Gestational Substance Abuse: A Call for a Thoughtful Legislative Response

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GESTATIONAL SUBSTANCE ABUSE: A CALL FOR A THOUGHTFUL LEGISLATIVE RESPONSE

Abstract: Gestational substance abuse seriously threatens fetal health. Recently, many states have prosecuted women who abuse drugs or alcohol during pregnancy. This Comment argues that *Roe v. Wade*, 410 U.S. 113 (1973), should govern state intervention in cases of gestational substance abuse. Because criminal prosecution fails to prevent gestational substance abuse, a state seeking to intervene should use civil commitment as the means of intervention.

Gestational substance abuse¹ poses a significant risk to the physical and mental health of an emerging generation of Americans. Because abuse of cocaine and alcohol seriously threatens fetal health, the state has a strong interest in preventing pregnant women from abusing these substances. Recently, states have used manslaughter, child abuse, and drug delivery statutes to prosecute women who abused drugs while pregnant. Such prosecutions increasingly pressure state legislatures to find a solution directly addressing gestational substance abuse.

State intervention in pregnancies, however, poses several problems. First, states will face difficulty determining when intervention is permissible. States seeking to combat gestational substance abuse by intervention should abide by the abortion rights guidelines articulated in *Roe v. Wade.*² Although *Roe* held that a right to privacy protects a woman’s decision to abort during the first trimester, *Roe* does not prohibit first-trimester intervention in cases of gestational substance abuse. Nonetheless, legislatures should treat gestational substance abuse consistently with abortion for reasons of public policy. Forbearance from early intervention is the only way to reconcile intervention with existing abortion law. Under this analysis, states can intervene only after the first trimester.

Second, states must decide what form intervention should take. Despite the recent increase in prosecution of pregnant substance abusers,³ criminalization is an inappropriate response to gestational substance abuse. Traditional justifications for punishment fail to support criminal liability. Criminalization also raises troublesome due process and mens rea issues.

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¹ For purposes of this comment, gestational substance abuse means abuse of alcohol or drugs by a pregnant woman.
² 410 U.S. 113 (1973).
³ See infra notes 28–32 and accompanying text.
Civil commitment offers a better solution to the problem of substance abuse during pregnancy because it strikes at the heart of the matter. Civil commitment directly addresses the problem, lacks punitive aspects, and offers a potentially effective and long-term solution to gestational substance abuse. A state using civil commitment to intervene should adopt the Uniform Alcoholism and Intoxication Treatment Act (Uniform Act), amending it to include gestational substance abuse.

I. THE LAW FAILS TO PROVIDE A CLEAR SOLUTION TO THE SERIOUS PROBLEM OF GESTATIONAL SUBSTANCE ABUSE

A. Gestational Substance Abuse Severely Damages Fetuses

No physical contact is more intimate than that between a woman and her developing fetus. This close physical relationship creates special problems when the woman is a substance abuser. A pregnant woman abusing alcohol or cocaine harms not only herself, but also her fetus. Recently, states have attempted to address gestational substance abuse by criminally prosecuting women who abuse substances during pregnancy.

1. Gestational Substance Abuse

a. Gestational Alcohol Abuse and Fetal Alcohol Syndrome

Use of alcohol during pregnancy poses severe risks to fetuses. Fetal Alcohol Syndrome (FAS) occurs in about one in a thousand live-born infants. Serious damage suffered by FAS infants includes heart

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4. A state has the power to commit for mental illness making a person either gravely disabled or a danger to him or herself or others. See, e.g., WASH. REV. CODE § 71.05 (1989). A state also has the power to commit for treatment an alcoholic who poses a danger to him or herself or to others. See infra notes 69–79 and accompanying text.


6. This comment focuses on damage caused during pregnancy by cocaine addiction and alcoholism, because of great potential of these substances for causing fetal damage. See Comment, Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus, 60 S. CAL. L. REV. 1209, 1210–18 (1987).

7. See infra notes 28–32 and accompanying text.

8. The damaging effects of alcohol may have been known since Biblical times. "Behold, thou shalt conceive, and bear a son; and now drink no strong wine or strong drink . . . ." Judges 13:7.

defects,\textsuperscript{10} mental retardation,\textsuperscript{11} and neurologic abnormalities.\textsuperscript{12} Newborns with FAS are irritable, tremulous, and lack strong reflexes.\textsuperscript{13} The extent and severity of the fetal damage may vary according to which stage of pregnancy the woman abuses alcohol. Most alcohol-caused damage occurs during the first trimester, when the organs of the fetus begin to form.\textsuperscript{14} Continued alcohol abuse causes additional harm throughout gestation, however, because the brain develops during the entire pregnancy.\textsuperscript{15} If a woman stops drinking during the second trimester, the size and healthiness of the fetus will improve, but its intelligence may not.\textsuperscript{16}

b. \textit{Cocaine’s Unique Threat to Fetuses}

Cocaine poses a unique risk to the physical and mental health of the youngest generation of Americans.\textsuperscript{17} The singular threat posed by cocaine stems from its relative popularity, particularly in the form of crack, among young women.\textsuperscript{18}

