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## How to Combat Prenatal Substance Abuse While Also Protecting Pregnant Women: A Legislative Proposal to Create an Appropriate Balance

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# How to Combat Prenatal Substance Abuse While Also Protecting Pregnant Women: A Legislative Proposal to Create an Appropriate Balance

## I. INTRODUCTION

“Substance abuse in pregnancy is associated with a number of adverse outcomes for the woman, fetus, and neonate.”<sup>1</sup> A recent study indicated that approximately 5.9% of pregnant women between the ages of fifteen and forty-four use illicit drugs.<sup>2</sup> Prenatal illicit drug use has escalated over the past decade, causing an increase in “maternal and neonatal complications, neonatal abstinence syndrome, and health care costs.”<sup>3</sup> Following alcohol and marijuana, methamphetamine is the most commonly abused drug.<sup>4</sup> By 2006, admissions for treatment of methamphetamine abuse among pregnant women

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1. Ass’n of Women’s Health, Obstetric & Neonatal Nurses, *Position Statement: Criminalization of Pregnant Women with Substance Abuse Disorders*, 44 J. OBSTETRIC GYNECOLOGIC & NEONATAL NURSING 155, 155 (2015).

2. *Id.*

3. *Id.* In analyzing various studies, the findings of prenatal methamphetamine use is consistently associated with small-for-gestational-age (SGA) infants and low birth weight babies, and it “appears to be associated with neonatal and childhood neurodevelopmental abnormalities.” COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMM. OP. NO. 479, METHAMPHETAMINE ABUSE IN WOMEN OF REPRODUCTIVE AGE 2-3 (2011), <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co479.pdf> [<https://perma.cc/8R3P-7SWG>].

4. COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, *supra* note 3, at 1. However, women who use methamphetamine often do not begin and end with methamphetamine but also “frequently use tobacco, alcohol, and other drugs, which may confound the birth outcomes.” *Id.* at 2.

had increased to twenty-four percent of federally-funded treatment admissions, up from eight percent in 1994.<sup>5</sup>

For years, states have attempted to combat this growing national issue by punishing women through existing drug prohibition statutes.<sup>6</sup> There are generally three rationales favoring the prosecution of pregnant women using controlled substances: deterrence, retribution, and improving maternal or fetal health.<sup>7</sup> Support for fetal abuse prosecutions assert that the “unaborted fetuses have a future interest in their well-being” and potentially dangerous maternal actions or omissions should, therefore, be prosecuted.<sup>8</sup> Those in favor of prosecution also contend that, although parents have discretion in how to raise their children, parents have a moral and legal obligation not to endanger their children; in this instance, prenatal drug use injures the child before birth.<sup>9</sup> Further, proponents believe that actual arrest, prosecution, incarceration, or the threat of one “will deter pregnant women from abusing drugs or alcohol,” thus ensuring “safer pregnancies and better birth outcomes.”<sup>10</sup>

However, women’s rights advocates and most in the medical field, such as the Association of Women’s Health, Obstetric, and Neonatal Nurses (AWHONN), do not “support laws that single out pregnant women” or laws that punish pregnant women more severely or differently than other

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5. *Id.* at 1.

6. Alisha Marano, Note, *Punishing Is Helping: An Analysis of the Implications of Ex Parte Ankrom and How the Intervention of the Criminal Justice System Is a Step in the Right Direction Toward Combating the National Drug Problem and Protecting the “Child”*, 35 U. LA VERNE L. REV. 113, 115 (2013).

7. Krista Stone-Manista, Comment, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. CRIM. L. & CRIMINOLOGY 823, 832-33 (2009).

8. Sarah Letitia Kowalski, Comment, *Looking for a Solution: Determining Fetal Status for Prenatal Drug Abuse Prosecutions*, 38 SANTA CLARA L. REV. 1255, 1258 (1998); Stone-Manista, *supra* note 7, at 836 (referencing the argument that “monitoring or imprisoning pregnant women . . . will lead to improved maternal or fetal health outcomes.”).

9. Kowalski, *supra* note 8; Stone-Manista, *supra* note 7, at 834 (explaining that the criminal justice theory of retribution believes that one who commits a morally or legally wrongful act should be held accountable).

10. Ass’n of Women’s Health, Obstetric & Neonatal Nurses, *supra* note 1, at 155; Stone-Manista, *supra* note 7, at 833 (stating that the “prosecution-as-deterrence” argues that if women know that prenatal illicit drug use may lead to imprisonment, then women would cease in their controlled substance use).

individuals that use illicit drugs.<sup>11</sup> Their argument is that such laws are an ineffective strategy for reducing prenatal substance abuse because the women often suffer from an addiction—“a chronic, relapsing disease”—and the fear of facing punitive action or being reported to law enforcement tends “to deter women from seeking prenatal care that can provide them access to appropriate counseling, referral, and monitoring.”<sup>12</sup> In the late 1980s, it was difficult for pregnant women to find a rehabilitation program that was willing to work with them.<sup>13</sup> Though pregnant women appear to have more options available to them now, the consequences of enrolling are not clear.<sup>14</sup> Further, there are constitutional and social concerns when it comes to prosecuting prenatal illicit drug use.<sup>15</sup>

On November 1, 2012, Melissa McCann Arms went into labor, and, later, while still in labor, tested positive for methamphetamine.<sup>16</sup> After birth, the toxicology reports showed that her baby also tested positive for multiple drugs, including methamphetamine.<sup>17</sup> One nurse testified that while the child was in the nursery he exhibited signs consistent with

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11. Ass’n of Women’s Health, Obstetric & Neonatal Nurses, *supra* note 1; *see also* Rachel Carlson, Comment, *A Gap in the Criminal Justice System, Creating a New Class of Felons in Pregnant Drug-Addicted Women, A State-by-State Analysis*, 83 MISS. L.J. 71, 88, 91 (2014) (arguing that “punish[ing] women because they are addicted to drugs and happen to be pregnant” conflicts with equal protection, due process, and Eighth Amendment issues, and wrongfully “creat[es] a new class of criminals and a new crime, resulting in an entirely new class of felons.”).

12. Ass’n of Women’s Health, Obstetric & Neonatal Nurses, *supra* note 1, at 155-56.

13. Stone-Manista, *supra* note 7, at 833.

14. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1445 (1991).

15. Meghan Horn, Note, *Mothers Versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse*, 14 WM. & MARY J. WOMEN & L. 635, 642-49 (2008) (discussing the three primary categories of constitutional issues with criminal prosecutions: procedural due process and vagueness, substantive due process and privacy, and equal protection). A recent study indicated that prosecutions for prenatal drug use tend to target minority or disadvantaged populations. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 311 (2013). The study discovered that women who were economically disadvantaged were significantly more likely to be prosecuted—seventy-one percent of the women qualified for indigent defense. *Id.* Moreover, there was a noticeable racial disparity in that fifty-nine percent of women prosecuted in this study were women of color. *Id.*

16. *Arms v. State*, 2015 Ark. 364, at 3-4, 471 S.W.3d 637, 640.

