# TAKING THE BABY BEFORE IT'S BORN: TERMINATION OF THE PARENTAL RIGHTS OF WOMEN WHO USE ILLEGAL DRUGS WHILE PREGNANT

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## I. INTRODUCTION

Several states allow a mother and child to be permanently separated for something the mother did before the child was born.[1] These states have made the use of illegal drugs while pregnant a ground for terminating a mother's parental rights. The intuition motivating such a policy is that drug users are bad parents, and the state protects children by removing them from such parents. Setting aside for the moment the question of whether pre-childbirth behavior should ever be a basis for evaluating parenting ability, the presumption in favor of termination is fundamentally ill conceived. Termination of parental rights is a drastic and unwise response to the public health problems caused by illegal drug use: drug use or addiction does not, ipso facto, make someone unfit to care for a child, although it may cause behaviors which constitute bad parenting. If those behaviors do emerge and they rise to the level of abuse or neglect, they would be sufficient legal ground for government intervention to protect the child in every state in the union. So, making drug use itself a ground for breaking up a family is unnecessary. Given that it also has various negative effects, including trammeling the constitutional rights of mothers and creating legal orphans,[2] the policy should be abandoned.

In this article, I argue that legal schemes that allow the termination of parental rights for prenatal drug use violate women's Fourteenth Amendment procedural and substantive due process rights.[3] The procedural due process issue is

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1. *See infra* Part II for examples of state schemes. Throughout this article I will pay particular attention to an Illinois statute that renders prenatal exposure to illegal drugs a ground for termination of parental rights. 750 ILL. COMP. STAT. ANN. § 50/1(D)(t) (2006). The explicit statutory scheme makes Illinois a good target for policy and constitutional analysis. As I argue in Part II, however, a statute like Illinois's is not a prerequisite for a state to have a policy of terminating the parental rights of women who use drugs during their pregnancies. Other states' schemes are no less problematic for the lack of an explicit statute.

2. Martin Guggenheim uses this phrase to describe children who have no legal parents because their parents' parental rights have been terminated and they have not been adopted. Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 137 (1995).

3. U.S. CONST. amend. XIV, § 1.

that, under these schemes, drug use during pregnancy creates a presumption that precludes an individualized determination as to parental fitness. The substantive due process problem is that these schemes fail the strict judicial scrutiny they deserve because there are alternative means to serve the proffered ends that are less restrictive of individuals' constitutional rights. This article argues that laws terminating parental rights for prenatal drug use violate due process and should be struck down.

In Part II, I describe certain state schemes that allow a mother's parental rights to be terminated if she used drugs during her pregnancy. I will introduce an Illinois statute on the subject, which serves as a focal point for much of the rest of the article. In Part III, I investigate the connections between these laws and both gender stereotypes and anti-abortion activism. Understanding these connections is an important step toward seeing that despite the putative public health justifications, the termination laws are unconstitutional. Part IV considers whether these laws violate the Fourteenth Amendment's guarantee of due process, both procedural and substantive. Part V discusses an Illinois case, *In re O.R.*,[4] which provides an interesting case study because of the state's unique statute. In *O.R.*, pursuant to the state statute, a child was removed from her mother because of positive drug tests, even though the mother had beaten her addiction. The court never inquired into her fitness as a parent per se.[5] Throughout the article, I argue that laws making prenatal substance abuse a basis for the termination of the mother's parental rights are both unconstitutional and disastrous social policy.

One theme that pervades the literature and case law on this issue deserves some discussion at the outset. There is a common misconception that the use of illegal drugs during pregnancy constitutes unique and inevitable harm to the fetus. Popular media reports in the 1980s of "crack babies," children born retarded, unteachable, and aggressive because of fetal exposure to cocaine, were based on methodologically questionable studies that have since been discredited.[6] It is simply not the case that every exposure to an illegal drug causes harm to a fetus. The point is not that there are no risks associated with illicit drug use during pregnancy, but rather that the risks should not be overstated in a way that leads to drastic and ultimately unhelpful reactions to the problem. The use of certain illegal drugs during pregnancy, like many other behaviors legal and illegal, does increase the risk of negative health outcomes and undoubtedly constitutes a public health issue that deserves the attention of the government. However, that does not mean that every measure taken in response to the problem is a sound policy.

In this article, I argue that terminating the parental rights of women who used drugs while pregnant is both unconstitutional and unwise. It destroys fami-

4. 767 N.E.2d 872 (Ill. App. Ct. 2002).

5. *Id.* at 878.

6. *See infra* text accompanying notes 57, 59.

lies, which mothers have a constitutional right to maintain and governments have a policy interest in keeping intact, and it does not effectively address the public health problem.

## II.
## STATE LAWS ALLOWING THE TERMINATION OF PARENTAL RIGHTS FOR PRENATAL DRUG USE

A mother's parental rights may be terminated in a number of states if she uses drugs while pregnant. Sixteen states have statutes providing that the use of illicit or controlled substances during pregnancy is child abuse.[7] Other states allow prenatal drug use to be considered in determinations of child status as abused, neglected, dependent, in need of assistance, or the like, even without a statutory mandate.[8] While only one state, Illinois, has a statute explicitly providing for termination due to prenatal drug use, child welfare laws in all states may be used by judges or social services agencies to permanently remove children from mothers who used drugs while pregnant.

In Illinois, a "neglected child" includes "any newborn infant whose blood, urine, or meconium contains any amount of a controlled substance . . . with the exception of controlled substances or metabolites of such substances, the presence of which in the newborn infant is the result of medical treatment administered to the mother or the newborn infant."[9] A neglected child may be removed from the parents' custody if a court determines that removal would be "consistent with the health, safety and best interests of the minor."[10] The child may not be returned to the parent until a court finds that shelter care placement is no longer necessary for the child's protection.[11] Parents who do not comply with the service plan the Department of Children and Family Services creates for them and "correct the conditions which require the child to be in care," [12] risk

7. Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Maryland, Minnesota, Nevada, Rhode Island, South Carolina, South Dakota, Texas, Virginia, and Wisconsin each have statutes that deem the mother's use of illicit or controlled substances during pregnancy to be child abuse. GUTTMACHER INST., STATE POLICIES IN BRIEF: SUBSTANCE ABUSE DURING PREGNANCY 2 (2008), http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf.

8. *See infra* notes 29–31 and accompanying text.

9. 705 ILL. COMP. STAT. 405/2-3(1)(c) (2006). Maryland has a somewhat comparable scheme. Maryland law makes a positive perinatal toxicology a "consideration" in termination proceedings if "the mother refused the level of drug treatment recommended by a qualified addictions specialist . . . ." MD. CODE ANN., FAM. LAW § 5-323(d)(3)(ii) (West 2007).

10. § 405/2-10(2). ("In determining the health, safety and best interests of the minor to prescribe shelter care, the court must find that it is a matter of immediate and urgent necessity for the safety and protection of the minor or of the person or property of another that the minor be placed in a shelter care facility or that he or she is likely to flee the jurisdiction of the court, and must further find that reasonable efforts have been made or that, consistent with the health, safety and best interests of the minor, no efforts reasonably can be made to prevent or eliminate the necessity of removal of the minor from his or her home.").

11. *Id.*

12. *Id.*

the termination of their parental rights. For the mother of a child who was removed because of a positive toxicology at birth, complying with a service plan would presumably mean refraining from using drugs.

Illinois law goes further. It provides that mothers who give birth to babies with a controlled substance or metabolite thereof in their blood, urine, or meconium are thereby unfit parents. Courts are to presume a mother in this situation is "unfit to have a child, without regard to the likelihood that the child will be placed for adoption."[13] This presumption is not rebuttable if she has already had a child who was adjudicated neglected because of positive toxicology at birth.[14] A determination that a parent is unfit does not automatically result in termination of her parental rights under Illinois law; a hearing on the best interests of the child is still necessary. It does, however, expose the mother to the possibility of termination and puts her at a "disadvantage" in the best interests hearing.[15] This statutory scheme leads to the termination of mothers' parental rights for giving birth to babies with positive toxicology and being unable to overcome their drug addiction within a relatively short period—with no showing of harm to the baby required.[16] Even a mother who has made "outstanding" progress in overcoming her drug addiction will not be able to prevent the termination of her parental rights if she has given birth to more than one drug-exposed infant.[17]

In Florida, the law provides that "[u]se by the mother of a controlled substance or alcohol during pregnancy when the child, at birth, is demonstrably adversely affected by such usage" is "harm" and therefore constitutes child abuse if done willfully.[18] Child abuse is, of course, a ground for temporary removal of

13. 750 ILL. COMP. STAT. 50/1(D) (2006).

14. Title 750, section 50/1(D)(k) of the Illinois Compiled Statutes creates a rebuttable presumption of unfitness upon a child's confirmed drug test result at birth, while section 50/1(D)(t) provides for a finding of parental unfitness if the mother had "the opportunity to enroll in and participate in a clinically appropriate substance abuse counseling, treatment, and rehabilitation program," after she had another child adjudicated neglected on the basis of prenatal drug use. The latter may be unconstitutional given state appellate court rulings that irrebuttable presumptions of unfitness violate principles of equal protection and due process. *See, e.g., In re* H.G., 757 N.E.2d 864 (Ill. 2001) (holding that presumption of parental unfitness based upon time child spent in foster care violates due process guarantees of federal and state constitutions); *In re* D.W., 827 N.E.2d 466 (Ill. 2005) (holding that scheme which created irrebuttable presumption of parental unfitness under one statutory provision and rebuttable presumption under another violated equal protection).

15. *In re* D.W., 827 N.E.2d at 484 ("Clearly, a parent found unfit at the first phase of termination proceedings enters the second phase at a disadvantage from a procedural *and* evidentiary standpoint.").

16. The Department of Children and Family services is required to file a petition for termination of parental rights if the child has been in foster care for fifteen of the most recent twenty-two months. 705 ILL. COMP. STAT. 405/2-13(4.5)(a)(i) (2007). Early termination of reasonable efforts to reunify the family can also be ordered in certain circumstances, including a court's determination that "further reunification services would no longer be appropriate." § 405/2-13.1(1)(C)(i).

17. *See In re* O.R., 767 N.E.2d 872, 875 (Ill. App. Ct. 2002).

18. FLA. STAT. ANN. § 39.01(31)(g)(1) (West Supp. 2007).

the child.[19] It can also constitute grounds for termination of parental rights, if it is found to be "egregious conduct."[20] So while the statute does not explicitly make prenatal drug use a ground for the termination of the mother's parental rights, its interpretation in conjunction with that of the statute setting out the grounds for termination allows prenatal drug use to result in the termination of a mother's parental rights. In addition, courts in Florida have considered prenatal drug use to be a ground for the termination of the mother's parental rights even though no statute explicitly makes it so.[21]

Policies regarding abuse and neglect determinations and termination of parental rights can break up families even without statutes like those in Illinois and Florida. Courts in many states have found that evidence of drug or alcohol use by a mother during her pregnancy is relevant to removal or termination proceedings in the absence of an explicit legislative mandate.[22] Ohio's supreme court has held, in *In re Baby Boy Blackshear*, that "[w]hen a newborn child's toxicology screen yields a positive result for an illegal drug due to prenatal maternal drug abuse, the newborn is, for purposes of [the juvenile law], per se an abused child."[23] The court avoided finding that a fetus is a "child" for the purposes of the state's child abuse laws, reasoning instead that "a child born alive who tests positive at birth for addiction to cocaine suffers from abuse and continued abuse no matter when the original abuse occurred."[24] Thus, the pregnant woman's action before the birth of the child combined with the result that the child has a drug in its system after birth constitutes abuse.[25]

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19. §§ 39.401, 39.521.

20. § 39.806(1)(f).

21. *See, e.g.*, C.H. v. Dep't of Children & Families, 744 So.2d 1212 (Fla. Dist. Ct. App. 1999) (considering the mother's drug use during pregnancy in affirming a judgment of termination of parental rights with no reference to any statute providing that prenatal conduct can be a ground for termination).

22. *See, e.g.*, Matter of Baby X, 293 N.W.2d 736 (Mich. Ct. App. 1980) (holding, in the absence of statutory language, that a newborn suffering "narcotics withdrawal symptoms" as a consequence of prenatal maternal drug addiction may properly be considered a neglected child); Matter of Smith, 492 N.Y.S.2d 331 (N.Y. Fam. Ct. 1985) (holding, in the absence of statutory language justifying the result, that evidence insufficient to establish that prenatal maternal alcohol use caused harm to the fetus nevertheless can be sufficient to adjudicate a baby as a "neglected child").

23. *In re* Baby Boy Blackshear, 736 N.E.2d 462, 462 (Ohio 2000).

24. *Id.* at 464 n.2. The court equivocates among (1) an infant with a positive toxicology screen, (2) an infant who is addicted to a drug, and (3) an infant who has sustained injury due to the action of the mother. The court is wrong to assume that any human being with a drug in his or her system is addicted to that drug. The medical term "addiction" describes a pattern of behavior, which newborns simply cannot exhibit. The court may consider itself to be defining the presence of drugs in a newborn as an injury, but, as the dissent points out, whether a newborn is harmed by prenatal drug exposure is an individualized, medical question of fact. *Id.* at 466 (Cook, J., dissenting).

