

**A GAP IN THE CRIMINAL JUSTICE  
SYSTEM, CREATING A NEW CLASS OF  
FELONS IN PREGNANT DRUG-ADDICTED  
WOMEN, A STATE-BY-STATE ANALYSIS**

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INTRODUCTION

“I figured since I was just informed that [I]’m a crackhead  
(still wonderin[g] how [I]’m the last to find out) and pregnant now

[I'll just shoot thru my belly button strait into the uterus to make sure the baby gets high to.”<sup>1</sup>

Imagine the joys in learning you are pregnant. Imagine the devastation of drug addiction. Combine the two and it is not a pretty picture. Stopping the drug and suffering withdrawal may harm the fetus but continuing the drug will most certainly harm the fetus and may lead to criminal charges when the child is born. What is one to do? Seeing a doctor would be the most common solution. However, increasingly across the United States, seeing a doctor may lead to criminal charges against the mother before the child is ever born, just for seeking advice.

Heather Capps, at the age of twenty-five, experienced this all too real scenario.<sup>2</sup> After becoming addicted to Oxycodone through prescription for scoliosis pain, Capps realized she had nowhere to turn for help when she became pregnant, so she sought out a lawyer.<sup>3</sup> Capps continued using Oxycodone at the lowest dosage she believed she could handle and was arrested almost immediately after giving birth under Alabama's chemical-endangerment of a child law.<sup>4</sup> Amanda Kimbrough, another Alabama citizen, only used methamphetamines once and was sentenced to ten years in jail after her son died nineteen hours after he was born and tested positive for methamphetamines.<sup>5</sup> And in Mississippi, a sixteen-year old girl, Rennie Gibbs, was charged with depraved heart murder and sentenced to life after her stillborn tested positive for cocaine.<sup>6</sup>

These women were all criminally charged for being addicted to drugs. While these women were charged after their child was born, the drug abuse occurred while they were pregnant. A gap in the criminal justice system is widening as a new class of felons is being created, pregnant women, and a new criminal charge is being specially created just for them, drug addiction.

The history of reproductive rights and drug legislation and the history of pregnant women who are criminally prosecuted for

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<sup>1</sup> Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES, Apr. 25, 2012, <http://perma.cc/7BLA-QTW7>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; see *infra* Section III.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; see also *Gibbs v. State*, 2010-IA-00819-SCT (Miss. 2011).

the use of controlled substances will be addressed in Part I of this article. Part II of this article provides a broad analysis of how each state currently addresses the ever-prevalent prosecution of these women, including a chart with the relevant statutes and cases. Part III explains why the issue is deeper than due process rights and whether the legislatures intended for child or minor to include fetus or unborn child. Finally, Part IV discusses other possible options states should explore to put a stop to the creation of a new class of felons. Whether one is pro-choice or pro-life and regardless of the health issues related to the use of drugs during pregnancy, a criminal conviction against pregnant women using drugs for the harm of their child is not only unconstitutional and creating an avoidance of medical care, but it is forging a gap in our criminal justice system and establishing a new illegality.

## I. BACKGROUND

### *A. An Overview of Reproductive Rights Legislation*

Women's reproductive rights have a rich history in case law and congressional acts. In 1965, the Supreme Court allowed married couples to use contraception.<sup>7</sup> In 1972, the Supreme Court allowed unmarried couples to use contraception.<sup>8</sup> Then, in 1973, the famous case of *Roe v. Wade*, struck down all state laws that made abortion illegal.<sup>9</sup> Three years later Congress passed the Hyde Amendment, prohibiting the use of federal money for abortions unless carrying a fetus to term would mean the mother was in danger of losing her life.<sup>10</sup> A year later, in 1977, Congress revised the amendment to exclude cases of rape and incest allowing Medicaid to cover those abortions.<sup>11</sup> Another milestone

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<sup>7</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down a Connecticut law prohibiting information or medical advice to married couples on contraception).

<sup>8</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (striking down a law prohibiting information to unmarried couples regarding contraception).

<sup>9</sup> 410 U.S. 113, 165 (1973).

<sup>10</sup> Act of Sept. 30, 1977, Pub. L. No. 94-439, 90 Stat. 1418 (prohibiting the use of federal money for abortions).

<sup>11</sup> Department of Health, Education, and Welfare Act, 1977-Limitation on Federal Funds for Abortions, 43 Op. Att'y Gen. 88 (1977). Congress recognized that the intent was not to prevent funding of abortions when deemed medically necessary by a physician due to endangerment of the woman's life but rather "to prohibit payment for

case made it to the Supreme Court on the issue of abortion almost two decades later. In 1992, the Supreme Court confirmed women's right to abortion but allowed states to restrict access so long as the restriction does not pose an undue burden on women.<sup>12</sup> As of today, though many states continue to introduce a variety of methods to prohibit abortion,<sup>13</sup> abortion is legal in all fifty states.

### *B. A Brief History of Drug Legislation*

Our government, both at the federal and state levels, has an equally rich history of drug legislation. One of the first acts Congress took in an attempt to stop drug abuse and addiction was the Harrison Narcotic Act in 1914.<sup>14</sup> Enacted as a revenue tax, because Congress recognized drug regulation was a police power, the act required doctors who prescribed narcotics to register and pay a tax.<sup>15</sup> The ratification of the Eighteenth Amendment and the prohibition era made the manufacturing, transportation, and sale of alcohol illegal.<sup>16</sup> The Mari[j]uana Tax Act was enacted by

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abortions as a method of family planning, or for emotional or social convenience." *Id.* at 89.

<sup>12</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992).

<sup>13</sup> Erik Eckholm, *Push for Personhood Amendment Represents New Tack in Abortion Fight*, N.Y. TIMES, (Oct. 25, 2011), <http://perma.cc/4BDN-YWMD>. Personhood USA is a Colorado based pro-life group trying to get two-thirds of the States to change their constitutions to include a fetus as a person before tackling the United States Constitution. *Id.* PERSONHOOD USA, <http://perma.cc/XTE7-Y3FU> (last visited Feb 3, 2014). Starting in Colorado and then to Mississippi, the group has similar plans to get a vote on the amending constitutions in Florida, Michigan, Montana, Ohio and Wisconsin. *Id.* The group's attempt in Mississippi, Prop 26, failed after voters voted it down in November 2011. Emily Wagster Pettus, *Mississippi 'Personhood' Amendment Vote Fails*, HUFFINGTON POST (Nov. 8, 2011, 11:17 PM), <http://perma.cc/7L3K-VMWH>.

<sup>14</sup> Harrison Narcotic Act of 1914, 63 Cong. ch. 1, 38 Stat. 785 (1914). The Act's purpose was "[t]o provide for the registration of with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes." *Id.*

<sup>15</sup> 39 A.L.R. 236 (1925); *see also* 13 A.L.R. 858 (1921). The act was passed in hopes the incidental effect of taxing and registration would prevent drug addicts from being prescribed narcotics. In *Linder v. U.S.*, 268 U.S. 5, 22-23 (1925), the Supreme Court upheld the law as a revenue tax acknowledging the police power could not be invaded by the power of Congress and the statute must be strictly construed so not to extend beyond a revenue act. The Court also held a doctor who prescribed a small amount of narcotics to an addict was not a violation of the act and that the federal government could not regulate medical practice. *Id.* at 18.

