# No Safe Harbors: Examining the Shift From Voluntary Treatment Options to Criminalization of Maternal Drug Use in Tennessee

SARAH E. SMITH*

I. INTRODUCTION ........................................................................203
II. BACKGROUND—NEONATAL ABSTINENCE SYNDROME & CRIMINALIZATION OF ITS CAUSE ........................................206
*A. Neonatal Abstinence Syndrome* ........................................207
*B. History of Criminal and Civil Penalties for Maternal Drug Abuse* ......................................................209
1. Rise of Criminalization ..............................................209
2. Modern Courts ...........................................................210
III. TENNESSEE APPROACHES .......................................................214
*A. Before the Safe Harbor Act* .............................................214
*B. The Safe Harbor Act* ........................................................216
*C. Criminalizing Maternal Drug Abuse in Tennessee* ..........218
IV. CONSTITUTIONAL ANALYSIS OF TENN. CODE ANN. SECTION 39-13-107 ......................................................222
*A. Eighth and Fourteenth Amendments: Cruel and Unusual Punishment* .......................................223
*B. Fourth Amendment: Warrantless Searches* ......................225
*C. Void-for-Vagueness: Substantive Due Process* ................226
V. ADOPTING A DIFFERENT APPROACH: HEALTH IMPACT OF CRIMINAL PROSECUTION OF MATERNAL DRUG USE ..........................................................229
VI. CONCLUSION...........................................................................232

## I. INTRODUCTION

Tennessee police arrested Mallory Loyola for assault in July 2014 based on Tennessee's recently amended assault statute for

harm caused to her child based on drug use during her pregnancy.[1] Effective July 1, 2014, Tennessee Code Annotated ("T.C.A.") section 39-13-107 was amended:

> [A woman can be prosecuted] for assault under § 39-13-101 for the illegal use of a narcotic drug, as defined in § 39-17-402,[2] while pregnant, 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.[3]

Days after the amendment passed, Mallory Loyola gave birth to a baby girl, and the child tested positive for methamphetamine.[4] Police subsequently arrested Mallory Loyola in Monroe County, Tennessee on assault charges.[5] Loyola pled guilty to a crime that she did not commit as the statute covers only "narcotic drug[s]," and the statutory language does not include methamphet-

---

* J.D. Candidate May 2016, The University of Memphis Cecil C. Humphreys School of Law; Managing Editor, *The University of Memphis Law Review*, Volume 46; B.A., History, Rhodes College, 2013. I am grateful to Kevin Brown, Professor Christina Zawisza, Phoebe Dossett, and Greg Wagner for their time, advice, and insight in assisting me in the drafting and completion of this Note.

1. *See* TENN. CODE ANN. § 39-13-107(c)(2) (2014); Lindsay Beyerstein, *Bad Medicine in Tennessee for Pregnant and Drug-Addicted Women*, ALJAZEERA AMERICA, (Sept. 30, 2014, 5:00 AM), http://america.aljazeera.com /articles/2014/9/30/tennessee-new-lawsb1391.html.

2. TENN. CODE. ANN. § 39-17-402 (2012). The definition of "narcotic" includes opiums, opiates, coca leaves, salts, and their derivatives. *Id.*

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

4. *Using Meth While Pregnant: That's Assault in Tennessee*, WRCBTV.COM Chattanooga (July 14, 2014, 2:36 PM), http://www.wrcbtv.com /story/26014723/using-meth-while-pregnant-thats-assault-in-tennessee (hereinafter *Using Meth*); *see* Beyerstein, *supra* note 1; Rosa Goldensohn & Rachael Levy, *The State Where Giving Birth Can Be Criminal*, THE NATION (Dec. 10, 2014), http://www.thenation.com/article/192593/state-where-giving-birth-can-be-criminal. Methamphetamine is a Schedule II drug in Tennessee and acts as a stimulant to the central nervous system. *See* TENN. CODE ANN. § 39-13-408(d) (2012).

5. While there may have been opiates in Loyola's system, the arrest was based on the methamphetamine use. *See Using Meth*, *supra* note 4.

amine.[6] A judge sent Loyola to drug rehabilitation as a result of a plea agreement requiring her successful completion of treatment.[7] Loyola's charges were dismissed in February 2015 when she successfully completed treatment, but the arrest and media attention remain.[8]

The Tennessee amendment to the assault statute is inconsistent with the Tennessee General Assembly's intent in the passage of the "Safe Harbor Act" in 2013.[9] The Safe Harbor Act was designed to create priority for pregnant women in treatment centers and provide protection from Juvenile Court proceedings where treatment is successfully completed.[10] The Safe Harbor Act is not punitive towards women with substance abuse problems, but rather established protections for pregnant women seeking drug treatment.[11] This Note discusses the background and implications of the law under which Loyola was charged. Tennessee's amendment to the assault statute fails to address the public health concerns of maternal drug addiction and violates three constitutional protec-

---

6. *Using Meth*, *supra* note 4. Since this arrest, the Tennessee General Assembly introduced an additional amendment to this statute that includes methamphetamine specifically in the statutory language. *See* S.B. 586, 109th Gen. Assemb., 1st Reg. Sess. (Tenn. 2015); H.B. 1340, 109th Gen. Assemb., 1st Reg. Sess. (Tenn. 2015). The addition of this amendment shows the original language of the statute does not cover methamphetamine. Methamphetamine is a schedule II drug and stimulant. TENN. CODE ANN. § 39-17-408 (2012). For a discussion of the initial non-inclusion of methamphetamine, see *infra* Section IV.C. During the publication period for this Note, that amendment failed to pass, leaving the assault statute as referenced in this Note. *See* Tenn. S.B. 586; Tenn. H.B. 1340.