The most tragic aspect of gestational cocaine use is its potential to cause permanent physical and mental damage. By depriving the fetus of oxygen, cocaine use threatens fetal development.\textsuperscript{19} Malformations of the urogenital, cardiac, and central nervous systems can result from

\begin{enumerate}
\item[10.] Id. at 478.
\item[11.] Id.
\item[13.] Id. at 1065.
\item[14.] Dorfman, \textit{Alcohol’s Youngest Victims}, \textit{Time}, Aug. 28, 1989, at 60.
\item[15.] Id.
\item[16.] Id. (quoting Sterling Clarren, Professor, University of Washington School of Medicine).
\item[17.] In the United States in 1989, 375,000 infants will have been exposed prenatally to illegal drugs. \textit{See Fetal Endangerment Cases Increase}, Christian Science Monitor, Oct. 10, 1989, at 8, col. 4.
\item[19.] Chavez, Mulrnare & Codero, \textit{Maternal Cocaine Use During Early Pregnancy as a Risk Factor for Congenital Urogenital Anomalies}, 262 \textit{J. Am. Med. A.} 795, 796 (1989); \textit{see also infra note} 32 (discussing manslaughter prosecution for infant who allegedly died from cocaine-caused oxygen deprivation).
\end{enumerate}
gestational cocaine abuse.\textsuperscript{20} Gestational cocaine use also places the fetus at a greater risk of suffering a stroke at birth, which leads to brain damage.\textsuperscript{21} Neurological problems caused by cocaine can permanently affect motor skills, reflexes, and coordination.\textsuperscript{22} Infants prenatally exposed to cocaine have lower birth weights\textsuperscript{23} and smaller head circumferences\textsuperscript{24} than do infants born drug-free. The majority of the fetal damage occurs during the first trimester, and it cannot be reversed by ceasing cocaine use.\textsuperscript{25} Halting cocaine use after the first trimester, however, improves fetal growth.\textsuperscript{26} Birth weights, lengths, and head circumferences of infants exposed to cocaine only in the first trimester do not differ significantly from non-exposed infants.\textsuperscript{27}

2. \textit{The Recent Increase in Criminal Prosecutions}

The prosecution of women who abused substances while pregnant, particularly crack, increased significantly in 1989.\textsuperscript{28} At least ten women in five different states were charged with crimes because of gestational substance abuse.\textsuperscript{29} Charges included delivery of drugs to a

\begin{itemize}
\item \textsuperscript{21} \textit{Id.} at 1407. This is particularly true when the woman used cocaine within a few days of delivery. \textit{Id.}
\item \textsuperscript{22} \textit{Id.}; Chasnoff, Griffith, MacGregor, Dirkes & Burns, \textit{Temporal Patterns of Cocaine Use In Pregnancy}, 261 J. AM. MED. A. 1741, 1744 (1989) [hereinafter Chasnoff, \textit{Temporal Patterns}]. Cocaine-exposed infants may exhibit neurobehavioral problems such as irritability, tremors, and stiffness. Chasnoff, \textit{Drug Use, supra} note 20, at 1407.
\item \textsuperscript{23} Babies born to cocaine addicts weighed about 400 grams less than those born to a control group. \textit{See} Keith, \textit{supra} note 18, at 718. Nineteen percent of infants born to cocaine addicts were small for their gestational age, compared to six percent of the control group’s infants. \textit{Id.}
\item \textsuperscript{24} Chasnoff, Lewis, Griffith & Willey, \textit{Cocaine and Pregnancy: Clinical and Toxological Implications for the Neonate}, 35 CLINICAL CHEMISTRY 1276, 1277 (1989). Cocaine-exposed infants had average head circumferences of 33.1 cm., compared to measurements of 34.8 cm. for a drug-free control group. \textit{Id.} at 1277. All infants compared were of at least 38 weeks gestation. \textit{Id.}
\item \textsuperscript{25} Chasnoff, \textit{Temporal Patterns, supra} note 22, at 1743–44. The rate of neurobehavioral deficiencies remains the same whether or not the woman ceases cocaine use after the first trimester. \textit{Id.} Urogenital malformations are also associated with first trimester cocaine use. \textit{Id.} The risk of malformation does not decrease if cocaine use ceases after the first trimester. \textit{Id.}
\item \textsuperscript{26} \textit{Id.} at 1743.
\item \textsuperscript{27} \textit{Id.} at 1743–44.
\item \textsuperscript{28} Sherman, \textit{supra} note 18, at 1, col. 4.
\item \textsuperscript{29} \textit{Id.}
\end{itemize}
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minor, criminal child neglect, and involuntary manslaughter. This flood of trials under laws not intended to prosecute gestational substance abuse exposes the law’s failure to balance adequately the rights and interests of women, fetuses, and the state.

B. The Legal Difficulty of Balancing the Rights and Interests Involved

The law fails to provide clear answers to the questions of whether and when a state can intervene in a pregnancy affected by substance abuse. Because abortion law involves the rights and interests of women, fetuses, and the state, it provides insight into how a legislature could approach state intervention in cases of gestational substance abuse.

1. Abortion Rights

The United States Supreme Court has held that constitutional protections limit a state’s right to regulate actions of pregnant women. In Roe v. Wade, the Court invalidated a state statute criminalizing all abortions except those necessary to save the life of the mother. The Court held that the “Fourteenth Amendment’s concept of personal liberty” protects a woman’s decision to terminate a pregnancy.

30. Jennifer Johnson of Florida was convicted of delivering drugs to a minor. State v. Johnson, Sherman, supra note 18, 89-890-CFA (Cir. Ct. Seminole Cty. 1989). The court held that Johnson delivered drugs to her baby via her umbilical cord in the moments after the infant was born but before the cord was cut. The infant was Johnson’s third cocaine baby. Johnson received a sentence of fourteen years probation and one year in a rehabilitation program. Johnson sought treatment, but an outpatient program refused to treat her because the center feared liability should the fetus fail to survive withdrawal. See Sherman, supra note 18, at 28, col. 2; Davidson, Newborn Drug Conviction a “Draastic” First, L.A. Times, July 31, 1989, § 1, at 1, col. 1. See generally Alters, supra note 18 (treatment often denied to crack-addicted women).