25. However, the court's language is inconsistent with this rationale when it implies that the "original abuse" occurred before birth. 736 N.E.2d at 464 n.2. In order for that to be possible, the fetus would have to be a child under the child abuse law. The court's claim that it is "apply[ing] the statute as written," 736 N.E.2d at 465, is also questionable. The statute applies to a child who

This judicial extension of the law is troubling in its breadth. The *Blackshear* court makes all children born with illegal drugs in their systems per se abused children, regardless of whether the drugs have caused any harm. In Ohio, a child who is adjudicated abused may be placed in "permanent custody of a public children services agency or private child placing agency."[26] Thus, it is possible for a mother to lose her parental rights solely because she used an illegal drug while she was pregnant, regardless of whether the child was harmed at all.

Similarly, a Texas appellate court has explicitly noted that the use of cocaine during pregnancy is a ground for termination regardless of whether the fetus was harmed.[27] Any child welfare scheme that allows a finding of child abuse or neglect based on perinatal positive toxicology can result in termination on basically the same ground, because reunification is typically conditioned on cessation of the mother's drug use, and termination is likely to come before the mother can overcome her addiction.[28]

Even in states without statutes or high court decisions on the matter, the parental rights of women who use drugs while pregnant may be subject to the zeal of state actors who are willing to interfere without a specific mandate from the legislature or judiciary.[29] Child welfare agencies can institute removal proceedings based on creative interpretations of child welfare statutes,[30] whether or not parental drug use poses any threat to the child's welfare.[31] Since judicial deter-

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suffers harm "because of the acts of his parents, guardian, or custodian." OHIO REV. CODE ANN. § 2151.031(D) (West 2008). When she uses drugs while pregnant, the woman is not yet the fetus's parent. So while the court may avoid extending the definition of "child" under the statute, it can do so only by extending the definition of "parent." The court also extends the definition of "harm." 736 N.E.2d at 466 (Cook, J., dissenting).

26. OHIO REV. CODE ANN. § 2151.353(A)(4) (West 2005) (providing that a grant of permanent custody to an agency is conditioned on the court determining "that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and . . . that the permanent commitment is in the best interest of the child.").

27. *In re* W.A.B., 979 S.W.2d 804, 806–08 (Tex. App. 1998) (applying statutory termination ground of engaging in conduct which endangers the physical and emotional well-being of a child to the case of pregnant drug use, despite a lack of support for the proposition that the statutory term "child" includes unborn fetuses).

28. *See infra* text accompanying note 107.

29. *See* Lynn M. Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 467 (2005) [hereinafter Paltrow, *Governmental Responses*] ("In some states that have not amended their laws, government officials have, by regulation or practice, extended existing civil child abuse laws to pregnant women despite the lack of legislative intent or specific authority to do so.").

30. For example, in a Texas case, the Department of Protective and Regulatory Services initiated a suit to terminate a mother's parental rights to her newborn after the child tested positive for cocaine at birth. *In re* M.A.C., 49 S.W.3d 923 (Tex. App. 2001). Texas has no statute authorizing the termination of parental rights on grounds of prenatal cocaine use.

31. A Massachusetts appellate court recounted with disdain the testimony of social workers who had removed a child and explicitly said that the parents showed no deficiency in their care of the child; the only reason for removal (which led to a judgment that the children be placed for adoption without the consent of the parents) was the parents' cocaine use. Adoption of Katharine, 674 N.E.2d 256, 260 (Mass. App. Ct. 1997).

minations in termination proceedings are guided by the wide-open "best interests of the child" standard, judges are free to remove children and terminate parental rights based on nothing more than their preconceptions about the harm that prenatal drug use causes and their conceptions of what mothers ought to be.

In general, once a child is determined to be abused or neglected because of prenatal substance abuse, the mother's substance abuse can become the basis for terminating her parental rights. This can be so whether or not there is specific statutory language permitting termination based on prenatal or continuing substance abuse. In practice, judges are often willing to consider drug use as a ground for termination even without a specific statutory mandate. A child welfare agency's determination that a child is abused or neglected based on prenatal substance abuse can be the first step in a governmental process that will end with the permanent removal of a child from her mother forever—a process the mother may be powerless to stop. In short, the power to decide whether these families will be destroyed lies in the hands of social workers and local judges. Statutes and reported appellate court decisions allowing or requiring termination of parental rights in cases of prenatal drug use reveal only part of the governmental practice of permanently breaking up families because of prenatal drug use.

## III.
## THE POLITICAL CONTEXT

While it may seem at first glance that drastic responses to drug use by pregnant women are justified by public health concerns, the policy of terminating parental rights should be examined within a broader context. As I will argue in Part IV, these laws are irrational as a means of protecting public health because the threat of termination does not serve the government's interest in fetal or children's health, and may actually harm those interests in addition to threatening mothers' constitutional rights. Though I contend that the public health rationale does not hold water, laws allowing termination of parental rights for prenatal drug users do serve other political goals. In this Part, I briefly discuss the connections between termination policies, patriarchal ideas of gender roles, and anti-abortion activism.

### *A. Patriarchal ideas of gender roles and ideal motherhood*

Punitive governmental reactions to drug use during pregnancy are in line with historical efforts by the government to control women's reproductive lives, and fit patriarchal notions of gender roles and "ideal mothers."[32] According to a patriarchal view, a pregnant woman's role as reproductive machine is her most

32. *See* Christa J. Richer, *Fetal Abuse Law: Punitive Approach and the Honorable Status of Motherhood*, 50 SYRACUSE L. REV. 1127, 1138 (2000) ("The ideology of a patriarchal society contains little concern for the rights of women, yet strongly defines the woman's duties as a woman and as a mother.").

important characteristic, one to which her own interests and humanity must be secondary. [33] Since women who deviate from this paradigm threaten not only the survival of the structure of gender roles, but also the survival of the race itself, they deserve to be punished. Within this framework, it is appropriate for the state to sever pregnant drug users' relationships with their children, since misconduct during pregnancy is taken as proof that the woman fails the model of the ideal mother. From this perspective, it is the state's place to decide which women satisfy the gender role stereotype of ideal motherhood and to separate those who do not from their children, for the good of those children. The fit between patriarchal ideas and termination policies for prenatal drug use does not necessarily mean that the governments behind these policies espouse patriarchy as an organizing principle of society or view it as a justification for the policies. Nor does it mean that the political problems with patriarchal thinking necessarily infect the policy of termination as a response to prenatal drug use. But it should make pressing a close examination of the proffered reasons for termination and its constitutionality, both of which I investigate in this article.

A possible influence from patriarchal structures is evident in the widespread failure to acknowledge that sexual abuse, domestic violence, and women's drug addictions correlate to a high degree: seventy percent of drug-addicted women were sexually abused before the age of sixteen.[34] Gender-based violence, harassment, and abuse are core social causes of substance abuse by women. Through harsh treatment of drug-addicted pregnant women, governments blame women for the consequences of the abuse they have suffered at the hands of men.[35]

Of course, governments also employ punitive responses to prenatal drug use other than termination. Fourteen states have mandatory reporting laws requiring health care workers who suspect a pregnant woman is using drugs to report her

33. Women's reproductive role has always motivated gender subordination in the United States, from the denial of suffrage and jury service to protective labor legislation. *See* April L. Cherry, *Roe's Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723, 741 (2004) (pointing out that the denial of women's admission to the bar and protective labor legislation were based on gendered social roles and that exclusion from jury service was based on the norm of the altruistic mother).

34. David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN'S L.J. 243, 258 (2001). In a substance abuse program for pregnant women in Wisconsin, over ninety-five percent of the clients "have a history of being brutally abused sexually and by other types of violence." *Hearing Before the Subcomm. on Nat'l Sec., Int'l Affairs, Criminal Justice, and Substance Abuse of the House Gov't Reform and Oversight Comm.*, 105th Cong. (July 23, 1998) [hereinafter *Hearing*] (statement of Francine Feinberg, Executive Dir., Meta House), reprinted in Federal Document Clearing House Congressional Testimony.

35. The fact that women are put into and expected to succeed in substance abuse treatment programs designed for men is another dimension of the gendered nature of government reactions to prenatal drug use. Traditional drug treatment is highly confrontational, an approach that many women, especially those facing trauma from domestic violence or sexual assault, do not respond to well. *See* Brody & McMillin, *supra* note 34, at 260–62.

to child welfare or law enforcement.[36] Four states require drug testing on suspicion of prenatal drug use.[37] Sixteen states designate prenatal drug use as child abuse by statute.[38] Statutes in Wisconsin, South Dakota, and Minnesota authorize the civil commitment of women who use drugs while they are pregnant.[39] In Wisconsin, the decision to take a pregnant woman into custody can be made by a law enforcement officer who "believes on reasonable grounds"[40] that there is a substantial risk to the health of the child. There is no requirement in the statute that law enforcement officers receive the medical training necessary for them to have any reasonable grounds on which to base such a belief. Based on learning that a woman was pregnant and using drugs, judges have chosen to sentence women to incarceration, or to longer sentences than they would otherwise face, for any crime that puts them in court.[41] Most disturbing, hundreds of women have been arrested and charged criminally for using drugs while pregnant under charges ranging from child abuse, to delivery of an illegal substance, to murder.[42]

The health and welfare of children and fetuses is obviously a legitimate public health concern and, as such, an appropriate area for state action.[43] Neverthe-

36. GUTTMACHER INST., *supra* note 7.

37. *Id.* These reports will likely lead to a determination that the child is abused or neglected, resulting in the child's removal, and often leading to permanent termination of parental rights. This partly explains how mandatory reporting statutes deter women from getting prenatal care.

38. *Id.* Judges in many more states likely make routine determinations that children whose mothers used drugs while they were pregnant are abused or neglected, even without statutory authorization.

39. *Id.*

40. WIS. STAT. ANN. § 48.193 (West 2006). Wisconsin law authorizes courts and law enforcement officers to take a pregnant woman into protective custody if they believe that the woman's "habitual lack of self-control in the use of alcohol beverages [or] controlled substances" creates a "substantial risk" to the health of the fetus. *Id.* A judge in Wisconsin may also order a pregnant woman to receive "special treatment or care." § 48.347. In South Dakota, the statute requires only that the person to be committed "habitually lacks self-control as to the use of alcoholic beverages or other drugs" and "[i]s pregnant and abusing alcohol or drugs." S.D. CODIFIED LAWS § 34-20A-70 (2006).

41. *See* Barrie Becker & Judge Peggy Hora, *The Legal Community's Response to Drug Use During Pregnancy in the Criminal Sentencing and Dependency Contexts: A Survey of Judges, Prosecuting Attorneys, and Defense Attorneys in Ten California Counties*, 2 S. CAL. REV. L. & WOMEN'S STUD. 527, 529–30, 547–50 (1993) (giving examples of increased sentences and reporting survey results showing that many judges think increased sentences are appropriate).

42. Paltrow, *Governmental Responses*, *supra* note 29, at 485.

43. The laws mentioned above are not all equally punitive; some serve more of a public health interest than others. Mandatory reporting statutes can be defended as a way of ensuring that state authorities, who are expert in child welfare, are aware of potential cases of abuse or neglect. Nevertheless, mandatory reporting laws are a threat to women's confidential relationship with their doctors. When combined with the other laws described, they are another way of stigmatizing women who fail to meet the model of ideal motherhood, with the disastrous consequence of making women justifiably worry that their doctor's medical assessment will lead to a government judgment of parental unfitness. They may thus deter women who are not "ideal mothers" from getting beneficial medical care through stigmatization and threats of punitive state action. *See* Barbara J. Prince, *The Special Needs Exception to the Fourth Amendment and How It Applies to*

less, patterns in both the type of threats to public welfare that are addressed and the means chosen to address them reflect the enforcement of gender roles (as well as class and race consciousness[44]). Environmental threats to child health, such as lead paint in urban areas of concentrated poverty,[45] do not create the same level of public outcry and legislative will as prenatal drug use. Compassionate and proven methods of addressing drug use, like providing substance abuse treatment, are passed up in favor of throwing women in jail and taking their children away.

This analysis has thus far focused on the conceptual fit between termination policies and patriarchal thinking. There is also some evidence that outright gender discrimination can play a part in governmental reactions to drug use by pregnant women. A survey of California judges found that a large majority would change their sentencing decision in a criminal case if the defendant were pregnant and addicted to drugs, and almost half would put a woman in jail until childbirth to prevent further drug use while pregnant.[46] The judges were also asked whether paternal drug use should be punished if drugs were shown to pass through male sperm to the fetus. Of those who said that fathers should not be punished, eleven percent said that "pregnant women should be incarcerated for harmful perinatal behavior."[47] These judges would punish women, but not men, for identical behavior having the same effect on the fetus.[48] It is likely that these discriminatory attitudes are due to the construction of women's unique role as reproductive machines and the duties associated with that role.

