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PROTECTING OUR CHILDREN: A CALL TO REFORM STATE POLICIES TO HOLD PREGNANT DRUG ADDICTS ACCOUNTABLE

INTRODUCTION

A panoramic view of the hospital's nursery window is a picture-perfect display of tranquil babies swaddled in pink and blue blankets.¹ Rebecca, a tiny baby girl in the corner, is not bundled in a pink blanket but covered by a tangle of wires, tubes and machines. She is not sleeping; she is erratically jerking her arms and legs in the air while piercing the maternity ward's silence with a shrill scream. Rebecca was born underweight and premature with kidney deformities.² Her pathetic shuddering and inconsolable shrieking screams will disappear after a few months, only to be replaced with listlessness and chronic diarrhea.³ By the age of one, daycare center workers will constantly watch this undersized baby girl because she impulsively hits the other children.⁴ At the age of two, Rebecca will become so unusually fearful of everything that she will not make eye contact with anyone.⁵ She will become so hyperactive that she will touch everything and foster peculiar habits, such as eating cigarette ashes.⁶ She will develop into a mentally limited adult and will have problems interacting with other persons.⁷ Cocaine, the drug that gave this little girl's mother the shortest high, will achieve its longest legacy through Rebecca.⁸

The hypothetical example above is a prime illustration of the devastating problem of infants who are casualties before they are born.⁹ This Note argues that state policies currently do not pro-

1. This hypothetical example illustrates the typical behavior patterns and complications a drug addicted infant experiences at birth.

2. Karen Dukess & Karl Vick, *Cocaine's Most Innocent Victims*, ST. PETERSBURG TIMES, Sept. 10, 1989, at 1A.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Maureen C. Murtaugh & Susan A. Capra, *Cocaine Babies: Meeting the Challenge*, 80 ILL. B.J. 348, 354 (1992).

tect the interests of drug-exposed children and are therefore in need of reform. Part I of this Note examines the cocaine problem among women in the United States and the traumatic effects it has on their children. Parts II and III analyze the current civil and criminal responses of various state courts and legislatures to manage the problem of drug-addicted infants. Finally, Part IV proposes a change in state laws that will effectively protect and provide drug-addicted children a chance to live a normal, stable life.

I. COCAINE AND ITS EFFECTS

First, this Part analyzes the history of cocaine use in the United States among women. This Part also discusses the effects that cocaine imposes on a child who is exposed in utero. Specifically, this Part examines the immediate effects of cocaine use on the infant, as well as possible long term behavioral and developmental effects the child may experience.

A. *Who Is The Cocaine Mother?*

The problem of substance abuse by pregnant mothers rose quickly during the 1980s when crack, the smokable form of cocaine, became available.¹⁰ Crack is a high-potency, low-cost and highly addictive drug; it became the drug of choice for many pregnant women because it is the quickest acting and easiest form of cocaine to use since it is smoked, rather than injected or sniffed.¹¹ More than 100 cocaine-addicted babies are born each day;¹² one out of every ten newborns has been exposed to illegal

10. Anastasia Toufexis, *Innocent Victims: Damaged by the Drugs Their Mothers Took, Crack Kids Will Face Social and Educational Hurdles and Must Count on Society's Compassion*, TIME, May 13, 1991, at 56. The number of women giving birth to crack-addicted children still continues to increase in numbers. James Kimberly, *Three Women Who Bore Babies Addicted To Cocaine Charged*, DAILY HERALD, Dec. 31, 1995, § 1, at 4. For instance, the state of Illinois saw the number of drug-addicted infants increase from 1415 infants in 1991 to 1847 infants in 1994. *Id.* See also Kathleen B. DeBettencourt, *The Wisdom of Solomon: Cutting the Cord That Harms; Children and Crack Exposure*, CHILDREN TODAY, July 1990, at 17 (quoting *Children in Crisis: Young Victims of the Drug Epidemic*, OAKLAND TRIB., May 7, 1989) (describing a routine drug bust in Oakland, California in 1989 where police "found a crack mother passed out on her bed, with her seven-month-old baby sitting in a pool of vomit, chewing on cigarettes. A glass crack pipe was nestled between mother and child.").

11. Jessie Harsham et al., *Growth Patterns Of Infants Exposed To Cocaine And Other Drugs In Utero*, 94 J. AM. DIETETIC ASS'N 999, 1004 (1994).

12. Steven Brill, *Should We Give Up?*, AM. LAW., Mar. 1990, at 3. See also Committee on Substance Abuse, *Drug-Exposed Infants*, 96 AM. ACAD. PEDIATRICS 364, 369 (1995) (explaining that recent state surveys show eight to twelve percent of women delivering their children in hospitals used illegal drugs at some time during their pregnancy, including moments up to delivery).

drugs in utero.¹³

The use of illegal substances during pregnancy occurs at all racial and socioeconomic levels.¹⁴ The children of the crack generation range from poor, black ghetto children to white upper and middle class children.¹⁵ Poor minority children have attracted more attention because cocaine abuse in white upper and middle classes is not frequently reported.¹⁶ A 1989 Florida study discovered that, while the rates of drug use among pregnant black and white women of equal socioeconomic class were the same, only one percent of white abusers were reported to authorities, as compared to ten percent of the black abusers.¹⁷ Although the statistics may not accurately reflect the number of drug abusing mothers, this growing problem is invading every corner of America and affecting our youth.

B. *The Effects Of Cocaine On The Fetus*

Cocaine ingested by a pregnant woman reaches the fetal circulation system by crossing the placenta.¹⁸ Once the drug enters the fetus' system, it is converted into a more powerful substance, narcocaine, which remains in the fetus' system longer than in the mother's system.¹⁹ This substance causes a constriction of the blood flow to the fetus and a corresponding decrease in the flow of oxygen to the fetus' developing vital organs, especially the brain.²⁰ The common consequences of maternal cocaine use in-

13. Toufexis, *supra* note 10, at 56. Some people often brand this crack addicted generation as the "children of the damned" or the "biological underclass." *Id.* However, many members of society not only pity these innocent victims of society's ills, but also pity the reality of the odds that are against them at home, at school and on the playground. *Id.* Also, members of society fear that these children will grow into unmanageable groups of disturbed adolescents, thereby becoming a lost generation. *Id.*

14. Committee on Substance Abuse, *supra* note 12, at 364. The peak age range for using illicit drugs is 18 to 34 years, the prime child-bearing years. Harsham et al., *supra* note 11, at 999. See, e.g., Richard Lacayo, *Do the Unborn Have Rights?; The Law is Looking Into the Womb. And Expectant Mothers Who Drink or Use Drugs may be Held Liable for Damage to Their Fetuses*, TIME, Oct. 1, 1990, at 22 (demonstrating a specific instance where a professional woman attorney, addicted to cocaine, got pregnant and gave birth to a baby girl who tested positive for drugs).

15. Toufexis, *supra* note 10, at 56.

16. *Id.* Middle to upper class white mothers usually deliver their babies in private hospitals which rarely question the mother about drug use and rarely screen the infants for drugs. *Id.*

17. *Id.*

18. Committee on Substance Abuse, *supra* note 12, at 364.

19. Dukess & Vick, *supra* note 2, at 1A.

20. *Id.* The head of a fetus grows as the brain becomes larger. *Id.* Since oxygen is limited to the fetus during vital brain development, the unborn's brain does not grow to full size. *Id.* See also Toufexis, *supra* note 10, at 56. The circumference of a

clude premature birth, impaired fetal growth and neonatal seizures.²¹ Many of these babies exhibit irritability,²² lethargy and unresponsiveness to stimuli.²³ Specifically, cocaine-addicted children commonly exhibit jerking motions and piercing wails.²⁴ More gruesome consequences may also result, such as a shriveled arm or leg, a missing section of an organ or other deformities.²⁵ Other serious, disabling repercussions include heart defects, bleeding brains²⁶ and respiratory disorders.²⁷

Although the tremors and other symptoms will dissipate after three or four months,²⁸ the consequences of maternal cocaine use may unfortunately extend to later periods of the child's life. Several long-term studies suggest that drug-exposed babies are at risk for later developmental problems and learning deficiencies.²⁹ Evidence shows that children exposed to drugs in utero are disorganized, rowdy and violent in the classroom.³⁰ Additionally, lan-

drug-exposed child's head is often smaller than a normal, healthy child; frequently, the smaller sized head is a trait associated with a low IQ score. *Id.*

21. Committee on Substance Abuse, *supra* note 12, at 364. *See also* DeBettencourt, *supra* note 10, at 17 (explaining that babies exposed to cocaine face an increasing rate of infant mortality resulting from premature birth or low birth weight). Additionally, these drug-exposed infants are at a higher for Sudden Infant Death Syndrome (SIDS). *Id.*

22. Harsham et al., *supra* note 11, at 999. An irritable infant uses more energy. *Id.* Researchers have found that the use of more energy by cocaine babies causes decreased nutrient absorption. *Id.* Additionally, these irritable babies may get less food because they are very difficult to feed. *Id.*

23. Committee on Substance Abuse, *supra* note 12, at 364.

24. Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem That Won't Go Away*, 25 ST. MARY'S L.J. 623, 627 (1994). The irritability and tremors are symptoms of neurological damage, not drug withdrawal. Dukess & Vick, *supra* note 2, at 1A.

25. Toufexis, *supra* note 10, at 56; *see also* H. Naci Mocan & Kudret Topyan, *Illicit Drug Use and Health: Analysis and Projections of New York City Birth Outcomes Using a Kalman Filter Model*, 62 S. ECON. J. 164, 164 (1995) (stating that cocaine-exposed newborns commonly suffer from intrauterine growth retardation, low birth weight and pre-term delivery more than unexposed infants).

26. Swenson & Crabbe, *supra* note 24, at 627.

27. DeBettencourt, *supra* note 10, at 17.

28. Dukess & Vick, *supra* note 2, at 1A.

29. Committee on Substance Abuse, *supra* note 12, at 364. Drug exposed toddlers exhibited lower developmental scores and deficits in the context of free play than toddlers from similar backgrounds who were not exposed to drugs. *Id.* Prenatal drug exposure was instrumental in the lower developmental outcome at two years of age and lower cognitive ability at three years of age. *Id.*

30. Toufexis, *supra* note 10, at 56. Some children are passive and cry often and some children are so aggressive that they have to be restrained. *Id.* *See also* Barbara J. Howard & Karen J. O'Donnell, *What is important about a study of within-group differences of "cocaine babies?"*, 149 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 663, 663 (1995) (explaining that children exposed to drugs have been described by the lay press as "without human emotions of empathy," "so hyperactive as to be unmanageable in the regular classroom" and "doomed to be sociopaths.").

guage production and comprehension, recognition memory and regulation of arousal and attention states can be critically affected.³¹

The "crack generation," however, does not have to be the "lost generation."³² Their history of drug exposure can neither be dismissed, nor held against them.³³ These innocent children have a chance of leading reasonably normal lives with appropriate and timely postnatal intervention.³⁴

The Slavin Special Education Center, a leading organization in Los Angeles that works with older children who have been prenatally exposed to drugs, reports promising outcomes.³⁵ More than half of the center's students eventually transfer to mainstream school classes, assisted by tutoring and counseling.³⁶ Another California study documents similar positive results.³⁷ For instance, one second grade drug-exposed student underwent a "metamorphosis from a non-communicative face constantly hidden under a hood to a smiling little boy full of curiosities."³⁸ In short, these children are not hopeless. Has the system, however, given up hope on these innocent lives?

