition that is not volitional.<sup>179</sup> In *Robinson*, the Court acknowledged that drug addiction is a disease with which individuals can be afflicted innocently or involuntarily.<sup>180</sup> The Court said:

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. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.<sup>181</sup>

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175. *Id.* at 666.

176. See Note, *Robinson v. California*, 370 U.S. 660 (1962)—*Legal Implications of Viewing Narcotics Addiction as a Disease Rather Than a Crime*, 57 NW. U. L. REV. 618, 620 (1962) (suggesting that one alternative basis for Court’s holding in *Robinson* is that California statute “failed to require proof of an illegal act within the punishing jurisdiction”); see also Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 312 (1996) (contending that “pure status” rationale of *Robinson* suggests that statutes that criminalize status violate Eighth Amendment, while there is presumption of validity for statutes that criminalize acts); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 646–47 (1966) (suggesting that one interpretation of *Robinson* is that law cannot punish mere status; only acts come within purview of criminal legislation).

177. Smith, *supra* note 176, at 313.

178. Appellant’s Opening Brief at 13, *Robinson v. California*, 370 U.S. 660 (1962) (No. 554).

179. See *id.*

180. 370 U.S. at 667 (citing *Linder v. United States*, 268 U.S. 5, 18 (1925)).

181. *Id.* at 666.



Hence, *Robinson* suggests that punishing illnesses like drug addiction is cruel and unusual.<sup>182</sup>

A final reason why the *Robinson* Court believed that the California statute criminalizing drug addiction was cruel and unusual was because the punishment was disproportionate to the crime. The Court reasoned, "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."<sup>183</sup> In short, the California statute inflicted an excessively severe penalty on the defendant in comparison to his moral fault. For the *Robinson* Court, the Eighth Amendment's Cruel and Unusual Punishment Clause means that even though the State has a legitimate interest in regulating serious problems such as narcotics addiction, that legitimate interest does not trump the individual's right to be free from punishments that violate human decency.<sup>184</sup>

It should be noted, however, that in the years after *Robinson*, members of the Court, though never commanding a majority, have attempted to limit the significance of *Robinson* to its discussion of the status/act distinction. In *Powell v. Texas*, the Court upheld the defendant's conviction, rejecting his argument that, because alcoholism is a disease, his appearance of being drunk in public was not of his own free will.<sup>185</sup> The Court held that the Texas statute criminalizing public drunkenness did not punish the status of being an alcoholic but, rather, the act of being in public while drunk.<sup>186</sup> The Court determined that "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or . . . has committed some actus reus."<sup>187</sup> *Powell* affirms *Robinson* by holding that a person cannot be punished for status

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182. See Note, *supra* note 176, at 648.

183. 370 U.S. at 667.

184. See Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, *supra* note 176, at 655.

185. 392 U.S. 514, 534–37 (1968). The Court was:

unable to conclude . . . that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication.

*Id.* at 535.

186. *Id.* at 532.

187. *Id.* at 533.

alone.<sup>188</sup> Nevertheless, *Powell* suggests that as long as the individual commits an illegal act, he can lawfully be punished for that act.

*D. Application of the Robinson Principles in the Context of Pregnant Drug-Addicted Women*

The punishment of drug-addicted women for their behavior during pregnancy is closer to the context of *Robinson v. California* than *Powell v. Texas*. Unlike the defendant in *Powell*, who committed the illegal act of being drunk in public, drug addiction during pregnancy is not an affirmative “act” but rather an involuntary addictive behavior. Drug addiction during pregnancy is thus a “condition” or “status” that should not be criminally punishable.<sup>189</sup>

Furthermore, use of drugs is not in itself a crime, as most states have recognized a distinction between drug use and drug possession. Usually, only drug possession is criminalized; “virtually no state . . . punishes drug use per se.”<sup>190</sup> Instead, most state drug laws make it a crime for a person to possess or distribute a controlled substance.<sup>191</sup>