In addition to the potential for gender discrimination, some institutional features of the enforcement of punitive laws addressing drug use by pregnant women show great potential for disproportionate effects according to socioeco-

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*Government Drug Testing of Pregnant Women: The Supreme Court Clarifies Where the Lines Are Drawn in* Ferguson v. City of Charleston, 35 CREIGHTON L. REV. 857, 899–900 (2002).

44. *See generally* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

45. *See* Howard W. Mielke, *Lead in the Inner Cities*, 87 AMER. SCIENTIST 62, 62 (1999) ("Some groups, mainly minority and poor children living in the inner city, suffer from high rates of lead poisoning.").

46. Becker & Hora, *supra* note 41, at 547. Seventy percent of California judges said they would grant such a woman probation conditioned on drug treatment; fifty-six percent said they would decline to release her or set high bail until sentencing; and forty-six percent said they would sentence her to jail or prison until childbirth. *Id.* Shockingly, only about half of the judges surveyed responded that they would consider either incarceration conditions, women's civil liberties, or whether the law allows them discretion to consider fetal health in sentencing. *Id.* at 549. Apparently, these judges are as unconcerned with the scope of their legal authority as they are with the effects on the health of both woman and fetus of a pregnancy and possibly childbirth in a dirty cell with poor or no prenatal care. Moreover, drugs are often more available in jails and prisons than they are outside. *See* David F. Chavkin, *"For Their Own Good": Civil Commitment of Alcohol and Drug-Dependent Pregnant Women*, 37 S.D. L. REV. 224, 247 n.144 (1992).

47. Becker & Hora, *supra* note 41, at 549 (italics removed).

48. The survey shows only a small minority of judges have such blatantly discriminatory attitudes. It is possible, however, that more judges have the same bias affecting their decisions but either are not conscious of it or are not so bold as to admit it on a survey.

nomic class.[49] Poor women are more likely than their wealthier counterparts to be in contact with government entities because of their use of government services like welfare and public hospitals.[50] This increased contact with the state in turn increases the likelihood that any prenatal drug use will be brought to the attention of the state. Furthermore, poverty itself is most often the root cause of neglect determinations.[51] When a government shapes its child welfare policy around the stereotype of the ideal mother and that ideal is not compatible with the realities of poor people's lives, the state ends up taking poor mothers' children away regardless of the strength or quality of the family bond.

### *B. The intersection of anti-abortion activism and the "war on drugs"*

While the connection between termination for prenatal drug use and patriarchal ideas of gender and motherhood is somewhat tenuous, the connection between these policies and anti-abortion activism is clear. Laws creating novel punishments for prenatal drug use are fueled by the rhetoric of the anti-abortion movement and its efforts to create fetal rights under the law.[52] Since *Roe v. Wade*,[53] the anti-abortion movement has tried to add the concept of fetal personhood to all manner of laws.[54] That political force has combined with the frenzy of the "war on drugs" to make laws punishing women for being pregnant and addicted to drugs easy for legislatures to pass and courts to create.[55] The punitive nature of these laws is justified by the vilification of drug addicts, especially pregnant drug addicts. In the 1980s and 1990s, there was widespread, sensation-

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49. *See generally* Roberts, *supra* note 44.

50. *Id.* at 1432.

51. Deborah Paruch, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law & Policy*, 8 J.L. & FAM. STUD. 119, 140 (2006) ("[T]he vast majority of children in foster care are there because of parental neglect related to poverty."); Shannon DeRouselle, *Welfare Reform and the Administration for Children's Services: Subjecting Children and Families to Poverty and Then Punishing Them for It*, 25 NYU REV. L. & SOC. CHANGE 403, 418 (1999) ("Most cases of neglect involve poor and minority families.").

52. This rhetoric can be seen in judicial opinions interpreting or creating law in order to allow the state to break up the families of women who use drugs while they are pregnant. *See e.g., In re* Unborn Child, 683 N.Y.S.2d 366, 371 (N.Y. Fam. Ct. 1998). In *Unborn Child*, the court reasoned, "It defies logical reasoning that our laws and society would preclude a mother from illegally introducing narcotics and other illegal drugs into her child, and yet not protect the unborn child from those same dangers while the child is still in the womb." *Id.* However, the court's reasoning, which affords identical protections to a fetus and a child, has been rejected by the Supreme Courts abortion jurisprudence. Consider also the *Blackshear* decision, where the court, striving to treat fetuses as children under the statute without admitting it was doing so, concludes, "[i]t is clear that there can be no more sacred or precious right of a newborn infant than the right to life and to begin that life, where medically possible, healthy, and uninjured." *In re* Baby Boy Blackshear, 736 N.E.2d 462, 465 (Ohio 2000). The use of the phrase "right to life," which is intimately associated with the anti-abortion movement, is surely no accident.

53. 410 U.S. 113 (1973).

54. Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1000 (1999) [hereinafter Paltrow, *Pregnant Drug Users*].

55. *See id.* at 1021.

alist media reporting on the effects of illicit drugs, mostly crack cocaine, on fetuses.[56] The studies on which these reports were based were plagued with methodological problems such as small sample size and failure to control for key variables like poverty, poor nutrition, and concurrent use of other drugs, including alcohol.[57] The dire conclusions about inevitable and permanent harm from prenatal exposure to cocaine were questioned or discredited by later studies,[58] which received little coverage in major media sources. The irresponsible media coverage created armies of legislators and judges with misconceptions about the medical facts with respect to prenatal drug use, especially cocaine.[59]

Fetal rights advocates see any chance to give fetuses rights or to make them legal persons for any purpose as a potential nail in the coffin of *Roe*. The *Roe* Court specifically held that a fetus is not a person under the Fourteenth Amendment.[60] If fetuses were considered legal persons, the analysis of a woman's right to abortion would presumably change; the woman's right to control over her own reproduction would be countered not only by the state's interest in fetal life, but also by the legal rights of the fetus itself. Anti-abortion activists hope that, if fetal legal personhood is established, the fetus's right to life would outweigh the pregnant woman's reproductive rights. This is why the anti-abortion movement supports laws like the Unborn Victims of Violence Act of 2004.[61] Creating a separate crime for harming fetuses (as well as explicitly using the anti-abortion movement's rhetoric in the title of the act) puts another chink in the armor protecting women's reproductive rights.

Laws allowing the termination of parental rights due to prenatal drug use are a part of this broad strategy. Changing juvenile laws so that they cover fetuses is a way of changing the definition of "child" and related terms in state laws to include fetuses. Since children are persons for many legal purposes, the effect is to

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56. *See* Katherine Sikich, *Peeling Back the Layers of Substance Abuse During Pregnancy*, 8 DEPAUL J. HEALTH CARE L. 369, 396 (2005) (pointing out that the media chose to focus on the rise of crack use among African Americans in the 1980s, rather than on the preexisting and continuing use by white people of both powder and smokable cocaine).

57. *See* Paltrow, *Pregnant Drug Users, supra* note 54, at 1018 ("[D]ozens of studies now indicate that (1) the pharmacological impact of cocaine has been greatly exaggerated, (2) other factors are responsible for many of the ills previously associated with cocaine use, and (3) political and legal responses have done more to exacerbate than alleviate the situation of poor and/or drug-using pregnant women and their stigmatized children.").

58. *See* Paltrow, *Governmental Responses*, *supra* note 29, at 462.

59. The media focus on cocaine is surely part of the reason that "[t]here is a common belief shared by most judges surveyed that cocaine is clearly the most harmful drug to fetal health." Becker & Hora, *supra* note 41, at 542. That belief is unlikely to be based on surveys of the medical literature, which show that alcohol and cigarettes are the most dangerous drugs to fetal health. *See infra* notes 141–143 and accompanying text.

60. *Roe*, 410 U.S at 158.

61. *See, e.g.*, Amy Lotierzo, *The Unborn Child, A Forgotten Interest: Reexamining* Roe *in Light of Increased Recognition of Fetal Rights*, 79 TEMP. L. REV. 279 (2006) (arguing that the Unborn Victims of Violence Act of 2004 undermines the foundation on which *Roe* stands by threatening the assumption that "unborn children" are not legal persons).

make fetuses legal persons as well. For example, Florida law provides that willful "[u]se by the mother of a controlled substance or alcohol during pregnancy when the child, at birth, is demonstrably adversely affected by such usage" constitutes child abuse.[62] If the harm visited upon a fetus by the pregnant woman is child abuse, then the fetus must be a child.

The statutory scheme in Illinois does not redefine "child." But it does arguably create an interest on the part of the fetus that can be vindicated after birth. At the least, it provides for civil consequences for pregnant women's conduct, and such a scheme would surely be held up by someone arguing for fetal personhood in Illinois. Statutes providing that fetuses are persons for the purposes of wrongful death actions are routinely held up by prosecutors as establishing fetal rights that justify the arrest and prosecution of pregnant women who use drugs.[63]

Judges in New York family courts have made feeble attempts to expand the definition of the term "child." One judge held that an "unborn child" is a "person" under the Family Court Act, citing only a single law review article and distinguishing Roe and its progeny.[64] Another family court judge in New York held that the status of "legal personality" is conferred on fetuses by the state's Family Court Act, even though the statute contains no language justifying that conclusion.[65] The court offered what meager support it could muster for this extension of the law by pointing to such obviously irrelevant statutory provisions as, inter alia, those allowing paternity petitions to be filed before birth, recognizing interests of unborn fetuses in the property disposition of estates, and providing for an increase in an indigent pregnant woman's social services allowance. The court thought that these provisions establish "legislative intent to protect the fetus" and concluded that the fetus may sue its mother (through a law guardian) to seek a judgment that it is neglected.[66] The use of such thinly supported reasoning by both advocates and judges shows that imposing consequences for women's prenatal conduct in the child protective arena can have far-reaching and perhaps unpredictable effects on the rights of fetuses and pregnant women.

Laws mandating the termination of the parental rights of women who use drugs while pregnant derive their conceptual justification from a patriarchal stereotype of ideal motherhood. They are politically supported by anti-abortion activists who see them as increasing fetal rights and thereby decreasing women's reproductive rights. When evaluating these laws' legitimacy it is important to

62. FLA. STAT. ANN. §§ 39.01(2), 39.01(31)(g) (West Supp. 2007).

63. Paltrow, *Pregnant Drug Users, supra* note 54, at 1014.

64. *In re* Smith, 492 N.Y.S.2d 331, 334 (N.Y. Fam. Ct. 1985).

65. *In re* Unborn Child, 683 N.Y.S.2d 366, 368 (N.Y. Fam. Ct. 1998) (finding support for ascribing legal personality to fetus in policy allowing women to file paternity petitions during pregnancy).

66. *Id.* at 368–71.

understand how they relate to state endorsement of patriarchal gender roles and anti-abortion positions.

## IV.
## FOURTEENTH AMENDMENT DUE PROCESS

There are two components to the Due Process Clause: procedural due process and substantive due process. The inquiry into whether a law comports with procedural due process has two parts. First, there is a threshold question of whether a protected interest is at stake.[67] If a legal scheme threatens a protected interest, the constitution demands procedural safeguards protecting that interest against government intrusion. To determine whether the process is adequate, a court must examine three factors: the individual's private interest; the risk that the individual will be deprived of that interest under the procedure in place and the likelihood that a different process would prevent erroneous deprivation; and the state interest, including the burden of any additional procedural safeguards.[68]

Substantive due process, on the other hand, is not really about process, but is rather a mechanism by which the Constitution protects certain liberty interests upon which the government may not infringe at all unless there is a pressing need and the means used are no more restrictive of individual liberty than necessary.[69] The judicial inquiry starts with a determination of whether there is a fundamental right threatened by the legal scheme in question. If so, the court applies strict scrutiny. and the law is found constitutional only if it is "narrowly tailored to further compelling governmental interests."[70] As I argue below, the termination of parental rights because of prenatal drug use violates both elements of due process.