17. *Id.* at 4, 471 S.W.3d at 640.

methamphetamine withdrawal.<sup>18</sup> As a result of her son testing positive for a controlled substance at birth, Arms lost custody of her child through dependency-neglect.<sup>19</sup> Although Arms successfully completed drug rehabilitation, counseling, parenting courses, and various 12-step programs in an effort to get her child back in her dependency-neglect case, she was criminally prosecuted in 2014.<sup>20</sup> At her criminal trial, a jury found Arms guilty of a felony for introducing a controlled substance into the body of another person and sentenced her to 20 years.<sup>21</sup>

In reversing Melissa Arms' conviction, the Arkansas Supreme Court held that (1) a fetus was not a person for purposes of the statute; and (2) there was not substantial evidence that there was a transfer of the controlled substance after birth to support the verdict.<sup>22</sup> Despite this, the prosecutor in the *Arms* case has successfully prosecuted two more women under the same introduction-of-a-controlled-substance statute as he did with Arms<sup>23</sup> and stated that he intends to continue bringing cases using this statute.<sup>24</sup> Following Arms' reversal, the Arkansas Attorney General stated that her office is "committed to working with the General Assembly to clarify

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18. *Id.*

19. Olga Khazan, *Freedom for a Woman Who Got 20 Years for Using Meth While Pregnant*, ATLANTIC (Oct. 9, 2015, 10:19 AM), <http://www.theatlantic.com/notes/2015/10/a-pregnant-drug-users-conviction-overtured/409867/> [<https://perma.cc/9FMZ-8H9M>]; see also ARK. CODE ANN. § 9-27-341 (2015); ARK. CODE ANN. § 9-27-303(36)(A)(ix)(b)(B)(i)(a) (2015) (stating that "neglect" includes "[c]ausing a child to be born with an illegal substance present in the child's bodily fluids or bodily substances").

20. Khazan, *supra* note 19.

21. See ARK. CODE ANN. § 5-13-2109(a) (2015); *Arms*, 2015 Ark. 364, at 1, 471 S.W.3d at 639.

22. *Arms*, 2015 Ark. 364, at 6-8, 471 S.W.3d at 642.

23. Melanie Buck, *Arms Case Overtured by Arkansas Supreme Court*, MYPULSENEWS (Oct. 10, 2015), <http://mypulsenews.com/arms-case-overtured-by-arkansas-supreme-court/> [<https://perma.cc/6SGS-L2D4>]. Following the *Arms* decision, the United States District Court for the Eastern District of Arkansas granted two separate federal petitions for writ of habeas corpus, vacating the respective defendants' convictions and sentences and ordering immediate release. See *Robertson v. Kelley*, No. 5:16-cv-00185-KGB/JTR, 2016 U.S. Dist. LEXIS 89418 (E.D. Ark. July 11, 2016); *Blankenship v. Kelley*, No. 5:16-cv-00005-BD, 2016 U.S. Dist. LEXIS 92265 (E.D. Ark. Apr. 28, 2016).

24. See Melissa Jeltsen, *Relief for Woman Sentenced to 20 Years for Using Meth While Pregnant*, HUFFINGTON POST (Oct. 13, 2015), [http://www.huffingtonpost.com/entry/melissa-mccann-arms-sentence-reversed\\_561bbb8fe4b0e66ad4e872f1](http://www.huffingtonpost.com/entry/melissa-mccann-arms-sentence-reversed_561bbb8fe4b0e66ad4e872f1) [<https://perma.cc/9DTZ-RDSB>].

that this statute makes it a crime for a pregnant woman to introduce controlled substances like methamphetamine into the body of her unborn or just born child.”<sup>25</sup> Until the Arkansas General Assembly modifies this particular statute, it is clear a fetus is not a person. However, there remains uncertainty in Arkansas following the *Arms* case and public statements by the state as to whether a woman can be charged or convicted under such statutes based on a transfer through the umbilical cord once there is a live birth.

This Comment examines whether a state can prosecute women for prenatal use of illicit substances under introduction of a controlled substance, child abuse, and child neglect statutes. Part II discusses an analysis of Arkansas’s first case of this kind, *Arms v. State*.<sup>26</sup> Part III surveys the various approaches other jurisdictions have taken in either criminalizing such conduct or refusing to enforce these types of criminal statutes against pregnant women. Part IV examines statutory and common law issues left open following the Arkansas Supreme Court’s opinion. Finally, Part V suggests a proposed solution for Arkansas and other states that are considering how to best approach the issue of prenatal controlled substance use. This Comment does not discuss the public policy arguments for or against criminalization of prenatal drug use that have been extensively covered by other authors.<sup>27</sup> As a result, the main

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25. See Buck, *supra* note 23. Although the facts in *Arms* technically fall within the introduction of a controlled substance statute parameters, it is unlikely that the legislature intended the statute to be applied to in utero transfers. *McCann-Arms v. State*, 2015 Ark. App. 27, at 11, 453 S.W.3d 709, 715 (Whiteaker, J., concurring), *vacated*, *Arms v. State*, 2015 Ark. 364, 471 S.W.3d 637. “If the [Arkansas] legislature does in fact intend this statute to apply to an *in utero* transfer of a controlled substance from a mother to her child, it should amend the statute to make its intent patently clear.” *Id.*

26. 2015 Ark. 364, 471 S.W.3d 637.

27. For more in-depth analysis of public policy and proper remedy arguments, see generally Louise Marlane Chan, Note, *S.O.S. from the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199 (1993) (arguing that criminal intervention, along with education and treatment is the best remedy for addressing prenatal drug use problems); Elizabeth E. Coleman & Monica K. Miller, *Assessing Legal Responses to Prenatal Drug Use: Can Therapeutic Responses Produce More Positive Outcomes Than Punitive Responses*, 20 J.L. & HEALTH 35 (2006) (discussing the effects of prenatal drug use on society, dangers of prosecuting under preexisting laws, and advocating for non-punitive avenues to handle prenatal substance abuse); Kowalski, *supra* note 8 (advancing three different models for prenatal abuse prosecution); Marano, *supra* note 6 (discussing Alabama’s public policy decision to protect

discussion is whether it is possible for a state to prosecute women at all under these types of statutes and to propose a statutory solution to cure the current ambiguity.

## II. EXAMINING ARMS V. STATE

In 2014, a jury convicted Melissa Arms of introducing a controlled substance into the body of another person and sentenced her to twenty years in prison.<sup>28</sup> The state charged Melissa Arms after she gave birth to a baby that tested positive for methamphetamine and other illegal substances.<sup>29</sup> Although Melissa Arms originally denied any drug use, she later admitted that she had used methamphetamine at least four times while pregnant—including as recent as the day before delivery.<sup>30</sup> The relevant statute provides that “[i]t is unlawful for any person to administer or cause to be ingested, inhaled, or otherwise introduced into the human body of another person a controlled substance.”<sup>31</sup>

The Arkansas Supreme Court, in reversing Melissa Arms’ conviction, first found that the statute’s use of “person” made no mention of a fetus or unborn child.<sup>32</sup> Further, the Arkansas Code “expressly limits criminalizing conduct with respect to an unborn child to homicide offenses,” and it “does not allow a mother to be charged or convicted of any homicide offense while her child is in utero.”<sup>33</sup> Consequently, the court held that Arms could not be convicted for a transfer while the child was in utero.<sup>34</sup> Therefore, the sole criminalizing behavior could have

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life, whether it be unborn or born life); Stone-Manista, *supra* note 7 (noting both public policy arguments for and against prosecuting women in prenatal abuse instances).

28. *Arms*, 2015 Ark. 364, at 1-2, 471 S.W.3d at 639.

29. *Id.* at 2, 4, 471 S.W.3d at 639-40.