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188. Lower federal and state courts have also used the reasoning of the status/act distinction. See, e.g., *United States v. Letts*, 264 F.3d 787, 791 (8th Cir. 2001) (rejecting defendant’s contention that 18 U.S.C. § 922(g)(3), which forbids unlawful user of controlled substance from possessing firearm, constitutes impermissible status offense because statute is aimed at act of possessing firearm, not defendant’s status as drug user); *Joel v. City of Orlando*, 232 F.3d 1353, 1361–62 (11th Cir. 2000) (upholding city camping ordinance against challenge from homeless plaintiff on grounds that availability of homeless shelters rendered plaintiff’s conduct not involuntary and thus did not punish on basis of plaintiff’s homeless status alone); *United States v. Walls*, 70 F.3d 1323, 1331 (D.C. Cir. 1995) (holding that punishments were based on defendants’ acts of “prepar[ing] large quantities of crack cocaine for sale” and not their status as drug addicts); *Edgerson v. State*, 302 So. 2d 556, 559 (Ala. Crim. App. 1974) (upholding sexual molestation statute as applied to mentally retarded defendant, stating that statute punishes act of molestation, not status of retardation); *Guevara v. Superior Court*, 73 Cal. Rptr. 2d 421, 425 (Cal. Ct. App. 1998) (upholding statute enhancing punishment for sexual offenses committed by HIV-positive defendants because requisite element of enhancement is commission of volitional criminal conduct); *Bosco v. Justice Court*, 143 Cal. Rptr. 468, 475 (Cal. Ct. App. 1978) (upholding statute proscribing use or being under influence of illegal substances, distinguishing use as act and not condition); *Ziebell v. State*, 788 N.E.2d 902, 910 (Ind. Ct. App. 2003) (upholding habitual offender statute because it did not create status offense but enhanced offender’s punishment).

189. Cf. *Petrow*, *supra* note 43, at 592 (explaining that crux of Court’s decision in *Robinson* was that “an addiction to narcotics is not an affirmative ‘act,’ but rather a condition or ‘status,’ not punishable as a crime”) (quoting *Robinson v. California*, 370 U.S. 660, 662 (1962)).

190. *Paltrow*, *supra* note 4, at 1021.

191. See Bryony J. Gagan, Note, *Ferguson v. City of Charleston, South Carolina: “Fetal Abuse,” Drug Testing, and the Fourth Amendment*, 53 STAN. L. REV. 491, 516 (2000). For examples of state statutes, see ALA. CODE § 13A-12-212 (LexisNexis 2005); NEB. REV. STAT. § 28-416(1) (Supp. 2005); N.M. STAT. ANN. § 30-31-22(A)

A substantial number of states have held that, absent other evidence indicating drug possession, the presence of drugs in an individual's bloodstream only demonstrates drug use, not drug possession. In *State v. Flinchpaugh*, for example, the Kansas Supreme Court held that the observation of a drug in an individual's blood sample is not sufficient evidence to establish guilt of drug possession beyond a reasonable doubt.<sup>192</sup> The court said:

Once a narcotic drug is injected into the vein, or swallowed orally, we think it apparent that it is no longer within one's control or held at one's disposal. And it would likewise be beyond the taker's ability to exercise any restraining or directing influence over it. Consequently, once the drug is ingested and assimilated into the taker's bodily system, it is no longer within his control and/or possession . . . .<sup>193</sup>

Other state courts have taken approaches similar to that of Kansas. In *State v. Lewis*, the Minnesota Court of Appeals held that evidence of a controlled substance in an individual's urine did not prove possession within the meaning of Minnesota's possession statute, nor was it sufficient circumstantial evidence to demonstrate prior possession beyond a reasonable doubt in the absence of probative evidence corroborating actual physical possession.<sup>194</sup> In *People v. Spann*, the California Court of Appeals held that an individual was not in control or possession of a substance once it reached his or her digestive and blood system.<sup>195</sup> Thus, case law prohibited convictions based upon "circumstantial reasoning from use to possession."<sup>196</sup> In *State v. Thronsen*, the Alaska Court of Appeals held that a defendant cannot be convicted for possession of cocaine in his or her body because once the cocaine is in the individual's body, he or she has no control over it and thus has no possession.<sup>197</sup>