7. Aaron Wright, *Mom Charged Under Drug-Addicted Baby Law Going to Rehab*, WBIR.COM (Aug. 5, 2014, 7:45 PM), http://www.wbir.com/story/news/local/mcminn-monroe/2014/08/05/woman-charged-under-drug-addicted-baby-law-to-appear-in-court/13614755/.

8. *See Mom's Charge in Prenatal Drug Case Dropped After She Completes Program*, WBIR.COM (Feb. 6, 2015, 7:24 PM), http://www.wbir.com/story/news/2015/02/06/moms-charge-in-newborn-drug-case-dropped-after-she-completes-program/23002693/.

9. *See* Safe Harbor Act of 2013, 2013 Pub. Ch. 398 (codified at TENN. CODE ANN. § 33-10-104(f) (2014)).

10. *Tenn. S. Health & Welfare Comm.*, S. 0459, 108th Gen. Assemb., 2d Reg. Sess. (Tenn. 2013), http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB0459&ga=108.

11. *Id.*

tions: (1) the protection against cruel and unusual punishment, (2) the protection against warrantless searches, and (3) substantive due process. Tennessee should return to the provisions of the Safe Harbor Act and expand its effect to focus on the health, safety, and welfare of mothers living with drug addiction.

Part II of this Note reviews the history of civil and criminal punishments of maternal drug use and Neonatal Abstinence Syndrome ("NAS"), including the public health concerns that drugs pose to vulnerable children and the cycle of drug abuse. Part III looks at the history of Tennessee's response to NAS, including civil, criminal, and public health remedies. Part IV addresses constitutional violations in elements of T.C.A. section 39-13-107, including the vague statutory language, warrantless searches, and its implication of a "status" crime. Lastly, Part V discusses a public health approach to NAS and proposes the Tennessee General Assembly take no action upon the criminal statute's sunset provision on July 1, 2016.[12] This Note concludes that the solution is for Tennessee to focus on expanding and funding the Safe Harbor Act to incentivize pregnant women who are addicted to drugs to seek treatment.

## II. BACKGROUND—NEONATAL ABSTINENCE SYNDROME & CRIMINALIZATION OF ITS CAUSE

Illicit drug use is problematic among pregnant women in the United States.[13] NAS is a health problem primarily capable of being solved by addressing the overall public health needs of the mother. Opiate use and abuse of prescription medications close to birth have particularly adverse health effects on newborns, includ-

---

12. 2014 Tenn. Pub. Acts Ch. 820 § 3 (codified as amended at TENN. CODE ANN. § 39-13-107 (2014)). The sunset provision establishes the effectiveness of the bill for a 2-year period, reverting back to earlier statutory text unless re-enacted by the General Assembly. *See id.* This option gives the General Assembly the ability to determine the effectiveness of the statute.

13. Office of Nat'l Drug Control Policy, *Substance Abuse and Maternal and Child Health,* THE WHITE HOUSE https://www.whitehouse.gov/ondcp/substance-abuse-maternal-child-health (last visited Oct. 21, 2015).

ing seizures and other neurological strains.[14] States take different approaches to addressing or controlling prenatal drug use, and the vast difference among state approaches shows the difficulty in addressing both the problems of the mother and the needs of the child.

### *A. Neonatal Abstinence Syndrome*

Four and a half percent of pregnant women ages fifteen to forty-four in the United States report illicit drug use during pregnancy, including nonmedical use of prescription drugs.[15] Chronic fetal exposure to drugs or alcohol can cause permanent developmental and behavioral abnormalities "consistent with drug effect."[16] Signs of withdrawal include crying, jitteriness, fever, tremors, respiratory distress, seizures, and other symptoms typical of drug withdrawal.[17] These neonatal withdrawal signs appear in 55–94% of infants exposed to opiates during pregnancy.[18] Withdrawal symptoms are presented in infants exposed to other legal and illegal drugs, including alcohol.[19] The long-term effects of NAS are difficult to ascertain because there are only a small number of long-term studies on infants born with NAS, and other environmental factors make the results difficult to quantify.[20] While

---

14. Mark L. Hudak et al., *Neonatal Drug Withdrawal*, 129 PEDIATRICS e540, e545 (2012), http://pediatrics.aappublications.org/content/129/2/e540.full.pdf.

15. *Id.* at e540. This is most likely an underestimate because the number of women self-reporting can be much lower than those actually tested. *Id.* at e540–41.

16. *Id.* at e541.

17. *Id.* at e543; *see also Neonatal Abstinence Syndrome*, U.S. NAT'L LIBRARY OF MED., http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0004566/ (last visited Oct. 21, 2015).

18. Hudak et al., *supra* note 14, at e541; *see Information About Drugs*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/illicit-drugs/definitions/ (last visited Oct. 21, 2015) ("Opiates is the generic name given to a group which includes naturally occurring drugs derived from the opium poppy (Papaver somniferum) such as opium, morphine and codeine, semi-synthetic substances such as heroin . . . .").

19. Hudak et al., *supra* note 14, at e541 (noting also it is difficult to distinguish the cause of NAS symptoms in women who abuse multiple substances, which is not uncommon).