30. *Id.* at 3-5, 471 S.W.3d at 640-41.

31. ARK. CODE ANN. § 5-13-210(b) (2015).

32. *Arms*, 2015 Ark. 364, at 6, 471 S.W.3d at 642. As evidenced in multiple Arkansas statutes including an unborn child as a person, “when the legislature intends to include ‘unborn child’ within the definition of ‘person,’ or it intends to afford protection to unborn children, it expressly does so in the statute.” *Id.* at 10, 471 S.W.3d at 644 (Brill, C.J., concurring). “The [Arkansas] legislature has chosen not to include ‘unborn child’ within the definition of ‘person’ for the purposes of section 5-13-210(b) . . . [I]t is the legislature, not the court, that determines the kind of conduct that constitutes a crime.” *Id.* at 11, 471 S.W.3d at 644.

33. *Arms*, 2015 Ark. 364, at 7, 471 S.W.3d at 642.

34. *Id.*

only occurred within the “narrow window of time when the child was outside the womb, but still attached to the placenta by the umbilical cord.”<sup>35</sup>

The registered nurse who performed the delivery testified that after Arms’ baby was born and outside of the womb, the umbilical cord remained attached for a brief period between a few seconds and few minutes.<sup>36</sup> However, the court determined that “the record [wa]s completely devoid of any evidence that Arms directly introduced methamphetamine into her baby’s system.”<sup>37</sup> More specifically, there was a lack of evidence proving “an ongoing transfer of the methamphetamine that was in Arms’s system after the child was born.”<sup>38</sup> The jury, therefore, would have had to speculate that Arms introduced the methamphetamine into the baby’s body after birth and that a “verdict [] not supported by substantial evidence” must be reversed and dismissed.<sup>39</sup> This left open the possibility of successful prosecutions under the statute so long as the state introduces substantial evidence of the postpartum transfer.

### III. CRIMINALIZATION OF PRENATAL DRUG USE IN OTHER JURISDICTIONS

The issue in *Arms v. State* was a case of first impression in Arkansas,<sup>40</sup> and although Melissa Arms’ conviction was

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35. *Id.* The Arkansas Court of Appeals determined that, even assuming the statute does not define a fetus as a person, Arms was not entitled to reversal:

Although there is no specific evidence before [the court] to indicate the exact time that [Arms’] newborn child’s umbilical cord was cut following his birth, there was some amount of time that passed between the child’s birth and its detachment from the umbilical cord through which he received nutrients and fluids from [Arms].

*McCann-Arms v. State*, 2015 Ark. App. 27, at 10, 453 S.W.3d 709, 714. Therefore, once the child was born, he “undoubtedly was ‘another person’ suffering from withdrawal from methamphetamine, which [Arms] caused him to ingest or otherwise introduced to him.” *Id.* at 10, 453 S.W.3d at 715.

36. *Arms*, 2015 Ark. 364, at 3-4, 471 S.W.3d at 640.

37. *Id.* at 7, 471 S.W.3d at 642.

38. *Id.*

39. *Id.* at 7-8, 471 S.W.3d at 642 (citing *Pridgett v. State*, 276 Ark. 52, 54, 631 S.W.2d 833, 834 (1982)).

40. However, it is worth noting that the Arkansas Supreme Court previously overruled a trial court’s order that an unborn fetus was dependent-neglected, thus placing the unborn fetus in the custody of the Arkansas Department of Human Services. Ark.



ultimately overturned, prosecutors in other jurisdictions have attempted to combat various forms of substance abuse during pregnancy by bringing criminal actions against mothers under these types of cases for nearly twenty-five years.<sup>41</sup> In fact, some states have successfully prosecuted women for similar offenses.<sup>42</sup> The primary theories used by prosecutors are (1) introducing a controlled substance;<sup>43</sup> and (2) child abuse, neglect, or endangerment statutes.<sup>44</sup>

### A. Use of Existing “Delivery” Statutes for Prenatal Drug Use Prosecution

Several states have prosecuted women for prenatal drug use through existing statutes that prohibit introduction of a controlled substance into the body of another person—also known as delivery statutes.<sup>45</sup> These statutes have not been amended to include the term fetus but have still resulted in

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Dep't of Human Servs. v. Collier, 351 Ark. 506, 515-17, 95 S.W.3d 772, 777-78 (2003). The court found that the term “juvenile” did not encompass an unborn fetus. *Id.* at 518, 95 S.W.3d at 778-79. It also did not find the state’s argument persuasive that “Amendment 68 to the Arkansas Constitution, which establishes a public policy to protect the life of every unborn child” required amending the legislature’s statutory definition of a juvenile. *Id.* at 522-23, 95 S.W.3d at 781; *see also* ARK. CONST. amend. LXVIII, § 2.

41. *Arms*, 2015 Ark. 364, at 8, 471 S.W.3d at 642-43; Tony A. Kordus, Comment, *Did South Carolina Really Protect the Fetus by Imposing Criminal Sanctions on a Woman for Ingesting Cocaine During Her Pregnancy* in Whitner v. State, No. 24468, 1999 WL 393164 (S.C. July 15, 1996)?, 76 NEB. L. REV. 319, 320 (1997).

42. *See, e.g.*, *Ankrom v. State*, 152 So. 3d 373, 377 (Ala. Crim. App. 2011); *Whitner v. State*, 492 S.E.2d 777, 779-83 (S.C. 1997).

43. *See Johnson v. State*, 602 So. 2d 1288, 1290, 1296 (Fla. 1992) (declining to enforce the criminal prosecution of a woman for prenatal illicit drug consumption under a delivery statute); *State v. Luster*, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992) (finding that the legislature did not mean to include prenatal transmission of controlled substances to a fetus); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991) (determining that prenatal use of cocaine, perhaps resulting in postpartum transfer of cocaine metabolites was not intended to be prosecuted under a delivery-of-cocaine statute).

44. *See Ankrom*, 152 So. 3d at 375, 377 (affirming a guilty plea for chemical endangerment of a child); *Reinesto v. Super. Ct.*, 894 P.2d 733, 734 (Ariz. Ct. App. 1995) (declining to apply a child abuse statute for prenatal heroin use); *State v. Armstard*, 991 So. 2d 116, 124 (La. Ct. App. 2008) (concluding the legislature did not intend the statute for mistreatment or neglect to include prenatal drug or alcohol use); *In re Baby Boy Blackshear*, 736 N.E.2d 462, 465 (Ohio 2000) (holding that a newborn’s positive toxicology test “for an illegal drug due to prenatal maternal drug abuse” is *per se* child abuse); *Whitner*, 492 S.E.2d at 778 (holding that a viable fetus falls under the term “child” in the child abuse and endangerment statute).