31. Linda C. Mayes et al., *Information Processing and Development Assessments in Three-Month-Old Infants Exposed Prenatally to Cocaine*, PEDIATRICS, Apr. 1995, at 539. See also Toufexis, *supra* note 10, at 56. Toufexis describes a deaf three year old named Felicia. *Id.* Doctors are not certain how much she can see. *Id.* She functions at the level of a four month old and, like a rag doll, she cannot sit or stand by herself. *Id.* Felicia's foster mother seeks to put her in a special school soon, hoping that Felicia will learn to feed herself. *Id.*

32. Toufexis, *supra* note 10, at 56.

33. Howard & O'Donnell, *supra* note 30, at 666. Stereotypes that portray drug-exposed infants as children destined for doom can be a self-fulfilling prophecy. *Id.*

34. Toufexis, *supra* note 10, at 56.

35. *Id.* Slavin Special Education Center in Los Angeles conducted a three year pilot program involving 50 drug exposed children, ranging from three to five years of age. *Id.* The program involved small classes with eight pupils to one teacher, fixed seat assignments and rigid routines. *Id.* The classroom environment was protected from loud noises or disturbing stimulation. *Id.*

36. *Id.*

37. Tanya Kne et al., *A program to address the special needs of drug-exposed children*, 64 J. SCH. HEALTH, 251, 251 (1994). The program was an outgrowth of the 1989 Parent-Child Intervention Program (PCIP). *Id.* It was designed for the Ravenswood City School District in East Palo Alto, California, to address the needs of children in grades K-3 who were exposed to illicit drugs, such as crack cocaine. *Id.* at 252. The Learning Center designed a simple atmosphere for the children and encouraged positive and predictable support. *Id.* Results from this project and similar interventions that compare the neurological development of children not exposed to drugs and these special at-risk children do not show any significant difference in this area. *Id.* at 253. Thus, remedial education is not required but special attention and early intervention is a must. *Id.*

38. *Id.* Members of the program felt that if this boy had not been part of an intervention program, he was likely to have "remained in his hooded cocoon throughout his elementary years." *Id.*

II. THE CIVIL LIABILITY IMPOSED ON DRUG-ABUSING MOTHERS

Justice demands the "recognition of the legal right of every human being to begin life unimpaired by physical, mental or emotional defects resulting from the neglectful acts of the parent."³⁹ State intervention in domestic relations because of neglectful parents may be an unhappy but necessary aspect of life in our organized society.⁴⁰ Although the painful problem of child abuse and neglect has found no fully satisfactory solution, continued state intervention has produced promising progress.⁴¹

This Part discusses the civil liability placed on a woman who uses drugs while pregnant. This Part also analyzes the negative effects on the children when states impose civil liability on mothers. Specifically, this Part will examine the problems that exist in the foster care system and in parental termination proceedings.

A. Child Abuse and Neglect Statutes

In response to the growing number of mothers giving birth to drug-addicted children, many states have intervened by imposing civil penalties on women who use drugs while pregnant. States have enacted laws that clearly define prenatal drug use as evidence of child abuse or neglect.⁴² Additionally, all states have

39. Department of Social Services *ex rel.* Mark S. v. Felicia B., 144 Misc. 2d 169, 171 (N.Y. Fam. Ct. 1989) (citing *Woods v. Lancet*, 102 N.E.2d 691 (N.Y. 1951)).

40. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (Rehnquist, J., dissenting).

41. See *infra* notes 42-43 and accompanying text for a discussion of state intervention. This Note only examines the major means of intervention by the state, namely civil liability under child abuse and neglect statutes and criminal prosecution under drug trafficking statutes. However, these are not the only methods of intervention. Swenson & Crabbe, *supra* note 24, at 635. One method is preventative incarceration of a pregnant mother using drugs. *Id.* Specifically, a pregnant drug user is brought before a state judge on other charges, such as theft or prostitution. *Id.* The judge, compelled to protect the fetus from further exposure to drugs, jails the mother on charges unrelated to the drug use — charges that most likely either have been dismissed or resulted in probation. *Id.* Another method was implemented by the Honorable Howard R. Broadman, a judge in California. Stephanie B. Goldberg, *No Baby, No Jail*, 78 A.B.A. J. 90, 90 (1992). Although the decision was ultimately overturned on other grounds, Judge Broadman allowed a child abuser to choose Noraplant, a method of birth control, as part of her sentence. *Id.* This woman already had five children, none of whom were in her custody; the judge feared that if she became pregnant again, she could give birth to a cocaine addicted baby. *Id.* These methods of intervention are criticized because they are a "quick fix" for drug addiction and infringe on a woman's constitutional rights to liberty and privacy. *Id.*

42. See 705 ILCS 405/2-3 (1992) (defining a neglected or abused minor as an infant whose blood or urine contains any amount of a controlled substance); MINN. STAT. ANN. § 626.556 (2)(c) (West 1995) (defining "neglect" as including "prenatal exposure to a controlled substance"); NEV. REV. STAT. § 432.330(1)(b) (1991) ("A

reporting laws that mandate certain persons, such as physicians, nurses, emergency room personnel and social workers, to report suspected child abuse and neglect to social service agencies.⁴³ For example, a physician is under a duty to immediately report the birth of a child who screens positive for drugs to a social service agency; the agency will subsequently investigate the report.⁴⁴ In Illinois, an obstetrician will report a finding of a drug-addicted child to the Department of Child and Family Services (DCFS).⁴⁵

Immediately following birth, the state's social service agency may determine that the drug-exposed newborn is not in immediate danger; consequently, the agency will send the newborn home from the hospital with the family on a service plan⁴⁶ until an adjudicatory hearing.⁴⁷ If the family complies with the plan, the infant remains at home.⁴⁸ If, however, the social service agency

child is in need of protection" if he is "suffering from congenital drug addiction or the fetal alcohol syndrome, because of the faults or habits of a person responsible for his welfare."); OKLA. STAT. tit. 10, § 7001-1.3 4(a)(3) (1995) (defining a deprived child as "a child in need of special care and treatment because of his physical or mental condition including a child born in a condition of dependence on a controlled dangerous substance.").

43. Sandra Anderson Garcia, *Drug Addiction and Mother/Child Welfare*, 13 J. LEG. MED. 129, 166 (1992). Women who use drugs during their pregnancy or give birth to a drug-addicted baby usually come to the attention of authorities from intake agency reports where the mother sought prenatal or postnatal care and had urine or blood samples screened for drugs. *Id.*

44. Murtaugh & Capra, *supra* note 9, at 349-50.

45. *Id.* at 350. When DCFS is notified, the agency then notifies the local law enforcement and the State's Attorney's Office. *Id.* DCFS is the sole agency responsible for investigating reports of child abuse and neglect in Illinois, except in cases of death, serious injury or sexual abuse of a child. *Id.* These exceptional situations warrant a law enforcement agency and DCFS to investigate. *Id.*

46. Letter from Theresa Wyatt, Assistant to Illinois Governor Jim Edgar, to the author of this Note, Law Review Staff, *The John Marshall Law Review* (Nov. 6, 1995) (on file with *The John Marshall Law Review*). The Illinois Department of Children and Family Services (DCFS) conducts a thorough risk assessment when a report indicates an infant is substance-affected. *Id.* The risk assessment includes an on-site evaluation of the environment in which the child will live, as well as an evaluation of the caretaker and others who will be residing there. *Id.* If DCFS discovers that the child is in imminent danger, a child welfare case is opened and the infant is removed into temporary protective custody. *Id.* If the child is not in imminent danger, the child will remain in the home of the natural parent and a case is opened and referred to the child welfare staff for a comprehensive assessment. *Id.* The child welfare staff refers the parents to a treatment agency licensed by the Illinois Department of Alcoholism and Substance Abuse (DASA) for an assessment of the mother's addiction and possible treatment. *Id.* The child welfare staff provides the service activities and treatment plan to the family as prescribed by DASA. *Id.* Illinois Governor Jim Edgar believes that these DCFS procedures are designed to adequately protect the children who are born substance-affected. *Id.*

47. Murtaugh & Capra, *supra* note 9, at 351.

48. *Id.*

determines that either the family has not followed the rehabilitative plan, the family is dysfunctional or the safety of the child is in question, the state agency takes custody of the child until an adjudicatory hearing.⁴⁹

After the agency files a petition alleging that a minor is abused or neglected, an adjudicatory hearing is held within 180 days after the date of service of process upon the minor and parents.⁵⁰ The court, at the dispositional hearing, reviews the effectiveness of past services aimed at family preservation and reunification.⁵¹ In Illinois, the purpose of the adjudicatory hearing is to act in a just and speedy manner to (1) determine the best interests of the minor, (2) identify families in need, and (3) reunify families where it is in the best interests of the minor. When it is not in the best interest of the minor to be reunified with his

49. *Id.*

50. 705 ILCS 405/2-14 (1992). "The legislature recognizes that serious delay in the adjudication of abuse, neglect, or dependency cases can cause grave harm to the minor and the family and that it frustrates the best interests of the minor and the effort to establish permanent homes for children in need." *Id.* This section of the Illinois statute insures that its intent is consistent with the Federal Adoption Assistance and Child Welfare Act of 1980. *Id.* See The Adoption Assistance and Child Welfare Act, 42 U.S.C. § 675(5)(c) (1988). The Act provides in pertinent part:

(c) with respect to each such child, procedural safeguards will be applied, . . . to ensure each child in foster care under the supervision of the State of a dispositional hearing to be held . . . no later than eighteen months after the original placement . . . which shall determine the future status of the child (including . . . whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should . . . be continued in foster care on a permanent or long-term basis . . .).

Id. But see *In re Ashley K.*, 571 N.E.2d 905, 919 (Ill. App. Ct. 1991). Ashley K., a baby born addicted to cocaine, did not have a dispositional hearing for the first five years of her life. *Id.* Obviously, the court did not comply with the Adoption Assistance and Child Welfare Act. In noting how important timeliness is in cases like these, the court stated:

[i]f there had been a dispositional hearing . . . (18 months after Ashley's placement) and a dispositional ruling within a reasonable time thereafter, a permanent decision would have been made for her future at a time which would have avoided the turmoil and problems she has suffered and may suffer the rest of her life.

Id.

51. Murtaugh & Capra, *supra* note 9, at 350. See also Carl E. Schneider, *Moral Discourse And The Transformation Of American Family Law*, 83 MICH. L. REV. 1803, 1807 (1985) (explaining that in the past two decades the legal tradition of noninterference in family affairs shaped the development of family law). This principal transfers many moral decisions from the law to the family. *Id.* The rationale for the traditional preference for parental autonomy is a commitment to diverse lifestyles and the right of parents to raise their children as they think best. *Id.* at 1816. Family reunification is preferred and legal judgments regarding the value of child-rearing patterns are discouraged so long as the child is afforded the best opportunity to fulfill his potential in society. *Id.*

parents, the court will find another permanent home for him.⁵²

If the provided services successfully reunify the family, the judge will award custody of the infant to the natural parents and close the case.⁵³ The most common outcome of the adjudicatory hearing, however, is a determination by the court that the best interest of the infant would be served by removing the infant from the custody of the natural parents.⁵⁴ The court will also determine whether to place the child in the custody of a suitable relative or to commit the child to an agency for care.⁵⁵ Ostensibly, the most important consideration throughout all of these procedures is the best interest of the child.