20. *Id.* at e550. *See generally* NEW SOUTH WALES MINISTRY OF HEALTH, NEONATAL ABSTINENCE SYNDROME GUIDELINES 1 (2013), http://www.health.

withdrawal symptoms in infants are present upon birth, the negative health impact of NAS appears to normalize during early infancy.[21]

NAS is a particularly prevalent problem in Tennessee.[22] Tennessee is ranked 44th for low birthweight in the United States which is linked to low income and lack of access to health care.[23] In Tennessee, there has been a sharp rise in the number of cases of NAS since the mid-2000s, largely attributable to the rise in prescription drug abuse within the state.[24] In 2000, there were only 57 reported cases of NAS.[25] In 2013, Tennessee had 855 reported cases of NAS, 27.6% of which resulted from non-prescription sub-

---

nsw.gov.au/policies/gl/2013/pdf/GL2013_008.pdf [hereinafter NEW SOUTH WALES] ("Provided that neonatal abstinence syndrome is appropriately managed, it is not currently known to be associated with any long-term health problems."); Susan Okie, *The Epidemic That Wasn't*, THE NEW YORK TIMES (Jan. 26, 2009), http://www.nytimes.com/2009/01/27/health/27coca.html?pagewanted=all&_r=0 (last visited Oct. 21, 2015) (stating scientific evidence shows relatively small long-term effects of NAS on a child's health).

21. Hudak et al., *supra* note 14, at e550; *see also* NEW SOUTH WALES, *supra* note 20, at 4.

22. *See* Douglas Springer, *Guest Column: Pregnancy, Narcotics Exact Huge Toll*, THE COM. APPEAL (May 18, 2014), http://www.commercialappeal.com/news/guest-column-pregnancy-narcotics-exact-huge-toll-ep-510192033-328957531.html ("Tennessee has one of the highest rates of NAS by population of any state, a rate that has more than tripled in the past eight years into a statewide epidemic.").

23. *See Tennessee Maintains 36th Ranking in Child Well-Being Report*, TENN. STATE COURTS (July 21, 2015), https://tncourts.gov/news/2015/07/21/Tennessee-maintains-36th-ranking-child-well-being-report ("Low-birthweight risk factors, often linked with low income and lack of health care access, include mothers with chronic health conditions, inadequate prenatal care and overweight or low maternal weight.").

24. *Neonatal Abstinence Syndrome (NAS)*, TENN. DEP'T OF HEALTH, http://tn.gov/health/topic/nas (last visited Oct. 22, 2015); Tony Gonzalez & Shelley DuBois, *Tennessee Faces Epidemic of Drug-Dependent Babies*, THE TENNESSEAN (June 13, 2014), http://www.tennessean.com/story/news/investigations/2014/06/13/drug-dependent-babies-challenge-doctors-politicians/10112813/ (showing data from 1999–2014, as well as changes in regulations in prescribing pain medication to assist in reducing drug-dependent children and access to pain medication prescriptions from multiple doctors).

25. *See* Gonzalez & DuBois, *supra* note 24 (infant drug dependency chart).

stances.[26] In 2014, there were 973 reported cases of NAS.[27] There is a comparable increase between July 1, 2013 and the end of 2014 while the law was in effect.[28] Significantly, these statistics show there was no significant drop in cases of NAS while the law has been in effect. Beyond the state interest in protecting newborns, NAS is costly to the state. The average Medicaid-eligible newborn with NAS costs over $40,000 in delivery expenses, as compared to around $7,000 for a healthy baby.[29] Drug dependency in newborns remains a prevalent problem in Tennessee.

### *B. History of Criminal and Civil Penalties for Maternal Drug Abuse*

#### 1. Rise of Criminalization

In the 1980s and 1990s, the use of crack cocaine during pregnancy was considered a national epidemic.[30] During this time, media coverage of the drug epidemic grew, and the criminalization of maternal substance abuse began.[31] Scientists began to study the

---

26. TENN. DEP'T OF HEALTH, DRUG DEPENDENT NEWBORNS (2013), http://tn.gov/assets/entities/health/attachments/NASsummary_Week_52.pdf (year-to-date statistics).

27. TENN. DEP'T OF HEALTH, DRUG DEPENDENT NEWBORNS (2015), https://www.tn.gov/assets/entities/health/attachments/NASsummary_Week_5314.pdf (year-to-date statistics).

28. *See id.*; *see also* Allie Spillyards, *Drug Addicted Babies* (Local 8 News WVLT television broadcast Nov. 28, 2012), https://www.youtube.com/watch?v=wLzcdHj48Tk.

29. MICHAEL D. WARREN, TENN. DEP'T OF HEALTH, TENNESSEE EFFORTS TO PREVENT NEONATAL ABSTINENCE SYNDROME, https://www.tn.gov/assets/entities/tccy/attachments/pres-CAD-13-NAS.pdf; *see also* Gonzalez & DuBois, *supra* note 24 ("Taxpayers bear the brunt of this cost — most of these babies and their mothers are on TennCare, the state's health insurance program for the poor.").

30. *See* Okie, *supra* note 20.

31. *See* Shona B. Glink, *Note: The Prosecution of Maternal Fetal Abuse: Is This the Answer?*, 1991 U. ILL. L. REV. 533 (1991).

> Nationwide, state prosecutors are prosecuting women for "fetal abuse" under a variety of criminal statutes. Although a few prosecutions focus on conduct other than the use of illegal drugs that cause prenatal injuries, the majority of pending cases involve women who continue to use illegal drugs during

effects of substance abuse on fetus development.[32] These studies discovered the impact of NAS, showing alcohol, strenuous activity, cigarettes, and drugs could all have detrimental effect on fetuses.[33] Women using drugs during pregnancy were charged with a variety of crimes in various states during these years, including homicide and assault.[34]

### 2. Modern Courts

States continue to vary greatly in their response to drug use during pregnancy. As of late 2014, 18 states consider drug use during pregnancy to be child abuse.[35] Four states require drug testing when abuse is suspected.[36] In three states, prenatal drug abuse is grounds for civil commitment—or the forced enrollment in a treatment program.[37] These states' provisions are widely varying,

---

> their second or third pregnancies, even though they already have given birth to at least one drug-dependent baby.

*Id.* at 535; *see also* Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC'Y 241, 248 (2011) (stating the first criminal indicted for child endangerment for drug use during pregnancy was in 1977).