45. *See Johnson*, 602 So. 2d at 1290-91; *Luster*, 419 S.E.2d at 33; *Hardy*, 469 N.W.2d at 51-52.

convictions. On appellate review, these convictions have been reversed.<sup>46</sup>

Jennifer Johnson, a Florida resident, was the first woman to face prosecution for her prenatal drug use after she exposed her newborn children to cocaine in two different instances.<sup>47</sup> First, Johnson admitted that she had used cocaine the night before her son was born, and the child tested positive for “a metabolite or ‘breakdown’ product of cocaine.”<sup>48</sup> Then, when Johnson’s daughter was born over a year later, Johnson admitted to smoking marijuana and using cocaine frequently throughout her entire pregnancy.<sup>49</sup> Consequently, Johnson was convicted on two counts for delivering a controlled substance to a minor.<sup>50</sup>

The prosecution theorized that, as a result of her voluntary drug use, Johnson delivered cocaine, or a breakdown of the substance, to the children “via blood flowing through the children’s umbilical cords” during the “sixty-to-ninety second period after they were expelled from her birth canal but before their cords were severed.”<sup>51</sup> The Florida Supreme Court, in reversing Johnson’s conviction, stated that the Florida Legislature did not intend to “encompass ‘delivery’ of an illegal drug derivative from womb to placenta to umbilical cord to newborn after a child’s birth.”<sup>52</sup> Following the Johnson case, many other states agreed with the Florida Supreme Court’s decision that “delivery” statutes were not applicable to prenatal drug use.<sup>53</sup>

In another example, the Georgia Court of Appeals affirmed a trial court’s dismissal of delivering a controlled substance charge against a woman for her prenatal drug use.<sup>54</sup> Although the *Luster* court conceded that once the child was born it became a person, for purposes of an indictment, “at the time any transfer

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46. See *Johnson*, 602 So. 2d at 1296-97; *Luster*, 419 S.E.2d at 33; *Hardy*, 469 N.W.2d at 52.

47. *Johnson*, 602 So. 2d at 1290-91; see also *Coleman & Miller*, *supra* note 27, at 43.

48. *Johnson*, 602 So. 2d at 1291.

49. *Id.*

50. *Id.* at 1290-91.

51. *Id.* (emphasis omitted).

52. *Id.* at 1296-97.

53. *State v. Luster*, 419 S.E.2d 32, 33 (Ga. Ct. App. 1992); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991).

54. *Luster*, 419 S.E.2d at 33.

of cocaine metabolites could have taken place” the fetus was not a person for purposes of the statute as intended by the legislature.<sup>55</sup>

Similarly, the state charged a woman in Michigan with “delivery of less than fifty grams of a mixture containing cocaine” when her child’s urine tested positive for cocaine metabolites, and she admitted smoking crack “less than thirteen hours before giving birth.”<sup>56</sup> The prosecutor asserted the theory that once the defendant ingested the cocaine, it was “transmitted from [the] defendant’s system through the umbilical cord during the period after the baby had passed through the birth canal until the umbilical cord was severed.”<sup>57</sup> Further, an expert in neonatology testified that it was “highly probable that finite amount[s] of cocaine were moving through the umbilical cord” between the mother and child prior to the umbilical cord being clamped.<sup>58</sup> However, the court reversed the district court’s refusal to quash the delivery of cocaine charge because it did not believe the legislature intended to prosecute women for drug use that may result in the transfer of metabolites via the umbilical cord.<sup>59</sup>

## B. Use of Existing Child Abuse and Child Endangerment Statutes for Prenatal Drug Use Prosecutions

### 1. *Jurisdictions Where Appellate Courts Have Affirmed Convictions*

The most successful criminal prosecutions for prenatal controlled substance use have been brought under existing child abuse or child endangerment statutes.<sup>60</sup> While these statutes have not been modified to specifically include the term “fetus,” the convictions have been affirmed on appeal. South Carolina was the first state to uphold a criminal conviction for prenatal

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55. *Id.* at 34.

56. *Hardy*, 469 N.W.2d at 51.

57. *Id.* at 51-52.

58. *Id.* at 52.

59. *Id.* at 53.

60. Carlson, *supra* note 11, at 83; *see e.g.*, *Whitner v. State*, 492 S.E.2d 777, 779-84 (S.C. 1997); *In re Benjamin M.*, 310 S.W.3d 844, 845-46 (Tenn. Ct. App. 2009); *Ankrom v. State*, 152 So. 3d 373, 376-77 (Ala. Crim. App. 2011).

drug use under a child endangerment statute.<sup>61</sup> In *Whitner*, the defendant, Cornelia Whitner, pled guilty to criminal child neglect after ingesting cocaine and causing her child to be born with cocaine metabolites in the child's system.<sup>62</sup> The South Carolina Supreme Court concluded that a fetus was a person under the applicable statute and that the state's policy of protecting children supported the court's interpretation.<sup>63</sup> Additionally, the court stated that because "it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child," the defendant had "all the notice the Constitution requires."<sup>64</sup> Finally, the court found that Whitner's right to privacy, specifically to carry her pregnancy to term, was not violated because cocaine use is illegal and cannot be placed "to the lofty status of a fundamental right."<sup>65</sup>

The Tennessee Court of Appeals affirmed another woman's conviction when she abused drugs during her pregnancy, and as a result, her child was delivered prematurely and suffered withdrawal symptoms.<sup>66</sup> The court reasoned that to accept the mother's argument that a fetus is not a child, would mean that "harm to a child knowingly inflicted before birth cannot be harm to, or abuse of, a child."<sup>67</sup> This would ignore the legislative intent and statutory language to ensure "care, protection, and wholesome moral, mental and physical development of children."<sup>68</sup> Moreover, the court found that the Tennessee statute, along with common law precedent, "clearly establishes that a parent may be held responsible for the prenatal conduct that exposes the child, once born, to great bodily harm."<sup>69</sup>

The Alabama Court of Criminal Appeals reached a similar result finding a woman guilty for chemical endangerment of a child for the mother's ingestion of illegal substances during pregnancy, resulting in the infant testing positive for the

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61. See *Whitner*, 492 S.E.2d at 779-84; Kordus, *supra* note 41, at 320-21.

62. *Whitner*, 492 S.E.2d at 778-79.

63. *Id.* at 780-81.

64. *Id.* at 785.

65. *Id.* at 786.

66. *In re Benjamin M.*, 310 S.W.3d 844, 845-46 (Tenn. Ct. App. 2009).

67. *Id.* at 849 (emphasis omitted).

68. *Id.*

69. *Id.* at 847.

controlled substance at birth.<sup>70</sup> Hope Elizabeth Ankrom, the mother, argued that the term “child” did not include a viable fetus.<sup>71</sup> Rejecting this theory, the court found that the word “child” was unambiguous, reasoning that “child” applied to a viable fetus in other contexts, the dictionary definition of “child” includes a fetus, and it is common in everyday use for “someone to state that a mother is pregnant with her first ‘child.’”<sup>72</sup> Further, the court explained that their ruling was supported by the public policy of Alabama, as stated by the Alabama Legislature.<sup>73</sup>

## 2. Jurisdictions Reversing Convictions

Although prosecutions under child abuse or endangerment statutes have been upheld in a few states, many jurisdictions have reached contrary decisions where the legislature has yet to amend the statutes to include a “fetus.” Some courts find extending such statutes in order to prosecute women for prenatal drug use is against legislative intent.<sup>74</sup> For example, some have held that prenatal drug use is not an activity foreseen by the legislature when creating the statute.<sup>75</sup> Other jurisdictions concluded that a fetus is not a person under their state’s statute.<sup>76</sup> In most of these cases, courts held that it was up to the state’s legislature to include an unborn fetus in the definition of “child” if its intent was to include it.<sup>77</sup>

A Nevada mother, Cathy Encoe, faced charges for child endangerment after she admitted to marijuana use during her pregnancy.<sup>78</sup> Then, following hospital protocol, her newborn

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70. Ankrom v. State, 152 So. 3d 373, 376-77 (Ala. Crim. App. 2011).