B. Problems With Imposing Civil Liability On Drug-Addicted Mothers

Those involved in creating policies related to perinatal drug addiction consider the child abuse, neglect and custody laws effective measures for protecting a child's best interests, altering maternal behavior and preserving the family unit.⁵⁶ The disturbing reality shows, however, that these laws do not achieve even one of these goals.⁵⁷ One reason why the state does not achieve its goals is because the courts frequently balance the parent's interest in remaining a parent against the child's interest of living in a stable home.⁵⁸ Some courts consider the child's best interests as only one of the many factors of consideration in a case of such delicate nature.⁵⁹ A child's best interest, however, is not part of

52. 705 ILCS 405/2-14 (1992). See also *supra* note 46 (discussing the overall Illinois risk assessment evaluation).

53. Murtaugh & Capra, *supra* note 9, at 350.

54. *Id.*

55. *Id.*

56. Garcia, *supra* note 43, at 165.

57. *Id.*

58. See, e.g., Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack" Abuse*, 56 BROOK. L. REV. 1213, 1254 (1991) (stating that the rights of the parents are contrasted with the welfare of the child, making the mother and child adversaries). For example, in *In re Ashley*, the court stated:

I agree Ashley has rights. I agree that what the best interest of Ashley is, must prevail. But, I also believe that the parents have rights. And that the parent's rights should interplay in this decision. And somewhere, somehow, we have to try to strike a balance between the best interest of the minor and indeed the parental rights.

571 N.E.2d at 923.

59. *In re Doe*, 627 N.E.2d 648, 663 (Ill. App. Ct. 1993) (Tully, J., dissenting). See *In re Doe*, 638 N.E.2d 181, 182 (Ill. 1994) (stating that the Illinois laws protect natural parents and their rights to their children wholly apart from any consideration of the child's best interests). If the child's best interests alone were a sufficient basis to determine child custody, anyone with superior income, intelligence or education could challenge the parents of their right to their children. *Id.*

any equation and is not to be balanced against any other interest.⁶⁰ "A child's best interest is and must remain inviolate and impregnable from all other factors, including the interests of the biological parents."⁶¹

1. *The Foster Care Drift*

Where, in fact, do the child's best interests lie? The best interests of the child are often found to be closely aligned with the best interests of the mother.⁶² Most of the babies exposed to drugs, however, are almost automatically torn from their natural mother and sent to foster care.⁶³ However, the ultimate consequence of ordering the separation of the parent and drug addicted infant by placing him in the foster care system is usually negative.⁶⁴

To understand the problem with sending drug-exposed infants to foster care, the current foster care system must be evaluated. Currently, there are approximately 500,000 children in the foster care system, with over 55,000 in Chicago and surrounding Cook County alone.⁶⁵ The vast majority of these children are placed in and out of various foster homes while the biological mother attempts to get her life together.⁶⁶ After spending years in the foster care system, the child most commonly loses contact with his natural parents.⁶⁷ Typically, the child is alone and without a chance to form a close relationship with any parental figure.⁶⁸ Specialists in the system label this the "foster care

60. *Ashley K.*, 571 N.E.2d at 923. The Appellate Court of Illinois flatly rejected the Circuit Court's theory that a parent's interest and a child's best interest should be balanced against each other. *Id.*

61. *Id.* See *In Re Violetta B.*, 568 N.E.2d 1345, 1346 (Ill. App. Ct. 1991) (stating that the child's best interest is superior to a natural parent's right to custody of the child); *People ex rel. Edwards v. Livingston*, 247 N.E.2d 417, 421 (Ill. 1969) (stating that the child's best interest is the appropriate standard).

62. Dolgin, *supra* note 58, at 1254.

63. See Joseph B. Treaster, *Plan Lets Addicted Mothers Take Their Newborns Home*, N.Y. TIMES, Sept. 19, 1991, at A5 (explaining how child welfare officials state that they routinely move drug addicted babies to the foster care system for the child's own protection against risks of abuse and neglect).

64. Dolgin, *supra* note 58, at 1214.

65. Patrick F. Fagan, *Why Serious Welfare Reform Must Include Serious Adoption Reform*, HERITAGE FOUND. REP., July 1995, at 1. Children enter the foster care system for a variety of reasons, most commonly child abuse or neglect, a parent's physical or mental illness or parental inability to provide child care. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 427 (1983). Seventy percent of foster children enter the system because of abuse, neglect or parental conditions, such as drug addiction, incarceration or illness. Conna Craig, *What I Need is a Mom*, 73 POL'Y REV. 41, 41 (1995).

66. Garrison, *supra* note 65, at 427.

67. *Id.* at 423.

68. *Id.*

drift.⁶⁹

When a child enters foster care, the biological parent cedes custody of the child to the state's child welfare system.⁷⁰ The state's duty is to provide both the child and the parents with services designed to resolve the problem that originally separated them.⁷¹ In most cases, however, state agencies offer few parents any help while their children are in foster care.⁷² In fact, case-workers do not regularly contact the natural parents.⁷³ The contact between the natural mother and agency often drastically decreases after the first year of placement of the child in foster care.⁷⁴ This estrangement between the natural parents and child is not in the child's best interest because frequent contact between the agency, natural parent and child increases the chances that the child will return home during the first year of placement.⁷⁵

When the state places a drug-addicted baby in the foster care system, the state may have custody of the child, but the natural mother still retains her parental rights.⁷⁶ Consequently, the foster care system traps tens of thousands of abused and neglected babies who are not free to be adopted into a stable family.⁷⁷ The biological mother is given multiple chances by the state to prove that she is fit to have legal custody of her child while her baby is bounced from foster home to foster home.⁷⁸ For example, when a

69. *Id.*

70. *Id.* at 428.

71. *Id.*

72. *Id.* at 428-29. For instance, an Arizona study revealed that 56% of natural parents were not offered services while their children remained in foster care. *Id.*

73. *Id.* In Iowa, 65% and in Massachusetts, 60% of the natural mothers surveyed did not have any contact with the state agency within six months or more of their child's removal. *Id.* See also Treaster, *supra* note 63, at A5 (showing how one mother commented that if social services just removed her son without any further communication she would have kept on "drugging" because she would have no baby). She said getting the chance to keep her child made her go through a drug program. *Id.*

74. Garrison, *supra* note 65, at 428.

75. *Id.* at 429.

76. Craig, *supra* note 65, at 41.

77. *Id.* The youngest children, such as drug-addicted infants, remain in the system longest. *Id.*

78. *Id.* See also *Punishing Pregnant Addicts: Debate, Dismay, No Solution*, N.Y. TIMES, Sept. 10, 1989, § 4, at 5 [hereinafter *Pregnant Addicts*]. Eve W. Paul, the director of legal affairs of The Planned Parenthood Federation in New York commented:

We thought we were getting tough when we tried voluntary contracts that required the parents to go into drug treatment, gave the state legal custody or allowed it to monitor the child. But it doesn't work. In a few weeks, the family disappears from the system and the child protection agencies are too overwhelmed to follow through. In a year, the family shows up with another drug-affected baby.

Id.

judge sees a mother who has failed her drug treatment, she is likely to insist that the mother enter every drug treatment program available before deciding that the offered services did not resolve the problem.⁷⁹ Actually, while the natural mother clings to her parental rights,⁸⁰ her child will, on average, live with three different families.⁸¹

It is not uncommon for a foster child to live in ten or more foster homes.⁸² To make matters worse, many social service agencies do not ensure that a child will be placed into a stable foster home.⁸³ Frequently, the agency "haphazardly" matches the child with the foster home, which consequently leads to removal and replacement of the child.⁸⁴

The instability that is inherent in the current foster care system has a remarkable effect on the children who remain stuck in the foster care drift.⁸⁵ Without stability, young children become unable to form healthy bonds or feel good about their futures.⁸⁶ Child psychologists deem permanency and continuity essential for a child's healthy, normal development.⁸⁷ Without

79. Craig, *supra* note 65, at 41. Biological parents are given multiple chances to be a fit parent, while innocent, helpless children are bounced between the state and their natural family. *Id.*

80. *Id.* Most states give biological parents every possible opportunity to prove they are fit. *Id.* One adoptive family dotes over their two-year-old foster daughter: [s]he is precious beyond belief, and her parents are being given chance upon chance to clean up their lives, at her expense, as we see it. She is so adoptable by the right family, but the system will keep her under lock and key for years if necessary for her parents' benefit.

Id. See also Fagan, *supra* note 65, at 1 (stating that laws and policies that are ostensibly predicated on the protection of the children have created barriers that prevent these children from getting the protection they need, a loving and permanent home).

81. Craig, *supra* note 65, at 41. For example, "Halie," a two and one half year old girl lived with her biological mother until the day "Halie's" mother tied her to an electric heater and left her there for hours. *Id.* The baby girl's face, chest and arms were disfigured. *Id.* After weeks of hospitalization, "Halie" was placed in the foster care system. *Id.* "Halie" turned 18 years old in foster care because she was never allowed to be adopted; social service agencies coached her natural mother in maintaining her legal rights to the child. *Id.*

82. Fagan, *supra* note 65, at 1. A psychologist specializing in attachment disorders remarks, "[e]very new placement is a disaster. The result is that these kids begin not to trust anyone." *Id.*

83. Garrison, *supra* note 65, at 429.

84. *Id.*

85. See Andrea Neal, *Hundreds of Children Still Languish in Limbo in Foster Care System*, INDIANAPOLIS STAR, Aug. 14, 1994, at A1 (asking "[w]hy are we beating them up in 10 or more placements? It's simply unconscionable").

86. *Id.*

87. Jamie D. Manasco, *Parent-Child Relationships: The Impetus Behind the Gregory K. Decision*, 17 LAW & PSYCHOL. REV. 243, 252 (1993). Children who grow up feeling unwanted in a unstable home can experience "serious scars" which can

them, a child is unable to form attachment bonds or "ties that bind,"⁸⁸ the child may experience delays in his adaptation to surroundings or setbacks in his emotional development.⁸⁹ Bouncing a child from foster home to foster home rips him away from his community and school, which can create great emotional trauma.⁹⁰ These children are crying out for a stable home with a caring family.⁹¹

"One of the prime weaknesses of our existing foster care system is that, once a child enters the system and remains in it for even a few months, the child is likely to become 'lost' in the system."⁹² "Yearly judicial reviews of the child's placement too often become perfunctory exercises with little or no focus upon the difficult question of what the child's future placement should be."⁹³ A significant disincentive exists for taking the risk of placing a child back home with his natural parent unless "you're damn sure everything will be OK."⁹⁴ No agency will fire a social worker for allowing a child to remain in foster care too long.⁹⁵ Thus, our existing "temporary" foster care system is a permanent, yet glaringly inadequate, solution for too many innocent children.⁹⁶

result in anger, rage, a dysfunctional adulthood or a life filled with violence. *Id.*

88. See Prepared Testimony of Carol "Cassie" Statuto Bevan, Ed.D., Before the House Committee on Ways and Means Subcommittee on Human Resources re: *Child Welfare Reform*, FED. NEWS SERV., 1995 WL 6621184 (Feb. 3, 1995).