<sup>16</sup> U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

Congress in 1937 along much the same lines as the Harrison Narcotic Act.<sup>17</sup> The act taxed those who dealt marijuana, in essence controlling the use of marijuana.<sup>18</sup> After the Court in *Leary v. U.S.* held that the act violated due process rights,<sup>19</sup> Congress enacted the Controlled Substance Act as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>20</sup> The CSA is the federal drug law and policy in the United States today and was signed into law by President Nixon.<sup>21</sup> The CSA makes it illegal “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance,”<sup>22</sup> as well as “proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any [controlled] substance.”<sup>23</sup> States have a somewhat harsh history in drug laws, such the Rockefeller drugs laws in New York<sup>24</sup> and California’s Three Strikes and You’re Out law.<sup>25</sup>

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<sup>17</sup> Marihuana Tax Act, ch. 553, 50 Stat. 551 (1937). “To impose an occupational excise tax upon certain dealers in marihuana [sic], to impose a transfer tax upon certain dealings in marihuana [sic], and to safeguard the revenue therefrom by registry and recording.” *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Leary v. U.S.*, 395 U.S. 6 (1969). The defendant’s charge with possession of marijuana under the act was overturned because compliance with the Marijuana Tax Act required self-incrimination under state drug laws. *Id.* at 16. The Court unanimously ruled self-incrimination was a defense to noncompliance and hence ruled the act to be unconstitutional under a violation of due process. *Id.* at 52-53.

<sup>20</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. §§ 801-899 (1970).

<sup>21</sup> *Id.* The CSA created five categories of controlled substances and made manufacture, possession, and distribution of certain drugs illegal. *Id.*

<sup>22</sup> *Id.* at § 841.

<sup>23</sup> *Id.* at § 844.

<sup>24</sup> *Rockefeller Drug Laws*, N.Y. TIMES, Jan. 6, 2013, <http://perma.cc/6EQR-5JLM>. At the time the laws made New York the harshest drug law state. *Id.*

<sup>25</sup> A law that went into effect in 1994, mandating a life sentence after a third felony conviction, including drug possession. CAL. PENAL CODE § 1170.12 (West 1994; *see also* Aaron Sankin, *California Prop 36, Measure Reforming State’s Three Strikes Law, Approved By Wide Majority of Voters*, HUFFINGTON POST (Nov. 7, 2012, 3:13 PM), <http://perma.cc/LV5L-4W7G>. The California law was amended to require the third “strike” to be a serious felony. *Id.*

*C. A Framework of the Prosecution of Drug-Addicted Pregnant Women*

1. The first, Jennifer Johnson

The combination of reproductive and drug legislation has created an interesting history of prosecuting women for drug use while pregnant. The first woman to be criminally convicted for using drugs while pregnant was Jennifer Johnson.<sup>26</sup> Johnson was criminally convicted in 1989 of delivery of a controlled substance to a baby through an umbilical cord after birth.<sup>27</sup> Johnson was using cocaine for three years, through the pregnancies of both her son and her daughter.<sup>28</sup> In 1987, Johnson admitted after delivering her son she had used cocaine the night before she went into labor.<sup>29</sup> Her son was born without any complications but did test positive for a product of cocaine.<sup>30</sup> Then in December 1988, Johnson was hospitalized for a cocaine overdose.<sup>31</sup> A month later Johnson delivered her baby and, with only sixty to ninety seconds before the umbilical cord was cut, was charged with delivery of a controlled substance to a baby.<sup>32</sup> The District Court of Appeals of Florida upheld the conviction and the question was certified a “great public importance.”<sup>33</sup> The Supreme Court of Florida quashed the decision of the lower court, concluding the legislature could not have meant for the law<sup>34</sup> to intend for delivery to be in the ninety seconds of before the umbilical cord is cut.<sup>35</sup>

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<sup>26</sup> *Johnson v. State*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), *decision quashed by*, 602 So. 2d 1288 (Fla. 1992) (convicted in 1989 in Seminole County Circuit Court).

<sup>27</sup> Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 280 (1990).

<sup>28</sup> *Johnson*, 602 So. 2d at 1291.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* The State can only prosecute the mother for the delivery of a controlled substance for the short time when the baby was no longer a fetus but still connected via umbilical cord to his mother. This is because the fluid in the umbilical cord was still transferring a controlled substance to the baby during the sixty to ninety seconds after birth but before the cord was cut. *Id.*

<sup>33</sup> *Johnson*, 578 So. 2d at 420.

<sup>34</sup> FLA. STAT. ANN. § 893.13(1)(c) (West 1973).

<sup>35</sup> 602 So. 2d at 1297.

Since the Supreme Court of Florida's ruling, there have been hundreds of similar cases in states all over the nation.<sup>36</sup> The criminal convictions range from delivery of a controlled substance to a child, like *Johnson*<sup>37</sup>, to chemical endangerment of a child,<sup>38</sup> to child abuse,<sup>39</sup> to manslaughter.<sup>40</sup> Prosecutors have tried almost as many cases and received convictions for manslaughter,<sup>41</sup> neglect of a dependent,<sup>42</sup> and endangerment of a child<sup>43</sup> making it to the highest state level courts before being overturned.<sup>44</sup>

Two cases, one from Mississippi and one from Alabama, show just how much of a gap in the criminal justice system this is creating. In Mississippi, where a sixteen-year old girl, Rennie Gibbs, was sentenced to life for depraved heart murder after her stillborn child tested positive for cocaine, the courts are trying their best not to answer the question.<sup>45</sup> The question being can a woman be convicted of "a crime that did not exist and a crime that would be unconstitutional if it did exist."<sup>46</sup> In Alabama, where Hope Ankrom, after giving birth to a son who tested positive for cocaine, was sentenced to three years in prison, the Court of

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<sup>36</sup> *E.g.*, *Ankrom v. State*, 2011 WL 3781258 (Ala. Crim. App. 2011); *Reinesto v. Superior Court of State In and For County of Navajo*, 894 P.2d 733 (Ariz. Ct. App. 1995); *Arkansas Dept. of Human Services v. Collier*, 95 S.W.3d 772 (Ark. 2003); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992); *Herron v. State*, 729 N.E.2d 1008 (Ind. Ct. App. 2000); *Bei Bei Shuai v. State*, 966 N.E.2d 619 (Ind. Ct. App. 2012); *Com. v. Welch*, 864 S.W.2d 280 (Ky. 1993); *Com. v. Pugh*, 969 N.E.2d 672 (Mass. 2012); *In re Baby Boy Blackshear*, 736 N.E.2d 462 (Ohio 2000); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

<sup>37</sup> *Johnson*, 578 So. 2d. at 419.

<sup>38</sup> *E.g.*, *Ankrom*, 2011 WL 3781258.

<sup>39</sup> *E.g.*, *In re Baby Boy Blackshear*, 736 N.E.2d 462; *Whitner*, 492 S.E.2d 777; *In re Benjamin M.*, 310 S.W.3d 844 (Penn. Ct. App. 2009).

<sup>40</sup> *E.g.*, *Gibbs v. State*, 2010-IA-00819-SCT (Miss. 2011).

<sup>41</sup> *E.g.*, *State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005); *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009).

<sup>42</sup> *E.g.*, *Herron*, 729 N.E.2d 1008; *Ark. Dept. Human Services*, 95 S.W.3d 772 (Ark. 2003).

<sup>43</sup> *E.g.*, *Kilmon v. State*, 905 A.2d 306 (Md. 2006); *State v. Wade*, 232 S.W.3d 663 (Mo. Ct. App. 2007); *Sheriff v. Encoe*, 885 P.2d 596 (Nev. 1994); *Geiser*, 763 N.W.2d 469; *State v. Gray*, 584 N.E.2d 710 (Ohio 1992).

<sup>44</sup> *See infra* note 93.