71. *Id.* at 382.

72. *Id.*

73. *Id.* at 379 (stating that Alabama’s public policy “is to protect life, born, and unborn” and especially “concerning unborn life that is capable of living outside the womb.”).

74. Sheriff, Washoe Cty. v. Encoe, 885 P.2d 596, 599 (Nev. 1994).

75. Kilmon v. State, 905 A.2d 306, 314 (Md. 2006) (reasoning that “the overwhelming majority of courts that have considered the issue have concluded that those crimes do not encompass that kind of activity.”).

76. State v. Stegall, 828 N.W.2d 526, 532-33 (N.D. 2013).

77. Reyes v. Super. Ct. of San Bernardino Cty., 75 Cal. App. 3d 214, 219 (Cal. Dist. Ct. App. 1977) (stating “when the [l]egislature has intended to include a fetus or unborn child within the protection of a penal statute, it has done so expressly.”).

78. *Encoe*, 885 P.2d at 597.

was tested and found positive for amphetamines and methamphetamine.<sup>79</sup> The state acknowledged that a fetus was not a person under the statute, but contended that “Encoe violated the statute from the moment her child left the womb to the moment the umbilical cord was severed”; thereby reasoning the passage of methamphetamine after birth while the umbilical cord was still connected constituted endangerment.<sup>80</sup> Notably, that was the precise argument raised in the Arkansas case, *Arms v. State*, without success.<sup>81</sup>

The Nevada Supreme Court held that the endangerment statute does not include prenatal ingestion of controlled substances and the transmission of the substances via the umbilical cord.<sup>82</sup> Further, “[a] person may not be punished for a crime unless her acts fall clearly within the language of the statute” and other courts have similarly found such “construction renders the statute impermissibly vague.”<sup>83</sup> The court also stated that this kind of prosecution “would open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal, toxins.”<sup>84</sup>

In *State v. Stegall*, the North Dakota Supreme Court addressed three separate cases in which women engaged in prenatal methamphetamine use, and, after giving birth, the children all tested positive for the substance.<sup>85</sup> North Dakota prosecuted their conduct under the theory of endangerment contending that the prenatal action of “each defendant continued to affect her child postpartum” and that “a child is still ‘exposed’ to the controlled substance following birth” despite the fact the substance use took place before the birth of the child.<sup>86</sup> The

79. *Id.*

80. *Id.* at 598.

81. *Arms v. State*, 2015 Ark. 364, at 5, 471 S.W.3d 637, 641.

82. *Encoe*, 885 P.2d at 599.

83. *Id.* at 598; *see also* *Johnson v. State*, 602 So. 2d 1288, 1294 (Fla. 1992); *People v. Hardy*, 469 N.W.2d 50, 52 (Mich. Ct. App. 1991); *State v. Gray*, 584 N.E.2d 710, 712-13 (Ohio 1992).

84. *Encoe*, 885 P.2d at 598 (stating that the legislature is the better forum to discuss public policy issues, such effects of, and criminalization of, prenatal drug use).

85. *State v. Stegall*, 828 N.W.2d 526, 528-29 (N.D. 2013).

86. *Id.* at 529-530; N.D. CENT. CODE ANN. § 19-03.1-22.2(2) (West 2003) (criminalizing when one “knowingly or intentionally causes or permits a child . . . to be exposed to, to ingest or inhale, or to have contact with a controlled substance”).

court held that “an unborn viable fetus is not a child under the endangerment of a child statute,” and, consequently, “a pregnant woman is not criminally liable for endangerment of a child for prenatal conduct that ultimately harms a child born alive.”<sup>87</sup> Also, the court noted that if “the [state] legislature had expressly intended to criminalize endangerment of a child to include an unborn child it would have done so.”<sup>88</sup>

### C. States with Statutes Specifically Criminalizing Prenatal Drug Use

In 2014, Tennessee passed a statute making the fetus a victim for purposes of assault and homicide statutes.<sup>89</sup> Under this statute, “‘another,’ ‘individuals,’ and ‘another person’ include a human embryo or fetus at any stage of gestation in utero,” when such terms refer to a victim of a criminal act.<sup>90</sup> The state legislature made a point to include that “nothing in this section shall preclude prosecution of a woman for assault” for prenatal narcotic drug use “if her child is born addicted to or harmed by the narcotic drug and the addiction or harm is a result of her illegal use of a narcotic drug taken while pregnant.”<sup>91</sup> There is, however, an affirmative defense if one “actively enrolled in an addiction recovery program before the child is born, remained in the program after delivery, and successfully completed the program.”<sup>92</sup> The current version of the statute only remained in effect until 2016, allowing lawmakers to assess the law’s impact before extending the law or passing another similar statute.<sup>93</sup>

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87. *Stegall*, 828 N.W.2d at 533.

88. *Id.* at 531.

89. TENN. CODE ANN. § 39-13-107 (West 2014).

90. TENN. CODE ANN. § 39-13-107(a) (West 2014).

91. *See* Act of Apr. 29, 2014, 2014 Tenn. L. Pub., ch. 820; TENN. CODE ANN. § 39-13-101(a)(1) (West 2016) (stating that assault occurs when one “[i]ntentionally, knowingly or recklessly causes bodily injury to another”).

92. Act of Apr. 29, 2014, 2014 Tenn. L. Pub., ch. 820.

93. Amanda Sakuma, *Tenn. Passes Law Criminalizing Moms Who Used Drugs While Pregnant*, MSNBC (Apr. 30, 2014, 7:06 PM), <http://www.msnbc.com/msnbc/tennessee-passes-law-criminalize-moms-drugs> [<https://perma.cc/Z3GN-YWXL>]. In the spring of 2016, it was determined that this law would not be renewed. *See* Sheila Burke, *Doctors Are Applauding the End of a Unique Tennessee Law Threatening Addicted Mothers with Jail for Assault if They Gave Birth to Babies with Drug Dependence*, U.S. NEWS (Apr. 1, 2016 5:49 PM),

#### IV. UNRESOLVED LEGAL ISSUES FOLLOWING *ARMS V. STATE*

As discussed in previous sections, opinions are split among jurisdictions on the prosecution of mothers for their prenatal drug use.<sup>94</sup> Aligning with other states, the Arkansas Supreme Court determined that an unborn fetus did not constitute a person for purposes of the statute in the *Arms* case, but perhaps left the door open for prosecution of other mothers under the statute as written.<sup>95</sup> The court found that the umbilical cord transfer failed for lack of sufficient evidence, suggesting that had there been sufficient evidence after birth, a conviction may have been possible.<sup>96</sup> Further, the court also opened up the debate as to whether the mother's actions in these situations is an active or passive function.<sup>97</sup>

##### A. Is It Possible to Obtain Substantial Evidence to Convict?

The medical field has extensively researched whether controlled substances are transferred across the placenta from a pregnant woman to an unborn fetus and child after birth.<sup>98</sup> For example, chemical products from marijuana—the most common illicit substance used during pregnancy—have been found to transfer through the placenta and into breast milk.<sup>99</sup> Also, there

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<http://www.usnews.com/news/us/articles/2016-04-01/doctors-applaud-the-end-of-tennessees-fetal-assault-law> [<https://perma.cc/C3FL-ZCP9>].