32. Prosecutors sought charges against Melanie Green of Illinois, alleging that her cocaine use caused her two-day-old daughter to die from brain damage induced by oxygen deprivation. See Jury in Illinois Refuses to Charge Mother in Drug Death of Newborn, N.Y. Times, May 27, 1989, § 1, at 10, col. 4 [hereinafter Illinois Jury]; see also supra note 19 and accompanying text (discussing cocaine-caused fetal oxygen deprivation). A grand jury refused to indict Green because of concern over her right to privacy. Illinois Jury, supra, § 1, at 10, col. 4.

34. Id. at 118.
35. Id. at 153.
Abortion therefore involves a fundamental right that the state may not limit without a compelling interest.  

Two compelling state interests justify limiting a woman’s right to terminate a pregnancy. First, the state has an interest in protecting women’s health.  

Second, the state has an interest in protecting potential human life.  

Under Roe, during the first trimester of pregnancy, the state's interests are never compelling, and the state may not intervene in a woman’s decision to abort.  

After the first trimester, the state has a compelling interest in women’s health, which it may protect by regulating abortion.  

At viability—which the Roe court considered the beginning of the third trimester—the state’s interest in protecting potential human life becomes compelling, and the state may prohibit abortions not necessary to save the life or health of the woman.

Webster v. Reproductive Health Services recently modified Roe’s trimester system. In Webster, the Court upheld a statute requiring physicians aborting pregnancies of twenty weeks or more to perform viability tests to ensure that a viable fetus is not aborted. The plurality acknowledged that some modification of Roe was necessary to support this decision. Webster rejected Roe’s trimester underpinnings, which the plurality criticized as “rigid.” Under Roe as modified by Webster, the state’s interest in protecting potential life becomes compelling at viability instead of the third trimester.

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36. Id. at 155.
37. Id. at 148-50, 163.
38. Id. at 150-51, 163-64.
39. Id. at 164.
40. Id. at 163. The Court reasoned that a first-trimester abortion is safer than childbirth, but a second-trimester abortion may be more dangerous than childbirth. Id. at 149-50, 163.
41. Id. at 160.
42. Id. at 162-64.
44. Id. at 3055-56.
45. Id. at 3056-57. The plurality conceded that the testing requirement imposes additional financial costs on women seeking abortions, but reasoned that the requirement permissibly furthered the state's interest in protecting potential life. Id. at 3056-57. The Court had previously held that the state may not impose unjustified financial costs on abortion. See Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 434-35 (1983). Justice O'Connor reasoned that the testing requirement was consistent with Roe. “No decision of this Court has held that the state may not directly promote its interest in potential life when viability is possible.” Webster, 109 S. Ct. at 3062 (O'Connor, J., concurring in part and concurring in the result).
46. Webster, 109 S. Ct at 3056.
2. **Women's Rights**

The Court continues to recognize that a woman's right to privacy and personal liberty encompasses her decision to abort.\(^{47}\) Even as modified by *Webster, Roe* protects a woman's right to decide whether to abort her non-viable pregnancy. Additionally, *Roe* recognizes a state interest in protecting a woman's life and health,\(^{48}\) which overrides the state's interest in protecting potential life. When the woman's life or health is in jeopardy, *Roe* bars a state from prohibiting even a post-viability abortion.\(^{49}\)

3. **Fetal Rights**

Legal rights of the fetus vary according to the nature of the legal claim.\(^{50}\) Under United States constitutional law, the fourteenth amendment’s protection of life and liberty does not extend to fetuses.\(^{51}\) Although *Roe* allows the state to prohibit post-viability abortions,\(^{52}\) *Roe* does not require states to protect fetuses.\(^{53}\)

Other areas of law provide the fetus with some legal protections. Under property law, fetuses have the right to inherit.\(^{54}\) Tort law in all jurisdictions allows a child to sue a third party for consequences of prenatal injuries.\(^{55}\) When the child is prenatally injured by the mother, however, results differ.\(^{56}\) Michigan would allow a child to recover for maternally-inflicted prenatal injuries, on the ground that a pregnant woman should bear the same liability as third parties.\(^{57}\)

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\(^{49}\) *Id.*


\(^{51}\) *Roe*, 410 U.S. at 157–58.

\(^{52}\) *Id.* at 163–64.

\(^{53}\) *Id.*


\(^{55}\) Prosser and Keeton on Torts § 55 at 368 (W. Keeton, D. Dobbs, R. Keeton & D. Owen 5th ed. 1984); see also *Roe*, 410 U.S. at 162. “Third party” means someone other than the woman carrying the fetus.


\(^{57}\) *Grodin*, 301 N.W.2d at 870.
Some commentators expand upon this base, and advise adoption of such a maternal duty of reasonable care in tort law and other areas.\textsuperscript{58} Another court, however, held that a maternal duty permitting such a cause of action would adversely affect public policy by making a woman the guarantor of the health of her fetus.\textsuperscript{59} Criminal law holds third parties, but not mothers, liable for acts that harm a fetus.\textsuperscript{60}

4. \textit{State Intervention Rights}

The law does not specifically define the right of the state to intervene in the pregnancy of a woman whose substance abuse threatens her fetus. The state has three legal tools with which to address the problem: criminal liability, dependency proceedings, and civil commitment.