### *A. Procedural Due Process*

The Supreme Court has held: "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process."[71] Mothers have a liberty interest in maintaining their status as legal parents. In *Stanley v. Illinois*, the Supreme Court said that the right to conceive and raise one's children is "essential,"[72] and that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom in-

67. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999) (internal citations omitted).
68. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
69. Reno v. Flores, 507 U.S. 292, 301–02 (1993).
70. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
71. *Am. Mfrs. Mut. Ins.*, 526 U.S. at 59 (internal citations omitted).
72. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

clude preparation for obligations the state can neither supply nor hinder."[73] *Stanley* stated that a presumption is not sufficient to establish parental unfitness; rather, a hearing and individual determination is necessary.[74] In *Quilloin v. Walcott*, the Court said, "[w]e have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness . . . ."[75]

In *Santosky v. Kramer*, the Court dealt specifically with the termination of parental rights.[76] The Court recognized that:

> freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. . . . The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.[77]

Since a parent's interest in the care, custody, and management of her child is a protected liberty interest, it is appropriate to make an inquiry into whether a state's procedures for terminating parental rights satisfy due process. The basic framework for determining what process is required under the Fourteenth Amendment is set out in *Mathews v. Eldridge*:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[78]

The *Santosky* Court applied this framework to parental rights to find that a clear and convincing evidentiary standard is necessary in termination proceedings, holding that "[i]n parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight."[79]

The Court's characterization of the first element, the private interest, is

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73. *Id.*
74. *Id.* at 656–58.
75. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (internal citations omitted).
76. Santosky v. Kramer, 455 U.S. 745 (1982).
77. *Id.* at 753.
78. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).
79. *Santosky*, 455 U.S. at 758.

common to all proceedings seeking to terminate parental rights. Every parent facing a potential loss of her legal relationship to her child has the same fundamental, constitutionally significant interest in maintaining that relationship. The *Santosky* Court's characterization of the latter two *Mathews* factors is specific to the question before the Court in that case, that of the appropriate evidentiary standard for termination proceedings. Inasmuch as one can generalize from the case, it shows that the private interest in family relations justifies stacking the deck against the state by requiring it to satisfy the clear and convincing evidentiary standard.[80]

The law that was challenged in *Stanley v. Illinois* had the effect of denying an unwed father the custody of his children upon the death of their mother.[81] The Court did not question the state's interest in the welfare of children, but it examined the process used by the state in determining whether children in such a position are dependent children. The state argued that it was entitled to presume that unmarried fathers are bad parents. But the Court objected that the state's classification was overinclusive: "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. . . . But all unmarried fathers are not in this category; some are wholly suited to have custody of their children."[82] The Court expressly faulted Illinois for proceeding by presumption when a fundamental interest in maintaining a family is at stake:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[83]

The Supreme Court has made clear that "issues of competence and care" should drive decisions about whether to remove children from their natural parents,[84] *Stanley* did not address the relationship between parental drug use and competence and care. I contend that the use of drugs by a parent is not, per se, evidence of parental unfitness.[85] The Constitution will not tolerate this presumption; it requires an inquiry into parental fitness. The state must hold a hearing and examine individualized proof of a parent's fitness when "the dismemberment of his family" is at stake.[86]

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80. *See id.* at 764–66.

81. Stanley v. Illinois, 405 U.S. 645, 646 (1972).

82. *Id.* at 654.

83. *Id.* at 656–57.

84. *Id.* at 657.

85. *Cf.* Adoption of Katharine, 674 N.E.2d 256, 257 (Mass. App. Ct. 1997) (describing the daughter of cocaine-addicted parents as "a cheerful child whose parents have adequately fed and clothed her, provided for her medical care, supervised her, and loved her.").

86. *Stanley*, 405 U.S. at 658.

*1. Prenatal drug use as a presumption of unfitness*

Although *Stanley v. Illinois* held that the Due Process Clause requires an individualized hearing rather than a presumption of unfitness, the Court also examined the accuracy of the presumption in question, criticizing it as overinclusive.[87] This raises the possibility that a highly accurate presumption could satisfy due process even when a weighty individual interest is at stake. Might the presumption created by laws that make a perinatal positive toxicology ground for termination of parental rights be sufficiently accurate? Such laws presume that any woman who uses drugs while pregnant will not be able to care for the child, once it is born.[88] There is, however, no reason to think that this presumption is any more accurate than the one challenged in *Stanley*. While this presumption does not defer to "past formalities" as did the *Stanley* presumption, which was based on traditional ideas about unwed fathers, it does defer to popular hysteria and ignorance about the harms of prenatal drug use. As research has repeatedly shown, a woman who uses drugs while pregnant or while parenting is not ipso facto an incompetent mother.[89] For example, one study at the University of Florida compared cocaine-exposed babies who were put in foster care with those who were left with their birth mothers.[90] The infants who stayed with their natural mothers showed better neurological and physical development than those in foster care. As one commentator put it, "separation from their mothers was more toxic than the cocaine to the foster care children."[91]

If the conclusions of the University of Florida study are correct, the presumption created where prenatal drug use serves as a ground for terminating parental rights is overinclusive, like the presumption at issue in *Stanley*. The former presumption, moreover, is perverse: if cocaine-exposed infants fare better with their birth mothers, then termination due to prenatal drug use actually harms children. Since the Court struck down the presumption at issue in *Stanley*, while at the same time noting that it might often be valid, a generally invalid presumption should a fortiori be unconstitutional.

One could argue that constitutional analysis of the termination presumption should not turn on the results of the small University of Florida study, without

87. *Id.* at 654.

88. For the purposes of this discussion I assume that the state's interest in terminating parental rights is child welfare rather than fetal health. In Part IV.B.2.i I argue that a state interest in fetal health, if there is one, cannot support laws terminating parental rights on grounds of prenatal drug use.

89. *See* SUSAN C. BOYD, MOTHERS AND ILLICIT DRUGS: TRANSCENDING THE MYTHS 14–16 (1999) (reviewing fourteen studies demonstrating that women who use illegal drugs can be fit parents).

90. Melanie Fridl Ross, *To Have and to Hold: University of Florida Shows Cocaine-Exposed Infants Fare Better with Their Biological Mothers*, SCIENCE DAILY, May 2, 1998, http://www.sciencedaily.com/releases/1998/05/980505092617.htm.

91. Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J. L. & SOC. POL'Y 303, 321 (2006).

additional corroborating evidence. Nevertheless, the results demonstrate that it is an open question whether termination is appropriate or, on the contrary, harmful to children. It shows that the knee-jerk response, "She does drugs, so she must be a bad mother and the child will fare better in any other environment," is based on empirically testable assumptions that are probably false, especially in light of studies showing that drug users can be fit mothers. Taking the child away probably seems to be erring on the side of caution about the child's welfare. But the University of Florida study throws that appearance into doubt. It means those who would recommend termination should worry about the possibility that such a policy is in fact a drastic reaction that is based on poorly-informed convictions about the harms of drugs rather than on medical evidence. Since there is doubt about whether termination is good for the children of drug-using mothers, trammeling those mothers' constitutional rights is unjustified.

As the above considerations show, the overinclusiveness (or perversity) of the prenatal-drug-use presumption means that the "risk of an erroneous deprivation"[92] of parents' interests is great, so the presumption fares poorly on the second *Mathews* factor. The presumption also cannot meet the third factor: "the Government's interest, including the function involved."[93] By treating prenatal drug use as a ground for termination, the state uses means that hamper rather than further its goal of protecting the welfare of children. Removing children from drug-using or formerly drug-using mothers is not an end in itself; it is only a worthy policy inasmuch as it protects children from abuse or neglect at the hands of unfit parents. But as the court pointed out in *Stanley*, "the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."[94] A presumption that a woman who used drugs while pregnant is an unfit parent will effect the unnecessary separation of families—that is, the separation of families in which the mother was not unfit despite a drug addiction—counter to the state's interest in maintaining fit families. If the state frustrates its own goals with this presumption, the presumption cannot meet the third Mathews factor.

*2. The window of recovery and expedited termination*

State child welfare schemes that allow termination of parental rights based on drug use may run afoul of the Fourteenth Amendment's requirement of procedural due process for other reasons as well. Take as an example a drug-addicted woman whose infant is placed in temporary custody by a child welfare agency because the baby showed a positive toxicology at birth. After some length of time, the agency institutes termination of parental rights proceedings,

92. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

93. *Id.*

94. Stanley v. Illinois, 405 U.S. 645, 652–53 (1972).

citing the mother's continuing drug use as a ground. The amount of time before the state attempts to terminate the mother's parental rights is likely to be short. A federal law, the Adoption and Safe Families Act of 1997 ("ASFA"), aims to encourage adoptions by, among other things, giving states incentives to expedite termination proceedings, reducing the requirements on states to provide services likely to lead to reunification before they file to terminate, and requiring states to file to terminate if a child has been in foster care for fifteen of the last twenty-two months.[95]

Generally, a child welfare agency creates a case plan for the parent or parents of a child who has been removed because of abuse or neglect. If a parent has not complied with the case plan within a certain amount of time, then the agency will file for termination of the parent's rights.[96] The amount of time in question is often twelve months.[97] Arizona law authorizes judges to terminate parental rights if the child has been in an out-of-home placement for nine months or longer and "the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement."[98] This vague "substantial neglect" standard potentially allows judges to remove children permanently from mothers who have had less than total success fighting their addictions over a nine month period.[99] Under this standard, a court may terminate parental rights even if the parent began the lengthy process of a successful recovery from addiction before the date of the termination hearing if the judge is not convinced that she has made "appreciable, good faith efforts" to overcome her addiction.[100]

Drug addiction often takes a long time to overcome. Substance abuse treatment programs that last less than ninety days are of "limited or no effectiveness."[101] There is some evidence that drug treatment plans are most effective

95. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89 (codified in scattered sections of 42 U.S.C.). *See* Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 255–63 (2002).

96. *See generally* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 675 (2006).

97. *See, e.g.*, ARK. CODE ANN. § 9-27-341(b)(3)(B)(i) (Lexis 2002) (providing that a neglected child being out of custody of the parent for twelve months is a ground for termination of parental rights). *See also* Paruch, *supra* note 51, at 137 n.105 (collecting statutes).

98. ARIZ. REV. STAT. ANN. § 8-533(B)(8)(a) (Supp. 2007).

99. *Cf. In re* Appeal in Maricopa County Juvenile Action No. JS-501568, 869 P.2d 1224, 1229 n.1 (Ariz. Ct. App. 1994) (stating that the "substantial neglect" standard makes it difficult to define the level of effort that would exempt a parent from termination of parental rights).

100. *Id.* at 1229–30.

101. NATIONAL INSTITUTE ON DRUG ABUSE, DEPARTMENT OF HEALTH AND HUMAN SERVICES, PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE 16, (1999), http://www.nida.nih.gov/PODAT/PODAT5.html ("[R]esearch has shown unequivocally that good outcomes are contingent on adequate lengths of treatment. Generally, for residential or outpatient treatment, participation for less than 90 days is of limited or no effectiveness, and treatments lasting significantly longer often are indicated.").

when they last nine to twelve months.[102] For poor addicts, there are often waiting periods to get in to substance abuse programs,[103] if programs even exist in their communities. In 1997, a national survey of state child welfare agencies revealed that residential substance abuse treatment was immediately available for parents at only 5.8% of those agencies.[104] The survey also found that agencies could provide appropriate drug treatment services to only twenty percent of pregnant women who needed them and only thirty-one percent of all parents who needed them.[105]

This system violates the procedural due process rights of mothers threatened with termination of parental rights by imposing an almost impossible task on them. It requires drug-addicted mothers to overcome their addictions within twelve to eighteen months, when the social and medical reality is that it often takes a minimum of two years to be admitted to and complete a drug treatment program.[106] It is "unrealistic" to think that addicted parents will be able to keep their children under the ASFA timetables.[107] The core of procedural due process protections is that the individual must have a genuine opportunity to affect the proceeding that threatens her rights. The timetables involved in current termination processes simply do not afford drug-addicted mothers a real chance to avoid the permanent loss of their children.

*i. The ASFA timetables and the state's interest in child welfare*

The ASFA timetables are irrational. As a result, state laws developed in response to ASFA speeding termination fail the third *Mathews* factor, the government interest and the function of the proceeding. The avowed purpose of expe-

102. *See* Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1228 (2002) ("Treatment outcome studies show that '[c]ontinuous abstinence is obtained for 88% of those who attend twelve months of continuing care after inpatient addictions treatment and 93% of those who used an outpatient program.'"); Harry K. Wexler, Gregory P. Falkin & Douglas S. Lipton, *Outcome Evaluation of a Prison Therapeutic Community for Substance Abuse Treatment*, 17 CRIM. JUST. & BEHAV. 71, 73, 85–87 (1990).

103. *See* Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 211–12 (2004).

104. Dorothy Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. HEALTH CARE L. & POL'Y 72, 77–78 (1999).

105. *Id.*

106. Timing issues only exacerbate a long list of problems for pregnant and parenting women seeking substance abuse treatment. They also confront the male-oriented, confrontational nature of most treatment programs; the lack of prenatal care and education as well as gynecological care and counseling about contraceptives; the lack of child care; and the failure of most programs to recognize domestic violence or sexual abuse as the likely source of women's addictions and offer counseling for those issues. *See id.* at 78.

107. Virginia Sawyer Radding, *Intention v. Implementation: Are Many Children, Removed from Their Biological Families, Being Protected or Deprived?*, 6 U.C. DAVIS J. JUV. L. & POL'Y 29, 46–47 (2001).

diting termination proceedings is to increase "permanency," i.e., adoptions.[108] But there simply is not sufficient demand for adoptions,[109] so the greater rate of termination of parental rights brought about by ASFA has perversely generated a greater number of children without the permanency of either natural or adoptive families.