94. See *Ankrom v. State*, 152 So. 3d 372, 382-85 (Ala. Crim. App. 2011); *Johnson v. State*, 602 So. 2d 1288, 1294-96 (Fla. 1992); *People v. Hardy*, 469 N.W.2d 50, 52-53 (Mich. Ct. App. 1991); *Whitner v. State*, 492 S.E.2d 777, 780-84 (S.C. 1997).

95. *Arms v. State*, 2015 Ark. 364, at 7, 471 S.W.3d 637, 637, 642; see *id.* at 13-14, 471 S.W.3d at 645-646 (Wood, J., concurring) (stating that the majority's comments "that section 5-13-210 could never include the transfer of a controlled substance through a passive bodily function" were "purely advisory" because no party raised that argument at trial). The Arkansas Supreme Court has repeatedly held that it will not address an issue not raised and ruled on at trial "and to otherwise would be to issue an advisory opinion, which we will not do." *Id.*

96. *Id.* at 7, 471 S.W.3d at 642.

97. *Id.* at 8, 471 S.W.3d at 642.

98. See Grace Chang, *Overview of Substance Misuse in Pregnant Women*, UPTODATE (Nov. 2, 2016), <http://www.uptodate.com/contents/overview-of-substance-misuse-in-pregnant-women?source=machineLearning&search=prenatal+drug+use&selectedTitle=1~150&sectionRank=1&anchor=H96352822#H96352822> [<https://perma.cc/9A79-HXGM>].

99. *Id.*



is evidence that “[c]ocaine readily crosses the placenta and fetal blood-brain barrier.”<sup>100</sup> Methamphetamine, which was used by Melissa Arms, and its byproducts are also known to cross the placenta.<sup>101</sup>

Although there is evidence that a transfer of a controlled substance occurs at some point, hence infants testing positive for illegal drugs at birth, it is difficult to determine exactly when the exposure happens.<sup>102</sup> Urine screening, as used in Arms’ case, presents a relatively short window of exposure, typically reflecting only days.<sup>103</sup> Meconium analysis allows testing for specific drugs through fetal excrement; however, this “testing is not typically available on-site at birth hospitals, and results from outside reference laboratories are often not readily available.”<sup>104</sup> It can also be quite challenging to collect appropriate samples of meconium because, for instance, meconium may be passed in utero or become contaminated with transitional human milk or formula stools.<sup>105</sup> A promising approach is the “[t]esting of umbilical cord blood and tissue by using drug class-specific immunoassays”; however, this method is not available for clinical use at the moment.<sup>106</sup> Although there are several effective methods of testing for controlled substance use, specifically, testing of the umbilical cord after birth—avoiding the debate about whether a fetus is a person for purposes of these statutes—“the question of how recent maternal drug ingestion must be in order to be detected . . . has not been settled.”<sup>107</sup>

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100. *Id.*

101. *Id.*; see also *Arms*, 2015 Ark. 364, at 3-5, 471 S.W.3d at 640-41.

102. See Suzanne D’Amico, Comment, *Inherently Female Cases of Child Abuse and Neglect: A Gender-Neutral Analysis*, 28 FORDHAM URB. L.J. 855, 862 (2001).

103. See *Arms*, 2015 Ark. 364, at 3, 471 S.W.3d at 640; Lauren M. Jansson, *Infants of Mothers with Substance Use Disorder*, UPTODATE (May 11, 2016), <http://www.uptodate.com/contents/infants-of-mothers-with-substance-abuse?source=machineLearning&search=Infants+of+mothers+with+substance+abuse&selectedTitle=1~150&sectionRank=1&anchor=H24#H24> [https://perma.cc/S9TU-UKDG].

104. Jansson, *supra* note 103.

105. *Id.*

106. *Id.*

107. D. Montgomery et al., *Testing for Fetal Exposure to Illicit Drugs Using Umbilical Cord Tissue vs Meconium*, 26 J. PERINATOLOGY 11, 13 (2006) (stating that pregnant animal studies “illustrate[] the complexity of this issue.”).

Few courts have discussed whether the brief time after birth that the umbilical cord is connected to the mother and child constitutes enough evidence to convict a mother under delivery statutes, since during this period it is indisputable that the baby is a “person,” eliminating the argument that a fetus is not a person. In *Johnson*, the judge reversed a mother’s conviction for lack of evidence because there was no testimony establishing “that any cocaine derivatives passed from the mother’s womb to the placenta during the sixty-to-ninety seconds” after the child was born.<sup>108</sup>

Although modern science can gather evidence to determine whether or not a baby receives a controlled substance through the placenta and umbilical cord from the mother, it is not sufficient to accurately pinpoint when the transfer occurs.<sup>109</sup> Therefore, the only time frame to collect evidence in order to convict a mother under a delivery statute—where a fetus is not yet a person—is “the narrow window of time when the child [is] outside the womb, but still attached to the placenta by the umbilical cord”; this is simply not scientifically possible from an evidentiary standpoint.<sup>110</sup>

## B. Statutory and Common Law Issues: Active/Voluntary Act vs. Passive/Involuntary Act

### 1. *Transfer of the Drug Is Involuntary or Passive Action*

Regardless of whether the Arkansas court had found a fetus was a person under the statute or whether there was sufficient evidence of an umbilical cord transfer, the state still had to deal with the *mens rea* element. The statute under which Melissa Arms was convicted states that “[i]t is unlawful for any person to administer or cause to be ingested, inhaled, or otherwise introduced into the human body of another person a controlled substance.”<sup>111</sup> The statute at issue does not include a *mens rea* element, and, under Arkansas law, if a statute defining an

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108. *Johnson v. State*, 602 So. 2d 1288, 1292 (Fla. 1992); *see also* Chan, *supra* note 27, at 212.

109. *See* Montgomery et al., *supra* note 107.

110. *Arms v. State*, 2015 Ark. 364, at 7, 471 S.W.3d 637, 642.

111. ARK. CODE ANN. § 5-13-210(b) (2013).

offense does not prescribe a mental state, a culpable mental state is statutorily required and established if one acts purposefully, knowingly, or recklessly.<sup>112</sup> There is a limitation to the mental state requirement if “[a] person does not commit an offense . . . unless his or her liability is based on conduct that includes a voluntary act.”<sup>113</sup>

There is an argument that the *mens rea* element is met by one simply knowingly administering the drug: for example, when Arms used the methamphetamine for her personal use. However, in most cases under the statute, one administers or causes the controlled substance to enter the victim’s body, a system obviously physically separate from the defendant’s body.<sup>114</sup> There is a unique situation involving the requisite *mens rea* for transfers between a woman and fetus, though, because it is the rare situation under the statute where the two individuals essentially share the same body. Therefore, this Comment proceeds on the assumption that a pregnant woman knowingly using the drug does not satisfy the *mens rea* component.

Further, Melissa Arms’ criminal liability would only have occurred after the child was born through Arms’ transmission of the drugs to the child voluntarily via the umbilical cord. The Arkansas Supreme Court determined that the statute “does not expressly criminalize the passive bodily processes that results in a mother’s use of a drug entering her unborn, or newborn child’s system,” and the statutory language “must be interpreted to refer to an active process.”<sup>115</sup> As a result, it appears as if the court found that, despite Melissa Arms admittedly taking the methamphetamine voluntarily for personal use multiple times during her pregnancy, the transfer via the umbilical cord to her baby was biological and involuntary—a passive process.<sup>116</sup>

Few courts have discussed whether a mother’s actions are voluntary in this type of situation. However, as mentioned earlier, a Florida mother’s conviction was reversed for lack of

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112. See ARK. CODE ANN. § 5-13-210(b); ARK. CODE ANN. § 5-2-203(b) (2013).