<sup>45</sup> *Gibbs v. State*, 2010-IA-00819-SCT (Miss. 2011). Gibbs filed a Petition for Permission to File Interlocutory Appeal on May 18, 2010, and the Mississippi Supreme Court granted her petition on June 17, 2010. *Id.* at 4. However, 498 days later, on October 27, 2011 the Supreme Court dismissed Gibbs's appeal. *Id.* at 7. *See also supra* text accompanying footnote 6.

<sup>46</sup> *Id.* at 5.

Criminal Appeals of Alabama set precedent holding a “viable fetus” is a child under the chemical endangerment of a child statute.<sup>47</sup>

## 2. A sixteen-year old sentenced to death

Rennie Gibbs was one month past her sixteenth birthday when she gave birth to a stillborn on November 12, 2006.<sup>48</sup> The autopsy report concluded “the stillbirth was caused by ‘cocaine toxicity.’”<sup>49</sup> Gibbs was indicted for depraved heart murder in violation of Miss. Code Ann. § 97-3-19<sup>50</sup> the following February. The charges read “that Gibbs ‘did . . . kill her unborn child, a human being, while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, by using cocaine while pregnant with her unborn child’. . . .”<sup>51</sup> Gibbs filed a motion to dismiss the indictment on November 18, 2009, and her motion was denied by the Lowndes County Circuit Court on April 27, 2010. However, the lower court did grant her permission for leave to file for an interlocutory appeal with the Mississippi Supreme Court.<sup>52</sup> After the Mississippi Supreme Court granted Gibbs’ appeal, more than fifty organizations and individuals filed amicus briefs on her behalf.<sup>53</sup> Gibbs’ brief raised constitutional questions of “due process violation, vagueness, lack of notice, prohibition on ex post facto laws, right to privacy, equal protection, and cruel and unusual punishment.”<sup>54</sup> Gibbs addressed the issue “that the plain language of the depraved-heart murder statute does not apply to harm to unborn children, that the ‘unborn children’ offenses statute excludes depraved-heart murder, and that the Legislature repeatedly has declined to

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<sup>47</sup> *Ankrom v. State* 2011 WL 3781258 (Ala. Crim. App. 2011); *See also* ALA. CODE § 26-15-3.2 (2009). The trial court suspended Ankrom’s three-year sentence and “placed her on one year of supervised probation.” *Ankrom*, at \*1.

<sup>48</sup> *Gibbs*, at \*4.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*5. Gibbs was indicted on February 4, 2007 in the Lowndes County Circuit Court. *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at \*4. The permission for leave to file an interlocutory appeal stated that it was a case of first impression under the laws of the state of Mississippi. *Id.*

<sup>53</sup> *Id.* The Supreme Court granted the appeal June 17, 2010 and the final briefs were received Feb. 7, 2011. *Id.*

<sup>54</sup> *Id.* at \*5.

subject pregnant drug users to homicide or child abuse prosecutions.”<sup>55</sup> Though the Mississippi Supreme Court heard oral arguments on May 25, 2011, on October 27, 2011 the Court dismissed Gibbs’s appeal as improvidently granted and returned it to the Lowndes County Circuit Court to be placed on the trial docket.<sup>56</sup>

### 3. A major precedent is set

In Alabama, a Department of Human Resources worker was assigned to Hope Ankrom to develop a plan of care for her child after her child tested positive for cocaine when he was born on January 31, 2009.<sup>57</sup> Through an investigation, the Department of Human Resources learned Ankrom had tested positive for cocaine and marijuana on more than one occasion during her pregnancy.<sup>58</sup> Just eighteen days after giving birth to her son, “Ankrom was arrested and charged with chemical endangerment of a child.”<sup>59</sup> Ankrom was indicted several months later by a grand jury for “knowingly, recklessly, or intentionally caus[ing] or permit[ing] a child . . . to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia.”<sup>60</sup> Ankrom submitted a motion to dismiss the

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<sup>55</sup> *Id.* at \*5-6. Gibbs raised this issue in her petition. Several of the amicus briefs filed on her behalf also raised public policy arguments. *Id.* at \*6.

<sup>56</sup> *Id.* at \*2, \*7. Justice King, dissenting, defined “improvidently” as “[a] judgment, decree, rule, injunction, etc., when given or rendered without adequate consideration by the court, or without proper information as to all the circumstances affecting it, or based upon a mistaken assumption or misleading information or advice, is sometimes said to have been ‘improvidently’ given or issued.” *Id.* at \*3 (quoting *Black’s Law Dictionary* 758 (6th ed. 1990)).

<sup>57</sup> *Ankrom v. State*, 2011 WL 3781258, at \*1 (Ala. Crim. App. 2011).

<sup>58</sup> *Id.* Ankrom readily admitted using marijuana during her pregnancy but denied the use of cocaine. *Id.*

<sup>59</sup> *Id.* Ankrom was arrested and charged on Feb. 18, 2009. *Id.*

<sup>60</sup> *Id.* The indictment on Aug. 25, 2009 stated “Ankrom did knowingly, recklessly, or intentionally cause or permit a child, to-wit: [B.W.], a better description of which is to the Grand Jury otherwise unknown, to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260 of the Code of Alabama, 1975, to-wit: Cocaine, in violation of Section [26-15-3.2(a)(1)].” *Id.* See also ALA. CODE § 13A-12-260 (2005) (defining drug paraphernalia); ALA. CODE § 26-15-3.2(a)(1) (2006) (prohibiting chemical endangerment of a child).

indictment a month later<sup>61</sup> on grounds that the legislature did not intend for child to mean fetus, that other states have held that similar statutes do not apply to prenatal conduct, that the law is impermissively vague and the rule of lenity applies, she had “not been accorded due process because there was no notice her conduct was illegal . . . , the prosecution of pregnant women is a violation of the constitutional guarantee of Equal Protection, and that prosecution of pregnant, allegedly drug-addicted, women is against public policy for numerous moral and ethical reasons.”<sup>62</sup> The trial court denied her motion after the State responded to the motion concluding that because the baby tested positive for cocaine when he was born, prosecution was proper under the chemical endangerment of a child statute.<sup>63</sup> Ankrom pled guilty but reserved an issue for appellate review.<sup>64</sup>

The issue Ankrom presented to the Court of Criminal Appeals of Alabama was “whether a mother who ingested a controlled substance during her pregnancy, may be prosecuted under [the chemical endangerment of a child statute]<sup>65</sup> if at birth the infant tests positive for the controlled substance.”<sup>66</sup> The court stated that though statutes are to be construed in favor of the accused, the rule of lenity does not require courts to abandon common sense.<sup>67</sup> Further, child in its plain meaning includes an unborn child<sup>68</sup> because the state of Alabama has a public policy “to protect life, born, and unborn . . . particularly . . . unborn life that is capable of living outside the womb.”<sup>69</sup>

In *Ankrom v. State*,<sup>70</sup> the court’s decision still holds and has set a precedent in the state of Alabama. In *Gibbs v. State*,<sup>71</sup> the

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<sup>61</sup> *Ankrom*, 2011 WL 3781258 at \*1. Ankrom filed her motion Sept. 25, 2009.

<sup>62</sup> *Id.* Ankrom also pointed to the legislature’s previous consideration of including fetus under child and declined to do so. *Id.*

<sup>63</sup> *Id.* See also ALA. CODE § 26-15-3.2(a)(1) (2006).

<sup>64</sup> *Ankrom*, 2011 WL 3781258 at \*1. Ankrom reserved the issue she raised in her motion to dismiss the indictment, that the facts do not assert an offense against her because the law is not applicable to the facts. *Id.* at \*2.