32. Glink, *supra* note 31, at 541–43 (noting studies showed the most significant effect on children was from alcohol abuse during pregnancy).

33. *Id.*

34. Mohapatra, *supra* note 31, at 250–51.

35. GUTTMACHER INST., SUBSTANCE ABUSE DURING PREGNANCY (2015), http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf. These states are: Alabama, Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. *Id.* Only six of those states also give priority to pregnant women in drug treatment programs (Oklahoma, Rhode Island, Texas, Tennessee, Utah & Wisconsin). *Id.*; *see also* Niraj Chokshi, *Criminalizing Harmful Substance Abuse During Pregnancy: Is There a Problem With That?*, THE WASHINGTON POST (May 1, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/05/01/criminalizing-harmful-substance-abuse-during-pregnancy-is-there-a-problem-with-that/.

36. GUTTMACHER INST., *supra* note 35. These states are Iowa, Kentucky, Minnesota, and North Dakota. *Id.*

37. Elisabeth Fitzpatrick, Note: *Cochran v. Commonwealth: Revisiting Whether Kentucky Should Charge, Commit, or Cure Pregnant Substance Abusers*, 50 U. LOUISVILLE L. REV. 551, 557 (2012); *see also* GUTTMACHER INST., *supra* note 35. Currently only Minnesota, South Dakota and Wisconsin find drug use to be grounds for civil commitment of the mother. *Id.*

but all three states permit involuntary civil commitment when a mother is shown to abuse certain drugs.[38] The civil commitment allows a judge to place a mother into protective custody and commit her to an inpatient alcohol or drug rehabilitation facility.[39] The widely varying criminal and civil penalties suggest there is great debate about the most successful method for preventing or treating NAS in the United States.

Several states include "fetus" in the definition of "child," which greatly impacts criminal penalties for prenatal drug use. In South Carolina, viable fetuses are considered persons and afforded privileges,[40] allowing a woman to be charged with child abuse for using drugs while pregnant.[41] In *Whitner v. State*, Cornelia Whitner pled guilty to criminal child abuse for ingesting crack cocaine while pregnant.[42] Whitner's petition for post-conviction relief was denied based on the inclusion of viable fetuses in the child abuse statute rather than based on the presence of NAS symptoms in her newborn.[43] Similarly, in Alabama, a woman can be charged with "chemical endangerment of a child" because the plain meaning of "child" now includes an unborn child.[44] In 2013, the Alabama Supreme Court found the applicability of the child endangerment statute to all unborn children is consistent with the definition of "child" under Alabama law.[45] In these states, penalties are based

---

38. Fitzpatrick, *supra* note 37, at 556–58; *see* MINN. STAT. ANN. § 253B.02(2) (West 2013); S.D. CODIFIED LAWS § 34-20A-70(2)-(3) (2013); WIS. STAT. ANN. § 48.193 (West 2012).

39. *See* Fitzpatrick, *supra* note 37, at 556.

40. *See e.g.*, McKnight v. State, 661 S.E.2d 354, 365 (S.C. 2008); Whitner v. State, 492 S.E.2d 777, 780–81 (S.C. 1997); State v. Horn, 319 S.E.2d 703, 704 (S.C. 1984) (finding a fetus is a "child" in South Carolina under various criminal statutes); *see also* Roe v. Wade, 410 U.S. 113, 160 (1973) (placing viability between 24–28 weeks).

41. *See Whitner*, 492 S.E.2d at 781–84.

42. *Id.* at 778–79. Whitner filed for post-conviction relief based on the lack of subject matter jurisdiction as a non-existent offense. *Id.* at 779.

43. *Id.* at 781. The Court focused on the South Carolina legislature's intent to include all viable fetuses as children in criminal statutes intended to protect the child. *Id.* at 781.

44. *Ex parte* Ankrom, 152 So. 3d 397, 419, 421 (Ala. 2013); *see also Ex parte* Hicks, 153 So. 3d 53 (Ala. 2014).

45. *Ankrom*, 152 So. 3d at 419.

primarily upon the definition of a child, rather than the criminalization of a woman's prenatal actions on post-birth effects.[46]

In Wisconsin, a judge can take a pregnant woman into custody through a civil proceeding when the woman uses drugs, refuses treatment or does not made a good faith effort to seek treatment, and there is substantial risk to the child.[47] The judge can then order the woman into custody to an inpatient alcohol or drug abuse treatment center.[48] Prenatal alcohol abuse and a non-exhaustive list of drug abuses are included in the list of punishable acts in Wisconsin.[49] Additionally, a juvenile judge in Wisconsin may incarcerate a pregnant woman who is found to have used drugs during her pregnancy based on juvenile court's jurisdiction over the safety and welfare of the child.[50] The fetus is given a

---

46. *See, e.g.*, *id.*; *Hicks*, 153 So. 3d at 59. *Compare* Kathleen Adams, *Chemical Endangerment of a Fetus: Societal Protection of the Defenseless or Unconstitutional Invasion of Women's Rights*, 65 ALA. L. REV. 1353 (2014) (arguing inclusion of fetuses in child abuse statutes is against public policy and constitutional principles), *with* Note & Comment: Alisha Marano, *Punishing is Helping: An Analysis of the Implications of* Ex Parte Akrom *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 (2013) (arguing that all states should consider fetuses in child abuse statutory protections, regardless of their stance on the definition of personhood).

47. Fitzpatrick, *supra* note 37 at 557–58; *see* Complaint at 1, Loertscher v. Van Hollen, No. 14-cv-820 (W.D. Wisc. Dec. 15, 2014) ("[The State] petitioned for, obtained, and sought enforcement of court orders against her, mandating unwanted and inappropriate medical treatment and incarceration. [The State] arrested her and jailed her while she was pregnant, and they then subjected her to solitary confinement, deprivations, and abuse while she was incarcerated."); *see also* Bruce Vielmetti, *Pregnant Woman Challenging Wisconsin Protective Custody Law*, MILWAUKEE-WIS. JOURNAL SENTINEL, (Jan. 2, 2015), http://www.jsonline.com/news/wisconsin/pregnant-woman-challenging-wisconsin-protective-custody-law-b99411705z1-287395241.html.