113. ARK. CODE ANN. § 5-2-204(a) (2013).

114. See *Yates v. State*, No. CACR 98-620 1999, 1999 Ark. App. LEXIS 500, at \*9-11 (Ark. Ct. App. June 30, 1999) (determining there was sufficient evidence the defendant introduced Rohypnol into the victim’s body).

115. *Arms*, 2015 Ark. 364, at 8, 471 S.W.3d at 642.

116. *Id.*

evidence.<sup>117</sup> Moreover, the judge said, “I can find no case where ‘delivery’ of a drug was based on an involuntary act such as diffusion and blood flow.”<sup>118</sup>

Another instance occurred when the Louisiana Court of Appeals held that umbilical transfer of a controlled substance could not be the basis for a criminal charge against the mother.<sup>119</sup> The court reasoned that the “transmission of the drugs . . . via the umbilical cord after the child was born was not a voluntary act or something over which a mother giving birth has any control by her will.”<sup>120</sup> Further, this does not show a willful act and therefore would not meet the prerequisite intention of criminal conduct.<sup>121</sup> A Pennsylvania district court ruled similarly, stating that the attempted prosecution under a delivery statute required a transfer to “another person” and “some willful voluntary act.”<sup>122</sup> In refusing to find a voluntary act, the court stated that “the inevitable, biological flow of blood is surely not a ‘voluntary act’ within the meaning of the [Pennsylvania] Code.”<sup>123</sup>

## *2. Should Recklessly Apply or Does Using While Pregnant Intend the Natural Consequences*

Although there is no precedent for finding a transfer of drugs through the umbilical cord to a child to be voluntary or active criminalizing conduct, there are strong statutory interpretation arguments and common law interpretations

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117. See *Johnson v. State*, 602 So. 2d 1288, 1292 (Fla. 1992). The court stated that:

The expert witnesses all testified about blood flow from the umbilical cord to child. But that blood flow is the child’s and the placenta through which it flows, is *not* part of the mother’s body. No witness testified in this case that any cocaine derivatives passed from the mother’s womb to the placenta during the sixty-to-ninety seconds after the child was expelled from the birth canal.

*Id.*

118. *Id.* at 1292.

119. *State v. Armstard*, 991 So. 2d 116, 126-27 (La. Ct. App. 2008).

120. *Id.* at 124.

121. *Id.*

122. *Commonwealth v. Kemp*, No. 2707 C 1991, 1992 WL 613723, at \*5 (Pa. Com. Pl. Dec. 16, 1992).

123. *Id.*

conflicting with the voluntary act exception to support the prosecution of women in these cases.

As previously noted, if there is not a *mens rea* requirement, then a culpable mental state exists when one acts purposefully, knowingly, or recklessly.<sup>124</sup> One acts recklessly “when the person consciously disregards a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur.”<sup>125</sup> Moreover, the risk must be the type where “disregard of the risk constitutes a gross deviation from the standard [of] care that a reasonable person would observe in the actor’s situation.”<sup>126</sup>

For example, the Arkansas Supreme Court determined that a person driving a truck around a curve on a bridge should be aware that driving on the wrong side of the road presented “a substantial and unjustifiable risk” that the driver may hit an oncoming car from the opposite direction and kill someone in that car.<sup>127</sup> Further, it was appropriate for the jury to find that the defendant’s failure to perceive that risk in that situation “constituted ‘a gross deviation from the standard of care that a reasonable person would observe’” in his circumstances.<sup>128</sup>

It is arguable that Melissa Arms met the minimal requirement for the *mens rea* as defined by statute in that she disregarded a substantial and unjustifiable risk that introducing methamphetamine to her baby would occur.<sup>129</sup> Even assuming that a fetus is not a person for purposes of the statute, she likely knew that there was a risk that the baby, after birth, would have the substance in his system when she used the drug one day before going into labor.<sup>130</sup> Additionally, this failure to perceive the risk could be considered a deviation from the standard of care of a reasonable person.<sup>131</sup>

The Arkansas Supreme Court has also stated that if there is a lack of direct evidence proving the intent or state of mind of a defendant that it “must usually be inferred from the

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124. See ARK. CODE ANN. § 5-2-203(b) (2013).

125. ARK. CODE ANN. § 5-2-202(3)(A) (2013).

126. ARK. CODE ANN. § 5-2-202(3)(B) (2013).

127. *Utley v. State*, 366 Ark. 514, 518, 237 S.W.3d 27, 30 (2006).

128. *Id.*

129. See ARK. CODE ANN. § 5-2-202(4) (2013).

130. See ARK. CODE ANN. § 5-2-202(4).

131. See ARK. CODE ANN. § 5-2-202(4)(B) (2013); *Utley*, 366 Ark. at 518, 237 S.W.3d at 30.

circumstances of the crime.”<sup>132</sup> Moreover, “because of the obvious difficulty in ascertaining a defendant’s intent, a presumption exists that a person intends the natural and probable consequences of his or her acts.”<sup>133</sup>

In one Arkansas case, the court found sufficient evidence to support a first-degree battery conviction when the defendant fired a gun three times at an occupied truck.<sup>134</sup> The court reasoned that because of the presumption that one “intends the natural and probable consequences of his acts,” the jury could have reasonably found that by firing at an occupied truck his purpose was to cause physical injury.<sup>135</sup>

Likewise, the Arkansas delivery statute at issue in the *Arms* case falls under the criminal chapter for assault and battery.<sup>136</sup> Assuming that Melissa Arms’ actions were passive and fall under the *mens rea* exception, there is still an issue of whether her conduct of transferring the controlled substance via the umbilical cord is a “natural and probable consequence” of consuming narcotics while pregnant. Because pregnant women are most likely aware that using alcohol, tobacco, or illicit drugs while pregnant can potentially cause harm or pass to the child, there appears to be a presumption that a mother using a controlled substance intends the natural and likely consequence of introducing the substance into the body of the child.

The rationale that supports a finding that mothers who use drugs while pregnant cannot be convicted for transferring the substance to their child is primarily based on the fact that it is a biological, passive act. However, this language would actually appear to fall under the Arkansas common law finding that a “natural and probable consequence”—regardless of whether it results from an intentional, active act or a biological, passive act—is sufficient to convict one for their actions.<sup>137</sup> Clearly, there is a conflicting issue about which rule of law should prevail.

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132. *Taylor v. State*, 77 Ark. App. 144, 150, 72 S.W.3d 882, 885 (Ct. App. 2002).

133. *Spight v. State*, 101 Ark. App. 400, 402, 278 S.W.3d 599, 600-01 (Ct. App. 2008).

134. *Taylor*, 77 Ark. App. at 150, 72 S.W.3d at 885.

135. *Id.*

136. *See* ARK. CODE ANN. § 5-13-210(b) (2013).