<sup>65</sup> ALA. CODE § 26-15-3.2(a)(1) (2009).

<sup>66</sup> *Ankrom*, 2011 WL 3781258 at \*2.

<sup>67</sup> *Id.* at \*5.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* See also Ala. Code § 26-22-1 (2009).

<sup>70</sup> *Ankrom*, 2011 WL 3781258.

<sup>71</sup> *Gibbs v. State*, 2010-IA-00819-SCT (Miss. 2011).

court chose not to rule on the issue and returned the case to circuit court. Both cases show that prosecutors are willing to pursue whatever charges necessary in order to obtain a conviction. This is widening the gap and allowing prosecutors to use case history such as *Ankrom* as persuasive precedent in the Eleventh Circuit states, and still of note to others. Because each state handles the issue differently, women are lacking in their due process rights.

## II. A STATE-BY-STATE ANALYSIS OF CRIMINAL CONVICTION OF DRUG-ADDICTED PREGNANT WOMEN

The chart in Appendix A<sup>72</sup> gives a broad look at the fifty states and the different ways each state is addressing the issue. In a large majority of states, prosecutors are using state child abuse statutes<sup>73</sup> and endangerment of child statutes<sup>74</sup> to prosecute women who use drugs while pregnant and their child tests positive at birth. Prosecutors receive the most convictions against pregnant drug abusing women under child abuse statutes.<sup>75</sup>

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<sup>72</sup> See *infra* Appendix A.

<sup>73</sup> See *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995); ARIZ. REV. STAT. ANN. § 13-3623 (2010); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991); FLA. STAT. ANN. § 827.04 (West 2006); *Com. v. Welch*, 864 S.W.2d 280 (Ky. 1993); KY. REV. STAT. ANN. § 508.110 (LexisNexis 2008); *State v. Martinez*, 137 P.3d 1195 (N.M. Ct. App. 2006); N.M. STAT. ANN. § 30-6-1 (West Supp. 2011); *In re Baby Boy Blackshear*, 736 N.E.2d 462 (Ohio 2000); OHIO REV. CODE ANN. § 2151.031 (LexisNexis 2007); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); S.C. CODE ANN. § 63-5-70 (2010); *In re Benjamin M.*, 310 S.W.3d 844 (Tenn. Ct. App. 2009); TENN. CODE ANN. § 37-1-102 (Supp. 2012).

<sup>74</sup> See *Reyes v. Superior Court*, 75 Cal. App. 3d 214 (Cal. Ct. App. 1977); CAL. PENAL CODE § 273a (West 2008); *Kilmon v. State*, 905 A.2d 306 (Md. 2006); MD. CODE ANN. CRIM. LAW § 3-204 (LexisNexis Supp. 2010); *State v. Wade*, 232 S.W.3d 663 (Mo. Ct. App. 2007); MO. ANN. STAT. § 568.045 (West Supp. 2011); *Sheriff v. Encoe*, 885 P.2d 596 (Nev. 1994); NEV. REV. STAT. ANN. § 200.508 (LexisNexis 2006); *People v. Morabito*, 580 N.Y.S.2d 843 (N.Y. City Ct. 1992); N.Y. PENAL LAW § 260.10 (McKinney Supp. 2011); *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009); N.D. CENT. CODE ANN. § 19-03.1-22.2 (2009); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992); OHIO REV. CODE ANN. § 2919.22 (LexisNexis 2010); *State v. Cervantes*, 223 P.3d 425 (Or. Ct. App. 2009); OR. REV. STAT. § 163.195 (2009); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); S.C. CODE ANN. § 63-5-70 (2010).

<sup>75</sup> See *In re Baby Boy Blackshear*, 736 N.E.2d 462 (Ohio 2000); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); *In re Benjamin M.*, 310 S.W.3d 844 (Tenn. Ct. App. 2009).

Manslaughter indictments<sup>76</sup> round out the top three most populous charges in the United States against these women, followed by neglect of a dependent<sup>77</sup> and delivering and distributing cocaine.<sup>78</sup> Some states are prosecuting for chemical endangerment of a child,<sup>79</sup> injury to a child,<sup>80</sup> or cruelty to juveniles.<sup>81</sup>

#### A. A Closer Look at the States Prosecuting under Child Abuse Statutes

States where prosecutors are using child abuse statutes to prosecute these drug-addicted mothers have the most success in conviction. Those that are not successful are overturned at the appellate level for various reasons. For example, in *Reinesto v. Superior Court*, the Arizona court acknowledged the issue involved a case of first impression of statewide importance and overturned the conviction, stating that the defendant could not be prosecuted for prenatal conduct that caused harm after birth and to allow so would render the statute impermissibly vague.<sup>82</sup> In *State v. Gethers*<sup>83</sup> and *Commonwealth v. Welch*,<sup>84</sup> the Florida and Kentucky courts respectively concluded that the child abuse statute did not apply to an unborn fetus. New Mexico, similarly,

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<sup>76</sup> See *State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005); HAW. REV. STAT. § 707-702 (Supp. 2007); *Bei Bei Shuai v. State*, 966 N.E.2d 619 (Ind. Ct. App. 2012); IND. CODE ANN. § 35-46-1-1 (LexisNexis 2009); *Hughes v. State*, 868 P.2d 730 (Okla. Crim. App. 1994); OKLA. STAT. ANN. tit. 21, § 691 (West Supp. 2011); *State v. Deborah J.Z.*, 228 Wis. 2d 468 (Wis. Ct. App. 1999); WIS. STAT. ANN. § 940.01 (West Supp. 2010).

<sup>77</sup> See *Arkansas Dept. of Human Services v. Collier*, 95 S.W.3d 772 (Ark. 2008); ARK. CODE ANN. § 9-27-303 (Supp. 2011); *Herron v. State*, 729 N.E.2d 1008 (Ind. Ct. App. 2000); IND. CODE ANN. § 35-46-1-4 (LexisNexis 2009).

<sup>78</sup> See *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992); GA. CODE ANN. § 16-13-30 (2011); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991); MICH. COMP. LAWS ANN. § 333.7401 (West Supp. 2011).

<sup>79</sup> See *Ankrom v. State*, 2011 WL 3781258 (Ala. Crim. App. 2011); ALA. CODE § 26-15-3.2 (LexisNexis 2009).

<sup>80</sup> See *Collins v. State*, 890 S.W.2d 893 (Tex. Ct. App. 1994); TEX. PENAL CODE ANN. § 1.07 (West Supp. 2011).

<sup>81</sup> See *State v. Armstard*, 43, 333 (La. App. 2 Cir. 8/13/08); 991 So. 2d 116; LA. REV. STAT. ANN. § 14:93 (2008).

<sup>82</sup> *Reinesto v. Superior Court*, 894 P.2d 733, 736 (Ariz. Ct. App. 1995).

<sup>83</sup> 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991).