89. Manasco, *supra* note 87, at 251-52. Any disruption in the continuity of developing and existing relationships will affect young children; these children will often build up resentment and develop a cold attitude towards everyone. *Id.*

90. Bernie Mixon, *Foster Care Is Taking Neighborly Approach — DCFS Joins Hull House In Experiment Aimed At Preserving Family*, CHI. TRIB., Apr. 25, 1995, at 1. See also Sharon Cohen, *Part II: Nobody's Children: Living in Limbo — And Waiting For a Home*, ASSOC. PRESS, 1995 WL 4385574 (Apr. 30, 1995). Tammy, a foster child bounced in the system for six years, comments on the foster system: "You never get comfortable. You're always the outsider. . . . I didn't really ever have no parents. . . . I always said if nobody wants me, that's OK. When you're little, you just want people to love you. Maybe if I had parents, I wouldn't have grown up so fast." *Id.*

91. See Cohen, *supra* note 90. James, 16 years old, lived his entire life in foster care. *Id.* James commented that, "[a]ll my friends have mothers and fathers. . . . If I could have anything, I'd like to have a family. I think that's the way it should be." *Id.*

92. *In re Ashley K.*, 571 N.E.2d 905, 918 (quoting Sen. Allen Cranston in 125 Cong. Rec. S22684).

93. *Id.* See also Cohen, *supra* note 90. James Randall's foster care case was on inactive status, a status one attorney mockingly calls "never-neverland." *Id.* The courts were required to monitor him regularly, however, they only did so twice in seven years. *Id.*

94. *Id.*

95. *Id.*

96. *Ashley K.*, 571 N.E.2d at 918. See Craig, *supra* note 65. Drug addicted children placed in the foster system face long term, temporary placements without any

2. Termination of Parental Rights

Social service agencies may commence permanent termination proceedings after a child is removed from his natural parent's home.⁹⁷ All fifty states have statutes enabling social service agencies to terminate parental rights in cases of abuse, abandonment or neglect.⁹⁸ Terminating a parent's right to a child severs the legal relationships between the child and the natural parents.⁹⁹

Generally, in the initial removal proceedings the court must first determine by a fair preponderance of the evidence,¹⁰⁰ or by clear and convincing evidence that the parents have permanently neglected the child.¹⁰¹ Second, the court must find that the supervising state agency made "diligent efforts to encourage and strengthen the parental relationship" and was unsuccessful at such attempts.¹⁰² Following this fact-finding hearing, the agency holds a dispositional hearing to determine what subsequent course of action is not only available, but is also in the best interests of the child.¹⁰³ Thus, the "paramount concern in these pro-

significant on-going parental relationship. *Id.* See also Cohen, *supra* note 90. The presiding judge of the Marion County, Indiana Juvenile Court commented that "kids don't fall through the cracks . . . We throw them in and grind them down so they're out of sight." *Id.*

97. *Santosky v. Kramer*, 455 U.S. 745, 776 (1982). Permanent termination proceedings are commenced by the filing of a petition in the court which orders the temporary removal. *Id.* The petition is filed by a state agency or by a foster parent authorized by the court. *Id.* at 777. Moreover, the petition must allege that the child has been permanently neglected by the parents. *Id.* at 778.

98. *Manasco*, *supra* note 87, at 246.

99. *Id.*

100. *Santosky*, 455 U.S. at 751. Only competent, material and relevant evidence will be admitted. *Id.* at 780.

101. *Id.* at 751. The substantive standards vary from state to state. *Id.* at 769. Fifteen states, the District of Columbia and the Virgin Islands have required "clear and convincing evidence" or its equivalent. *Id.* South Dakota's Supreme Court requires a "clear preponderance" of the evidence in a dependency proceeding. *Id.* at 751, n.3. Illinois and New York generally require a preponderance of the evidence, but require clear and convincing evidence to terminate the parental rights for reasons of mental illness, retardation or severe and repeated child abuse. *Id.* Two federal courts have held that allegations in evidence in termination proceedings must be proven by clear and convincing evidence. *Id.*

102. *Id.* at 779. The state's first obligation is to reunite the child with his natural parents. *Id.*

103. *Id.* at 780. The court has the option to either dismiss the petition or suspend judgment on the petition and retain jurisdiction for a period of one year in order to provide further opportunity to reunite the family or terminate the parents' right to custody. *Id.* Regardless of which avenue the court chooses, its decision is solely based on the record of "material and relevant evidence" introduced at the dispositional hearing and not on a presumption of what will promote the best interests of the child. *Id.*

ceedings is the child's best interests."¹⁰⁴

The theory justifying the state's right to intervene is that when parents fail to provide their children with adequate care, "the state has a right, indeed a duty, to protect children."¹⁰⁵ The U.S. Supreme Court recognizes the state's interest in protecting its children.¹⁰⁶ Since the termination of parental rights is a dramatic and intrusive state action,¹⁰⁷ state intervention on behalf of a child must be predicated by a compelling state interest.¹⁰⁸ The more significant the harm, the greater the state interest in combating it.¹⁰⁹ The main issue is, however, what type of conduct on behalf of the drug addicted mother will invoke a compelling state interest that warrants intervention.¹¹⁰

In a termination proceeding, the presiding judge is committed to choosing an alternative that maximizes the best interests of the child.¹¹¹ This "best interests of the child" standard, however, is a general standard that is inherently indeterminate.¹¹² Since an indeterminate standard can render the outcome of litigation difficult to predict, it can ironically encourage more litigation than a standard that makes the outcome more predictable.¹¹³

Moreover, an indeterminate standard in child custody cases raises a number of questions related to fairness.¹¹⁴ Broad, per-

104. *J.L.B. v. State Dep't of Human Resources*, 608 So. 2d 1367, 1368 (Ala. Civ. App. 1992).

105. *In re Philip B.*, 156 Cal. Rptr. 48, 51 (Cal. Ct. App. 1979).

106. *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944). The Court reasoned that "the state has a wide range of power for limiting parental freedom and authority in things affecting child welfare." *Id.*

107. *In re Valerie D.*, 613 A.2d 748, 752 (Conn. 1992).

108. Sonja C. Davig, *Crack Cocaine Babies: Protecting Society's Innocent Victims*, 15 *HAMLIN J. OF PUB. L. & POL'Y* 281, 296 (1994).

109. *Id.* See also *In re Stefanel Tyasha C.*, 556 N.Y.S.2d 280, 286 (N.Y. App. Div. 1990) (stating that the responsibility of the courts is to protect a living child's legal rights and interests in remaining alive and to protect him from physical injury when others have failed).

110. Garcia, *supra* note 43, at 129.

111. ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, & STATE* 721 (3d ed. 1995).

112. *Id.* "The indeterminacy flows from our inability to predict accurately human behavior and from a lack of social consensus about the values that should inform the decision." *Id.* at 729. See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (stating that termination proceedings often require the fact-finder to decide issues that are difficult to prove to a degree of certainty); *In re A.W.*, 569 A.2d 168, 169 (D.C. 1990) (showing that the court's expectation is that the case evidence will bring enlightenment of what will be in the best interest of the child).

113. MNOOKIN & WEISBERG, *supra* note 111, at 728. A broad child neglect standard giving great discretion to a juvenile court to remove a child from the natural parent may encourage social workers, probation officers and other state agencies to seek intervention in a broader range of cases than might a narrow standard. *Id.*

114. *Id.* More clearly defined and less discretionary standards can minimize the lack of fairness problem. *Id.*

son-orientated standards are unfair because the mother may not have the opportunity to conform her conduct to the norm subsequently used by a particular judge.¹¹⁵ Most importantly, the indeterminate termination standards violate the fundamental precept that like cases should be decided alike.¹¹⁶ The use of the indeterminate "best interests of the child" standard implies that judges may decide cases on the basis of unarticulated, unconscious predictions and preferences.¹¹⁷ There is a substantial risk that judges will base child custody cases on values not widely shared among other judges or society.¹¹⁸ Thus, "[i]n the end, a judge is the only person a child in peril has to count on. If a judge's humanity fails, who will hear the child's cry?"¹¹⁹

An excellent illustration of the unfair and inconsistent decisions that can result from the use of an indeterminate standard is a study involving three child welfare professionals.¹²⁰ Each professional was independently given the actual files of ninety-four children from fifty families.¹²¹ The task was to analyze the files and decide whether the state should remove the children from parental custody and place them in foster care, or whether the state should provide services in the home.¹²² The three child welfare professionals agreed in less than one-half of ninety-four cases.¹²³ More importantly, when the three professionals agreed on a decision, they did not identify the same determinative factors.¹²⁴ This study demonstrates how the use of an indeterminate standard results in inconsistent decisions of what is in the best interest of a child.¹²⁵

This type of inconsistent decisionmaking for a child's future

115. *Id.* Broad standards also do not give the party notice and opportunity to address the grounds that the court uses as the basis for the judgment. *Id.*

116. *Id.* Proponents who argue that people differ and no two cases are the same claim that no process is more fair than one decided by a highly individualized, person-orientated standard. *Id.* However, when such a discretionary standard is applied, the very same case presented to different judges can easily result in different decisions. *Id.*

117. *Id.*

118. MNOOKIN & WEISBERG, *supra* note 111, at 728-29. The judge's decision today need not be reconciled with decisions made earlier in similar cases. *Id.* at 728.

119. Bob Greene, *Who Will Hear the Child's Cry?*, CHI. TRIB., Aug. 22, 1993, at C1.

120. MNOOKIN & WEISBERG, *supra* note 111, at 729. Each child welfare professional had at least five years experience. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* In the current juvenile system, a trial judge has the primary authority to decide what are the child's best interests although it is unclear how her responsibility is affected by social workers, psychologists and psychiatrists. *Id.*

goes beyond hypothetical studies. For instance, one situation in which the use of an indeterminate standard gravely affected a child's life was the custody battle over a child named Ashley K.¹²⁶ Ashley was born one month premature and addicted to heroin.¹²⁷ Ashley's mother and father were both drug addicts who were not married but were living together.¹²⁸ Ashley's mother also had a history of prostitution, even while she was pregnant with Ashley.¹²⁹ To make matters worse, before Ashley's birth, Ashley's parents had an open case with the DCFS regarding the neglect of Ashley's brother and sister.¹³⁰ Additionally, Ashley's mother had a criminal conviction for neglecting her older daughter when she was just fourteen months old.¹³¹ After Ashley's birth, the circuit court found that Ashley was a neglected minor and ordered that DCFS take temporary custody of her.¹³²

Ashley remained in the hospital for approximately one and one half months following her birth because of her drug withdrawal; during that time, Ashley's mother did not visit her.¹³³ When the hospital finally discharged the baby, the state placed Ashley in the foster home of Joseph and Marjorie Procopio.¹³⁴ During the first five months, baby Ashley suffered from tremors, fever, severe diarrhea and long periods of inconsolable crying.¹³⁵

During the first sixteen months of Ashley's life, her biological mother visited her three times and her biological father visited her twice.¹³⁶ After Ashley's birth, not only was her biological mother arrested for prostitution, possession of stolen property and

126. See *In re Ashley K.*, 571 N.E.2d 905, 909 (Ill. App. Ct. 1991).

127. *Id.* at 906.