These "legal orphans" are needlessly languishing in inherently temporary and often dangerous foster care. The federal government's data on foster care shows that "a child is more than twice as likely to die of abuse in foster care than in the general population," and that rates of sexual and physical abuse are higher in foster homes and astronomically higher in group homes than in the general population.[110] One might object that the general population is not the relevant comparison: since children in state care have ex hypothesi been removed from abusive homes, any abuse rate in foster care will be lower. This is a mistake: the vast majority of children removed from the custody of their parents are removed because of neglect, not abuse.[111] Indeed, the state schemes under consideration here allow the termination of parental rights solely for drug use for nine to eighteen months during and after pregnancy. While everyone may agree that a mother who is currently addicted to an illegal substance faces an extra difficulty in providing her child with care, that weakness alone does not justify exposing the child to these other serious risks.[112]

ASFA-induced schemes make termination faster and easier. While increasing the rate of termination does create an increase in the rate of adoption, it creates a greater increase in the number of legal orphans. Thus, ASFA-induced state schemes fail to achieve the goal of increased permanency. Worse, they actually increase the danger to children by exposing them to dangerous foster care environments. What does all this mean for my constitutional argument? The irrationality, not to say perversity, of ASFA's mechanism for increasing the rate of adoption radically decreases the case for a pressing state interest in the termination of parental rights under ASFA-induced state schemes. In the Mathews inquiry then, the state's interest in any proceeding to terminate parental rights is reduced by the problems associated with the ASFA scheme. Having prenatal drug use operate as a justification for termination does not serve the "function involved" in conducting termination proceedings under ASFA, so the scheme is

108. *See* H.R. Rep. No. 105-77 at 8 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 2739, 2740.

109. *See* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 145 (2001) ("In New Jersey, between 1997 and 1999 almost four children had parental rights terminated for every one actually adopted. A study of urban counties in Nebraska found that more than a year after parental rights were terminated, fewer than half the children had permanent homes.").

110. Wexler, *supra* note 109, at 137.

111. White, *supra* note 91, at n.64.

112. Research indicates that foster care can be developmentally harmful to children. *See* Michelle Jackson & Gordon Berry, *Motherhood and Drug Dependency: The Attributes of Full-Time Versus Part-Time Responsibility for Child Care*, 29 INT'L J. ADDICTIONS 1521 (1994).

problematic under the third *Mathews* factor. In short, the state's use of termination to serve its interest in child welfare in cases of prenatal substance abuse is tainted by the irrationality of the whole ASFA scheme.

The termination of parental rights on the basis of prenatal drug use fails the Fourteenth Amendment's procedural due process standard. Statutes or judicial practices that allow for termination on the ground of positive perinatal toxicology alone violate *Stanley* by using an overinclusive presumption that is not probative of the "determinative issues of competence and care."[113] State schemes that allow children to be permanently taken away from their mothers because of prenatal drug use violate the Fourteenth Amendment both because they invoke an overinclusive presumption and because of the interaction between the timetables of termination proceedings and the time required for completion of drug treatment. When a state allows termination before a mother has had a reasonable opportunity to get a hold on her illness, it violates her fundamental right to custody and care of her children without providing her a meaningful opportunity to affect the outcome of the process. The connection between drug treatment, parental fitness, and termination proceedings will loom large in the discussion of substantive due process, which is the subject of the next section.

### *B. Substantive Due Process*

The Supreme Court held in *Troxel v. Granville* that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[114] The decision was based on a substantive due process right to parent.[115] The existence of a fundamental right means that states' efforts to terminate the parental rights of women who use drugs while pregnant are subject to strict judicial scrutiny.[116] Laws fail the strict scrutiny test when they are not narrowly tailored to a compelling governmental interest.[117] The Court has interpreted "the Fifth and Fourteenth Amendments' guarantees of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[118] State law schemes that allow the termination of the parental rights of women who use drugs while pregnant must be narrowly tailored to a compelling state interest,

113. Stanley v. Illinois, 405 U.S. 645, 656–57 (1972).

114. Troxel v. Granville, 530 U.S. 57, 66 (2000).

115. *See id.* at 65.

116. *See, e.g., id.* at 80 (Thomas, J., concurring) ("I would apply strict scrutiny to infringements of fundamental rights."); Graham v. Richardson, 403 U.S. 365, 375 (1971) (holding that the impingement of a fundamental right is sufficient to subject a law to strict scrutiny).

117. *See* Reno v. Flores, 507 U.S. 292, 301–02 (1993).

118. *Id.*

since they infringe on mothers' fundamental liberty interest in "the care, custody, and control of their children."

*1. Government interests: fetal health and child welfare*

There are two potential governmental interests in termination of parental rights for women who use drugs while pregnant: fetal health[119] and child welfare.[120] In this section I will examine the strength of these interests as counterweights to mothers' liberty interest in maintaining care and custody of their children. The Supreme Court will likely find both state interests to be compelling. Nevertheless, there are difficult questions implicit in these interests that deserve close analysis.

*i. Fetal health*

As for fetal health, the argument for a compelling state interest would presumably be that a pregnant woman's drug use creates a threat to the health of the fetus, and the state has an interest in the health of the fetus, so the state has an interest in deterring that drug use. Laws that make prenatal drug use constitutive of child neglect[121] or abuse[122] are presumably based on this reasoning. As the thinking goes, a fetus is considered to be within the definition of a "child" under child welfare law, and the mother's use of drugs is considered a harm that warrants adjudging the fetus an abused or neglected child.

Does the state have an interest in fetal health per se? Many judicial opinions misinterpret *Roe v. Wade* and its progeny as holding that the government has an interest in fetal health.[123] In fact, *Roe*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[124] and *Gonzales v. Carhart*[125] hold only that the state

119. *See* State *ex rel.* Angela M.W. v. Kruzicki, 541 N.W.2d 482, 495–96 (Wis. Ct. App. 1995) (reasoning that the state's compelling interest in the potential life of a fetus and the juvenile court's jurisdiction to protect the health of children justify the sheriffs' detention of the pregnant woman in a hospital), *overruled by* State *ex rel.* Angela M.W. v. Kruzicki, 561 N.W.2d 729 (Wis. 1997) (holding that a fetus is not a "child" under relevant statute).

120. *See In re* O.R., 767 N.E.2d 872, 877 (Ill.App. Ct. 2002) ("[T]he compelling state interest is the protection of the child from harm, and the legislature protects that interest by declaring unfit those mothers who pose a risk to the safety and well-being of their children.").

121. *E.g.*, 705 ILL. COMP. STAT. 405/2-3(1)(c) (2006).

122. *E.g.*, *In re* Baby Boy Blackshear, 736 N.E.2d 462 (Ohio 2000).

123. *See, e.g.*, Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247 (N.D. Fla. 1999) (holding that, since the state can force a woman to have an unwanted child in some circumstances, it can impose on any lesser constitutional interest and therefore force her to have a cesarean section, citing *Roe*); *In re* Unborn Child, 683 N.Y.S.2d 366, 370 (N.Y. Fam. Ct. 1998) ("Protection of the fetus, as well as protection of the pregnant woman's health, has been definitively recognized as a legitimate state interest since *Roe v. Wade*."). *See also* Cherry, *supra* note 33, at 726–27.

124. 505 U.S. 833 (1992).

125. 127 S. Ct. 1610 (2007).

has an interest in fetal life, and only in the context of abortion.[126] *Roe* makes clear that a fetus is not a person for constitutional purposes,[127] so any state interest in fetal health cannot be based on federal constitutional personhood. The decisions also make clear that the woman's due process right to control her own reproductive life outweighs the state's interest in fetal life in some circumstances; *Roe* and its progeny do not support the proposition that fetal health is a compelling state interest.

It is hard to imagine why fetal health per se would be a compelling state interest under the view that the fetus is a part of the woman's body and is only potentially a separate person.[128] On that view, the state's interest in fetal health is only derivative of the state's interest in pregnant women's health. The actions of the state should not set up a conflict between mother and fetus, but rather should see their welfare as interdependent and work toward the unitary end of maternal/fetal health. This understanding of the state's interest in fetal health does not, it should be obvious, justify punitive policies like terminating the parental rights of drug-using pregnant women. On the other hand, on the view that the fetus is a living person with legal rights, the state has a clear interest in fetal health per se. It seems, therefore, to require an acceptance of anti-abortion, fetal-rights thinking to maintain the position that fetal health per se (as distinct from both maternal health and children's health) is a state interest at all, never mind a compelling one. This is another example of the connection between punitive reactions to drug use by pregnant women and anti-abortion activism.

Despite the handful of arguments to the contrary presented here, it is likely, given the present composition of the Supreme Court[129] and the trend in abortion decisions,[130] that the Court would find fetal health per se to be a compelling state interest, were the question squarely presented to it. Justice Kennedy, the current "swing vote" on the Court, would almost assuredly endorse an opinion finding a compelling state interest in fetal health. In *Ferguson v. City of*

126. Cherry, *supra* note 33, at 728–29.

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

128. *See* Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569, 570 (1992) (noting the "inescapable reality that, physically, a fetus is part of a woman's body"). This was the view under the common law in the United States. Jennifer A. Brobst, *The Prospect of Enacting an Unborn Victims of Violence Act in North Carolina*, 28 N.C. CENT. L.J. 127, 133 (2006).

129. A majority of the current Supreme Court consists of Catholics, for the first time in our nation's history. All five Catholics are also Republicans. *See* Alan Cooperman, *Court Could Tip to Catholic Majority*, WASH. POST, Nov. 7, 2005, at A03. While political bent cannot necessarily be ascertained from religious affiliation (Justice Brennan was Catholic, and Justice Kennedy, one of the current Catholics, has voted to uphold *Roe*), the views of the Catholic Church on the moral status of fetuses may be more relevant to Supreme Court jurisprudence than ever before.

130. *Casey* recognized a broader state interest in fetal life than did *Roe*, and that interest was apparently strengthened again in *Gonzales v. Carhart*. 127 S. Ct. 1610, 1626 (2007). *Casey* and *Gonzales* referred to the state interest as "legitimate" or "legitimate and substantial," *id.*, and balanced it against a woman's right to get an abortion. Recall that the abortion cases deal with an interest in fetal *life*, not health.

*Charleston*, where the Court held that reporting results of urine tests done at the time of delivery to police without consent constituted an unreasonable search, Kennedy concurred.[131] His concurring opinion argued that in order to see the limitations of the majority's holding, one must "acknowledge the legitimacy of the State's interest in fetal life and of the *grave risk to the life and health of the fetus*, and later the child, caused by cocaine ingestion."[132] Furthermore, Kennedy's majority opinion in *Gonzales v. Carhart* puts forth the state's interest in fetal life as the justification for upholding a regulation limiting a particular method of abortion, even though it does not, on its face, protect fetal life.[133] That the law in question "promote[s] respect for life" satisfied Kennedy and the rest of the majority.[134] The importance of the state's legitimate and substantial interest in fetal life in the eyes of the *Carhart* majority is an indication that those justices would likely find a compelling interest in fetal health.

*ii. Child welfare*

The second state interest at play in the regulation of drug use during pregnancy is that of child welfare. Child welfare is undoubtedly a compelling state interest. There appear to be two lines of reasoning that can connect the termination of parental rights on grounds of prenatal drug use with child welfare. First, drug use during pregnancy is a threat to child welfare because of the health effects a child may experience once it is born as a result of prenatal exposure to drugs.[135] Fetal alcohol spectrum disorders, a cluster of developmental, behavioral, and physical problems caused by prenatal exposure to alcohol, provide an example.[136] The state has an interest in preventing alcohol use by pregnant women in order to prevent continuing health problems for children.

Second, some assume that a woman's use of drugs while pregnant (exposing her fetus to health risks) is probative of her inability to parent.[137] For this reason, the drug-using mother should have her child taken away because her prenatal drug use gives the state reason to predict that she will not care for the child

131. Ferguson v. City of Charleston, 532 U.S. 67, 80–85, 86–91 (2001).

132. *Id.* at 89 (2001) (Kennedy, J., concurring) (emphasis added). Kennedy's vote was not necessary to create a majority for the result. *Id.* at 69.

133. *See* Gonzales v. Carhart, 127 S. Ct. at 1647 (Ginsburg, J., dissenting) ("The law saves not a single fetus from destruction, for it targets only a method of performing abortion.").

134. *Id.* at 1633.

135. *See, e.g., In re* Baby Boy Blackshear, 736 N.E.2d 462, 464–65 (Ohio 2000) ("It is clear that the action taken by [the mother] caused [the child] injury—both before and after birth.").

136. *See* Sue Thomas, Lisa Rickert & Carol Cannon, *The Meaning, Status, and Future of Reproductive Autonomy: The Case of Alcohol Use During Pregnancy*, 15 UCLA WOMEN'S L.J. 1 (2006) (describing symptoms and incidence of fetal alcohol spectrum disorders and discussing the effects of legislative responses on women's reproductive freedom).

137. *See, e.g., In re* O.R., 767 N.E.2d 872, 879 (Ill. App. Ct. 2002) (stating that a law providing for the termination of parental rights of women who give birth to more than one child who tests positive for controlled substances is related to a mother's "competence to care for her child in the future").

properly. While there are problems with both of these lines of reasoning, those problems go to the tailoring inquiry rather than to whether the state interest is compelling. It is hard, if not impossible, to imagine that any court would find that child welfare is not a compelling state interest.[138]

*2. Tailoring*

The Fourteenth Amendment requires that laws that impinge on a fundamental right be narrowly tailored to a compelling government interest.[139] The narrow tailoring requirement means the government cannot constitutionally get in the way of the individual's liberty interest any more than is necessary to further the state interest at play. Laws that allow the termination of parental rights for prenatal drug use are not narrowly tailored to serve either the goal of protecting fetal health or that of protecting child welfare.