The state has the power to criminalize conduct,\textsuperscript{61} but no state has yet enacted laws specifically imposing criminal liability on a woman who harms her fetus through gestational substance abuse. States have, however, used existing criminal statutes to prosecute women who abuse substances during their pregnancies.\textsuperscript{62}

A state's \textit{parens patriae}\textsuperscript{63} authority gives it the power to use dependency proceedings to transfer the custody of a child from a parent to the state.\textsuperscript{64} Prenatal substance abuse can be per se grounds for transfer of custody to the state after birth.\textsuperscript{65} The \textit{parens patriae} power also

\begin{itemize}
  \item \textsuperscript{58} Robertson, supra note 50, at 437; see also Dershowitz, Drawing the Line on Prenatal Rights: When a Pregnant Woman Abuses Her Health, Should the State Intervene on Behalf of the Baby?, L.A. Times, May 14, 1989, § 5, at 5, col. 2.
  \item \textsuperscript{59} Stallman, 531 N.W.2d at 359–61.
  \item \textsuperscript{60} See, e.g., CAL. PENAL CODE § 187 (West 1988) (unlawful killing of a fetus with malice aforethought is second-degree murder); WASH. REV. CODE § 9A.32.060(b) (1989) (first degree manslaughter includes intentionally killing a "quick" fetus by inflicting any injury upon the body of the mother). Quicking is the first motion of the fetus as felt by the woman, and usually occurs midway into the pregnancy. BLACK'S LAW DICTIONARY 1122–23 (5th ed. 1979). Criminal law may be changing to allow a mother to be prosecuted for harming her fetus. In what may be the first case of its kind, a Massachusetts woman was charged with vehicular homicide when her viable fetus died after an accident allegedly caused by the woman's negligent driving. See Wash. Post, Nov. 25, 1989, § A, at 4, col. 1. A fetus is a person under the Massachusetts vehicular homicide statute. Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984).
  \item \textsuperscript{61} See W. LAFAVE & A. SCOTT, CRIMINAL LAW § 2.10 (2d ed. 1986).
  \item \textsuperscript{62} See supra notes 28–32 and accompanying text.
  \item \textsuperscript{63} \textit{Parens patriae} is a power used "to protect those quasi-sovereign interests such as health, comfort, and welfare of the people." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).
  \item \textsuperscript{64} See, e.g., WASH. REV. CODE § 13.34 (1989).
\end{itemize}
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gives the state authority to order treatment for a viable fetus in utero. The state can compel a woman to submit to a caesarean section or to a maternal blood transfusion for the benefit of the fetus.66

The state's

pants patriae
do further permits the state to commit persons for treatment.68 Many states have adopted the Uniform Alcoholism and Intoxication Treatment Act (Uniform Act).69 The Uniform Act gives the state the power to commit alcoholics to an approved treatment facility.70 Under the Uniform Act, the state may commit a person who is either incapacitated71 by alcohol or an alcoholic72 who poses a danger to others and is likely to inflict harm on another unless committed.73

The Uniform Act requires procedural safeguards. Before an alcoholic may be committed involuntarily, a physician must certify that he or she examined the alcoholic.74 The court promptly hears commit-


68. For example, states can commit the mentally ill who are gravely disabled or pose a danger to themselves or others. See, e.g., Wash. Rev. Code § 71.05 (1989).


71. Under the Uniform Act, “incapacitated by alcohol” means “that a person, as a result of the use of alcohol, is unconscious or has his [sic] judgment otherwise so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment.” Unif. Act § 2(9), 9(1) U.L.A. 84 (1988); see also 1989 Wash. Laws ch. 271 § 305(7).

72. Under the Uniform Act, an “alcoholic” is “a person who habitually lacks self-control as to the use of alcoholic beverages, or uses alcoholic beverages to the extent that his [sic] health is substantially impaired or endangered or his social or economic function is substantially disrupted.” Unif. Act § 2(1), 9(1) U.L.A. 84 (1988); cf. 1989 Wash. Laws ch. 271 § 305(1).


74. Id. § 14(a)
ment proceedings.\textsuperscript{75} If the petitioner establishes a ground for involuntary commitment by clear and convincing proof, the court commits the alcoholic.\textsuperscript{76} At the end of the commitment term, the facility releases the alcoholic.\textsuperscript{77} However, when a person has been committed because he or she posed a danger to others, the facility applies for recommitment if the danger persists.\textsuperscript{78} If the likelihood of harm ends before the commitment term, the facility discharges a person committed because of dangerousness.\textsuperscript{79}

II. GESTATIONAL ALCOHOL AND DRUG USE SHOULD BE TREATED CONSISTENTLY

Before the state can decide how to intervene in cases of gestational substance abuse, it must define the predicate behavior that will trigger state intervention. The state should consider both drug and alcohol abuse when deciding whether to intervene. Abuse of either alcohol or illegal drugs should establish predicate behavior for state intervention.\textsuperscript{80} However, the state must narrowly define actions that will spur state intervention, because due process requires fair notice of what conduct constitutes a crime or predicate behavior for civil commitment.\textsuperscript{81}

State intervention predicated on drug versus alcohol abuse raises different legal questions. Abuse of illegal drugs creates the most convincing case for state intervention. Imposing sanctions on a pregnant woman for abuse of illegal drugs is not a significant infringement of

\textsuperscript{75} Under the Uniform Act, a hearing must be held no later than ten days after the petition is filed. \textit{Unif. Act} § 14(b), 9(1) U.L.A. 100 (1988); cf. \textit{Wash. Rev. Code} § 70.96A.140(2) (1989) (two to seven days).