48. Fitzpatrick, *supra* note 37 at 557–58. Substance abuse during pregnancy is also grounds for civil commitment in Minnesota and South Dakota. GUTTMACHER INST., *supra* note 35.

49. *See* WIS. STAT. ANN. § 48.193 (West 2012) (including abuse of alcohol, tobacco, and controlled substance in the description of when a judge can court-order a pregnant woman into protective custody).

50. *See id.*; *see also* Vielmetti, *supra* note 47 ("Tamara Loertscher, 30, of Medford was jailed in Taylor County for 18 days — including three in solitary confinement — after a judge found her in contempt for refusing to move to a

guardian ad litem[51] and held in protective custody, via the commitment of the pregnant woman.[52] The mother may be subjected to involuntary drug treatment.[53]

Alternatively, the Kentucky Supreme Court found criminal penalties for a woman's prenatal conduct subject women to an "indefinite number of new crimes covering the full range of a behavior—rendering the statutes void for vagueness."[54] The Kentucky Court noted the punishment for possession of drugs cannot be enhanced simply because a woman is pregnant or punished additionally for harm to a child.[55] In *Cochran v. Commonwealth*, the Kentucky Supreme Court recognized additional problems arising from the criminal prosecution of a pregnant drug user in a case in which a woman was charged with first-degree wanton endangerment for ingesting cocaine *in utero*.[56] The Court noted "punitive actions . . . discourag[es] these individuals from seeking the essential prenatal care and substance abuse treatment necessary to deliver a healthy newborn," finding Kentucky intended to treat *in utero* drug use as a public health concern.[57]

Most states, however, have no avenue for criminal or civil penalties for prenatal drug use.[58] The states utilizing prenatal drug

---

residential treatment center, according to the federal civil rights lawsuit she filed in Madison.").

51. A guardian ad litem is a court-appointed attorney who represents the best interests of the child in court proceedings. For a discussion of the appointment of guardians ad litem for fetuses, see Mark H. Bonner & Jennifer A. Sheriff, *A Child Needs a Champion: Guardian Ad Litem Representation for Prenatal Children*, 19 WM. & MARY J. WOMEN & L. 511 (2013). This Note does not discuss the role of juvenile proceedings in regards to maternal substance abuse.

52. WIS. STAT. ANN. § 48.193; *see also* Fitzpatrick, *supra* note 37, at 557–58; Vielmetti, *supra* note 47.

53. *See* WIS. STAT. ANN. § 48.193; *see also* Vielmetti, *supra* note 47.

54. Cochran v. Commonwealth, 315 S.W.3d 325, 325 (Ky. 2010). The Supreme Court in Kentucky additionally based this holding on the Maternal Health Act of 1992, finding the Kentucky legislature had no intention of criminalizing prenatal drug and alcohol use. *Id.* at 329 (citing Maternal Health Act of 1992, 1992 Ky. Acts, ch. 442 (H.B. 192)).

55. *Id.* (citing *Commonwealth v. Welch*, 864 S.W.2d 280, 284 (Ky. 1993)).

56. *Id.* at 327, 329.

57. *Id.* at 329. See Fitzpatrick, *supra* note 37 for an in-depth discussion of the decision in *Cochran v. Commonwealth*.

58. *See* Fitzpatrick, *supra* note 37, at 558.

use statutes primarily operate in a criminal system defining a viable fetus as a child.[59] The variety of approaches in states show there is not one path to treating or addressing NAS. Some states have taken extreme approaches to address NAS, but no solution has proven entirely effective for addressing the issue.[60]

## III. TENNESSEE APPROACHES

Tennessee has used a variety of methods to address NAS. Prior to 2013, the punitive measures against women for drug abuse during pregnancy focused on child abuse and neglect in civil proceedings in juvenile court.[61] Rates of NAS grew steadily throughout the 2000s,[62] prompting the Tennessee General Assembly to pass the Safe Harbor Act in 2013 to address public health concerns regarding maternal drug abuse.[63] A year later, the General Assembly addressed the issue criminally and passed an amendment to the assault statute to include maternal drug abuse during pregnancy.[64] The amendment to Tennessee's assault statute is the first of its kind in the country: it charges a mother criminally based on the harm that occurs to a child after birth.[65]

### *A. Before the Safe Harbor Act*

Prior to the passage of the Safe Harbor Act, there was no specific mandate or provision for charging a woman with a crimi-

---

59. *See e.g.*, McKnight v. State, 661 S.E.2d 354, 365 (S.C. 2008).

60. *See* GUTTMACHER INST., *supra* note 35.

61. *See* Cornelius v. State, 314 S.W.3d 902, 910–11 (Tenn. Ct. App. 2009); *In re* Benjamin M., 310 S.W.3d 844, 848–51 (Tenn. Ct. App. 2009); *see also* TENN. CODE ANN. § 37-1-102(b)(12) (2014) (defining "dependent and neglected child" for civil proceedings); Liability for Infants Born with Narcotic Drug Dependency, Tenn. Att'y Gen. Op. No. 13-01 (Feb. 1, 2013) ("[P]renatal drug use may be found to constitute abuse or severe child abuse in the civil context of juvenile court proceedings.").

62. *See Neonatal Abstinence Syndrome (NAS)*, *supra* note 24.