<sup>84</sup> 864 S.W.2d 280, 285 (Ky. 1993). Specifically the court states the General Assembly could have included the unborn child if they had so wished the statute to be interpreted in that way. *Id.*

has stated that the legislature did not intend for fetus to be included in the definition of a child for purposes of the child abuse statute.<sup>85</sup>

Several states have set precedent by affirming the holding of the lower courts and allowing pregnant women to be prosecuted under child abuse statutes for using drugs while pregnant. In *Whitner v. State*,<sup>86</sup> South Carolina's highest court held that a fetus is a child under the meaning of the child abuse statute.<sup>87</sup> The court further concluded the defendant did not lack due process rights because it is common knowledge cocaine during pregnancy can harm the fetus.<sup>88</sup> Tennessee's Court of Appeals held in *In re Benjamin M.*, that due to the withdrawal problems the child experienced, the mother's use of drugs constituted severe child abuse.<sup>89</sup> Ohio addressed the issue slightly differently and of particular note in *In re Baby Boy Blackshear*.<sup>90</sup> In *In re Baby Boy Blackshear*, the court applied the civil child abuse statute as opposed to a criminal child abuse statute; however, the court still concluded that child included fetus in the statutory definition.<sup>91</sup>

### *B. Other States' Approaches and Reasons for Overturning Convictions*

Other states are most commonly overturning convictions at the appellate level, regardless of the statute, due to the statutory definition of child not including a viable fetus or unborn child.<sup>92</sup> However, Oklahoma concludes that the statutory definition of human being allows a fetus to be the victim of homicide, but the

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<sup>85</sup> *State v. Martinez*, 2006-NMCA-068, 139 N.M. 741, 137 P.3d 1195, 1198.

<sup>86</sup> 492 S.E.2d 777 (S.C. 1997).

<sup>87</sup> *Id.* at 780; S.C. CODE ANN. § 63-5-70 (2008).

<sup>88</sup> 492 S.E.2d at 785. The court contends that because the plain meaning of child includes a viable fetus the defendant "had all the notice the Constitution requires." *Id.*

<sup>89</sup> 310 S.W.3d 844, 850 (Tenn. Ct. App. 2009).

<sup>90</sup> 736 N.E.2d 462 (Ohio 2000).

<sup>91</sup> *Id.* at 465.

<sup>92</sup> *See Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991); *State v. Martinez*, 137 P.3d 1195 (N.M. Ct. App. 2006); *State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005); *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. Ct. App. 1999); *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977); *People v. Morabito*, 580 N.Y.S.2d 843 (N.Y. City Ct. 1992); *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992); *State v. Cervantes*, 223 P.3d 425 (Or. Ct. App. 2009).

mother can only be prosecuted if she committed the crime that caused the death of her unborn child.<sup>93</sup> On the other hand, states such as North Dakota and Pennsylvania do not allow in their statutes for the mother to be prosecuted for crimes against her own unborn child.<sup>94</sup>

Most state courts that are overturning convictions are reasoning the legislature did not intend for human or child to mean fetus.<sup>95</sup> Few, if any, courts are overturning cases on a due process level, a discrimination level, or Eighth Amendment level.<sup>96</sup> Precedent allows for prosecution in states such as South Carolina, where a fetus is a child under child abuse statutes,<sup>97</sup> and Alabama, where *Ankrom v. State*<sup>98</sup> is precedent and mothers can be prosecuted for chemical endangerment of a child. On the contrary, states like California, where the child endangerment statute does not include fetus or unborn child,<sup>99</sup> and Maryland, where injury to a fetus by cocaine use while pregnant does not apply to the reckless endangerment statute,<sup>100</sup> convictions prove to be thwarted. Regardless of whether precedent will allow for prosecution or demonstrates the courts' unwillingness to convict, prosecutors in courts all over the country are continuing to prosecute these women and that is where the problem lies.

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<sup>93</sup> *Hughes v. State*, 868 P.2d 730 (Okla. Crim. App. 1994); OKLA. STAT. ANN. tit. 21, § 691 (West 2006). The statute specifically states, "Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child." *Id.*

<sup>94</sup> N.D. CENT. CODE ANN. § 19-03.1-22.2 (LexisNexis 2003); 18 PA. CONS. STAT. ANN. § 2608 (West 1997).

<sup>95</sup> *See supra* note 93.

<sup>96</sup> *Collins v. State*, 890 S.W.2d 893, 898 (Tex. Ct. App. 1994) (holding that because the mother did not have notice that her use of cocaine could subject her to prosecution the case must be reversed).

<sup>97</sup> *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

<sup>98</sup> *Ankrom v. State*, 2011 WL 3781258, at \*1 (Ala. Crim. App. 2011).

<sup>99</sup> *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977) (prosecution of a mother for the use of heroin during pregnancy).

<sup>100</sup> *Kilmon v. State*, 905 A.2d 306 (Md. 2006).

## III. LOOKING PAST DUE PROCESS AND DEFINING “CHILD”

Many academics have discussed prosecuting women for harm to their unborn child.<sup>101</sup> There are statutes for feticide if the mother kills her child<sup>102</sup> and if a third party kills the child by harming the mother.<sup>103</sup> If the third party did not know the mother was pregnant, there are statutes that say prosecutors cannot charge that person for killing a baby.<sup>104</sup> There are also statutes that make abortion illegal if performed by the mother or another person who is not a doctor.<sup>105</sup> However, abortion is legal, as of today, in all fifty states.<sup>106</sup>

Most women are prosecuted under child endangerment statutes and child abuse statutes. Mothers who take drugs while they are pregnant are inevitably harming their child. A mother taking drugs while pregnant is never a good thing. The fetus experiences everything the woman does. The food the mother ingests, the nicotine she smokes, the alcohol she drinks,<sup>107</sup> and yes, of course, the drugs she takes, all get to the fetus. The problem lies within prosecuting women for fetal abuse.

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<sup>101</sup> See generally Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990); Michael A. Hammer, *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 (1992); Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 PACE L. REV. 43 (Fall 2008); Staci Visser, *Prosecuting Women for Participating in Illegal Abortions: Undermining Gender Equality and the Effectiveness of State Police Power*, 13 J.L. & FAM. STUD. 171 (2011); Krista Stone-Manista, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. CRIM. L. & CRIMINOLOGY 823 (2009).

<sup>102</sup> See HAW. REV. STAT. § 707-702 (West 2006); IND. CODE ANN. § 35-42-1-6 (West 2009).

<sup>103</sup> See *Commonwealth v. Pugh*, 969 N.E.2d 672 (Mass. 2012); MINN. STAT. ANN. § 609.266 (West 2007); MISS. CODE ANN. § 97-3-37 (West 2011); IND. CODE ANN. § 35-41-1-6 (West 2009); DEL. CODE ANN. tit. 11, § 4209 (West 2013); ALASKA STAT. ANN. § 11.41.150 (West 2006); IDAHO CODE ANN. § 18-4016 (West 2002); IOWA CODE ANN. § 707.7 (West 2009).

<sup>104</sup> See MISS. CODE ANN. § 97-3-37 (2011); ME. REV. STAT. ANN. tit. 17A, § 1252 (2008).

<sup>105</sup> See MISS. CODE ANN. § 97-3-3 (West 1997); OHIO REV. CODE ANN. § 2919.17 (West 2011); 720 ILL. COMP. STAT. ANN. 510/1 (West 2013); UTAH CODE ANN. § 76-7-314 (West 2010); VT. STAT. ANN. tit. 13, § 101 (West 2013).

<sup>106</sup> *Roe v. Wade*, 410 U.S. 113, 165 (1973).

<sup>107</sup> *Fetal alcohol syndrome: What you should know about drinking during pregnancy*, PAEDIATRICS & CHILD HEALTH (March 2002), <http://perma.cc/7WLD-JL3K>.

*A. Drawing the Line between Ill-Advised and Illegal*

The state governments do not prosecute women who drink or smoke while pregnant, or women who eat lunchmeat, swordfish, or drink caffeinated drinks. These are acts that are ill-advised during pregnancy. Swordfish is high in mercury and can damage the developing nervous system.<sup>108</sup> Caffeine creates a higher heart rate in the fetus and can cause a miscarriage.<sup>109</sup> The effects of drinking during pregnancy, while often disputed in terms of type and quantity, are well known to cause fetal alcohol syndrome leading to “facial deformities, heart problems, low birth weight, and mental retardation.”<sup>110</sup> Prosecutors are not charging the women committing these ill-advised acts with child abuse. However, states do prosecute women for drug use while pregnant. Granted consuming caffeine is not on par with drugs, but certainly alcohol and smoking come closer. The practice of using drugs while pregnant is ill-advised, but it should not be an act that is criminally prosecuted.