128. *Id.*

129. *Id.* Ashley's parents' drug use increased and they had difficulty in supporting their habits. *Id.* Ashley's father was not working at the time and they were living off of the mother's social security money. *Id.* The mother confessed that she never stole anything to support their drug habits. *Id.* However, she did admit that she was a prostitute. *Id.* She confessed that she prostituted herself enough to get the drugs which she took home and used, often with the father. *Id.*

130. *Id.* at 907. "When Ashley was born, her [parents] had five DCFS reports of inadequate and unsafe housing involving Ashley's . . . sister and brother." *Id.* One DCFS report revealed that at one time the family was living in a car. *Id.* Another report revealed that there was no furniture or appliances in the family's apartment, except two mattresses, a dresser and a hot plate. *Id.*

131. *In re Ashley K.*, 571 N.E.2d 905, 907 (Ill. App. Ct. 1991).

132. *Id.*

133. *Id.* Ashley's mother claims that DCFS lied to her and told her that Ashley was in a home, not the hospital. *Id.*

134. *Id.* The "Procopios are an attractive middle class couple who present themselves as intelligent, mature residents of Bridgeview, Illinois." *Id.* The couple was married in 1982. *Id.* Mr. Procopio had six grown children from a previous marriage and Mrs. Procopio had one grown daughter. *Id.*

135. *Id.* at 907-08.

136. *In re Ashley K.*, 571 N.E.2d 905, 908 (Ill. App. Ct. 1991).

forgery, but she also continued to use heroin.¹³⁷ Despite Ashley's parents' criminal conduct, DCFS continued to work towards the goal of returning Ashley to her biological parents.¹³⁸ Eventually, Ashley's mother entered an outpatient methadone maintenance program; in essence, this program protects the addict so the addict does not commit crimes in order to maintain the addiction.¹³⁹ DCFS considered this a step forward and did not deviate from its goal of returning Ashley to her biological parents.¹⁴⁰

When Ashley was three years old, Ashley's behavioral and emotional problems concerned the Procopios; they related these problems during the visitations by Ashley's mother and father.¹⁴¹ Subsequently, the Procopios admitted her to an in-patient program at Mount Sinai hospital for a psychological evaluation.¹⁴² Mount Sinai reported that the state should return Ashley to her foster parents and implement a permanency plan so that Ashley could be adopted by the Procopios.¹⁴³ DCFS ignored the recommendations and the monthly visits of Ashley's natural parents continued.¹⁴⁴

When Ashley was five years old, her biological parents petitioned the circuit court to vacate the guardianship order to the DCFS.¹⁴⁵ During this hearing, the court reported that her biological mother was drug free.¹⁴⁶ A board-certified psychiatrist, however, concluded that it was not in Ashley's best interest to separate her from the foster family she regarded as her real family.¹⁴⁷ Despite the psychiatrist's recommendation, the circuit

137. *Id.* Ashley's father was also convicted of forgery. *Id.*

138. *Id.* DCFS's service plan for Ashley continued to be reunification with her biological parents despite the fact that DCFS workers told the Procopios that the biological mother and father would "never make it" and that they would never get into rehabilitation for drug addiction. *Id.* at 909.

139. *Id.* at 909. Methadone maintenance programs may be characterized as a "controlled legal addiction." *Id.*

140. *Id.*

141. *In re Ashley K.*, 571 N.E.2d 905, 910 (Ill. App. Ct. 1991).

142. *Id.* According to a Mount Sinai report of an observed meeting between Ashley and her biological parents:

Ashley broke into tears at the sight of her biological parents and clung to the examiner. She appeared very distressed and her behavior was regressive. For example, she started sucking her thumb and laid on the examiner's lap in a fetal position. After a few questions, Ashley broke into tears and ran for the bed. She was crying and repeatedly stated, "I want my real mommy." referring to her foster mother.

Id.

143. *Id.* Although these findings were not contradicted by medical evidence, the DCFS ignored the recommendations. *Id.*

144. *Id.*

145. *Id.* at 911.

146. *In re Ashley K.*, 571 N.E.2d 905, 912 (Ill. App. Ct. 1991).

147. *Id.* The doctor had reviewed the case, interviewed Ashley, the foster parents

court directed social services to develop a plan to change the supervised visits of the biological parents to unsupervised visits so that reunification could eventually take place.¹⁴⁸

After the circuit court's order, DCFS removed Ashley from the Procopio home and placed her in a shelter as an intermediate step before placing her with her natural parents.¹⁴⁹ The shelter forbade the Procopios from calling or visiting Ashley; the shelter considered this a hindrance to the development of the relationship between Ashley and her biological parents.¹⁵⁰ Eventually, the circuit court vacated its original order appointing the DCFS Ashley's guardian and entered a dispositional order transferring custody of Ashley to her natural parents.¹⁵¹ By this time, Ashley was five years and four months old and had never lived with her biological parents.¹⁵² Additionally, the circuit court ordered that the Procopios refrain from any contact with Ashley that was not approved by a therapist.¹⁵³

The Appellate Court of Illinois, in hearing the appeal from the circuit court, failed to see how the facts taken as a whole could possibly be construed to favor the transfer of Ashley from the custody of the Procopios to her biological parents.¹⁵⁴ The Appellate Court stated that the circuit court was wrong: "the facts leave no doubt that it was not in the best interest of Ashley to transfer custody to her biological mother and father."¹⁵⁵ Additionally, the Appellate Court disagreed with the determinative factors that the circuit court used in deciding where to place Ashley. The fact that the biological parents stopped using drugs or finally showed an interest in their five year old child was not the determinative criteria to decide the best interest of Ashley.¹⁵⁶ Thus, the court remanded the case for a new hearing on the bio-

and the biological parents. *Id.*

148. *Id.* at 913. The judge ordered that the petition to vacate the guardianship order and return custody of Ashley to her natural parents should be continued to another date. *Id.*

149. *Id.* at 914.

150. *Id.*

151. *In re Ashley K.*, 571 N.E.2d 905, 915 (Ill. App. Ct. 1991).

152. *Id.*

153. *Id.* at 916.

154. *Id.* at 922. The court found that when the facts were construed in favor of the biological parents, at best they demonstrate that although they have a 10 year history of drug abuse, repeated prostitution, child neglect, child abandonment and forgery conviction, they stopped using drugs for a 13 month period. *Id.* The court further held that the drug free period consisting of 13 months is "negligible when [considering the risk of] recidivism for heroin and cocaine addicts and the kind of risk that is involved in putting a child of Ashley's age in the environment that drug addiction breeds." *Id.*

155. *Id.* at 923.

156. *In re Ashley K.*, 571 N.E.2d 905, 923 (Ill. App. Ct. 1991).

logical parent's petition for custody of Ashley.¹⁵⁷

As demonstrated by the tragic story of Ashley K.,¹⁵⁸ the "best interests of the child" standard in termination proceedings is vague at best.¹⁵⁹ The Appellate Court's sharp disagreement with the lower court's decision demonstrates how an intermediate standard results in inconsistent decisions. Given the enormity of the interests at issue and the finality of the court's decision,¹⁶⁰ an ambiguous standard for termination of parental rights does not adequately address the situation or protect the children.¹⁶¹ Fos-

157. *Id. Compare with In re A.W.*, 569 A.2d 168 (D.C. 1990). In *In re A.W.*, a mother gave birth to a baby suffering from drug withdrawal; consequently, she agreed to commit the child to the Department of Human Services (DHS). *Id.* at 169. Additionally, she promised to maintain a regular schedule of visits with her baby and complete a drug counseling program. *Id.* The mother, however, failed the drug program and began to abuse drugs again; subsequently, she was incarcerated. *Id.* DHS officials recommended the termination of the mother's parental rights. *Id.* This action by the DHS prompted the mother to assert her desire to be reunited with A.W. *Id.* Despite the mother's argument that termination was premature because no adoptive parents had been identified for A.W., the District of Columbia's Court of Appeals held there was clear and convincing evidence to support a decision that termination was in the best interests of the child. *Id.* at 168. Chief Justice Rogers dissented, asserting that the majority made no reference to the significant evidence that the mother requested visitation with her child and expressed the desire to be reunified with A.W. *Id.* at 176 (Rogers, C.J., dissenting). Moreover, the dissent argued that this was a premature termination of the mother's parental rights. *Id.* at 177. Rogers reasoned that A.W. would be subjected to the very circumstances that the court seeks to avoid: "the agony of a rootless child who remains adrift in the foster care system without any permanent familial relationships." *Id.* Thus, Chief Justice Rogers seriously questioned whether A.W.'s best interests were adequately assessed. *Id.*

158. *In re Ashley K.*, 571 N.E.2d at 905. Ultimately, Judge Robert Smierciak ruled that Ashley would remain in her natural parent's home with regular visits with her foster parents. Rob Karwath, *Judge Heeds 'Sarah'; Rules for Her Parents*, CHI. TRIB., Oct. 9, 1991, at C1. In addition, Judge Smierciak imposed intense monitoring of the biological parents to ensure that they were properly raising Ashley. *Id.* The main impetus for deciding that Ashley should remain with her biological parents was a report from two court appointed psychiatrists. *Id.* The psychiatrists told Judge Smierciak that uprooting Ashley from a second family would be even more traumatic than her original removal from the Procopios. *Id.* Judge Smierciak did not view his decision as a victory for the birth parents or a loss for the adoptive parents. *Id.* According to Judge Smierciak, this was a victory for the little girl and her chance for a start of a normal life. *Id.*

159. *In re A.W.*, 569 A.2d at 176 (Rogers, C.J., dissenting).

160. *Id.* at 169.

161. See Schneider, *supra* note 51, at 1815. Currently, popular opinion favors defining the grounds for intervention narrowly and specifically so that the state is allowed to act only when the child suffers or risks severe physical or mental injury. *Id.* This approach decreases intervention based on value judgments concerning appropriate child-rearing practices. *Id.* In light of the seriousness of the court's decision to intervene in a family, intervention should only be allowed where there is a clear-cut decision, openly and deliberately made by responsible political bodies. *Id.* at 1816. Value judgments should not be decided by the individual opinions of

ter care placement and termination proceedings are not effectively remedying the problem of drug use among pregnant women; therefore, prosecutors have resorted to criminally prosecuting these mothers.

III. THE CRIMINAL PROSECUTION OF DRUG-ABUSING MOTHERS

"Two of the great problems of our democratic society . . . [are] drug use and parents who apparently show no responsibility for their children."¹⁶² A judge in an Illinois trial court characterized these types of irresponsible mothers as "time bombs."¹⁶³ This Part examines the debate among state courts of whether criminal liability should be imposed on pregnant women using drugs. This Part also examines the possible repercussions that may occur from imposing criminal liability on a crack-addicted mother.

A. *The Criminal Prosecution of Drug-Abusing Mothers Under State Drug Trafficking Laws*

Prosecutors nationwide are fed up with pregnant mothers using cocaine and escaping punishment.¹⁶⁴ In a crusade to bring about justice, they have tried to criminally prosecute women for

hundreds of nonaccountable decision-makers. *Id.*

162. *People v. Bedenkop*, 625 N.E.2d 123, 130 (Ill. App. Ct. 1993) (Murray, J., concurring).