137. *Id.*

## V. ARKANSAS PROPOSED SOLUTION

As previously mentioned, after Arms' conviction was reversed, the Arkansas Attorney General stated that her office is "committed to working with the General Assembly to clarify that this statute makes it a crime for a pregnant woman to introduce controlled substances like methamphetamine into the body of her unborn or just born child."<sup>138</sup> Therefore, it seems that regardless of the holding in *Arms v. State*,<sup>139</sup> it is highly likely that the Arkansas Legislature will face pressure to find a statutory solution in order to prosecute women for prenatal illicit drug use during its next session occurring in 2017.<sup>140</sup> The question becomes what is the best avenue, in consideration of public policy arguments, to address this issue in Arkansas, as well as other states.

A quick fix, such as simply defining an unborn fetus as a person for an introduction statute or delivery statute leaves the door open for interpretation and evidentiary issues.<sup>141</sup> Further, the Arkansas "delivery" statute provides that one who violates it is guilty of a Class Y, Class B, or Class C felony.<sup>142</sup> These types of harsh penalties for felony convictions are exactly what most who oppose prosecuting prenatal drug use fear.<sup>143</sup>

Accordingly, the most appropriate remedy to combat this problem would be a specific statute that would address prenatal drug use directly—such as the statute Tennessee briefly

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138. See Buck, *supra* note 23.

139. *Arms v. State*, 2015 Ark. 364, at 7-8, 471 S.W.3d 637, 642.

140. In fact, during the 2015 Arkansas legislative session, a bill was introduced to include ARK. CODE ANN. § 5-13-210 to the list of enumerated statutes having the term "unborn child" within the definition of a "person." See H.R. 1376, 90th Gen. Assemb., Reg. Sess. (Ark. 2015). However, this bill "died in the House at sine die adjournment." *Arms*, 2015 Ark. 364, at 11, 471 S.W.3d at 644 n.1 (Brill, C.J., concurring).

141. See *supra* Part IV.

142. ARK. CODE ANN. § 5-13-210(c)(1)-(3) (2013); ARK. CODE ANN. § 5-4-401(a)(1) (2013) (stating that a Class Y felony sentence ranges between ten and forty years); ARK. CODE ANN. § 5-4-401(a)(3) (2013) (stating that a Class B felony requires a five to twenty year sentence); ARK. CODE ANN. § 5-4-401(a)(4) (2013) (stating that a Class C felony violation results in a three to ten year sentence). Arms was convicted of a felony and sentenced to twenty years. *Arms*, 2015 Ark. 364, at 1, 471 S.W.3d at 639.

143. Carlson, *supra* note 11, at 87-89.

implemented.<sup>144</sup> The proposed statute should similarly include an “unborn fetus” or “unborn child” in the definition of a “person” for a fetal assault crime.<sup>145</sup>

This statute would not only expressly allow prenatal drug use to be prosecuted as an assault<sup>146</sup> but would also give states the option to classify the offense as a lesser misdemeanor.<sup>147</sup> For example, if Arkansas adopted a punishment for either a Class A or Class B misdemeanor, the maximum sentence would be one year or ninety-days, respectively.<sup>148</sup> By allowing a lesser misdemeanor penalty—a compromise of sorts—those in favor of prosecuting for prenatal drug-use would retain a criminal punishment for the offense, while those who oppose a severe punishment would likely appreciate that the maximum sentence would be reduced to no more than a year.

In addition to a less steep penalty for violating the proposed statute, an affirmative defense should also remain; specifically, participation in a drug-treatment program.<sup>149</sup> However, while this affirmative defense in Tennessee is a good foundation, technically a woman in Tennessee can take a risk and enroll the day before expecting to give birth, then complete the program without punishment because the statute only requires one enter a program prior to the child’s birth.<sup>150</sup> The proposed statute should include a strict time frame during which the expectant mother would be required to enter a drug rehabilitation program. This time frame ideally will ease the medical field’s strong belief that prosecuting women is detrimental to the women, the baby, and society because it deters women from seeking help and avoiding punishment. This option would give women a period of time in which they know, regardless of their struggles with addiction, they can openly reach out for assistance without the fear of prosecution. The time frame for entrance into the program would also help protect the fetus—a key issue for

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144. *See supra* Part III.C.

145. *See supra* Part III.C.

146. TENN. CODE ANN. § 39-13-107(c)(2) (West 2014). This statute was amended in 2016. *See* TENN. CODE ANN. § 39-13-107(c)(2) (West 2016).

147. TENN. CODE ANN. § 39-13-101(b)(1)(A) (West 2016) (stating that typically assault is a Class A misdemeanor, but extreme cases allow for a Class B misdemeanor).

148. ARK. CODE ANN. § 5-4-401(b)(1)-(2) (2013).

149. TENN. CODE ANN. § 39-13-107(c)(3) (West 2014).

150. TENN. CODE ANN. § 39-13-107(c)(3).



prosecutors and the state—by encouraging expectant mothers to enroll early so as to meet the bright-line rule which would allow them to avoid prosecution. As previously discussed, the different methods in which states have attempted to combat the increasing use of illicit drugs by pregnant women has revealed the sharply divided societal opinions on the issue and has created questionable prosecutorial legal arguments. A specific statute could, in theory, create a compromise between the opposing sides of the argument about whether to prosecute women for prenatal drug use, while providing an opportunity for soon-to-be mothers and children to live healthy lives.

## VI. CONCLUSION

According to the current Arkansas statutory language and case law, even though a fetus is not a person under the introduction of a controlled substance statute, the presumed intention of an action's "natural and probable consequences" allows pregnant women using drugs to be prosecuted under the statute.<sup>151</sup> Therefore, a mother who knowingly or intentionally ingests a controlled substance and is aware that through the natural, biological process of exchanging fluid through the placenta with her unborn fetus, should be presumed to intend the natural and probable consequence of transmitting the drug to the child in utero. This reasoning follows the thought process of the *Whitner* court in that "it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child."<sup>152</sup>

Further, just as Alabama and Tennessee have statutory public policy in favor of protecting both unborn and born children,<sup>153</sup> "Arkansas public policy 'is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.'"<sup>154</sup> Accordingly, determining that one who ingests a controlled substance while

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151. ARK. CODE ANN. § 5-13-210(a) (2013); *Spight v. State*, 101 Ark. App. 400, 403, 278 S.W.3d 599, 601 (Ct. App. 2008).

152. *Whitner v. State*, 492 S.E.2d 777, 785 (S.C. 1997).

153. *Ankrom v. State*, 152 So. 3d 373, 379 (Ala. Crim. App. 2011) (citing ALA. CODE § 26-22-1(a) (1975)); *In re Benjamin M.*, 310 S.W.3d 844, 849 (Tenn. Ct. App. 2009).

154. *Arms v. State*, 2015 Ark. 364, at 11, 471 S.W.3d 637, 644 (Brill, C.J., concurring) (citing ARK. CONST. amend. LXVIII, § 2).

pregnant intends the natural and probable consequences of their action is supported by Arkansas public policy as defined in the Arkansas Constitution. This does not mean, however, that prosecuting women under the theory of introduction of a controlled substance to another person is the correct legal theory.

The more appropriate and less controversial attempt to curve prenatal drug use, while not deterring women from seeking medical attention or addiction assistance while pregnant, is to enact a statute specifically criminalizing prenatal drug use and fetal assault, while allowing women to avoid prosecution if enrolled in a drug treatment program. In this proposed statute, both those for and against the prosecution of women for prenatal drug use will make concessions to the other side, hopefully allowing some form of middle ground to be formed to help address this growing issue for the sake of maternal health, neonatal and infant health, as well as society as a whole.<sup>155</sup>

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155. *See supra* Part V.