Academia provides articles on why the use of drugs during pregnancy should not be a criminal offense.<sup>111</sup> These articles discuss whether “child” and “fetus” are synonymous according to the statutes the women are being prosecuted under and whether the legislature intended for the statutes to reach to pregnant women and their fetuses.<sup>112</sup> Other articles examine why women are prosecuted,<sup>113</sup> that the hope is to deter women from using drugs while pregnant.<sup>114</sup> There is analysis on whether these

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<sup>108</sup> Mayo Clinic, *Pregnancy Nutrition: Foods to avoid during pregnancy*, <http://perma.cc/TD24-PZQ3>.

<sup>109</sup> *Id.*

<sup>110</sup> *Fetal alcohol syndrome, supra* note 107.

<sup>111</sup> *See supra* note 101.

<sup>112</sup> *Id.*

<sup>113</sup> Stone-Manista, *supra* note 101, at 832-33. There are several rationales on why women are being prosecuted. *Id.* Some believe that if women are prosecuted they will stop using drugs. *Id.* That belief is central to a deterrent effect and “that prosecuted women will refrain from drugs use during potential future pregnancies and will serve as examples to their peers.” *Id.* at 832. Still others believe not in a deterrent effect but rather one of retribution. *Id.* The idea of retribution is that these women should be prosecuted “because they are deserving of punishment.” *Id.* Another rationale is that “criminal prosecutions will improve maternal and fetal health outcomes as a result of greater prenatal medical care and monitoring.” *Id.* at 832-33.

<sup>114</sup> *See supra* note 113.

criminal charges violate due process because the mother was not notified her behavior was criminal.<sup>115</sup> Violation of the Eighth Amendment has been discussed under the argument it is cruel and unusual and unconstitutional to punish for an addiction.<sup>116</sup> Discussion on equal rights and the creation of a crime man can never be punished for is less voluminous but nonetheless exists.<sup>117</sup> The recurring theme among academics is that of statute interpretation and legislative intent. The statutes women are being prosecuted under are vague and unconstitutional. The legislature did not intend for child to include fetus. No matter which way the issue is approached, it is clear from academic discussion there is a statutory problem.

### *B. The Growing Gap*

What has not been discussed is the gap in the criminal justice system. We are punishing women for an addiction. There are no criminal statutes in any state that allows prosecutors to punish for drug addiction, only for drug possession and distribution. People are punished criminally for drug possession. If a person goes to their doctor and admits they have an addiction to drugs, the doctor does not call the police. The doctor offers help, suggests drug rehabilitation treatments, and discusses it.

The current criminal system creates an anomaly such that a pregnant woman with a drug addiction would be more successful in overcoming her addiction to drugs by aborting the baby and

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<sup>115</sup> Hammer, *supra* note 101, at 1461. “[I]t is questionable whether the statutes under which women are being prosecuted are clearly drafted to provide reasonable notice, as required by the Due Process Clause, that such conduct is prohibited.” *Id.* “A judicial decision criminalizing prenatal child abuse . . . would violate . . . constitutional due process rights, as she did not have prior warning and fair notice that her conduct was criminal under the statute.” Stone-Manista, *supra* note 101 at 831.

<sup>116</sup> Hammer, *supra* note 101. “[P]rosecuting women for giving birth to drug addicted babies punishes them for their dual status of being pregnant and drug-addicted in contravention of the Eight Amendment’s proscription against cruel and unusual punishment.” *Id.* Also, because prosecution of these women is essentially punishing being an addict there is ground for an Eight Amendment violation. *Id.* at 1490. “[T]he criminalization of prenatal-substance abuse . . . punish[es] the addiction, rather than the conduct. The United States Supreme Court has indicated that criminalizing the status of being an addict . . . violates the Eighth Amendment.” *Id.*

<sup>117</sup> Moss, *supra* note 101, at 286. “[P]regnant women are being singled out for criminal liability while similar behavior engaged in by men or non-pregnant women remains immune.” *Id.*

then seeking help with her addiction.<sup>118</sup> Our criminal justice system punishes drug possession. It does not punish for addiction. How is it fair to punish women, pregnant women, criminally, for being addicted to drugs? Why should they be scared to seek help because they may be criminally prosecuted?

Even in cases where the prosecution of a woman under child abuse or child endangerment laws for her prenatal use of drugs is denied or reversed, the judges have similar reasoning. The reasoning behind the disposition of these cases is that the mother cannot be prosecuted because it denies her due process rights because “child” is not defined as “unborn child.”<sup>119</sup> Judges are predicating their decisions based on the notion that if the statute defined child in that way, then the state could prosecute the pregnant woman. Regardless of whether the statute defines “child” as an “unborn child” or not, pregnant women cannot be prosecuted for drug use when men and un-pregnant women are not prosecuted.

It would be one thing if the criminal system punished for addiction and resolved the equal rights issue, but it does not. It would be different if there were specifically a statute that says it is illegal for pregnant women to use drugs, but there is no such statute and that statute would be unconstitutional because it would be discriminatory under equal rights. Therefore, to punish women because they are addicted to drugs and happen to be pregnant is unconstitutional and does not solve any problems or help women and their children.

Men and women are already charged for use of drugs in regards to children. It often occurs in custody and visitation cases, where children are taken from their parents who have drug addictions. The difference is, those are civil charges, not a criminal

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<sup>118</sup> The few drug-addicted pregnant women who do understand the potential arrest that may await them “if they or their babies test positive for drugs” and are aware of the potential for their medical records to be subpoenaed “may be changing their behavior - although not necessarily as some prosecutors hoped. [W]omen who use drugs may . . . be having abortions to avoid prosecution. This law . . . is a deterrent to choosing life.” Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES, Apr. 25, 2012, <http://perma.cc/KL9G-GM34>. See also Stone-Manista *supra* note 113, at 833. “[W]omen who face this dilemma often choose to end their pregnancies, rather than to end their addictions.” *Id.*

<sup>119</sup> See *supra* note 92.

charge for the use of drugs. Once the child is born and the mother is still addicted to drugs, a civil case can and should be brought against the mother. A mother should not be addicted to drugs. She should be given help to overcome her addiction and then her situation with her child should be reevaluated. However, the gap in the criminal justice system that allows for pregnant women to be criminally prosecuted for the use of drugs is what needs to be resolved.

#### IV. A NON-CRIMINAL SOLUTION

Some scholarly articles have proposed solutions such as challenging drug abuse programs that do not allow pregnant women.<sup>120</sup> That is the first step, but rather than challenging the programs and hoping for the best, states need to be proactive in changing their laws. Drug addiction is first and foremost a health issue. Addressing a health issue solely as a legal problem does not solve the problem. Rather than prosecute women under criminal law, the states should use their legislative power to provide assistance.

Even states where the legislature has a public policy on protecting the unborn child could benefit from a change because the unborn child can benefit. If women could get the help they needed to overcome their addictions to drugs, the unborn child would be healthier. The sooner the woman stops using drugs the sooner the fetus would begin normal development again.<sup>121</sup> The prosecutions of these women are leading to more abortions to avoid a criminal conviction;<sup>122</sup> therefore, it would only make sense the states should want to put a stop to it. The earlier the mother can receive help, the healthier her baby will be when it is born.