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(LexisNexis 1997); S.D. CODIFIED LAWS § 22-42-5 (1998); VA. CODE ANN. § 18.2-248(A) (Supp. 2005); W. VA. CODE § 60A-4-401(a) (LexisNexis Supp. 2005). These are just a few of the majority of states that only criminalize drug possession as opposed to drug use. Arizona, Delaware, and Ohio may be the only states that do not distinguish between drug use and drug possession and hence criminalize both. See ARIZ. REV. STAT. § 13-3407(A)(1) (Supp. 2005); DEL. CODE ANN. tit. 16 § 4754 (2003); OHIO REV. CODE ANN. § 2925.11 (West Supp. 2005).

192. 659 P.2d 208, 212 (Kan. 1983).

193. *Id.* at 211 (quoting *Franklin v. State*, 258 A.2d 767, 769 (Md. Ct. Spec. App. 1969)) (internal quotations omitted).

194. 394 N.W.2d 212, 217 (Minn. Ct. App. 1986).

195. 232 Cal. Rptr. 31, 32 (Cal. Ct. App. 1986).

196. *Id.* at 34.

197. 809 P.2d 941, 943 (Alaska Ct. App. 1991).

The Constitution does not provide an individual with the right to use drugs. Nevertheless, the Court in *Robinson* held that the Constitution prohibits the State from punishing an individual simply due to his status as a drug user.<sup>198</sup> The State is only constitutionally permitted to punish individuals for an act, not their status. In *Robinson*, the Court gave three reasons why the California statute criminalizing drug addiction violated the Cruel and Unusual Punishment Clause: (1) the statute did not acknowledge the status/act distinction; (2) the statute criminalized an unalterable condition; and (3) the punishment for violating the statute was not proportionate to the offense.<sup>199</sup>

By charging drug-addicted women with child abuse, neglect, endangerment, manslaughter, delivery of a controlled substance to a minor, or homicide for their use of drugs during pregnancy, the State is “seeking to have the judiciary create a new crime of drug use.”<sup>200</sup> The principles behind *Robinson v. California* prohibit the creation of this new status crime. In the pregnant drug-addicted woman context, where typically there is no statute expressly criminalizing drug addiction, the principle that an individual cannot be punished for her status should still apply.<sup>201</sup>

### *I. Status/Act Distinction*

Under the first prong of the Court’s reasoning in *Robinson*—the status/act distinction—a pregnant woman is punished for her status when she is prosecuted as a result of her drug addiction. The typical defendant in such prosecutions is a drug addict who used illegal drugs at some point during her pregnancy.<sup>202</sup> Nothing suggests that she intentionally used drugs to endanger her baby. She was drug-addicted before she became pregnant; her use of cocaine had nothing to do with her pregnancy. Hence, she lacks the mens rea to endanger, abuse, neglect, or kill her child. Nor did she engage in overt misconduct with respect to the child, so the actus reus is missing as well. Since the

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198. See *supra* Part III.C (discussing complex holding of *Robinson v. California*).

199. See *supra* Part III.C.

200. Paltrow, *supra* note 4, at 1022.

201. It should be noted that the Supreme Court has stated that “the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with the process of law.” *Ingraham v. Wright*, 430 U.S. 651, 671–72 n.40 (1977). The Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment, protects against punishment inflicted by the State prior to a determination of criminal guilt. *Id.* Eighth Amendment scrutiny therefore would not apply in pregnant drug-addicted women cases where the drug-addicted women were not convicted of crimes, even though the prosecution itself is arguably inhumane, unjust, cruel, and unusual.

202. See *supra* notes 20–39 and accompanying text.

mens rea and the actus reus are not present, the crime of child endangerment, neglect, manslaughter, or homicide was not committed. Thus, a pregnant drug-addicted woman is simply punished for her status as a drug user.