163. *Id.* at 129. The defendant pleaded guilty to possession of a controlled substance with intent to deliver and delivery of a controlled substance and was sentenced to two years' probation. *Id.* at 124. When the defendant failed to "appear and report," a petition to revoke her probation was filed. *Id.* At the revocation hearing, the court learned that the defendant gave birth to an infant addicted to cocaine. *Id.* at 125. Additionally, the court learned that the defendant's two other children were also exposed to cocaine in utero. *Id.* at 128. The judge was outraged and asked the defendant, "[h]ow many more times am I going to allow you to become pregnant and to have more children damaged by their exposure to cocaine in your womb?" *Id.* The judge further stated that he did not want to see that woman become pregnant again for fear that she may endanger the life or quality of life of another child. *Id.* at 129. The judge sentenced the defendant to seven year's imprisonment. *Id.* at 125. The defendant appealed and the Appellate Court of Illinois reversed and remanded the lower court's decision. *Id.* at 130. The court reasoned that the defendant was deprived of her due process rights when the lower court broadened the scope of her revocation proceeding without providing her notice; the petition to revoke defendant's probation only referred to her failure to report, not to her drug use while pregnant. *Id.* at 125.

164. See *Pregnant Addicts*, *supra* note 78, at 5. Eve W. Paul, director of legal affairs at Planned Parenthood Federation in New York commented, "I'm fed up with seeing damaged babies born who have lost the right to make what they can out of life. And, as the years go by, I don't see that the courts have had any impact." *Id.* Ms. Paul also believes that society cannot promise that people will have unlimited rights to have a child forever. *Id.* "We license people to cut hair but we don't have to have any kind of training to have a child. What's more important — a bad hair-cut or a permanently damaged child?" *Id.*

giving birth to children who test positive for drugs.¹⁶⁵ Prosecutors have attempted to charge these mothers with delivering drugs to a minor via the umbilical cord.¹⁶⁶ Delivering drugs to a minor is a felony drug charge carrying a possible jail sentence of thirty years.¹⁶⁷

The first case that brought nationwide attention to the issue arose in Florida in 1989.¹⁶⁸ Jennifer Johnson admitted to the baby's pediatrician that she used cocaine the night before she delivered her child.¹⁶⁹ She was indicted and convicted of two counts of delivering a controlled substance to her minor child in violation of Florida's drug delivery statute.¹⁷⁰ The lower court found that Johnson "delivered" cocaine to her two children "via blood flowing through the umbilical cords in the sixty to ninety second period [after birth] but before the cords were severed."¹⁷¹

On appeal, the Florida Appellate Court upheld the decision.¹⁷² The Florida Supreme Court, however, eventually re-

165. See, e.g., *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991) (dismissing a felony charge against a mother for delivering cocaine to her fetus through the umbilical cord); *People v. Morabito*, 580 N.Y.S.2d 843 (N.Y. City Ct. 1992) (dismissing a felony charge of child endangerment against a mother who smoked crack while pregnant).

166. Wendy Chavkin, *Help, Don't Jail, Addicted Mothers*, N.Y. TIMES, July 18, 1989, at A21. See *Hardy*, 469 N.W.2d at 55 (Reilly, J., concurring). The Michigan Court of Appeals held that cocaine used by pregnant woman and transferred to her baby through the umbilical cord is not the type of conduct that the legislature intended to be prosecuted under the delivery of cocaine statute. *Id.* The court noted, however, that the court's decision that the mother cannot be charged with delivery of a controlled substance will not interfere with prosecution for the less serious offense of possession of an illegal drug. *Id.* The court stated that the defendant may properly have been charged with possession of cocaine when she admitted to smoking crack. *Id.* at 53.

167. Chavkin, *supra* note 166, at A21. This is commonly the charge made against drug dealers. *Id.*

168. *Johnson v. State*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991) *rev'd*, 602 So. 2d 1288 (Fla. 1992).

169. *Johnson v. State*, 602 So. 2d 1288, 1291 (Fla. 1992).

170. *Id.* The Florida Statute provides:

It is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years, or to use or hire a person under the age of 18 years as an agent or employee in the sale or delivery of such a substance, or to use such person to assist in avoiding detection or apprehension for violation of this chapter. Any person who violates this provision with respect to: (A) A controlled substance . . . commits a felony of the first degree . . .

FLA. STAT. ANN. § 893.13(4) (West 1994).

171. *Johnson*, 602 So. 2d at 1290.

172. *Johnson*, 578 So. 2d at 420. The court found that the appellant's arguments that the Florida Legislature declined to pass a child abuse statute which forbade Johnson's conduct and as to what pregnant mothers would resort to if they knew they may be charged with this crime were unimpressive. *Id.* The court simply stated in their two page majority opinion that Johnson violated Florida's delivery

versed the trial court's and Appellate Court's decisions.¹⁷³ The Florida Supreme Court reasoned that it was absurd to apply the delivery-of-a-drug statute to this scenario.¹⁷⁴ The court held that the Florida Legislature did not intend the Florida Drug Delivery Statute to encompass the delivery of an illegal drug from the womb to the placenta to the umbilical cord and to the newborn after a child's birth.¹⁷⁵

Prosecutors' attempts to hold pregnant drug addicts criminally liable include charging women under controlled substance statutes,¹⁷⁶ pure use statutes¹⁷⁷ and involuntary manslaughter statutes.¹⁷⁸ Some state prosecutors have successfully obtained convictions at the trial level; however, not one state supreme court has upheld such a conviction.¹⁷⁹ In the most recent case in Illi-

statute two times by taking cocaine into her pregnant body and causing the passage of that cocaine to her child through the umbilical cord after the birth of the child. *Id.* Specifically, the court found that Johnson voluntarily ingested cocaine, knowing not only that it would pass to her fetus, but also that the birth was imminent. *Id.* Thus, Johnson was deemed to know that an infant at birth is a person and a minor, and that delivery of cocaine to a minor is illegal. *Id.* The court stated that they could "reach no other conclusion logically." *Id.* In Justice Cobb's concurring opinion, he argued that if the Florida Legislature wished to exempt the transmission of cocaine through the umbilical cord from the Florida Drug Delivery Statute, it was their prerogative; however, the legislature had not done so. *Id.* at 421 (Cobb, J., concurring). Furthermore, Justice Cobb reasons that the court's function is not to set forth public policy reasons for actions taken or not taken by the legislature, but to apply the law. *Id.*

173. *Johnson*, 602 So. 2d at 1288.

174. *Id.* at 1292.

175. *Id.* at 1293. The court reasoned that criminal statutes must be strictly, not loosely construed. *Id.* at 1293. The court noted that the Legislature chose to treat the problem of drug exposed newborns as a public health problem and it expressly rejected imposing criminal sanctions via § 893.13(1)(c)1 of the Florida Drug Delivery Statute. *Id.* at 1293. In 1987, the Florida Legislature stated that no parent of a drug-addicted infant will be subject to criminal investigation solely on the basis of the child's drug dependency. *Id.* In justifying this policy, the House stated that its primary goal is to keep families intact. *Id.*

176. Shona B. Glink, *The Prosecution of Maternal Fetal Abuse: Is This the Answer?*, 1991 U. ILL. L. REV. 533, 544 n.129. Prosecutors in Florida, Illinois, Colorado, South Carolina, Michigan and Indiana attempted to charge women under their controlled substance statutes. *Id.*

177. *Id.* at 551. Pure use statutes, which make it a crime to use drugs, have been passed in only a few states. *Id.* If this statute were used to prosecute pregnant women using drugs, the mother would be penalized for using an illegal drug, not for harming her fetus. *Id.* Moreover, using pure use statutes to prosecute drug abusing mothers raises evidentiary problems of proof and most states are reluctant to pass pure use statutes to prosecute drug-addicted mothers. *Id.*

178. *Id.* at 551-52. State prosecutors from Rockford, Illinois in 1989 charged Melanie Green with involuntary manslaughter because her child was born with cocaine in her system and subsequently died. *Id.* at 552. The grand jury refused to indict Green. *Id.* They reasoned that the legislature did not intend for the manslaughter statute to impose criminal liability on a pregnant women for the death of her fetus. *Id.*

179. Marcy Tench Stovall, *Looking for a Solution: In re Valerie D and State*

nois, the Kane County State's Attorney Office decided to pursue felony drug-possession charges against three women who delivered cocaine-addicted children.¹⁸⁰ These cases may be the first time in Illinois that prosecutors charge a mother with cocaine possession while relying on the baby's blood for evidence.¹⁸¹ The chief of the Kane County Felony Division, John A. Barsanti, admitted that he did not find any case law in Illinois related to this type of prosecution.¹⁸²

At this time, no state law specifically holds a mother criminally liable for giving birth to a drug-addicted infant.¹⁸³ Applying state drug trafficking statutes to the passage of blood between a woman and a fetus as a delivery of a drug is extremely problematic.¹⁸⁴ Such an interpretation of the statute goes beyond the intent of the state legislatures in creating those laws.¹⁸⁵ Not only

Intervention in Prenatal Drug Abuse, 25 CONN. L. REV. 1265, 1270 (1993). One prosecutor commented that this is a "very minor setback" and that although he is not "sitting on rock-solid legal ground," something needs to be done. *Id.* at 1271. See also Glink, *supra* note 176, at n.176. Many prosecutors argue that they bring these suits to awaken the state legislatures for the need to enact legislation "to deal with the growing problem of drug-dependent infants." *Id.*

180. Kimberly, *supra* note 10, at 4. A Kane County grand jury indicted the first women on the felony drug charges in the summer of 1995. *Id.* The criminal cases against the women, however, are slowly proceeding because two of them have not been arrested for the felony charges. *Id.*

181. *Id.*

182. *Id.*

183. Letter from Theresa Wyatt, *supra* note 46. See H.R. RES. 2262, 86th Leg., 2d Sess., 1989 Ill. Laws. Illinois has left the issue of criminal liability on cocaine mothers unanswered. *Id.* For example, Illinois was in the process of amending its Juvenile Act to provide that a neglected minor includes a newborn infant who is physically dependent on a controlled substance. *Id.* When the amendment was on the floor for debate, Illinois Representatives McCracken and Young made it clear that this provision did not, in any capacity, answer the question whether a mother could be criminally charged if a controlled substance was found in the bloodstream of her infant:

Q: Would [this amendment] have any effect on the mother, in terms of any criminal effects or presumptions . . .

A: No.

Q: . . . Or . . . How . . . in terms of this Amendment in this Bill, is this . . . do you consider this merely a civil procedure to have no effect one way or another or do you consider this to be an alternative procedure, these instances to a criminal procedure?

A: No, no. It has nothing to do with the criminal procedure.

Q: So in terms of whether a mother could still be charged or would not be charged criminally, but would just be subject to being neglected parents, this Bill doesn't try to answer that question in either event?

A: No.

Id.

184. Margaret Phillips, Comment, *Umbilical Cords: The New Drug Connection*, 40 BUFF. L. REV. 525, 548 (1992).

185. *Id.* at 549. For example, Florida and Michigan legislatures sought to control

are there problems with this type of statutory interpretation of drug trafficking statutes, but there are also inherent problems with imposing any criminal liability on pregnant drug users.

B. The Inherent Problems of Imposing Criminal Liability On Mothers Who Use Drugs During Pregnancy

Opponents attack the criminal prosecution of crack mothers on the grounds that the criminalization infringes on the woman's right to Equal Protection under the Fourteenth Amendment,¹⁸⁶ the ban on punishing status under the Eighth Amendment¹⁸⁷ and the right to privacy as interpreted under the liberty guarantee of the Fourteenth Amendment.¹⁸⁸ Despite these arguments against the imposition of criminal liability on crack-mothers, criminal penalties for pregnant drug-abusers have widespread public support.¹⁸⁹ In a survey of fifteen states, seventy-one percent of

drug trafficking through their current statutes and did not intend for the statute to be applied to pregnant drug users. *Id.*

186. The Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Thus, any statute discriminating against a class of persons will be scrutinized to determine if it complies with the Fourteenth Amendment. Julia Elizabeth Jones, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1166 (1992). However, the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). The Court, in recognizing the inherent, fundamental differences between men and women, has upheld statutes which discriminate against a gender. *Michael M. v. Superior Court*, 450 U.S. 464, 470 (1981) (upholding a statute that held only men liable for statutory rape).