\textsuperscript{76} \textit{Unif. Act}, § 14(e), 9(1) U.L.A. 100 (1988) (30 day initial commitment, recommitment up to 90 days); cf. \textit{Wash. Rev. Code} § 70.96A.140(5) (1989) (initial commitment up to 60 days).

\textsuperscript{77} \textit{Unif. Act} § 14(e), 9(1) U.L.A. 100 (1988).


\textsuperscript{80} See supra notes 8–27 and accompanying text (damage caused by abuse of drugs and alcohol during pregnancy).

\textsuperscript{81} The public must have fair notice of acts constituting criminal conduct. See W. LAFAYE & A. SCOTT, CRIMINAL LAW § 2.3(b) (2d ed. 1986). Similarly, the public must have fair notice of conduct establishing predicate conditions for civil commitment. See Hontz v. State, 105 Wash. 2d 302, 305–06, 714 P.2d 1176, 1178–79 (1986), \textit{reconsid. denied}, (April 7, 1986).
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her rights, because there is no fundamental right to use illegal drugs.\textsuperscript{82} Therefore, the state need not show a compelling interest to forbid their use by pregnant women.\textsuperscript{83} Alcohol, however, is legal. Prohibiting a pregnant woman from abusing alcohol thus represents a greater infringement on her rights.\textsuperscript{84} Yet, like use of illegal drugs, alcohol use is not a fundamental right,\textsuperscript{85} and the state can and does regulate its use.

The state should treat abuse of alcohol during pregnancy the same way it treats abuse of illegal drugs. Penalizing pregnant drug users while ignoring alcoholics is inconsistent and ignores the purpose of intervention, because the root of both problems is the same: both involve maternal addictions that endanger fetal health. If the state's goal is prevention of fetal harm, then gestational alcohol and illegal drug abuse must be treated similarly. To effectively prevent fetal damage, and to be consistent, the state must intervene in cases of alcoholism as well as drug addiction.

III. CIVIL COMMITMENT HARMONIZED WITH ROE IS THE BEST FORM OF STATE INTERVENTION

Gestational substance abuse requires thoughtful legislative consideration. State intervention in a pregnancy is an extremely intrusive action. Using a non-intrusive approach, the state could generously fund addiction prevention and voluntary treatment programs, with a special emphasis on averting gestational substance abuse.\textsuperscript{86} Before pursuing invasive solutions, the legislature should seriously consider making voluntary treatment more readily available. Unfortunately, however, prosecutors are calling for action and urging state legislatures to enact laws specifically allowing prosecution of pregnant sub-

\textsuperscript{82} State v. Murphy, 117 Ariz. 57, 570 P.2d 1070 (1977) (marijuana use not a fundamental right).  
\textsuperscript{83} See Robertson, supra note 50, at 442.  
\textsuperscript{84} But see Comment, supra note 6, at 1220–21 (alcohol use is a privilege regulated by the state).  
\textsuperscript{85} See Houser v. State, 85 Wash. 2d 803, 540 P.2d 412 (1975), overruled on other grounds, State v. Smith, 93 Wash. 2d 329, 610 P.2d 869 (1980). In Houser, the Washington Supreme Court held that the "right to consume alcohol is far from fundamental." Houser, 85 Wash. 2d at 805–06, 540 P.2d at 414. Therefore, a state can regulate alcohol use if the regulation bears a "rational relationship" to a state interest. Id. at 806, 540 P.2d at 414. One manifestation of this state interest is the recent law requiring labels on alcoholic beverages to warn of the dangers posed by alcohol use during pregnancy. 27 U.S.C.A. § 215 (1988 & Supp. 1989). See also Walker v. Hall, 399 F. Supp. 1304, 1311–12 (W.D. Okla. 1975) (twenty-first amendment strengthens case for state regulation of alcohol); Comment, supra note 6, at 1220–21.  
\textsuperscript{86} Pregnant addicts are often denied treatment. See Alters, supra note 18, at 4, col. 1.
stance abusers. The state undeniably has a tremendous interest in preventing fetal harm. Children physically and mentally damaged by gestational substance abuse will require many additional state services to meet their special medical, educational, and emotional needs. Yet prosecuting the mother fails to protect fetuses from harm.

The state should use the guidelines established in Roe v. Wade to determine when intervention is desirable. Although the Constitution does not prohibit first-trimester intervention in cases of gestational substance abuse, public policy and logical consistency require the state to follow Roe's analysis and refrain from intervening until after the first trimester.

Civil commitment after the first trimester is the best form of state intervention. Any state intervention presents a dilemma: for intervention to be consistent with abortion law, the state may not intervene in the first trimester. State action after the first trimester, however, may avert little harm.

A. The State Should Adopt a Roe Analysis to Determine When Intervention Is Appropriate

State intervention to prevent gestational substance abuse may be analyzed under Roe's framework, or under a theory requiring a maternal duty of reasonable care. The maternal duty theory creates logical and public policy problems. Roe's framework, although not constitutionally mandated, is preferable both because abortion and gestational substance abuse implicate similar rights and interests, and because applying Roe achieves logical consistency.