## 2. *Criminalizing an Unalterable Condition*

Under the second prong of the Court's reasoning in *Robinson*—that criminalizing an involuntary condition or status is unconstitutional<sup>203</sup>—a pregnant drug-addicted woman is punished for her status as a drug addict, a physical condition over which she has no control. The Supreme Court has recognized that drug addiction is a disease.<sup>204</sup> The medical community defines addiction as “habitual psychological and physiological dependence on a substance or practice that is beyond voluntary control.”<sup>205</sup> Drug addicts do not freely choose chemical dependency; rather, they lose control over substance abuse.<sup>206</sup> Medical researchers maintain that drugs such as cocaine, crack cocaine, and heroin yield psychological and physiological addictions that require serious medical therapy.<sup>207</sup>

Typically a drug-addicted woman does not intentionally try to harm her fetus by using drugs during her pregnancy.<sup>208</sup> She does not deliberately ignore the consequences of her dangerous behavior. Yet, consumed by drug addiction, she cannot stop using drugs simply because she is pregnant.<sup>209</sup> Indeed, “the pregnant addict’s mental state may be such that she does not realize or even consider the possible harmful effects of her drug use on her baby.”<sup>210</sup> Moreover, “[e]ven if she does know that the drug is harmful to the fetus, she may be unable

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203. *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

204. *See Linder v. United States*, 268 U.S. 5, 18 (1925). The Court in *Robinson* cited *Linder* and reiterated the point that drug addiction is an illness. 370 U.S. at 667 n.8.

205. *STEDMAN’S MEDICAL DICTIONARY* 23 (27th ed. 2000).

206. *See A. Thomas McLellan et al., Drug Dependence, a Chronic Medical Illness: Implications for Treatment, Insurance, and Outcomes Evaluation*, 284 JAMA 1689, 1690 (2000), available at <http://jama.ama-assn.org/cgi/reprint/284/13/1689.pdf>.

207. Michael A. Hammer, Comment, *The Constitutional, Judicial and Social Pitfalls Attendant to the Criminalization of Prenatal Maternal Substance Abuse: A Plea for Governmental Uniformity and Mercy*, 22 SETON HALL L. REV. 1456, 1485 (1992).

208. *See Lynn M. Paltrow, Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 477–78 (2005) (“[P]renatal substance abuse by an addicted mother does not reflect willful maltreatment of a fetus . . .”).

209. *See Deborah Ann Bailey, Comment, Maternal Substance Abuse: Does Ohio Have an Answer?* 17 U. DAYTON L. REV. 1019, 1041 (1992).

210. *Id.*

to act in accordance with this knowledge.”<sup>211</sup> A pregnant drug-addicted woman may have had free will when she began using drugs, but once she has become addicted she cannot stop by herself.<sup>212</sup> She needs help.

In fact, pregnant drug-addicted women have a tremendous incentive to seek drug treatment. Providers of health care and drug and alcohol treatment find that pregnant drug-addicted women care deeply about the potential life growing inside them and often want to alter their behavior in ways that will advance the health of the fetus.<sup>213</sup> Despite this motivation, many women who want to escape drug addiction for the sake of the fetus have no place to turn and few resources to help fight this debilitating disease.

Treatment programs that handle the complex needs of pregnant drug-addicted women are in short supply.<sup>214</sup> Typically, these women are single parents raising multiple children with little to no support from their children’s fathers.<sup>215</sup> Many do not have jobs and may be unable to pay for clinic or treatment services. Even if a single, pregnant, drug-addicted woman is able to get a treatment appointment, she is often unable to keep it because she may have no one to watch her children and may lack transportation.<sup>216</sup> Furthermore, the few drug treatment programs that can handle the diverse mental, physical, and emotional needs of pregnant drug-addicted women usually have long waiting lists, are understaffed, and are prohibitively expensive.<sup>217</sup> Without the proper health care and drug treatment, many pregnant women’s drug addictions are, effectively, unalterable conditions.

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211. *Id.*

212. See David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN’S L.J. 243, 247 (2001) (asserting that pregnant drug-addicted women “rationally know that using drugs while pregnant may well cause such harm, the physical and psychological needs that characterize addiction eclipse their judgment and lead to continued drug use”).

213. Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women’s Liberty*, 43 HASTINGS L.J. 569, 575 (1992).