187. Phillips, *supra* note 184, at 555. Some critics argue that prosecuting mothers for delivering drugs to their fetuses is discriminatory treatment against pregnant women. *Id.* Moreover, critics argue that explicitly criminalizing drug use by pregnant women will subject women to disproportionate punishment because of their biological connection to their fetus. *Id.* at 554. See also Stovall, *supra* note 179, at 1274-75. Criminalization of prenatal drug use would impose a burden of state intrusion on pregnant women, a burden not borne by men or non-pregnant women. *Id.* at 1275. Additionally, criminalizing prenatal drug use is dangerously close to penalizing a woman for her status as an addict. *Id.* at 1276-77. However, the Supreme Court forbids punishment based on an individual's status as an addict. *Id.* at 1277.

188. Phillips, *supra* note 184, at 552. The Fourteenth Amendment argument is that drug delivery charges violate a mother's fundamental privacy right of procreation and the right to autonomy in reproductive decision making. *Id.* A violation of a women's fundamental right to privacy is justified if the state has a compelling interest in a viable child that overrides the defendant's privacy right. *Id.* Those in opposition to criminal prosecution of drug abusing mothers argue that there are less intrusive means for the state to guard its compelling interest, such as education, medical care and drug treatment programs for pregnant women. *Id.* See *infra* notes 203-08 and accompanying text for a discussion of the limited effects of education and prevention programs.

189. Mark Curriden, *Holding Mom Accountable: Roe v. Wade Does Not Prevent*

1500 people polled favored prosecuting women whose use of illegal drugs injured their unborn child.¹⁹⁰ After all:

If you raised your child in [a] wilderness and the child's malfunctions punished no one but yourselves, it would be none of their damn business. But if your child is to live with us, be educated by us, suffered by us, add to the crowd of us, we should have a say.¹⁹¹

Criminalization, however, may provoke the mother to further harm the person the law aims to protect by avoiding prenatal or postnatal care.¹⁹² Health care providers are concerned that if women fear that they will be criminally charged for their drug use during pregnancy, these mothers may actually avoid medical care in order to avoid detection for their substance abuse.¹⁹³ Consequently, the absence of prenatal and postnatal medical care places drug abusing mothers and their helpless children at even greater risk.¹⁹⁴

Furthermore, crack cocaine is considered one of the most powerful reinforcers in the world, "almost analogous to breathing."¹⁹⁵ For addicts, crack "is almost as compelling as breathing" and even "more compelling than the need for sleep or food."¹⁹⁶ Although a mother addicted to crack most likely recognizes the potential harm she can cause her fetus, she is unable to control her addiction.¹⁹⁷ As long as a mother lacks the power to control and ensure a healthy pregnancy, postnatal sanctions will neither affect her conduct nor protect the child's health.¹⁹⁸ Consequently, criminal sanctions may not be an effective deterrent because a drug-abusing mother is not a reality-based individual;¹⁹⁹ she is

Criminal Prosecution of Prenatal Child Abuse, 76 A.B.A. J. 50, 51 (1990).

190. *Id.*

191. MNOOKIN & WEISBERG, *supra* note 111, at 94.

192. Schneider, *supra* note 51, at 1837. The mother who is criminally prosecuted would be able to injure the child, the very person the law intervenes to protect. *Id.*

193. Stovall, *supra* note 179, at 1277. It defies common sense to discourage or drive pregnant women away from prenatal care. *Id.* at 1278.

194. *Id.*

195. *Id.* at 1279.

196. *Id.*

197. Note, *Rethinking Motherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1342 (1990). Maternal substance abuse does not derive from the mother's lack of incentive to protect the fetus, but her lack of control over the necessary conditions to ensure the health of her baby. *Id.* See also Chavkin, *supra* note 166, at 21A. The majority of pregnant mothers long to do what's right for their children. *Id.*

198. Note, *supra* note 197, at 1342. See also Chavkin, *supra* note 166, at 21A. Prenatal drug use will not be solved by policing pregnant women or jailing mothers. *Id.* These crack addicted mothers need treatment, not prosecution. *Id.*

199. Dr. Ira Chasnoff, *Fear Is Not a Deterrent*, in *Punishing Pregnant Addicts: Debate, Dismay, No Solution*, N.Y. TIMES, Sept. 10, 1989, § 4, at 5. Criminalization

controlled by her addiction and, thus, unable to do what she knows is best for herself and her child.²⁰⁰ The goal of the state is to protect and ensure healthy babies who are not drug-dependent; however, criminal sanctions alone are unlikely to accomplish that goal.²⁰¹ Punishing a crack mother by ordering her to serve time in jail subjects her baby to the punishment of temporary foster care.²⁰² The overreaching principle is that if the state aims to reach and protect the children, it must first reach the mothers.²⁰³

IV. LEGISLATIVE AND JUDICIAL RESPONSE TO DRUG USING MOTHERS: A CHANGE IN POLICY

Ideally, the most important and effective method of dealing with cocaine use by pregnant women is prevention.²⁰⁴ Our history of success, however, in prohibiting the use of illegal substances does not "inspire the hope that preventing cocaine use will occur quickly."²⁰⁵ For example, a hospital in South Carolina attempted to educate women about the damage they caused to their children by taking cocaine while pregnant.²⁰⁶ Unfortunately, the hospital workers did not convince many of the drug-addicted, pregnant women to enter a drug treatment program. Most of the women did not even return for any type of prenatal care.²⁰⁷ Despite the of-

is just a short-term, knee-jerk solution that will not accomplish anything in the long run. *Id.*

200. Dr. Jan Bays, *People Are Talking About Sterilization, in Punishing Pregnant Addicts: Debate, Dismay, No Solution*, N.Y. TIMES, Sept. 10, 1989, § 4, at 5. Drug addicts, who have strong denial mechanisms, often rationalize that they will never be caught. Chasnoff, *supra* note 199.

201. *Pregnant Addicts, supra* note 78, at 5. "Criminalizing is a barbaric approach to deal with someone who is sick." Eve W. Paul, *Barbaric Approach to an Illness, in Punishing Pregnant Addicts: Debate, Dismay, No Solution*, N.Y. TIMES, Sept. 10, 1989, § 4, at 5. This frustrating problem calls for protective action, not punishment. *Pregnant Addicts, supra* note 78, at 5.

202. See *supra* notes 85-91 and accompanying text for a discussion of the effects of foster care on children.

203. See *In re Valerie D.*, 613 A.2d 748, 752 (Conn. 1992).

204. Robert Horowitz, *Perinatal Substance Abuse: A Coordinated Public Health And Child Welfare Response*, 19 CHILDREN TODAY 8, 8 (1990). Prevention is the cheapest and easiest remedy to attempt. *Id.* Prevention methods entail education about the effects of drug use while pregnant. *Id.* This may reduce the number of drug addicted mothers; however, it will not eliminate the problem. *Id.* For instance, recent attempts to educate pregnant women about the effects of taking legal drugs, such as anti-acne drugs, have not halted the use of these drugs by mothers. *Id.*

205. Linda C. Mayes et al., *The Problem of Prenatal Cocaine Exposure*, 267 JAMA 406, 408 (1992).

206. Charles Molony Condon, *Clinton's Cocaine Babies: Why Won't the Administration Let Us Save Our Children*, POL'Y REV., Spring 1995, at 12.

207. *Id.*

fer of free drug treatment and free prenatal care, few women voluntarily participated in the program.²⁰⁸ South Carolina's drug rehabilitation specialists asserted that "unless you have sanctions in place, unless you understand the basic irresponsibility of these drug-addicted women, it won't work."²⁰⁹

Thus, this Part proposes a change in state laws to effectively protect the best interests of a drug exposed child. This Part first discusses programs that successfully protect the children. This Part then proposes an ideal program that protects the health of the child, while also preserving the integrity of the family unit.

A. A Model Solution: South Carolina's Crack Prevention Program

The state must force crack-addicted mothers to realize their responsibility to seek treatment and to protect their children.²¹⁰ After all, if a mother injected cocaine directly into the tiny arm of her newborn baby, causing permanent brain damage or death, that mother would certainly be arrested and prosecuted to the fullest extent allowed by law.²¹¹

Several years ago, Charleston's Medical University of South Carolina (MUSC) effectively addressed the problem of cocaine abuse during pregnancy.²¹² Accordingly, the MUSC and the office of the circuit solicitor in South Carolina presented all pregnant mothers who tested positive for cocaine use with a choice: the women could either seek drug treatment or face arrest and possible jail time.²¹³ The results of this "crack-baby" prevention program clearly demonstrates that it was a success.²¹⁴ Prior to the institution of this program, approximately twenty-four pregnant mothers a month tested positive for cocaine at the hospital.²¹⁵ Almost none of these women were willing to seek help

208. *Id.* Many of the women were poor and uneducated and received free counseling from the hospital. *Id.*

209. *Id.*

210. Mark Curridan, *Crack Addicted Mother Faces Charges*, ATLANTA J. & CONST., June 5, 1991, at D1. See, e.g., Scott Bronstein, *The Crack Epidemic; Saving Not One Life — But Two; Project Prevent: Grady Program Treats Pregnant Women Addicted to Cocaine; Before They Give Birth, Helping Both Mother and Child*, ATLANTA J. & CONST., Nov. 28, 1991, at E1 (telling a series of success stories of pregnant crack mothers and the program that helped them). It is important to note that this program was a voluntary program, not one in which the state mandated treatment.