*i. Fetal Health*

The policy of termination of parental rights putatively effectuates the goal of fetal health by deterring drug use in pregnant women. The state threatens women with the permanent removal of their children in order to deter them from taking a drug that may harm the fetus. This legal scheme is both underinclusive and overinclusive. It is underinclusive because illicit drug use is not the only thing that can harm a fetus. This lack of tailoring is starkly apparent in the case of laws which make only illegal drug use a ground for termination.[140] Alcohol is more dangerous to the development of a fetus than any illegal drug,[141] and smoking during pregnancy is the single most important preventable risk factor for unsuccessful pregnancy outcomes.[142] In addition, due to the greater prevalence of use of licit drugs, many more fetuses are exposed to them than to illicit

138. Many courts have found a compelling interest in child welfare or based decisions about parents' due process rights on the assumption that there is such an interest. *See, e.g.*, Aid for Women v. Foulston, 441 F.3d 1101, 1119–20 (10th Cir. 2006); Abdouch v. Burger, 426 F.3d 982, 987 (8th Cir. 2005); Hobbs v. County of Westchester, 397 F.3d 133, 153 (2d Cir. 2005).

139. Reno v. Flores, 507 U.S 292, 301–02 (1993).

140. Some states do include prenatal alcohol use in their statutory definitions of neglected children. Paltrow, *Governmental Responses, supra* note 29, at 466.

141. *See, e.g.*, Karen Auge, *Few Months of Drinks and Lifetime of Damage*, DENVER POST, Dec. 11, 2005, at A01 ("In the long run, 'the effects of narcotics are not nearly as dramatic as alcohol.'"); Linda Carroll, *Alcohol's Toll on Fetuses: Even Worse Than Thought*, N.Y. TIMES, Nov. 4, 2003, at F1 ("Because alcohol affects so many sites in the brain, researchers have come to believe that alcohol is far worse for the developing fetus than any other abused drug.").

142. *Smoking During Pregnancy Is Preventable Risk Factor for Unsuccessful Outcome*, HEALTH & MEDICINE WEEK, Jul. 26, 2004, at 8. *See also* Tom Corwin, *Nicotine's Effects on Babies Called Serious: Study Claims Smoking by Pregnant Women Causes More Birth Defects than Cocaine Use*, THE AUGUSTA CHRONICLE, June 3, 1998, at A1 ("[A] researcher at Duke University Medical Center showed that smoking is a far bigger problem than cocaine during pregnancy and that nicotine causes more fetal brain damage than cocaine.").

drugs.[143] In the face of the overwhelming evidence of the risks to fetuses of prenatal exposure to cigarettes and alcohol, any law which is designed to deter only the use of illegal drugs during pregnancy is irrationally underinclusive.

Such laws are also irrationally underinclusive in picking out drug use, whether legal or illegal, among all the behaviors that a pregnant woman might engage in that might pose a risk to the fetus. Eating fish with high levels of mercury,[144] failing to take folic acid,[145] taking certain drugs prescribed by a doctor,[146] taking fertility drugs,[147] being overweight,[148] spending time at high altitude,[149] and standing still for prolonged periods of time[150] are all behaviors that may pose a risk to fetal health. In fact, among the greatest risk factors to fetal health is poverty, with attendant nutrition and medical care deficiencies.[151]

Another way in which these laws may be underinclusive is if they, like the Illinois statute, are triggered by a positive toxicology at birth, either in the newborn or the mother. Any use of drugs by the woman earlier in her pregnancy will not trigger juvenile law consequences, since it will not show up in drug tests at birth. However, fetuses are no less at risk of health effects from the woman's drug use early in pregnancy. Laws singling out drug use that generates a positive toxicology at birth are therefore systematically underinclusive.

Termination policies are also overinclusive. First, since prenatal drug use does not invariably harm the fetus, laws that provide for the termination of parental rights because of the presence of drugs alone infringe upon the interests of more women than is necessary to effect the state's purpose of protecting fetal health. Perfectly healthy children who test positive at birth for an illegal substance will be taken from their mothers despite the fact that the drugs in their

143. *See, e.g.*, Deanna S. Gomby & Patricia H. Shiono, *Estimating the Number of Substance-Exposed Infants*, THE FUTURE OF CHILDREN, Spring 1991, at 17, 19.

144. *See* Environmental Protection Agency, What You Need to Know about Mercury in Fish and Shellfish, http://www.epa.gov/waterscience/fish/files/MethylmercuryBrochure.pdf 1("[S]ome fish and shellfish contain higher levels of mercury that may harm an unborn baby or young child's developing nervous system.") (last visited Apr. 7, 2008).

145. March of Dimes, Folic Acid, http://www.marchofdimes.com/professionals/14332_1151.asp (last visited Apr. 7, 2008).

146. *See* Daniel N. Abrahamson, Graham Boyd & Michael T. Risher, *Amicus Curiae Brief: Cornelia Whitner v. The State of South Carolina*, 9 HASTINGS WOMEN'S L. J. 139, 145–46 (1998).

147. *See* Ezekiel J. Emanuel, *Eight is Too Many*, NEW REPUBLIC, Jan. 25, 1999, at 8–10 (discussing fertility treatments that lead to multiple births and associated problems such as low birthweight and death).

148. *See* Heather Boerner, Plus-Size Pregnancy, http://www.plannedparenthood.org/issues-action/std-hiv/obese-pregnancy-10350.htm (last visited Apr. 7, 2008).

149. *See* Lauren Streicher, *Pregnant? Know Risks if Traveling, Skiing*, CHICAGO SUN-TIMES, Nov. 19, 2004, at 67 ("Preterm labor and bleeding are the most commonly encountered pregnancy complications among pregnant visitors to high altitudes.").

150. Sally Squires, *Pregnant Women Get Green Light to Exercise*, WASH. POST, Jan. 18, 1994, at z.07.

151. *See* COMM. ON SCIENTIFIC EVALUATION OF WIC NUTRITION RISK CRITERIA, INSTITUTE OF MEDICINE, WIC NUTRITION RISK CRITERIA: A SCIENTIFIC ASSESSMENT 41, 43 (1996).

system caused them no harm.[152] Limiting termination of parental rights to those mothers whose prenatal drug use is established to have caused some medically identifiable harm should be a minimum requirement for a law to pass the narrow tailoring test.[153]

Moving beyond the under- and overinclusiveness problems, laws providing for the termination of parental rights because of prenatal drug use fail to be narrowly tailored to achieve the goal of fetal health because they are irrational or counterproductive. They are irrational because they are aimed at deterring drug use by pregnant women, which may be a uniquely undeterrable activity. Addiction is a powerful psychological force.[154] Many pregnant addicts are highly motivated to quit when they learn that they are pregnant but find that it is just too difficult.[155] In addition, pregnancy only lasts nine months, and the period during which a woman knows she is pregnant is likely to be significantly shorter. Drug treatment, however, is widely recognized to take at least nine months to be effective.[156] The time window involved may just be too short to reasonably expect a pregnant drug addict to be able to beat her addiction. It is possible that the threat of termination of parental rights does not adequately deter very many pregnant women from using drugs. If not, such termination is an irrational means to the end of fetal health. Moreover, if the threat of termination actually does make a pregnant addict quit, say, heroin "cold turkey," withdrawal may harm the fetus, possibly even causing a miscarriage.[157] It is perhaps counterintuitive, but stop-

152. *See In re* Baby Boy Blackshear, 736 N.E.2d 462, 466 (Ohio 2000) (Cook, J., dissenting) (explaining that the majority decision allows child removal even when no harm has been caused to the fetus).

153. Note that this would require the state to show more than that the mother used drugs while she was pregnant and that the baby experienced some medical problem. The state would also have to show that the drug use *caused* the problem. The contrary practice can be seen in *In re Smith*, where the court explicitly held that a causal connection between the mother's alcohol use while she was pregnant and the child's medical problems was not necessary to a finding that the child was neglected because of that use of alcohol. *In re* Smith, 492 N.Y.S.2d 331, 334 (N.Y. Fam. Ct. 1985).

154. *See, e.g.*, Paltrow, *Governmental Responses, supra* note 33, at 476 ("The American Medical Association has unequivocally stated: 'it is clear that addiction is not simply the product of a failure of individual willpower.. Instead, dependency is the product of complex hereditary and environmental factors. It is properly viewed as a disease, and one that physicians can help many individuals control and overcome.'"); Julia Elizabeth Jones, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1174 (1992) ("Punishing a person for something that is beyond his or her control is not an effective deterrent to the punished behavior.").

155. *See* Paltrow, *Governmental Responses, supra* note 33, at 477–78 ("A woman with a substance abuse problem may genuinely desire to terminate the use of such substances prenatally but may be unable, without access to substance abuse treatment programs, to act on her desire.").

156. *See supra* notes 101–102, 107 and accompanying text.

157. Karol Kaltenbach, Vincenzo Berghella & Loretta Finnegan, *Opioid Dependence During Pregnancy*, 25 OBSTETRICS & GYNECOLOGY CLINICS OF N. AM. 139, 145 (1998) (recommending methadone maintenance for the opioid-addicted pregnant woman in part because of the harmful effects of withdrawal to the fetus); *see also* Stephen R. Kandall & Wendy Chavkin, *Illicit Drugs in America: History, Impact on Women and Infants, and Treatment Strategies for Women*, 43 HASTINGS L.J. 615, 629 n.136 (1992).

ping pregnant drug users from using drugs is not necessarily the best medicine for the fetus. Drug addiction, a disease, must be treated medically,[158] not addressed by clumsy and counterproductive threats of painful and permanent legal consequences.

Even worse, these laws may actually have a net negative effect on fetal health. While the threat of termination is unlikely to deter many pregnant addicts from using drugs, it is very likely to deter them from seeking prenatal care.[159] Women worried about losing their children (both the new baby and any older children they may have) will not seek out care when they know that medical health professionals will report their drug use to child welfare services. The lack of prenatal care is an enormous risk to fetal health. Indeed, since drug use increases the risk of fetal health problems, the state should be doing everything it can to encourage pregnant drug users to seek prenatal care, rather than frightening them away with threats.

Furthermore, using the termination of parental rights on the basis of prenatal drug use to protect fetal health fails the narrow tailoring test because there are other means available that do not restrict women's fundamental right to the care and custody of their children. Providing robust social services to pregnant addicts, most obviously substance abuse treatment and subsidized prenatal care,[160] would be a practical and effective means to protect fetal health from prenatal drug use. For example, the Mandela House, a residential treatment program designed for pregnant and postpartum women in Oakland, California, "provides twenty-four-hour supervision, support groups, nutritious food, medical appointments, parenting classes, job and life skills training, and administrative assistance in meeting court hearing dates and scheduling visitation with older children."[161] The program "has an eighty percent clean pregnancy rate among its clients, most of whom stay in the program for one year."[162] Center of CARE, an outpatient substance abuse treatment program at Children's Hospital Medical Center in Oakland, provides a wide range of services to families with members suffering from drug addiction. The program has enabled eighty-six percent of the

158. *See* Brody & McMillin, *supra* note 34, at 246 ("It is scientifically accepted that once addicted to a drug, a person faces a serious illness and needs to be treated appropriately.").

159. Aware of punitive government responses to prenatal drug use, women left a substance abuse program for pregnant and postpartum women in Wisconsin because the staff could not convince them that the program would not "turn them over to authorities." *Hearing*, *supra* note 34.

160. Contraceptive counseling, domestic violence therapy, sexual abuse therapy, shelter services, subsidized child care, and occupational counseling would also be helpful.

161. Becker & Hora, *supra* note 41, at 538. *See also* Paltrow, *Governmental Responses*, *supra* note 33, at 478 ("Research shows that comprehensive treatment programs that do not separate mothers from their children help women and their families. They are also cost-effective, especially when one compares their price tag to the staggering financial and social costs of separating mother and child.").

162. Becker & Hora, *supra* note 41, at 538. However, there is a waiting list of as many as one hundred women at any given time. *Id.*

families it treats to remain intact.[163] Furthermore, children in participating families often score as well on developmental tests as those of non-drug-exposed children.[164] If the government were to provide services to prenatal drug users, such activities would not restrict the fundamental right those women have in the care and custody of their children. Therefore, the state cannot constitutionally choose to terminate parental rights rather than to provide services.

What is more, there is evidence that these other means would be both more effective and more cost-efficient, making the termination of parental rights all the more repugnant to the constitution.[165] A government study in Minnesota concluded that most of the costs of substance abuse treatment would be offset "within one year by savings to the health care and criminal justice systems."[166] Residential treatment at Mandela House costs about $30 per person per day, and outpatient treatment is cheaper.[167] The termination of parental rights involves additional litigation costs to the state and requires the state to pay for foster care, which is estimated to cost $10,000 to $20,000 per child annually.[168] Add to that increased neonatal intensive care and long-term education costs potentially created by the failure to provide early substance abuse treatment and other services, and it is likely that any state that chooses breaking up families over providing treatment is both violating women's constitutional rights and wasting taxpayer dollars.