214. See Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem that Won’t Go Away*, 25 ST. MARY’S L.J. 623, 637 (1994).

215. Philip H. Jos et al., *Substance Abuse During Pregnancy: Clinical and Public Health Approaches*, 31 J.L. MED. & ETHICS 340, 343 (2003).

216. See *id.*

217. See *id.* For example, pregnant drug-addicted women often suffer from domestic abuse; one study reports that “19 percent of pregnant drug abusers were severely beaten and 15 percent were raped as children, while 70 percent were beaten and 21 percent were raped as adults.” Swenson & Crabbe, *supra* note 214, at 663.

### 3. *Disproportionality*

Under the last prong of the Court's reasoning in *Robinson*—disproportionality—the punishment of a pregnant drug-addicted woman is not proportional to her alleged offense. A pregnant drug-addicted woman is really punished for the “offense” of being a drug addict, because she lacked the requisite mens rea and actus reus to commit child endangerment, abuse, manslaughter, or homicide.<sup>218</sup> Removing the child and imprisoning the drug-addicted mother is an unreasonably excessive penalty in relation to the mother's guilt. While acknowledging that a drug-addicted woman who uses drugs during pregnancy must bear some responsibility, the current punishments are nevertheless unreasonable because they fail to recognize that drug addiction is an illness. Prosecution and imprisonment should not be viewed as the only mechanisms to hold a drug-addicted woman accountable for her actions. The State can foster responsible behavior through other means, such as mandatory drug treatment and parenting classes.<sup>219</sup> Punishing an individual for having an illness is immoral and inhumane, particularly so where the illness renders the individual helpless to fight the disease. Accordingly, imprisonment as punishment does not constitutionally “fit” the alleged “crime.”

The core distinction between the addict in *Robinson v. California* and a pregnant drug-addicted woman is that the woman is carrying a viable fetus. Consequently, in the pregnant drug-addicted woman context, an additional factor must be considered: the State's compelling interest in potential life.<sup>220</sup> It is true that drug abuse by pregnant women is a serious problem. It is also true that the State has a legitimate interest in protecting potential life. Some babies are harmed by their mother's drug use and suffer adverse short- or long-term consequences as a result.<sup>221</sup> Because of this possibility, the State has a le-

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218. See *supra* Part III.D.1.

219. See Lynn M. Paltrow, *Punishment and Prejudice: Judging Drug-Using Women*, in MOTHER TROUBLES, RETHINKING CONTEMPORARY MATERNAL DILEMMAS (Julia Hanigsberg & Sara Ruddick eds., 1999), available at <http://www.advocatesforpregnantwomen.org/articles/ruddick.htm>. For such state-sponsored remedies for parents not addicted to drugs, see *State ex rel. State Office for Serv. to Children and Families v. Frazier*, 955 P.2d 272, 281 (Or. Ct. App. 1997) (stating that state must make reasonable efforts to help parents become minimally adequate parents); *In re R.H.*, 819 P.2d 152, 155–56 (Mont. 1991) (upholding plan including parenting classes).

220. See *supra* notes 46–50, 120–21 and accompanying text.

221. See March of Dimes, *Illicit Drug Use During Pregnancy*, [http://www.marchofdimes.com/printablearticles/14332\\_1169.asp](http://www.marchofdimes.com/printablearticles/14332_1169.asp) (last visited Apr. 16, 2006); Westside Pregnancy Resource Center, *Prenatal Health Risks*, <http://www.wprc.org/preghealth.phtml> (last visited Apr. 16, 2006).

gitimate interest in seeing that women stay drug-free during pregnancy in order to ensure that they give birth to healthy children.

However, the State's mechanisms for achieving this goal—homicide, manslaughter, controlled substance, child abuse, neglect, and endangerment prosecutions—do not satisfy such interests and instead result in cruel and unusual punishment. Sending a woman to prison for her behavior during pregnancy does not directly advance the State's interest in protecting potential life. Additionally, the threat of prosecution may discourage pregnant drug-addicted women from seeking crucial health and prenatal care for fear of being reported to enforcement officials by their doctors.<sup>222</sup> If the State is worried about the potential harm that could come from drug use during pregnancy, one possible solution is early intervention. Early on, states should be permitted to recommend and provide drug treatment facilities, health care and prenatal services, and transportation to these facilities for drug-addicted women. That way, the State would not be engaging in cruel and unusual punishment and could reduce the number of newborns who are prenatally exposed to narcotic substances.