Several states have started including in their statutes provisions that they will provide assistance to drug-addicted

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<sup>120</sup> See Stone-Manista, *supra* note 113, at 833; Moss, *supra* note 101, at 297-98.

<sup>121</sup> The effect of alcohol on a fetus, which has negative effects on the fetus in a similar manner to drugs, is more frequently studied. The best advice to women who drink during pregnancy is stop immediately. As soon as the mother stops drinking the fetus is doing better. See *Better Safe Than Sorry: Preventing a Tragedy*, <http://perma.cc/KHA6-K6RT>; see also *Fetal alcohol syndrome*, *supra* note 107.

<sup>122</sup> See *supra* note 118 and accompanying text.

pregnant women.<sup>123</sup> The state of Montana provides assistance to low-income women in special programs to protect the health of the women and children.<sup>124</sup> The statute provides for “assistance to low-income women and infants in gaining access to prenatal care, delivery, and postpartum care”<sup>125</sup> and also referrals to other programs and public and community outreach.<sup>126</sup>

Connecticut, moreover, provides assistance, but even more notable, the statute specifically provides for substance abuse programs to pregnant women.<sup>127</sup> The program seeks to provide education and prevention outreach “to identify pregnant substance abusers early and enroll them in prenatal care and substance abuse treatment programs”, vocational training, and a housing component, in addition to several other services.<sup>128</sup> The statute also seeks to “overcome barriers to treatment which are specific to pregnant women” and to collaborate with existing programs.<sup>129</sup>

Kansas has a screening process for pregnant drug abusing women and provides that health care providers may refer women to the local health department with no civil or criminal liability attached against the health provider.<sup>130</sup> Beyond that, the statute provides that the referral is confidential and “shall not be used in any criminal prosecution.”<sup>131</sup>

States across the country should take note and implement similar statutes in their states. All of the statutes from Montana, Kansas, and Connecticut, have been in place since the early nineties and are still in effect.<sup>132</sup> These statutes are cost effective

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<sup>123</sup> See CONN. GEN. STAT. ANN. § 17a-710 (West 1995); KAN. STAT. ANN. § 65-1,165 (West 2012); KAN. STAT. ANN. § 65-1,163 (West 1992); MONT. CODE ANN. § 50-19-311 (West 1991).

<sup>124</sup> MONT. CODE ANN. § 50-19-311 (West 1991) (creating the “MIAMI” project, Montana Initiative for the Abatement of Mortality in Infants).

<sup>125</sup> § 50-19-311(2)(d).

<sup>126</sup> § 50-19-311(2)(e), (f).

<sup>127</sup> CONN. GEN. STAT. ANN. § 17a-710 (West 1995). The statute provides that the Department of Mental Health and Addiction Services has a policy “to develop and implement treatment programs for substance-abusing pregnant women of any age and their children.” § 17a-710(a).

<sup>128</sup> *Id.*

<sup>129</sup> § 17a-710(c).

<sup>130</sup> KAN. STAT. ANN. § 65-1,163(a)-(c) (West 1992).

<sup>131</sup> § 65-1,163(d).

<sup>132</sup> See *supra* note 123.

if combined with existing programs and reduce costs with regards to the judicial system and correctional facilities. They address the problem and provide for actual assistance to the women rather than hoping for a deterrent effective from punishment. These statutes do not eliminate the potential for loss of custody if the mother proves unfit later. The statutes also provide a way for the women to bring their baby to full term rather than having an abortion.

#### CONCLUSION

The prosecution of drug-addicted pregnant women is creating a new class of criminals and a new crime, resulting in an entirely new class of felons. It creates a crime that men can never be punished for committing. It also creates a crime that an un-pregnant woman could never be punished for committing. Both of which call into question equal protection issues, due process rights issues, and Eighth Amendment cruel and unusual punishment issues. Women, using drugs while pregnant, are not informed that what they are doing is actually punishable under criminal law. Creating this new class of a crime, drug addiction, is isolating a group of people and punishing their status as a drug addict. These women being prosecuted may live in states that hold they can punish for the harm to an unborn child because public policy is to protect the unborn. In actuality, these women are getting abortions to avoid criminal convictions. A mother should not be using drugs, but that is why civil statutes exist – to assess those problems. It is not the place of criminal law.

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## APPENDIX A

STATE	APPLICABLE STATUTE	CASES	FINDING
Ala.	ALA. CODE § 26-15-3.2 (2006)	Ankrom v. State, 2011 WL 3781258 (Ala. Crim. App. 2011)	May prosecute mother for chemical endangerment of a child for use of drugs during pregnancy when child tests positive for a controlled substance at birth
Alaska	ALASKA STAT. ANN. § 11.41.150 (West 2006)		Murder of unborn child, nothing precludes mother from being charged for actions
Ariz.	ARIZ. REV. STAT. ANN. § 13-3623 (2009)	Reinesto v. Superior Court, 894 P.2d 733 (Ariz. Ct. App. 1995)	Can not prosecute mother for child abuse for drug use during pregnancy
Ark.	ARK. CODE ANN. § 9-27-302 (West 2007) ARK. CODE ANN. § 9-27-303 (West 2013)	Arkansas Dept. of Human Services v. Collier, 95 S.W.3d 772 (Ark. 2003)	Unborn fetus is not included in definition of dependent-neglect juvenile statute
Cal.	CAL. PENAL CODE § 273a (West 1984)	Reyes v. Superior Court, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977)	Child endangering statute does not include fetus or unborn child when prosecuting mother for use of heroin during pregnancy

Colo.		People v. Lage, 232 P.3d 138 (Colo. App. 2009)	Unborn child may be victim of reckless driving
Conn.	CONN. GEN. STAT. ANN. §17a-710 (West 1995)		Conn. provides specific substance abuse programs to pregnant women
Del.	DEL. CODE ANN. tit. 24, § 1769A (West 2005) DEL. CODE ANN. tit. 11, § 4209 (West 2013)		Requires doctors to advise pregnant women of the effects of cocaine, heroin, and other narcotics during pregnancy Aggravated circumstance if murder of pregnant woman
Fla.	FLA. STAT. ANN. § 827.04 (West 1996)	State v. Gethers, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991)	Unborn fetus is not applicable to child abuse statute when prosecuting for use of cocaine during pregnancy
Ga.	GA. CODE ANN. § 16-13-30 (West 2013)	State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992)	In delivering and distributing cocaine statute, transfer is not meant to include umbilical cord and person does not include fetus
Haw.	HAW. REV. STAT. § 707-702 (West 2006)	State v. Aiwohi, 123 P.3d 1210 (Haw. 2005)	Person in manslaughter statute does not include fetus when mother used drugs during pregnancy
Idaho	IDAHO CODE ANN. § 18-4016 (West 2002)		Woman may not be charged with death of her own fetus

Ill.	720 ILL. COMP. STAT. ANN. 510/1 (West 1979)		State public policy to protect right to life of the unborn
Ind.	IND. CODE ANN. § 35-46-1-4 (West 2013) IND. CODE ANN. § 35-46-1-1 (West 2007)	Herron v. State, 729 N.E.2d 1008 (Ind. Ct. App. 2000); <i>but see</i> Bei Bei Shuai v. State, 966 N.E.2d 619 (Ind. Ct. App. 2012)	Dependent does not include unborn child in neglect of a dependent statutory definition; but ingesting poison to kill herself and fetus does apply to murder and feticide
Iowa	IOWA CODE ANN. § 707.8 (West 2009)		Serious injury to human pregnancy does not apply to an act of the pregnant person
Kan.	KAN. STAT. ANN. § 65-1,165 (West 2012) KAN. STAT. ANN. § 65-1,163 (West 1992)		Pregnant drug-addicted women get first priority in substance abuse treatment facilities A screening process to refer these women to facilities
Ky.	KY. REV. STAT. ANN. § 508.110 (West 1982)	Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993)	Criminal child abuse statute did not apply to defendant's use of controlled substances during her pregnancy; General Assembly did not intend to include prenatal injury from pregnant woman's self-abuse within scope of offense