The real threat to fetal health is poverty.[169] If the state is truly concerned with fetal health, rather than with the vilification of disempowered women, it should move to eradicate poverty and its harmful effects on pregnant women. In addition, the state should protect pregnant women and fetuses from environ-

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163. *Id.*

164. *Id.*

165. *See* DeRouselle, *supra* note 51, at 431–32 (arguing that, by taking away services for needy families and increasing foster care placements, New York will expend more money in the long run).

166. Caroline S. Palmer, *The Risks of State Intervention in Preventing Prenatal Alcohol Abuse and the Viability of an Inclusive Approach: Arguments for Limiting Punitive and Coercive Prenatal Alcohol Abuse Legislation in Minnesota*, 10 HASTINGS WOMEN'S L. J. 287, 339 n.277 (1999). There is broad consensus that drug treatment is cheaper than incarceration. *See* Charles Marwick, *Physician Leadership on National Drug Policy Finds Addiction Treatment Works*, 279 JAMA 1149 (1998) (reviewing 600 peer-reviewed articles that found that drug addiction can be treated successfully, and citing costs of up to $6800 for long-term residential substance abuse treatment, which is far less expensive than keeping one person in prison, which costs $25,900 per year).

167. Becker & Hora, *supra* note 41, at 539. This is the lowest cost program described by Becker and Hora.

168. Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L & SOC. PROBS. 327, 360 (1997).

169. A 1999 study found that poverty is more harmful than cocaine to the development of a young child's brain; the study's lead author said, "the inner-city child who has had no drug exposure at all is doing no better than the child labeled a 'crack-baby.'" Paltrow, *Governmental Responses, supra* note 33, at 462.

mental hazards. Mercury and other pollutants are harmful to fetuses.[170] Environmental hazards are found in disproportionate quantities in urban areas of concentrated poverty, where, for example, more children suffer from asthma.[171] The state should serve its concern for fetal health by cleaning up the environmental hazards from which poor women literally cannot escape. This will better serve the state interest than would destroying their families to punish their "choice" to take a drug to which they were addicted while pregnant.

*ii. Child Welfare*

There are two lines of reasoning by which the state might think that the termination of parental rights because of prenatal drug use serves the goal of protecting the welfare of children. The first is that, since children can suffer postnatally from the effects of prenatal drug use, termination is needed to protect children, after birth, from the mother's conduct, before birth. The idea must be that the threat of termination will deter pregnant women's drug use, thereby shielding children from the possible after-birth effects of fetal drug exposure. But this argument is just another version of the argument that termination should be used to protect fetal health, with the coda that fetal health affects children's health.[172] As such, it is subject to the constitutional problems described above.

The second line of reasoning truly concerns child welfare, as opposed to fetal health. It is premised on the idea that a woman who uses drugs while pregnant gives the state reason to predict that she will be an unfit mother.[173] Because she cannot care for the child, the state is supposed to be justified in terminating her parental rights. Of course, states terminate parental rights on grounds of unfitness all the time. There are, sadly, more than enough examples of horrific child abuse to justify this state power. The question here is whether prenatal drug use is an appropriate trigger for the use of that power.

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170. *Prenatal Mercury Exposure Via Mother's Diet Can Impair Certain Brain Functions*, WOMEN'S HEALTH WEEKLY, Mar. 4, 2004, at 51 (reporting study that found that pregnant women with diet high in fish exposed to mercury have children with irreversible impairment to specific brain functions); Paul B. Tchounwou, Wellington K. Ayensu, Nanuli Ninashvili & Dwayne Sutton, *Environmental Exposure to Mercury and Its Toxicopathologic Implications for Public Health*, 18 ENVIRONMENTAL TOXICOLOGY 149, 151, 155 (2003) (discussing fetal health risks caused by exposure to mercury in the environment).

171. Gail G. Shapiro & James W. Stout, *Childhood Asthma in the United States: Urban Issues*, 33 PEDIATRIC PULMONOLOGY 47 (2002) (examining the disproportionate impact of asthma on children in urban and impoverished areas). *See* Richard Perez-Pena, *Study Finds Asthma in 25% of Children in Central Harlem*, N.Y. TIMES, Apr. 19, 2003, at A1.

172. Although presumably, the effect on children's health always underlies a concern with fetal health.

173. *Cf. In re* Milland, 548 N.Y.S.2d 995, 999 (N.Y. Fam. Ct. 1989) ("The issue . . . is whether her alcohol use during pregnancy, together with the other evidence in this case, prove by a preponderance of the evidence that this child, with her special needs, would be in danger if placed in the mother's care. The answer can only be in the affirmative.").

The view that the state can predict that a woman who uses drugs while pregnant will necessarily be an unfit parent generates the kind of irrebuttable presumption that the Supreme Court held unconstitutional in *Stanley*.[174] It is surely overinclusive, since not all women who use drugs while pregnant will be unable to care for their children.[175] In fact, the prediction may get things exactly backwards. Recall the study discussed above, finding that cocaine-exposed babies who were left with their birth mothers often fared better than those who were placed in foster care.[176] While women who use drugs while they are pregnant are likely to use drugs after the child is born, drug use by a parent should not be considered child neglect per se.[177] The parent's ability to care for her child is the essence of a neglect determination. Drug use or addiction should not be used as a proxy for an inquiry into quality of care. [178] It is easy enough to imagine someone who is an unfit parent because her addiction eats up all of her time, emotional strength, and financial resources, but it should be the failure to adequately parent that drives a determination of unfitness rather than the use of drugs itself.

One might object that a woman who uses drugs while she is pregnant, knowing of the risk to the fetus, manifests a lack of concern for the welfare of her offspring that can be expected to continue after birth. On this view, a woman willing to expose her fetus to the dangers of her drug use is likely to be willing to expose her child to other dangers after birth. This argument suffers from two main flaws. First, research shows that it is wrong on the facts.[179] Second, it ignores the power of addiction. The inability to stop using a drug does not manifest recklessness or lack of concern when it is the result of addiction. It is the very definition of addiction that use of the substance continues despite adverse

174. Stanley v. Illinois, 405 U.S. 645, 656–58 (1972).

175. *See generally* Maureen M. Black, Prasanna Nair, Cynthia Kight, Renee Wachtel, Patricia Roby & Maureen Schuler, *Parenting and Early Development Among Children of Drug-Abusing Women: Effects of Home Intervention*, 94 PEDIATRICS 440 (1994).

176. Ross, *supra* note 103.

177. *See, e.g.*, Adoption of Katharine, 674 N.E.2d 256, 261 (Mass. App. Ct. 1997) ("In the absence of a showing that a cocaine-using parent has been neglectful or abusive in the care of that parent's child, we do not think a cocaine habit, without more, translates automatically into legal unfitness to act as a parent. We do not suppose that if a parent abused alcohol or had committed a crime such as larceny, but attended effectively to the feeding, clothing, medical care, and supervision of her child, that there would be an occasion for separating that parent forever from her child.").

178. *See, e.g., In re* Appeal in Pima County Juvenile Severance Action No. S-120171, 905 P.2d 555, 558 (Ariz. Ct. App. 1995) ("chronic substance abuse during pregnancy in and of itself does not reflect an inability to parent that would justify severance of a parent's fundamental rights."); *In re* Guardianship of K.H.O., 736 A.2d 1246, 1252 (N.J. 1999) ("Prenatal drug use does not, without more, establish parental unfitness or an inability to parent."); State *ex rel.* Juvenile Dep't of Marion County v. Randall, 773 P.2d 1348 (Or. Ct. App. 1989) (holding that use of controlled substances alone is not sufficient to establish that child's welfare is endangered and child should be made ward of state).

179. *See, e.g., supra* text accompanying note 89.

consequences.[180] And even if it is often the case that mothers who use drugs do not demonstrate capacity to care for their children after birth, that fact would not defeat the *Stanley* rule against overinclusive presumptions in matters of fundamental family rights.

To look at the problem from another perspective, the dangers of the foster care system must be weighed when evaluating a law that results in placing more children in foster care in the name of child welfare. Indeed, the move toward child removal and termination of parental rights in cases of prenatal drug exposure led to an increase in the foster care population in the 1980s.[181] Removing a child from a drug-using parent, where there is a weak prediction of neglect, in favor of a foster care placement, where there is a strong prediction of abuse, hardly seems to serve the end of child welfare. Furthermore, the more children the state puts in foster care, the more dangerous it becomes for all the children in the system.[182] This is because a larger foster care population stretches already inadequate state resources for regulation and oversight. The same number of caseworkers is responsible for a greater number of cases. States may have actually diminished child welfare by removing children based on prenatal exposure to drugs and terminating their relationships with their parents.

For many addicts, their family relationships are their best and most pressing reasons to overcome their illnesses. Getting pregnant may be a powerful motivator for a woman to take steps to rid herself of her addiction.[183] Drug treatment experts recognize the power of maintaining relationships with family, especially children, to provide motivation and psychic support to recovering addicts.[184] Removing children from their mothers eliminates this familial contact that may be an important part of the healing process. Terminating an addict's parental rights and forever removing that reason to get better is likely to decrease the chances that a mother's substance abuse treatment will be successful. Under these circumstances, the termination of an addicted mother's parental rights will be an obstacle to the state's public health interest in the mother's welfare and its criminal justice interest in reducing drug-related activity.

As with the state's interest in fetal health, the goal of protecting child welfare could be served by means that do not impinge on mothers' fundamental

180. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 181 (4th ed. 1994).

181. *See* Paltrow, *Governmental Responses, supra* note 33, at 482.

182. *See* Wexler, *supra* note 109, at 149 ("The more the system is overloaded with children who do not need to be in foster care, the less time workers have to find children in real danger. As a result, they make more mistakes in both directions, and more children die.").

183. *See* Paltrow, *Governmental Responses, supra* note 33, at 480 ("Despite all the obstacles, studies have found that pregnant drug using women do all that they can to take responsibility for their drug use and life circumstances, making efforts, for example, to stop or reduce their drug use and to improve their own health for the sake of the pregnancy.").

184. *See* Holly A. Hills, Deborah Rugs & M. Scott Young, *The Impact of Substance Use Disorders on Women Involved in Dependency Court*, 14 WASH. U. J.L. & POL'Y 359, 378 (2004).

right to the care and custody of their children. Since drug use while pregnant itself is not probative of parental fitness, the termination of a mother's parental rights on that ground alone is irrational. However, an addiction that continues after the birth of the child may be the cause of parenting difficulties, even to the point of child neglect. In such cases, the addiction, rather than the mother's legal relationship to the child, should be the condition the state works to end. Eradicating addiction can be achieved best with subsidized, immediately available substance abuse treatment that is designed to be appropriate for pregnant and parenting women.

It may be tempting to think that the lack of effective drug treatment options creates the due process problem here, and that the solution is to improve the availability of treatment and other social services while maintaining the threat of termination as a "safety valve," either to provide motivation for pregnant drug addicts to quit or to guarantee that the state will be able to remove children from mothers whose addiction is incorrigible and has destroyed their ability to care for their children. The most obvious problem with this argument is that there is no need to make prenatal drug use a ground for the termination of parental rights in order to serve the "safety valve" purpose. Since the termination of parental rights is always available in cases where the state can show that a parent is incapable of caring for her children (whether because of a drug addiction or some other problem), there is no need to provide a separate ground for termination for pregnant women who use drugs. Doing so creates an irrebuttable presumption of unfitness that is both unhelpful in identifying cases of actual unfitness and unconstitutional, as I have argued above.

Even worse, this position fails to avoid the due process problem. The proposal boils down to having the state threaten to trammel one fundamental right if an individual does not submit to having another fundamental right trammeled. In *Cruzan v. Director, Missouri Department of Health*, the Court held that there is a due process right to refuse medical treatment.[185] Therefore, a state that forces individuals to choose between forced medical treatment for addiction and losing the custody and care of their children is necessarily impinging on one constitutional right or the other.[186]

185. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

186. My reasoning here is similar to that of the doctrine of unconstitutional conditions. Under that doctrine, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 59 (2006) (internal quotation marks and citations omitted). This recent case is just one example; the doctrine is not limited to First Amendment rights. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 77–110 (2001) (collecting cases). If the government cannot condition the exercise of a constitutional right on the individual giving up a benefit to which she is not entitled, then *a fortiori*, it cannot condition the exercise of one constitutional right on another to which the individual is entitled.

The counter-objection is that the scheme as a whole can pass the narrow tailoring test. While the termination of parental rights for drug use during pregnancy by itself fails to be narrowly tailored (because the alternative of offering treatment and services would not restrict a fundamental right), offering treatment and taking the child away only if the mother refuses treatment or fails to defeat her addiction theoretically restricts the right to care and custody of children only in cases where the state must separate the family to serve its interests in fetal health or child welfare.

However, this reasoning is mistaken. Again, since the state can terminate the parental rights of any unfit parent, the mechanism that allows termination because of prenatal drug use serves no purpose in the scheme. The requirement that the law be narrowly tailored justifies terminating the parental rights of only those parents that the state can show are unfit. Any presumption based on past or continuing drug use fails to establish an inability to care for children, and so will fail the narrow tailoring test. Furthermore, the "choice" that the scheme offers individuals to have one or the other constitutional right violated surely cannot save the scheme as a whole from being unconstitutional.