1. Creating a Maternal Duty of Care Is Undesirable

Establishing a maternal duty theoretically allows first-trimester intervention, by distinguishing a woman's right of privacy in deciding whether to abort from her right of privacy in deciding whether to abuse substances during pregnancy. A fundamental right to privacy protects a decision to abort, but not a decision to abuse drugs or alcohol. Therefore, although a woman has a fundamental right to abort during the first trimester, once she chooses to carry the pregnancy to term she has a duty to use reasonable care to prevent harm to the

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87. See Illinois Jury, supra note 32, § 1, at 10, col. 5; Davidson, supra note 30, § 1, at 1, col. 2.
88. See Chasnoff, Temporal Patterns, supra note 22, at 1744.
89. 410 U.S. 113 (1973).
90. See supra notes 14-17, 25-27 and accompanying text (much damage occurs during first trimester).
fetus.\textsuperscript{91} The state can intervene if the woman breaches the duty of care owed to the fetus, regardless of the stage of pregnancy.

The maternal duty theory presents an undesirable departure from \textit{Roe}'s analysis because it conflicts with first-trimester abortion rights. Under the maternal duty model, the state could intervene in early pregnancy, when much of the fetal damage occurs.\textsuperscript{92} Yet although first-trimester intervention does not legally conflict with \textit{Roe}, it conflicts logically with \textit{Roe}'s protection of first-trimester abortion rights. Prosecuting a woman for acts which harm her fetus is inconsistent with her right to terminate the pregnancy. Additionally, although the state may in theory have the right to intervene in first-trimester pregnancies, it may not prosecute a woman for violating a maternal duty unless the state could prove that she did not intend to abort.\textsuperscript{93}

Imposing a duty of care on pregnant women would also have adverse public policy consequences. A maternal duty renders a woman the guarantor of the mental and physical health of her fetus.\textsuperscript{94} Requiring a woman to conform to an objective standard limits her right to conduct her life and pregnancy as she sees fit.\textsuperscript{95} Also, imposing a duty may create an adversarial relationship between a woman and her fetus: a woman might view her fetus as a potential opponent rather than as a future child.\textsuperscript{96} Because of the potentially adverse

\textsuperscript{91} "Once she decides to forgo abortion and the state chooses to protect the fetus, the woman loses the liberty to act in ways that would adversely affect the fetus." Robertson, \textit{supra} note 50, at 437; \textit{supra} notes 56–59 and accompanying text (discussing establishment and rejection of a maternal duty).

\textsuperscript{92} \textit{See supra} notes 14–17, 25–27 and accompanying text (much damage occurs in first trimester).

\textsuperscript{93} Many women may not literally "choose" to carry to term. For example, a poor woman may be forced to carry her pregnancy to term because abortion is not financially an option.

\textsuperscript{94} Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355, 359 (1988). \textit{See supra} notes 56–59 and accompanying text; \textit{see also} Robertson, \textit{supra} note 50, at 442–43. A woman conceivably could be liable for any preventable birth defect.

\textsuperscript{95} As the \textit{Stallman} court stated:

By what judicially defined standard would a mother have her every act or omission while pregnant subjected to State scrutiny? . . . In what way would prejudicial and stereotypical beliefs about the reproductive abilities of women be kept from interfering with a jury's determination of whether a particular woman was negligent at any point during her pregnancy?


For example, a pregnant vegan vegetarian may choose not to eat any animal products. However, the state could conclude that a "reasonable pregnant woman" would drink milk, thus requiring her to conform to this objective standard or risk liability.

\textsuperscript{96} Imposing a duty could encourage abortions. If a pregnant addict fears that seeking help for her addiction could expose her violation of a maternal duty and make her vulnerable to prosecution, she may be more likely to abort.
effects of a maternal duty on the lives of pregnant women, the state should not impose such a duty.

The maternal duty theory might be improved by establishing a standard of recklessness, instead of negligence. Neither pregnant nor non-pregnant persons may lawfully act recklessly. A recklessness standard would allow pregnant women more flexibility in actions and decisions potentially affecting the fetus. Nonetheless, a pregnant woman's potential liability would still be greater than a non-pregnant person's. This difference should make legislatures hesitant to impose a maternal duty.

2. Adopting a Roe Analysis Is Logically Consistent

Because imposing a maternal duty of care is unsound as a matter of logic and policy, the state should turn to Roe's analysis to determine when it may intervene in cases of gestational substance abuse. Although use of Roe is not constitutionally required, it results in sounder public policy and a conclusion consistent with abortion law. Gestational substance abuse and abortion involve similar rights and interests. Yet, the Constitution does not require Roe to govern state intervention in gestational substance abuse, because the resulting legal concerns are not the same.

The right of privacy articulated in Roe should prohibit the state from intervening to prevent substance abuse in early pregnancy because the state's interest in protecting potential life is not compelling until viability. If the state lacks a compelling interest in first-trimester fetal life, then it lacks a compelling interest in first-trimester fetal health. Without a compelling interest, the state cannot invade the cloak of privacy protecting a woman's first-trimester conduct. Although the Constitution does not mandate this conclusion, Roe's model of intervention harmonizes analysis of gestational substance abuse with abortion rights law.

Under Roe, the state has the right to intervene after fetal viability. Because the compelling state interest in post-viability potential life has justified invasive measures such as caesarean sections and maternal

97. For example, a pregnant vegan's decision not to drink milk, or a pregnant Christian Scientist's decision to seek alternative medical care, would probably not be reckless.

98. "[A]s a matter of law, the right of a woman to an abortion is different and distinct from her obligations to the fetus once she has decided not to timely terminate her pregnancy." In re A.C., 533 A.2d 611, 614 (D.C. 1987), vacated, Matter of A.C., 539 A.2d 203 (D.C. 1988).