La.	LA. REV. STAT. ANN. § 14:93 (2008)	State v. Armstard, 43, 333 (La. App. 2 Cir. 8/13/08); 991 So. 2d 116	Drugs transmission to child through umbilical cord does not fall under cruelty to juvenile statute
Me.	ME. REV. STAT. ANN. tit. 17A, § 1252 (2008)		Aggravated circumstance if knew or had reason to know woman was pregnant
Md.	MD. CODE ANN. CRIM. LAW § 3- 204 (West 2003)	Kilmon v. State, 905 A.2d 306 (Md. 2006)	Injury to fetus by cocaine use while pregnant does not apply to reckless endangerment statute
Mass.		Common- wealth v. Pugh, 969 N.E.2d 672 (Mass. 2012)	“The judge noted correctly that criminal liability may be imposed on a person—whether a woman in the late stages of pregnancy, a physician, or a third party—who intentionally kills a viable fetus.” <i>Pugh</i> , 969 N.E.2d at 691.
Mich.	MICH. COMP. LAWS ANN. § 333.7401 (West 2012)	People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991)	Use of cocaine by pregnant woman not what legislature intended to be prosecuted under delivery of cocaine statue
Minn.	MINN. STAT. ANN. § 609.266 (West 2007)		No prosecution against mother of the unborn
Miss.	MISS. CODE ANN. § 97-3-19 (West 2013)	Gibbs v. State, 2010-IA- 00819-SCT (Miss. 2011)	Remanded to trial court after Miss. S. Ct. denial of interlocutory appeal

Mo.	MO. ANN. STAT. § 568.045 (West 2009)	State v. Wade, 232 S.W.3d 663 (Mo. Ct. App. 2007)	Child endangerment statute does not apply to a mother's conduct against her unborn child
Mont.	MONT. CODE ANN. § 50-19-311 (1991)		Mont. provides assistance to low-income pregnant women in programs to protect the health of the women and children
Neb.	NEB. REV. STAT. ANN. § 28-390 (LexisNexis 2002)		Homicide of unborn child does not apply if committed by the mother
Nev.	NEV. REV. STAT. ANN. § 200.508 (West 2003)	Sheriff v. Encoe, 885 P.2d 596 (Nev. 1994)	Child endangerment statute does not apply to drug use by a pregnant woman
N.H.			Not available
N.J.	N.J. STAT. ANN. § 2C:11-2 (West 1979)	State in Interest of A.W.S, 440 A.2d 1144 (N.J. Super. Ct. App. Div. 1981)	Unborn fetus is not a human being for criminal homicide statute
N.M.	N.M. STAT. ANN. § 30-6-1 (2009)	State v. Martinez, 137 P.3d 1195 (N.M. Ct. App. 2006)	Child does not include viable fetus in child abuse statute
N.Y.	N.Y. PENAL LAW § 260.10 (McKinney 2010)	People v. Morabito, 580 N.Y.S.2d 843 (N.Y. City Ct. 1992)	Child does not include unborn child in endangering the welfare of a child

N.C.	N.C. GEN. STAT. ANN. § 14-23.7 (West 2011)		Prosecution not permitted if act committed by the pregnant woman killed or harmed her own unborn child
N.D.	N.D. CENT. CODE ANN. § 19-03.1-22.2 (West 2003)	State v. Geiser, 763 N.W.2d 469 (N.D. 2009)	Child does not include unborn child under endangerment of a child statute and mother may not be charged with homicide or assault of her own unborn
Ohio	OHIO REV. CODE ANN. § 2151.031 (West 1989) OHIO REV. CODE ANN. § 2919.22 (West 2011)	State v. Gray, 584 N.E.2d 710 (Ohio 1992) In re Baby Boy Blackshear, 736 N.E.2d 462 (Ohio 2000)	Mother cannot be prosecuted for endangerment for substance abuse before birth of her child However, mother can be prosecuted under civil statute of abused child
Okla.	OKLA. STAT. ANN. tit. 21, § 691 (West 2006)	Hughes v. State, 868 P.2d 730 (Okla. Crim. App. 1994)	Mother of child may only be prosecuted if she committed a crime that caused the death of her unborn child
Or.	OR. REV. STAT. ANN. § 163.195 (West 1971)	State v. Cervantes, 223 P.3d 425 (Or. Ct. App. 2009)	Fetus is not a person under “endangering another person” requirement
Pa.	18 PA. CONS. STAT. ANN. § 2608 (West 1997)		No criminal liability for acts committed by the mother against her own unborn

R.I.	R.I. GEN. LAWS ANN. § 11-23-5 (West 1975) R.I. GEN. LAWS ANN. § 11-23-6 (West 1981)		Killing of unborn child does not make an exception to act by the pregnant women but does not address it either Statute against delivery of controlled substance to minor; minor not defined
S.C.	S.C. CODE ANN. § 63-5-70 (2008)	Whitner v. State, 492 S.E.2d 777 (S.C. 1997)	Child does include a viable fetus in the statutory definition
S.D.	S.D. CODIFIED LAWS § 22-16-1.1 (2005)		Feticide statute
Tenn.	TENN. CODE ANN. § 37-1-102 (West 2011)	In re Benjamin M., 310 S.W.3d 844 (Tenn. Ct. App. 2009)	Drug use during pregnancy does constitute severe child abuse
Tex.	TEX. PENAL CODE ANN. § 1.07 (West 2011)	Collins v. State, 890 S.W.2d 893 (Tex. Ct. App. 1994)	Can not prosecute mother for use of cocaine because statutory definition does not include fetus
Utah	UTAH CODE ANN. § 76-7-314 (West 2010)		Statute for violation of abortion laws amounts to a felony
Vt.	VT. STAT. ANN. tit. 13, § 101 (West 1971)		Any person who causes woman to miscarry can be found guilty and imprisoned up to 20 years but the mother shall not be liable to these same penalties

Va.	VA. CODE ANN. § 18.2-32.2 (West 2004)		“Any person who unlawfully, willfully, deliberately, maliciously and with premeditation kills the fetus of another is guilty of a Class 2 felony.” § 18.2-32.2.A.
Wash.	WASH. REV. CODE ANN. § 9A.42.020 (West 2006)	State v. Dunn, 916 P.2d 952 (Wash. Ct. App. 1996)	Fetus is not a child under statute when defendant was charged with criminal mistreatment after use of cocaine while pregnant
W. Va.	W. VA. CODE ANN. § 61-2-8 (West 1923)		Guilty of felony if any person shall cause woman to take any drug with intent to destroy unborn
Wis.	WIS. STAT. ANN. § 939.22 (West 2011) WIS. STAT. ANN. § 940.01 (West 2011) WIS. STAT. ANN. § 940.23 (West 2011)	State v. Deborah J.Z., 596 N.W.2d 490 (Wis. Ct. App. 1999)	In a fetal alcohol case, unborn was not a child for homicide or reckless injury statutes
Wyo.	WYO. STAT. ANN. § 6-2-108 (West 2010)		Drug induced homicide if at least four years older than victim or unlawful delivery of a controlled substance to minor, minor not defined