211. Condon, *supra* note 206, at 12.

212. *Id.* The MUSC could not continue to watch the birth of crack babies and pay the increasingly high price in dollars and human suffering. *Id.*

213. *Id.*

214. *Id.* This was one of the first "crack-baby" prevention programs in the nation. *Id.*

215. *Id.*

voluntarily.²¹⁶ After the implementation of the tough amnesty program in 1989, the number of mothers testing positive for cocaine decreased to five or six a month.²¹⁷

The basis of the program was "not only a carrot, but a real and very firm stick."²¹⁸ The cocaine-baby program brought personnel from various groups and agencies to the table, including social workers, Charleston County substance abuse and drug-rehabilitation specialists, law-enforcement officials, hospital officials and prosecutors from the office of the circuit solicitor.²¹⁹ Whenever a pregnant mother tested positive for drugs, the hospital staff counseled the woman about the consequences of drug abuse during pregnancy.²²⁰ In addition, the solicitor's office presented the mother with a letter informing her that she faced arrest and prosecution if she refused drug treatment.²²¹ The solicitor's office also promised to drop all charges against the woman if she successfully completed a drug-treatment program.²²² Most of the pregnant women who tested positive for crack cocaine agreed to enter the drug program. Those women who refused the treatment were arrested, but later agreed to enter the program once they saw that the hospital was serious.²²³

Politically correct resolutions by the American Medical Association and the American Pediatrics Association labeled the program as punitive and unwise.²²⁴ Subsequently, the Clinton Ad-

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* The office of the circuit solicitor made it clear that he was willing to prosecute when necessary. *Id.*

220. *Id.*

221. *Id.* Crack cocaine use is a felony in South Carolina. *Id.* The program was asking pregnant mothers to enter the program in good faith to stop abusing their unborn children with illegal drugs. *Id.*

222. *Id.* The hospital's goal in the crack-cocaine prevention program was to produce a healthy child. *Id.*

223. *Id.* Only two women continued to refuse treatment. *Id.* They were ultimately placed on probation. *Id.*

224. *Id.* Without any evidence, the Secretary of Health and Human Services, Donna Shalala, claimed that the program had "a chilling effect on minority pregnant women seeking prenatal health care." *Id.* Despite the fact that most of the women treated were black, the Police Chief, who was also African American, stated that this policy was not discriminatory. *Id.* He stated that cocaine use is more common in South Carolina among blacks than whites, and that he was glad to see that somebody was finally doing something to help the children in the black community. *Id.* Additionally, a federal judge refused to issue an injunction against the hospital to suspend the drug testing program because he found no basis for the discrimination charges. *Id.* See also Curridan, *supra* note 210, at D1. Placing criminal sanctions on a pregnant woman for drug use during pregnancy is punitive and turns pregnancy into a crime. *Id.* Prosecution of these women will "scare away the wom-

ministration, misguided by its notion that a woman's privacy rights are more fundamental than a mother's most basic responsibility to her own child, forced the end of a program that was clearly saving lives.²²⁵ Despite a report conducted by the Office of National Drug Control Policy in 1992 that the "criminal justice system can steer offenders toward drug treatment as a condition for deferred prosecution," the Clinton Administration chose to ignore the practical solutions the program achieved.²²⁶

The cocaine prevention program was neither designed as a punitive measure nor as a method to put people in jail.²²⁷ These types of programs are not designed to scare away crack-addicted mothers, but rather to instill in them a sense of responsibility to seek drug treatment.²²⁸ Ultimately, these crack prevention programs are a major "humanitarian effort to save lives through tough, decisive action under urgent circumstances."²²⁹

B. Proposed Legislative and Judicial Change

The sole purpose of any effort to combat prenatal drug use should be to protect the child and to serve the child's best interests.²³⁰ A crack-addicted mother does not have any right to take illegal drugs; thus, the protection and best interests of the child must be the state's top priority.²³¹ The state has a responsibility to uphold the right of children to be born drug-free and to hold accountable those who break the law.²³²

This Note proposes that state legislatures adopt a revised version of the crack prevention program instituted by the Medical University of South Carolina. The mission of the state program should be to provide a safe home for the children with their biological family by requiring aggressive treatment and

en most in need" of prenatal care. *Id.*

225. Condon, *supra* note 206, at 12. The Clinton administration stated that it would withhold millions of dollars from the Medical University, stop all Medicaid assistance, shut down its children's hospital and cancer center, discontinue numerous medical services, close down its 558 beds and ultimately force the hospital to turn away its patients, merely to stop a program that offended the liberal sensibilities of President Bill Clinton. *Id.* Ultimately, the President's administration held a gun to the hospital's head and forced them to give up a program they believed in. *Id.* The hospital had no choice; it had to protect all of its other patients. *Id.*

226. *Id.* Most drug and law enforcement officials agree that cocaine addicts need a strong motive to mend their destructive ways. *Id.*

227. *Id.* The program helped women invariably avoid going to jail. *Id.*

228. Bronstein, *supra* note 210, at E1.

229. Condon, *supra* note 206, at 12.

230. See John E.B. Myers, *A Limited Role for the Legal System in Responding to Maternal Abuse During Pregnancy*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 747, 754-55 (1991).

231. *Id.* at 751-52.

232. Murtaugh & Capra, *supra* note 9, at 353.

rehabilitation.²³³

Under such a revised crack prevention program, a woman who is pregnant and found using illegal drugs or a woman who gives birth to an infant who tests positive for drugs would be given an option to either successfully complete a rehabilitation program or to lose her parental rights. In either situation, public health and child protection teams should conduct joint interventions.²³⁴ Both teams would set forth a written treatment plan for the mother and child, including the amount of time she has to complete such a plan.²³⁵

It is crucial that the intervention plan differentiate between these developmental impairments caused by prenatal cocaine exposure and those that are the effects of inadequate prenatal care.²³⁶ The public health nurse would assess the drug dependency of the mother and prescribe appropriate treatment needed to restore her to health.²³⁷ Services, such as drug treatment, health care and family support assistance, would be mandatory.²³⁸ Also, a child protection worker would closely monitor the child to help ensure the child's safety from further abuse.²³⁹ For the infant, such services would include adequate nutrition, health care and early developmental intervention programs.²⁴⁰

The coordination of the required child services and drug rehabilitation is also important.²⁴¹ Keeping multiple appointments in different sites is difficult for mothers with infants, especially mothers with a history of using drugs.²⁴² Thus, providing pediatric health care, drug treatment, child development and family planning in one location with one appointment system would help facilitate a mother's compliance with the system.²⁴³ Home visits by the state's social service agency are also important.²⁴⁴ Home

233. See France Griggs, *Mission Is to Find Safe Homes*, CIN. POST, Dec. 26, 1994, at 6A.

234. Horowitz, *supra* note 204, at 8.

235. *Id.* The written case plan must not, in any way, be deficient because efforts to later terminate parental rights may be defeated. *Id.*

236. Mayes et al., *supra* note 205, at 408.

237. Horowitz, *supra* note 204, at 8.

238. Mayes et al., *supra* note 205, at 406. See also Treaster, *supra* note 63, at A1. Mothers should be taught how to calm irritable cocaine babies and how to get the babies to suck for proper feeding. *Id.*

239. Horowitz, *supra* note 204, at 8.

240. Mayes et al., *supra* note 205, at 408.

241. *Id.*

242. *Id.*

243. *Id.* The National Commission on Infant Mortality suggested that "one stop shopping" may be the most effective system. *Id.* See e.g., Treaster, *supra* note 63, at A1. The most intense counseling and assistance program provided by a state would approximately cost \$16,000 a year, as compared to \$15,000 - \$20,000 for foster home care. *Id.*

244. See, e.g., Kne, *supra* note 37, at 253. Successful intervention can only occur

visits give social workers the opportunity to meet with the family as their advocates rather than adversaries, sharing and creating mutual goals for the child's nurture and development.²⁴⁵

However, if the mother failed to remedy the conditions set forth in the treatment plan, the parent's failure would sustain a termination action.²⁴⁶ Initially, the intervention plan will provide the mother with a period of time to remedy the problem; however, the plan will not allow years of effort.²⁴⁷ Whereas one or two years may have been the norm to wait before termination of parental rights, many states are increasingly adopting a shorter time period of three to six months.²⁴⁸ Thus, the treatment plan would require that a mother successfully complete her rehabilitation in a strict, minimal period of time, or otherwise face a termination action filed by the state.²⁴⁹

This program is a "one chance" opportunity. In other words, the mother is given the option to comply with the intervention program or immediately lose her parental rights.²⁵⁰ If she agreed to the intervention program but failed to successfully complete it in the limited time estimated in her plan, the state would terminate the mother's parental rights. There would not be another chance for her to complete the program. It is one strike and you're out!

This type of program seeks to protect the best interests of the child, keeping the child in his own home with his biological parents.²⁵¹ It works at much greater speed than the current system,

with cooperation from the home front. *Id.*

245. *Id.* If parents play an active role in the intervention plan and are kept well informed of their child's progress they are more likely to support the treatment plan and see more positive attributes in their children. *Id.*

246. Horowitz, *supra* note 204, at 8.

247. *Id.*

248. *Id.* Some states, acknowledging that instability has detrimental effects on infants, have required periods of less than three months to prove that a parent's rights should be terminated. *Id.*

249. *Id.* By avoiding foster care, the costs absorbed by the state significantly decrease. See Phoebe Wall Howard, *Lawsuit Against State to Help Foster Children Threatened. The Department of Human Services is Supposed to Find Adoptive Parents for Some Foster Children*, DES MOINES REG., Sept. 21, 1994, at 4. The average yearly cost to the state of maintaining a child in adoptive placement is approximately \$3900. *Id.* The average cost for maintaining a child in foster care is roughly \$10,000 - \$40,400. *Id.*

250. See DeBettencourt, *supra* note 10, at 17. The child would consequently be placed with an adoption agency. *Id.* When reunification is impossible for a baby and a mother addicted to drugs, adoption is in the best interest of the child. *Id.* See also Craig, *supra* note 65, at 41. For every child that is ready and able for a permanent home, there are scores of families waiting to adopt a child. *Id.* The idea that adoptive parents only want "healthy, white babies" is a myth. *Id.* There are waiting lists for parents willing to adopt white children, black children, Hispanic children, Down's Syndrome children and AIDS children. *Id.*

251. DeBettencourt, *supra* note 10, at 17. When the state removes a child from a

while being more sensitive to a child's need for stability and proper care.²⁵² By allowing recovering addicts to care for their infants at home will not leave open the risk of abuse and neglect because the state will continually monitor the mothers and infants; if the city does find neglect or abuse, the state has the recourse to immediately file a petition to terminate a parent's rights.²⁵³ This type of program will give children the opportunity to stay with their biological parents, thus giving these parents an incentive to stop using cocaine and to commit to treatment.²⁵⁴ This program is not designed to scare mothers away from seeking prenatal or postnatal care; it simply encourages a mother to take responsibility for the child she brought into this world.²⁵⁵

CONCLUSION

State courts and legislatures can never ensure that an unborn child will not be exposed to drugs.²⁵⁶ This type of protection can only come from mothers who take responsibility for the lives of their children.²⁵⁷ Currently, the government raises these drug-addicted children.²⁵⁸ It is time, however, for the government to squarely place this responsibility on the parent's shoulders where it belongs. "[I]t takes more to being a parent than being one of the sexual partners to the physiological formation of a child."²⁵⁹ If the parent does not want that responsibility or cannot handle it, why should the child suffer? Cocaine-addicted babies were once abused by their own mother; now it is time to

mother addicted to cocaine, the state's first preference is reunification with the biological parents. *Id.* See also Toufexis, *supra* note 10, at 56. In one study, 300 cocaine-exposed infants and their mothers immediately received intensive postnatal intervention. *Id.* "Of [the] 90 children tested at age three, 90% showed normal intelligence, 70% had no behavioral problems, and 60% did not need speech therapy." *Id.*

252. See, e.g., Andrea Neal, *Agreement Puts Foster Children First: Board Sets Goals to Speed Placement of Youngsters Stuck in Welfare System*, INDIANAPOLIS STAR, Jan. 6, 1994, at E1.

253. Treaster, *supra* note 63. The children are spared the cold, impersonal and unstable experience of life in a foster home. *Id.* Since the state would be making efforts to end the mother's drug use and to strengthen the family, the child is given the chance to live in his own home with his own biological parents. *Id.*

254. *Id.* This type of program can break the cycle of a mother giving birth to a cocaine baby, placing the child in foster care, going back to the streets and giving birth to another cocaine baby. *Id.*

255. Lacayo, *supra* note 14, at 22.

256. Jill Severn, *Government Alone Unable to Save America's Children*, SEATTLE POST-INTELLIGENCER, Nov. 11, 1994, at A15.

257. *Id.*

258. Severn, *supra* note 256, at A15.

259. *In re Doe*, 627 N.E.2d 648, 653 (Ill. App. Ct. 1993).

stop the system from abusing them, too.

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