99. See supra notes 43-47 and accompanying text.

blood transfusions,\textsuperscript{101} similarly, this interest allows the state to intervene after viability.

It is futile, however, to allow state intervention only after viability, because most of the fetal damage happens during early pregnancy.\textsuperscript{102} Post-viability intervention may fail to prevent fetal harm. Nonetheless, departing from \textit{Roe} is logically inconsistent with abortion rights law and creates undesirable maternal liability. The state should therefore apply \textit{Roe} by analogy, and intervene only after the first trimester.

\textbf{B. Civil Commitment Is the Best Form of Intervention}

A state electing to intervene must choose between criminalization and civil commitment. Criminalization is a poor choice because it lacks justification and raises mens rea and due process concerns. Moreover, criminalization misses the central problem—preventing fetal harm. Civil commitment under the Uniform Act both substantively and procedurally suits gestational substance abuse. Commitment lacks the punitive elements of criminalization, and strikes to the heart of the issue by protecting and treating both the woman and her fetus.

\textbf{I. Criminalization Is Unjustified and Complicated}

If the state chooses the criminal law to address gestational substance abuse, either by enacting a new statute specifically criminalizing substance abuse during pregnancy or by prosecuting pregnant substance abusers under existing criminal statutes, it faces several problems. First, the traditional rationales for criminal liability do not justify prosecuting pregnant substance abusers. Second, if the state enacts a new criminal statute to address gestational substance abuse, the state will have difficulty selecting an appropriate mens rea standard. Third, states prosecuting under existing criminal statutes may infringe upon the due process rights of the defendants. Finally, because criminalization fails to address the essential problem of maternal addiction, it fails to accomplish the intended purpose of protecting fetuses.

Traditional justifications for punishments—restraint, general and specific deterrence, retribution, and rehabilitation\textsuperscript{103}—do not support imposition of criminal liability. Criminal liability restrains a pregnant woman from further gestational substance abuse only if the law moves

\textsuperscript{101} See supra notes 66–67 and accompanying text.
\textsuperscript{102} See supra notes 14–17, 25–27 and accompanying text (discussing first-trimester fetal damage).
\textsuperscript{103} See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW § 1.5 (2d ed. 1986).
quickly enough to incarcerate her while she is still pregnant. Further, criminal sanctions are unlikely to either generally or specifically deter pregnant substance abusers. Neither incarceration, nor the knowledge that others are incarcerated, will encourage a woman to remain substance-free during future pregnancies. Addiction is not a moral weakness curable by jail time. Instead of deterring pregnant women from substance abuse, prosecution may encourage them to get rid of the "evidence" by aborting.

Retribution is perhaps the least persuasive reason to impose criminal liability on pregnant substance abusers. Although the goal of many state sentencing plans is retribution, punishing pregnant substance abusers who lack mental culpability fails to further this aim. The state may decide that illegal drug use requires retributive punishment, but the state can impose upon pregnant women the usual penalties for possession or sale of drugs.

Although rehabilitation is the strongest justification for holding pregnant substance abusers criminally liable, it too fails. The criminal justice system is an ineffective way to provide rehabilitative treatment for an addict. The jail may not be drug free. Furthermore, states may be under no duty to provide jail inmates with the same types of addiction treatment as civilians. Penal incarceration could thus prevent a woman from getting the same treatment available to non-inmates.

Additionally, although under Roe the state has the power to protect a viable fetus threatened by gestational substance abuse, the state should not use this power to punish a woman for harming her fetus. Criminalization of gestational substance abuse would needlessly and unjustifiably elevate fetal rights at the expense of the woman's rights.

If the state establishes a new crime, it faces the difficult choice of an appropriate mens rea. The state could impose strict criminal liability by punishing all women who abuse substances while pregnant, regard-


107. Aripa v. Department of Social and Health Services, 91 Wash. 2d 135, 588 P.2d 185 (1978) (Washington's version of the Uniform Act does not give prisoners a right to treatment under the Act).

less of state of mind. Strict liability is troublesome because it imposes penal sanctions on a woman without mental culpability. Alternatively, the state could prosecute only those who knowingly abuse drugs while pregnant. This standard fails, however, because the dual elements of substance abuse and knowledge of pregnancy might be difficult to prove. An addicted woman might not know she is pregnant until after the fetal damage is done. A third alternative is a recklessness standard, but recklessness casts its net broadly. Because a woman knows when she uses drugs or alcohol, the recklessness standard would apply to the element of pregnancy. The state could then prosecute non-pregnant women who disregarded the risk of pregnancy when using drugs or alcohol. The state would also find it difficult to define substance abuse without penalizing casual users.

Although establishing new crimes presents mens rea difficulties, prosecuting pregnant substance abusers under existing criminal statutes raises a due process issue. Due process requires reasonable notice that the act in question constitutes a crime. Because statutes penalizing homicide, child abuse, and delivery of drugs to minors fail to address gestational substance abuse explicitly, they deny pregnant substance abusers notice that their conduct could be criminal.

Finally, criminalization fails to strike at the heart of the issue. Because criminalization does not attempt to cure the addictions which cause fetal harm, it fails to protect fetuses from the dangers of gestational substance abuse.