63. *Tenn. S. Health & Welfare Comm.*, S. 0459, 108th Gen. Assemb., 2d Reg. Sess. (Tenn. Feb. 27 2013), http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB0459&ga=108 (noting that access to prenatal care and drug rehabilitation options provides both better opportunities for a healthy delivery and gives the mother options for healthcare).

64. TENN. CODE ANN. § 39-13-107(c) (2014); *see supra* Part I.

65. § 39-13-107(c); GUTTMACHER INST., *supra* note 35.

nal offense based on drug use during pregnancy.[66] Tennessee women could be charged with a criminal offense depending on the type of harm caused to the infant, a question of fact requiring evidentiary support.[67] The Tennessee Attorney General, in an opinion regarding maternal drug use stated:

> [T]he question of whether the symptoms associated with withdrawal constitute an injury that would support the charges of assault, aggravated assault, or reckless endangerment must be determined by the trier of fact. However, a medical expert who is knowledgeable about the symptoms of withdrawal from a drug addiction could aid the trier of fact in making this determination.[68]

A court in the Middle District of Tennessee found ingestion of cocaine during pregnancy causing an unborn child serious bodily injury could not be considered a crime under the aggravated child abuse statute.[69] Drug use during pregnancy can constitute

---

66. *See* Criminal Liability of Mother of Child Born with Drug Addiction, Tenn. Att'y Gen. Op. No. 08-114, 1 (May 21, 2008), http://www.tn.gov/attorneygeneral/op/2008/op/op114.pdf ("The question of whether the symptoms of withdrawal alone could constitute bodily injury or serious bodily injury is a question of fact that would most likely require expert medical evidence to resolve.").

67. State v. Barnes, 954 S.W.2d 760, 765–66 (Tenn. Crim. App. 1997); *see also* Criminal Liability of Mother of Child Born with Drug Addiction, *supra* note 66, at 1.

68. Criminal Liability of Mother of Child Born with Drug Addiction, *supra* note 66, at 2.

69. State v. Hudson, No. M2006-01051-CCA-R9-CO, 2007 WL 1836840, at *1 (Tenn. Crim. App. June 27, 2007). In *Hudson*, the Court of Criminal Appeals dismissed an indictment for aggravated child abuse and neglect where the mother ingested cocaine during her pregnancy. *Id.*; *see also* Drug Tests on Pregnant Women and Infants and the Child Abuse Reporting Statute, Tenn. Att'y Gen. Op. No. 02-136, 2 (Dec. 23, 2002), http://attorneygeneral.tn.gov/op/2002/op/op136.pdf. It is important to note at this point, the Attorney General attached a hospital reporting requirement to a positive drug screen on a child. *Id.* However, that reporting requirement "cannot attach before the birth of the child . . . the reporting requirement attaches after the child is born when someone becomes aware the child was born with drugs in his or her system." *Id.* at 2–3; *see*, *e.g.* Richards v. State, No. E2004-02326-CCA-R3-PC,

severe child abuse in juvenile court dependency and neglect proceedings, which are separate from criminal proceedings.[70] The Tennessee Court of Appeals has held illicit drug use during pregnancy that causes harm to a child once born can be the basis for a dependency and neglect and a child abuse proceeding in juvenile court, which has a different standard and purpose than criminal proceedings.[71]

### *B. The Safe Harbor Act*

In 2013, the Tennessee General Assembly passed the Safe Harbor Act.[72] The Safe Harbor Act protects the rights of pregnant

---

2005 WL 2138244, at *2–3 (Tenn. Crim. App. Sep. 2, 2005) (reversing the denial of a petition for post-conviction relief where two women pled guilty to aggravated child abuse after using illicit drugs during pregnancy where their actions fell outside the scope of the statute).

70. *In re* Benjamin M., 310 S.W.3d 844, 849–50 (Tenn. Ct. App. 2009). The Court noted preceding criminal cases do not control in civil proceedings in juvenile court, where the court is considering only the best interest of the affected child rather than incarcerating an individual. *Id.* Therefore, abuse can be found in a civil proceeding for removal regardless of the criminal liability for the mother's drug use during her pregnancy. The Tennessee Supreme Court has not addressed this issue, however, there are several holdings at the Court of Appeals level indicating support of this finding. *See, e.g.*, *In re* C.L., No. E2013-02035-COA-R3-PT, 2014 WL 2442970, at *1 (Tenn. Ct. App. May 28, 2014); *In re* B.A.C., 317 S.W.3d 718, 725–26 (Tenn. Ct. App. 2009) (finding in utero drug use as the basis of termination of parental rights).

71. *In re Benjamin M.*, 310 S.W.3d at 850–51 ("When a child is born alive but injured, the pre-birth timing of the actions is not dispositive."). Juvenile court proceedings are not criminal proceedings. *Id.* at 849 ("Our criminal law is premised upon society's accepted value that it is better for several guilty people to go free than to jail one innocent person . . . . The focus of [juvenile court] proceedings is on the best interest of the affected child.").

72. *See* TENN. CODE ANN. § 33-10-104(f) (2015).