It should be noted that not all women who use drugs during pregnancy are drug addicts. Hence, an argument could be made that these non-addicted women in some sense should be held more responsible for their actions because they do not suffer from the debilitating disease of drug addiction. While the actions of these women could potentially endanger their fetuses, the women who are not drug addicts but use drugs during pregnancy are nevertheless still protected by the Constitution's Cruel and Unusual Punishment Clause, as the State is unlawfully punishing them for their status as drug users, which *Robinson* prohibits. As mentioned in a previous section of this Note, in most states, use of drugs alone is not a crime.<sup>223</sup> The reasons behind a pregnant woman's drug use are numerous and should not be reduced to the assumption that the woman simply does not care about her fetus.

#### *E. Applying the Eighth Amendment's Principle of Equality*

In addition to the principles laid out in *Robinson*, punishing women for their behavior during pregnancy is precluded by the Cruel and Unusual Punishment Clause's principle of equality. This principle prohibits the selective and arbitrary application of penalties against

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222. See *supra* Part II.A.

223. See *supra* notes 190–97 and accompanying text.



minority groups.<sup>224</sup> The Cruel and Unusual Punishment Clause's principle of equality is different from that of the Equal Protection Clause because the principle of equality is not premised on the different treatment of a judicially-identified "suspect class." Instead, under the Cruel and Unusual Punishment Clause, the principle of equality is concerned with the unequal treatment of minority groups in comparison to more socially accepted groups.

In punishing drug-addicted women for their behavior during pregnancy, state prosecutors target one of society's most unpopular groups and single them out for selective and arbitrary punishment. State prosecutors claim that one of the main reasons they prosecute drug-addicted women is because they have a compelling interest in protecting human life by controlling what they regard as fetal abuse.<sup>225</sup> They believe that by treating pregnant women's drug use as the equivalent of child abuse, they secure the welfare of fetuses and children by holding these women responsible for their actions.<sup>226</sup>

However, if state prosecutors were fully committed to protecting unborn children from fetal abuse, they would not limit their attack on fetal abuse solely to prosecuting drug-addicted mothers. Rather, they would also pursue and punish women who drank alcohol, took medication, smoked cigarettes, drank coffee, ate poorly, exercised too much, were obese, failed to get bed rest, traveled on a plane, engaged in sexual intercourse, and came in contact with workplace hazards during pregnancy.<sup>227</sup> All of these behaviors could pose health risks for the fetus.<sup>228</sup> Moreover, some of these behaviors could be more harmful than drug use. For instance, studies indicate that cigarette-smoking and alcohol abuse during pregnancy are more harmful to the fetus than illegal drug use.<sup>229</sup> Yet state prosecutors and courts have singled out drug-addicted mothers for punishment.

Among alcoholics, smokers, poor eaters, and other deviant social groups, drug addicts are quite possibly society's most unpopular

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224. See *supra* notes 138–40 and accompanying text.

225. See McNulty, *supra* note 4, at 290–92 (describing how states perceive interest in fetal life with respect to maternal conduct during pregnancy as well as with respect to abortion).

226. See Paltrow, *supra* note 219.

227. See *id.*; Tara-Nicholle B. DeLouth, Recent Development, *Pregnant Drug Addicts as Child Abusers: A South Carolina Ruling*, 14 BERKELEY WOMEN'S L.J. 96, 99 (1999); Marcy Tench Stovall, Note, *Looking for a Solution: In re Valerie D. and State Intervention in Prenatal Drug Abuse*, 25 CONN. L. REV. 1265, 1269 (1993).