## V.
## CASE STUDY: *IN RE O.R.*

An Illinois statute expressly provides for the termination of the parental rights of a woman who gives birth to a child with a controlled substance in its system, when the woman has previously given birth to a child with controlled substances in its system and has since had the "opportunity to enroll in and participate in a clinically appropriate substance abuse counseling, treatment, and rehabilitation program."[187] The text of the statutory ground for termination in section 1(D)(t) seems to address a concern that the state should not remove the children of drug-addicted mothers who have had no help getting over their addiction. On closer inspection, however, the statute falls short of providing a real safeguard against hasty termination before the mother has had a meaningful chance to conquer her addiction. It requires only that the mother had an "opportunity to enroll in and participate" since her last drug-positive newborn. It does not require that she have an opportunity to complete drug treatment. The text of the statute would be satisfied if a woman had enrolled in a treatment program and attended one session before the birth of the affected child.

The statutory safeguard in section 1(D)(t) also does not address the timetable problem discussed above with regard to ASFA-induced state schemes.[188] It is biologically possible to become pregnant weeks after giving birth, and is considered safe to get pregnant again within a few months. Two births may be less than a year apart. As discussed above, substance abuse treatment often takes two

187. 750 ILL. COMP. STAT. ANN. § 50/1(D)(t) (West 2007).

188. *See supra* text accompanying notes 101–107.

years to get into and complete. Therefore, requiring that a mother have the opportunity to enroll and participate in treatment between births is not an effective safeguard. It does not ensure that which due process requires: that mothers who are addicted to drugs be given a meaningful opportunity to get over their illness with the help of substance abuse treatment before the state takes away their children on the basis of their addiction.

More importantly, the safeguard that there be an opportunity to enroll and participate in treatment before termination does not guarantee that parental rights will be terminated on the basis of concerns regarding competence and care, as required by *Stanley*.[189] This problem is dramatically illustrated by a 2002 appellate decision in Illinois, *In re O.R.*[190] The mother in that case, A.R., had a long-standing drug problem and had given birth to at least one child with drugs in its system before the birth of the child at issue, O.R. A.R. used drugs three times in the two months after O.R.'s birth, but at the time of trial had been clean for twenty-six months. She had successfully completed at least one substance abuse treatment program, continued to attend meetings, and had worked as a dietary aide at a nursing home for two years.[191] A.R. had beaten her addiction; she was a drug treatment success story. The trial judge was convinced that A.R.'s rehabilitation made termination inappropriate. The appellate court, however, reversed that determination, arguing that the mother's progress overcoming her addiction was not enough to warrant a decision that her parental rights should not be terminated under section 1(D)(t).[192] The statutory ground for termination was still present: A.R. had given birth to a child with drugs in its system after already having given birth to one such child and having an opportunity to enroll and participate in drug treatment. In short, even a mother's success in beating an addiction is not enough to save a family from being torn apart by the state under the Illinois law. The condition that supposedly made A.R. a bad parent—her addiction—was no longer present, but her child was still permanently removed. Notice that at no point was there was any inquiry into her parenting ability. Two positive drug tests were enough, according to the controlling statute.

*In re O.R.* gave the Illinois appellate court occasion to address the constitutionality of the statute providing that a positive drug screen at birth is a ground for termination. The court rejected A.R.'s contention that section 1(D)(t) violated her substantive due process rights.[193] The court employed strict scrutiny in

189. Stanley v. Illinois, 405 U.S. 645, 657 (1972) (holding that a presumption that unmarried fathers are unsuitable and neglectful parents cannot stand when it "forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities.").

190. *In re* O.R., 767 N.E.2d 872 (Ill. App. Ct. 2002).

191. *Id.* at 874–75.

192. *Id.* at 875.

193. *Id.* at 877–79. The court also rejected A.R.'s claim that section 1(D)(t) violated her equal protection rights by arguing that there is no similarly situated group that is treated differently by the law. *Id.* at 877.

reviewing the law because a fundamental interest was at play[194] and found a compelling interest, saying, "[c]learly, the State, as parens patriae, has a compelling interest in protecting children from abuse, both after and before the abuse occurs. Section 1(D)(t) promotes that interest by allowing courts to consider a mother's abuse of one child when determining whether the mother is also fit to parent her other current or future children."[195] The court's thinking in the first quoted sentence is confused: the state obviously cannot protect a child from abuse after it occurs; that would require the ability to change the past. Perhaps the court means that the state has an interest in protecting a child who has been abused from being abused again in the same way. Yet even this does not make sense in a case where the "abuse" is fetal exposure to a controlled substance and the child has since been born. Nevertheless, whatever the court meant, it is clear that the state has an interest in preventing abuse. The second quoted sentence only makes sense in reference to section 1(D)(t) if the prenatal exposure of the fetus to drugs is itself considered abuse. Illinois law does not define "abuse" as including prenatal drug use, although it does consider a child born with drugs in its system to be neglected.[196] The analysis of the state's compelling interest is also affected by the court's assumption that prenatal exposure to controlled substances constitutes harm, regardless of whether any injury was in fact sustained by the fetus.

Contending that the state does not have the compelling interest identified, A.R. presented a scientific study showing that "prenatal cocaine exposure does not have the severe consequences for the child's long-term health as previously found."[197] However, the court refused to consider that evidence on procedural grounds, as it had not been introduced at trial. We cannot know how the court might have ruled if it had considered medical evidence about the effect of cocaine on fetuses. This is unfortunate, since understanding both the effects of drugs on fetuses and the effects of separation from their natural parents on children are relevant to the wisdom and constitutionality of laws like 1(D)(t).[198] Perhaps the question of the constitutionality of section 1(D)(t) in Illinois would have come out differently had the *In re O.R.* court considered all the relevant evidence.

A.R. also attacked the tailoring of section 1(D)(t), arguing that it "imposes an impermissible irrebuttable presumption of unfitness because it does not give her the opportunity to rebut the presumption of unfitness with her current ability to discharge her parental responsibilities."[199] This argument must be understood in the context of an Illinois supreme court decision, *In re H.G.*, striking down a

194. *Id.* at 876.
195. *Id.* (citation omitted).
196. 705 ILL. COMP. STAT. 405/2-3(1)(c) (2006).
197. *In re* O.R., 767 N.E.2d at 877.
198. *See supra* Part IV.
199. *In re* O.R., 767 N.E.2d at 878.

presumption of parental unfitness in cases where the child has been in foster care for fifteen months out of any twenty-two month period.[200] The Illinois Supreme Court held that that law, section 1(D)(m-1), violates substantive due process under both the federal and state constitutions. The law failed to be narrowly tailored to the goal of identifying unfit parents because "in many cases, the length of a child's stay in foster care has nothing to do with the parent's ability or inability to safely care for the child but, instead, is due to circumstances beyond the parent's control."[201] The court specifically identified the unavoidable delay in getting into substance abuse treatment as part of the problem.[202] Because of the long waiting lists for treatment, section 1(D)(m-1) allowed a finding of unfitness through no fault of the parent.

The appellate court deciding *In re O.R.* did not follow this reasoning, however. The court did not deny that section 1(D)(t) is an irrebuttable presumption. Instead, it pointed to the opportunity to enroll and participate in substance abuse treatment between the two births as a "procedural safeguard" that ensures the law is a "narrowly tailored means of identifying parents who pose a danger to their children's health and safety."[203] The court pointed to a passage from *In re H.G.* that approves of time periods as grounds for unfitness determinations when they measure some form of "parental conduct, inaction, or inability relating to the competence or the care given to a child."[204] The *O.R.* court reasoned that section 1(D)(t) is more like the approved grounds than section 1(D)(m-1):

> [Section 1(D)(t)] provides a time framework that is tied to the mother's conduct, inaction, or inability that relates to her competence to care for her child in the future, as well as to the care she has already given her child in utero. The time period is not specifically expressed in terms of a specific number of months. However, it is implied, given the gestation period between births and the requirement that the mother has the opportunity to participate in drug rehabilitation services.[205]

If the evidence that prenatal drug use does not result in unique or inevitable harm to fetuses and that separation from their mothers is more dangerous to children than prenatal drug exposure[206] is taken into account, it is easy to see that the *O.R.* court is wrong in its application of the supreme court's rule in *H.G.* Recall that the high court said:

> The presumption of unfitness set forth in section 1(D)(m-1) is not narrowly tailored to the compelling goal of identifying unfit parents be-

200. *In re* H.G., 757 N.E.2d 864 (Ill. 2001).
201. *Id.* at 872.
202. *Id.*
203. *In re* O.R., 767 N.E.2d. at 878–79.
204. *Id.* at 879.
205. *Id.*
206. *See supra* text accompanying notes 90–91.

> cause it fails to account for the fact that, in many cases, the length of a child's stay in foster care has nothing to do with the parent's ability or inability to safely care for the child but, instead, is due to circumstances beyond the parent's control.[207]

Applying this reasoning to section 1(D)(t), the question is whether a woman's drug use during two different pregnancies has anything to do with her ability to safely care for the child or, on the contrary, is due to circumstances beyond her control. As I noted above, drug use during pregnancy does not determine a woman's ability to safely care for the child.[208] In fact, a woman's addiction gives some reason to think that the circumstances of drug use while pregnant are beyond her control.

Even if it is true that, all other things being equal, a drug-addicted mother is less likely to safely care for the child than one who does not have an addiction, section 1(D)(t) still violates the constitutional guarantee of due process. As the *O.R.* court recognized, the tailoring inquiry in cases of strict due process scrutiny requires that the legislature use "the least restrictive means consistent with the attainment of its goal."[209] Section 1(D)(t) is not the least restrictive means of establishing a parent's ability to safely care for her child because it will result in fit parents having their children permanently taken away and because there are less restrictive means available—namely, making a direct inquiry into ability to care.

The Illinois statute, unique in expressly making prenatal drug use a ground for the termination of parental rights, was obviously drafted with some concern about its harsh impact on mothers who are addicted to drugs. It provides a safeguard, that a mother must have had the opportunity to enroll and participate in drug treatment since the birth of her last drug-exposed child before a new child can be permanently removed. However, this safeguard does not prevent section 1(D)(t) from resulting in the termination of the parental rights of fit mothers, and it should not save the statute from being found to violate constitutional requirements of due process, as the O.R. court might have done had it considered the evidence surrounding fetal drug exposure and the separation of children from their mothers.

## VI.
## CONCLUSION

I have argued that state schemes that allow the termination of parental rights on the basis of a woman's drug use while pregnant violate individuals' Fourteenth Amendment due process rights. While there are compelling state interests at play, these laws impinge on women's fundamental right to care, custody and

207. *In re H.G.*, 757 N.E.2d at 872.

208. *See supra* text accompanying notes 175–180.

209. *In re* O.R., 767 N.E.2d 872, 877 (App. Ill. 2002).

management of their children. Drug use and drug addiction cannot constitutionally be used as a presumption of parental unfitness. Since the government can address the public health problem of prenatal substance abuse without impinging on that right through the provision of drug treatment and social services, the termination of parental rights on the ground of prenatal drug use fails the "narrow tailoring" prong of the strict judicial scrutiny test.

The arguments against terminating pregnant drug addicts' parental rights do not only go to the constitutionality of such a legal scheme, however. These policies are ineffective, needlessly destructive of families (especially poor families), and probably counterproductive to the ends of both fetal health and child welfare. As such, they are bad policies that should be avoided by legislators and judges, independent of their constitutional shortcomings. The National Association of Public Child Welfare Administrators has come out strongly against the termination of parental rights as a result of prenatal drug use:

> Families and children are best served when treatment and family preservation services are central and when medical, education, mental health, and social work services are provided. Laws, regulations, or policies should strengthen, not hinder, families in need of help.... Laws, regulations, or policies that set unique time frames on decisions related to the termination of parental rights solely because of substance abuse are inappropriate.... Substance-abusing families need support to regain their well-being and to adequately care for their children. Society should seek the removal of children from their families only when there is serious risk to their well-being, and not as an automatic response when parents are substance abusers.[210]

The state has an interest in the welfare of children who have been exposed to drugs prenatally. However, it frustrates that interest with its knee-jerk response of removing children from the developmentally beneficial natural-parent setting to unstable and potentially dangerous foster care, terminating mothers' parental rights regardless of the availability of adoptive placements, and failing to offer services that address the problem's root causes. In addition, the divisive response of termination frustrates the states' related, but distinct interest in maintaining families. The irrationality of these laws given the governmental ends involved is both explained by and made all the more constitutionally[211] and morally troubling when their connection to gender stereotypes about women's roles as reproductive machines is pointed out. Women should not be punished by the

210. National Association of Public Child Welfare Administrators, *Working With Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response*, PUB. WELFARE, Fall 1991, at 37, 38.

211. Judicial scrutiny of sex-based classifications under the Equal Protection Clause is heightened in part because of the danger of basing them on traditional stereotypes. *See* Craig v. Boren, 429 U.S. 190, 203 & n.14 (1976).

destruction of their families for failing to live up to a patriarchal model of "ideal motherhood."