> (1) Notwithstanding subsection (e), a pregnant woman referred for drug abuse or drug dependence treatment at any treatment resource that receives public funding shall be a priority user of available treatment. All records and reports regarding such pregnant woman shall be kept confidential. The department of mental health and substance abuse services shall ensure that family-oriented drug abuse or drug dependence treatment is available, as appropriations allow. A treatment resource that receives public funds shall not refuse to treat a person solely because the person is pregnant as long as appropriate services are offered by the treatment resource.

women who seek drug treatment by giving them first priority in treatment facilities,[73] in addition to providing some protections from termination of her parental rights and dependency and neglect proceedings when—or if—treatment is successfully completed.[74] The Safe Harbor Act was passed in the wake of debate between lawmakers and health officials over the best method to combat NAS.[75] This debate resulted in a compromise agreement between

---

> (2)
>
> (A) If during prenatal care, the attending obstetrical provider determines no later than the end of the twentieth week of pregnancy that the patient has used prescription drugs which may place the fetus in jeopardy, and drug abuse or drug dependence treatment is indicated, the provider shall encourage counseling, drug abuse or drug dependence treatment and other assistance to the patient.
>
> (B) If the patient initiates drug abuse or drug dependence treatment based upon a clinical assessment prior to her next regularly scheduled prenatal visit and maintains compliance with both drug abuse or drug dependence treatment based on a clinical assessment as well as prenatal care throughout the remaining term of the pregnancy, then the department of children's services shall not file any petition to terminate the mother's parental rights or otherwise seek protection of the newborn solely because of the patient's use of prescription drugs for non-medical purposes during the term of her pregnancy.
>
> (C) Notwithstanding subdivision (f)(2)(B), nothing shall prevent the department of children's services from filing any petition to terminate the mother's parental rights or seek protection of the newborn should the department determine that the newborn's mother, or any other adult caring for the newborn, is unfit to properly care for such child.

*Id.*

73. *Id.* ("[A] pregnant woman referred for drug abuse or drug dependence treatment at any treatment resource that receives public funding shall be a priority user of available treatment.").

74. *Id.* ("[If a mother who initiates treatment and complies with a treatment program throughout pregnancy], then the department of children's services shall not file any petition to terminate the mother's parental rights or otherwise seek protection of the newborn solely because of the patient's use of prescription drugs for non-medical purposes during the term of her pregnancy."); *see* TENN. CODE ANN. § 36-1-113 (2014).

75. *See* Tony Gonzalez, *Drug-Addicted Babies Bring Competing Approaches in Proposed TN Legislation*, THE TENNESSEAN (Mar. 11, 2013),

the Tennessee General Assembly, the Tennessee Department of Health, the Tennessee Department of Mental Health and Substance Abuse Services, the Tennessee Department of Children's Services, TennCare, and a number of other state agencies.[76] The Safe Harbor Act received national support as a model approach to NAS,[77] and the President of the Tennessee Medical Association lauded the passage of the Safe Harbor Act as a product of collaboration between health officials across the state.[78] Despite its public support, Tennessee legislators continued to debate solutions to NAS subsequent to the Safe Harbor Act's passage.

### *C. Criminalizing Maternal Drug Abuse in Tennessee*

Tennessee had been unsuccessful in passing a specific criminal statute to combat NAS prior to 2014.[79] A year after the Safe Harbor Act's enactment, lawmakers proposed legislation to establish criminal penalties for maternal drug use.[80] The Tennes-

---

http://archive.tennessean.com/article/20130311/NEWS07/303110017/Drug-addicted-babies-bring-competing-approaches-proposed-TN-legislation.

76. *Information Available to Health Care Providers and Patients about New State Laws related to Neonatal Abstinence Syndrome*, TENN. ACAD. OF FAMILY PHYSICIANS (June 30, 2013), http://www.tnafp.org/documents/NAS%20FAQ%2063014.pdf; *see also The 108th General Assembly*, AMERICAN ACAD. OF PEDIATRICS, TENN. CHAPTER, http://www.tnaap.org/Legislative/legislative.htm (last visited Oct. 26, 2015) (noting the Tennessee General Assembly passed the Safe Harbor Act but failed to fund the $2 million attached to the bill).

77. Springer, *supra* note 22. Dr. Douglas Springer is the President of the Tennessee Medical Association ("TMA"). *Id.* He notes the rate of NAS has tripled in the last eight years in Tennessee, and the TMA backed the Safe Harbor Act as a method for medical intervention. *See id.*; *see also* Gonzalez & DuBois, *supra* note 24 ("When you talk about forward-leaning states that are looking at NAS, you always hear Tennessee . . . .") (quoting Michael Botticelli, Deputy Director of the Office of National Drug Control Policy).

78. Springer, *supra* note 22.

79. *See, e.g.*, S.B. 2874, 107th Gen. Assemb. (Tenn. 2012).

80. TENN. CODE ANN. § 39-13-107(c) (2014).

> (1) Nothing in subsection (a) shall apply to any lawful act or lawful omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant, or to any lawful medical or surgical procedure to which a pregnant woman consents, performed by a health care professional who is licensed to perform such procedure.
>
> (2) Notwithstanding subdivision (c)(1), nothing in this section shall preclude prosecution of a woman for assault under §

see General Assembly amended the general assault statute, T.C.A. section 39-13-107(c), to specifically include illegal use of a narcotic by a pregnant woman if the child is born "addicted to or harmed by" the *in utero* drug use.[81] This statute is the first criminal statute in the United States to make substance abuse during pregnancy a specific criminal act.[82] Initially, the Bill allowed for a felony charge of aggravated assault where serious bodily injury occurs.[83] Health care professionals tried to limit the punitive scope of the Bill by limiting the assault charge to a misdemeanor and by creating a "sunset" provision effective July 2016 to evaluate the effectiveness of the statute.[84] The "sunset" provision provides that the law is only in effect for two years.[85] At the end of that time, the General Assembly will be required to pass the Bill again.

The Bill passed both the state house and senate and set in place a standalone prosecution for assault based on drug use during pregnancy.[86] Sponsoring Senator Reginald Tate alleged during the

---

> 39-13-101 for the illegal use of a narcotic drug, as defined in § 39-17-402, while pregnant, 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.
> (3) It is an affirmative defense to a prosecution permitted by subdivision (c)(2) that the woman actively enrolled in an addiction recovery program before the child is born, remained in the program after delivery, and successfully completed the program, regardless of whether the child was born addicted to or harmed by the narcotic drug.