228. See Bailey, *supra* note 209, at 1047.

229. See Paltrow, *supra* note 4, at 1019 (citing DEANNA S. GOMBY & PATRICIA H. SHIONO, CENTER FOR THE FUTURE OF CHILDREN, ESTIMATING THE NUMBER OF SUBSTANCE-EXPOSED INFANTS, THE FUTURE OF CHILDREN 17, 19 (1991)).

crowd. There are no doubt myriad reasons, including stereotypes, the “war on drugs,” and media and political distortion of reality. Illicit drug use has been depicted as a plague that is destroying American society.<sup>230</sup> Drug addiction is even more frowned upon when it involves pregnant women. Drug-addicted mothers are unpopular because society views them as prototypical “bad mothers.” Many members of society think that drug-addicted mothers are “selfish or irresponsible”<sup>231</sup> because they assume that innocent children suffer due to their drug-addicted mothers’ behavior.<sup>232</sup>

While indeed drug use is not a good thing and may pose risks for children, the demonizing is out of proportion. Studies have found that many drug-exposed babies are not doomed to die and do not suffer from adverse short- or long-term consequences.<sup>233</sup> For example, in one study of the effects of cocaine use on fetuses, researchers observed that cocaine increases particular health risks such as low birth weight, but only in some pregnancies.<sup>234</sup> However, in the pregnancies in which cocaine was associated with low birth weight, it was one of several factors that contributed to that particular health risk.<sup>235</sup> Despite the results of these studies, drug-addicted women are still being singled out for punishment.

What is even more disturbing about state prosecutors singling out drug-addicted women for punishment is that the majority of those singled out are low-income women of color. Overwhelmingly, women of color are prosecuted for drug use during pregnancy and are more likely to be reported to social services for drug use than white women.<sup>236</sup> This is unnerving because as mentioned above, the difference between white and African-American women using drugs during pregnancy is trivial. Professor Dorothy Roberts argues that African-American women have been disproportionately sought out for arrest and punishment because “they are least likely to obtain adequate prenatal care, the most vulnerable to government monitoring, and the least able to conform to the white, middle-class standard of motherhood. They are therefore the primary targets of government con-

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230. *Id.* at 1017.

231. Paltrow, *supra* note 219.

232. *See id.*

233. *See id.*

234. *Id.* (citing Barry Zuckerman et al., *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 *NEW ENG. J. MED.* 762 (1989)).

235. *See id.* (citing Barry Zuckerman et al., *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 *NEW ENG. J. MED.* 762 (1989)).

236. *See supra* notes 101–107 and accompanying text.

trol.”<sup>237</sup> Thus, the punishment of pregnant drug-addicted women is reflective of the underlying discrimination against vulnerable, low-income, women of color. These women are being singled out and treated differently because they are not part of mainstream society.

State prosecutors are therefore violating one of the fundamental principles behind the Cruel and Unusual Punishment Clause of the Eighth Amendment: equality. They are selectively applying child abuse, neglect, endangerment, manslaughter, controlled substance, and homicide statutes to an unpopular group—pregnant drug-addicted mothers—while not subjecting other women who engage in conduct that could potentially put their unborn children at risk to similarly severe punishment.

#### CONCLUSION

This Note does not purport to suggest that women who use drugs during pregnancy are blameless or unaccountable for their actions. It does argue, however, that they should not be singled out for punishment simply for the fact that many members of society perceive them as evil mothers whose behavior puts innocent children at risk. The pregnant drug-addicted women cases discussed in this Note show that the women who are subject to punishment are those who occupy the lowest level of the social status hierarchy. They tend to be poor, physically and emotionally abused, women of color who have limited means to defend themselves against the State’s unconstitutional, punitive intrusion upon their lives.

This Note has demonstrated that the punishment of pregnant drug-addicted women is cruel and unusual because these women are being singled out and penalized due to their status as drug addicts. One fundamental principle of our nation’s criminal justice system is that individuals can only be punished after the State proves a wrongful or culpable state of mind and the commission of a criminal act. Accordingly, these women cannot be punished for their status. Another fundamental principle is that the State cannot selectively and arbitrarily apply laws against minorities, outcasts, and unpopular groups in society. Creating status crimes in order to punish women who used drugs during their pregnancy violates these core principles of the Eighth Amendment.

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237. Roberts, *supra* note 101, at 1422.