2. Civil Commitment Addresses the Issues of Maternal and Fetal Health

Civil commitment is a better solution than criminalization because it focuses on the core of the problem, contains procedural safeguards, and protects both the woman and her fetus. A state choosing civil commitment should use the Uniform Act, and amend it to allow involuntary commitment of drug addicts as well as alcoholics. A state

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109. Recklessness requires knowledge and disregard of a substantial risk that a wrongful act may occur. See e.g., WASH. REV. CODE § 9A.08.010(c) (1989).


111. Although possession of illegal drugs is already a crime, a pregnant addict has no notice that her pregnant status allows the state to impose additional punishment.

112. For example, Washington’s version of the Uniform Act includes the following definition of a drug addict: “a person who uses drugs other than alcohol in a chronic, compulsive, or uncontrollable manner, to the extent that it is seriously interfering with the individual’s health, economic or social functioning. Drug addiction is characterized by a compulsive desire for one
should also amend the Uniform Act specifically to include gestational substance abuse as part of the concept of posing danger to others.\textsuperscript{113}

The Uniform Act substantively and procedurally suits gestational substance abuse. Its substantive limits prevent arbitrary commitment and commitment of casual users. To trigger the civil commitment process, the pregnant substance abuser must first fit the definition of an alcoholic, or, under an amended Uniform Act, a drug addict. The Uniform Act's narrow definition of alcoholism and drug addiction thus decreases the risk of arbitrary or erroneous commitment. A threshold requirement of addiction makes civil commitment a solution carefully shaped to address gestational substance abuse, thus avoiding "slippery slope" problems. For example, under the Uniform Act a woman could not be committed for failing to eat properly, because the Uniform Act allows state intervention only in the case of substance addiction.

The Uniform Act's procedural safeguards and limits suit gestational substance abuse well by providing greater flexibility than criminal incarceration. Whereas criminal statutes fix the time of incarceration, the Uniform Act responds to the individual. An alcoholic or addict may be released when he or she is no longer a danger to others. If the danger persists, the substance abuser can be recommitted. Like the substantive limits, the procedural safeguards also prevent erroneous or unjustified commitments. Because the Uniform Act requires a physician's certification, casual users would not be committed.

Unlike penal incarceration, civil commitment recognizes and furthers the state's interest in protecting the lives and health of both the woman and the fetus. Civil commitment protects fetal health by treating the woman's addiction. Criminal incarceration may prevent further harmful substance abuse,\textsuperscript{114} but by ignoring the woman's health it fails to protect fetal health adequately. Nor does criminal incarceration guarantee treatment.\textsuperscript{115} Civil commitment protects fetal health,
yet by making the woman's addiction the paramount concern, civil commitment treats her as a separate person and not as a mere vessel for the more-valued fetus.

Because civil commitment lacks a penal purpose, it does not involve complicated mens rea requirements.\(^{116}\) If the state amends the Uniform Act specifically to address gestational substance abuse, the state may commit once the predicate elements of alcoholism or drug addiction and threat of harm to a viable fetus are met. Thus, the issue of mens rea is avoided.

Civil commitment also has the advantage of speed. After the filing of a petition, a commitment hearing must be held promptly.\(^{117}\) The criminal process may take much longer. While it is true that much of the damage to the fetus occurs early in the pregnancy, before the state can intervene, civil commitment's speedy process prevents additional harm which might occur during a more lengthy criminal proceeding.\(^{118}\)

Civil commitment is not without difficulties. Even using civil commitment, the state should not intervene during the first trimester, despite the severity of the fetal damage during this period. Additionally, as with criminalization, civil commitment will not prevent damage that occurs before the woman suspects she is pregnant. Finally, civil commitment probably costs more than criminal punishment, because it involves treatment as well as incarceration. However, as the Supreme Court noted in \textit{Roe}, pregnancy is temporary but capable of being repeated.\(^{119}\) Treatment, more than punishment, lessens the likelihood of abuse during future pregnancies. In the long run, treatment may be less expensive than prosecution or inaction, because it lessens the need for additional interventions, and because it decreases the number of children damaged by gestational substance abuse.

IV. CONCLUSION

Gestational substance abuse presents troubling questions, and the law offers no ready answers. The best solution might not involve the

\(^{116}\) Because civil commitment lacks a penal purpose, it does not carry the stigma of prosecution: "[a] prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused cannot be justified as means of protecting society, where a civil commitment would do as well." \textit{Robinson v. California}, 370 U.S. 660, 677 (1962) (Douglas, J., concurring).

\(^{117}\) \textit{See supra} note 75.

\(^{118}\) Preventing the woman from using cocaine in the days before delivery can decrease the risk of fetal strokes. \textit{See supra} note 21 and accompanying text.

\(^{119}\) \textit{Roe}, 410 U.S. at 125.
law at all, but rather include increased state funding of drug abuse prevention and addiction treatment programs. Such programs are expensive, yet ultimately less costly than the effects of gestational substance abuse. Voluntary treatment programs avert the dilemma inherent in state intervention: although the United States Constitution probably does not prohibit early pregnancy intervention, policy and logic demand that the state not intervene before viability. Yet, tragically, most of the fetal damage occurs during early pregnancy.

If the state does intervene, it must speak to the real problem, and not attack its symptoms through highly publicized prosecutions. Prosecution has recently been the means for addressing gestational substance abuse, but this is a poor solution. Criminalization is unjustified by traditional rationales and offers no long-term solution to gestational substance abuse.

Civil commitment under the Uniform Act offers a better solution. It strikes to the heart of the issue, contains substantive and procedural safeguards, and protects the fetus by treating, not punishing, the woman. The only way the state can protect its future citizens is by treating its present citizens.

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