*Id.*

81. *Id.* ("[N]othing in this section shall preclude prosecution of a woman for assault . . . if her child is born addicted to or harmed by the narcotic drug . . . .").

82. GUTTMACHER INST., *supra* note 35.

83. *Tenn. S. Judiciary Comm.*, S. 1391, 108th Gen. Assemb., 2d Reg. Sess. (Tenn. 2014) (testimony of Senator Reginald Tate) http://tnga.granicus.com/MediaPlayer.php?view_id=269&clip_id=9050.

84. Springer, *supra* note 22 ("The Tennessee Medical Association opposed the bill, and advocated successfully for two important modifications . . . . [T]he lesser simple assault charge is enough to get women into drug court and . . . their cases could potentially be resolved by judicial deferment of prosecution or placement in a pretrial diversion program.").

85. *Id.*

86. Bill History, S.B. 1391, 108th Gen. Assemb., http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1391&ga=108.

committee hearing: "[T]his bill does not go out and find anybody to charge them with a particular charge. You would have to . . . be before some court system to even be charged with under the influence of narcotics or being on drugs while you were pregnant."[87] Despite Senator Tate's assertion, T.C.A. section 39-13-107(c) creates a standalone statute for assault.[88] The statute allows prosecution of assault without an existing narcotics charge or other related charge.[89] The statute also provides that successful completion of treatment during pregnancy serves as a defense to the crime.[90] State officials consider the law a "velvet hammer," intended to provide treatment through state drug court proceedings.[91] This creates a diversion program in drug court that is available for women who successfully complete treatment.[92] Both lawmakers and state officials cite the bill as giving "protection" from prosecution for women who seek treatment.[93] But, successful completion

---

87. *Tenn. S. Judiciary Comm.*, *supra* note 83.

88. TENN. CODE ANN. § 39-13-107(c) (2014).

89. *Id.*

90. *Id.*; *see also* Amy Weirich, *Letter: New Law Helps Babies, Moms*, THE COM. APPEAL (June 7, 2014), http://www.commercialappeal.com/news/letter-new-law-helps-babies-moms-ep-510115421-328941561.html.

91. Weirich, *supra* note 90; *see Tenn. S. Judiciary Comm.*, *supra* note 83 (testimony of Barry Stavis) ("The whole intent of this bill balances deterrent [sic] with accountability and with treatment"); *see also id.* (testimony of Senator Mike Bell). Senator Bell expressed concern that several of the counties he represented do not currently have a Drug Court available or access to treatment options. *Id.*

92. In Tennessee, Drug Court provides drug addicts and alcoholics the ability to avoid incarceration by completion of a court-supervised treatment program. *See* Samantha Bryson, *New State Law Could Scare Mothers of Babies with Neonatal Abstinence Syndrome From Treatment*, THE COM. APPEAL (July 25, 2014) (quoting Shelby County Drug Court Judge Tim Dwyer) http://www.commercialappeal.com/news/crime/new-state-law-could-scare-mothers-of-babies-with-neonatal-abstinence-syndrome-from-treatment-some-ep-324362721.html. When an offender does not successfully adhere to the strict requirements of a drug treatment program, he or she will be sent back to jail for the remainder of the sentence. *See* Yolanda Jones & Samantha Bryson, *Mother Charged with Drug Use While Pregnant Back in Jail*, THE COM. APPEAL (Jan. 22, 2015), http://www.commercialappeal.com/news/local-news/mother-charged-with-drug-use-while-pregnant-back-in-jail_16552921.

93. *See* Weirich, *supra* note 90 ("[The law's] goal is not to incarcerate mothers but to empower these women to overcome their addictions. Our plan is

of treatment is only a defense to the charge of assault, not a grant of immunity.[94]

In Shelby County (Memphis), Jamillah Falls was one of the first mothers arrested under the assault statute. Falls was processed through Drug Court with Judge Tim Dwyer, and was ordered to a residential rehabilitation program instead of a jail sentence of up to 11 months and 29 days.[95] Falls went through residential treatment, but then failed to meet the requirements of the program at a halfway house and returned to jail.[96] Even in Shelby County, Falls had few options to seek residential treatment prior to her arrest.[97]

Senator Mike Bell expressed concern with the defense of the completion of successful treatment, noting women in his dis-

---

to refer such women to drug court treatment programs operating in many of Tennessee's judicial districts, including Shelby County, and provide them the opportunity to participate in the program."). Amy Weirich is the District Attorney General in Shelby County (Memphis), Tennessee. *See id.*

94. Immunity from prosecution prevents charges being filed, whereas a defense to a crime may allow a case to be later dismissed when evidence presented to a jury provides for a valid defense to the crime. For a comparison of how Tennessee treats immunity agreements versus traditional defenses, see State v. Howington, 907 S.W.2d 403, 409 (Tenn. 1995) (citing Zani v. State, 701 S.W.2d 249, 254 (Tex. Crim. App. 1985)). The burden is on the State to show a defendant breached an immunity agreement; whereas the burden of evidence of a traditional defense to a crime is on the defendant. *See id.*

95. Samantha Bryson, *Addicted Mom Charged Under New Law Will Go to Rehab, Not Jail*, THE COM. APPEAL (Aug. 6, 2014), http://www.commercialappeal.com/news/local-news/addicted-mom-charged-under-new-law-will-go-to-rehab-not-jail_32005503.

96. Jones & Bryson*, supra* note 92.

97. Wendi C. Thomas, *Treatment Options Scarce for Pregnant Women with Addictions*, THE COM. APPEAL (Aug. 7, 2014), http://www.commercialappeal.com/news/local-news/crime/treatment-options-scarce-for-pregnant-women-with-addictions_24325724. This news article notes that there are limitations on available treatment options for pregnant women in Shelby County: one does not accept pregnant women; one only takes private insurance or self-pay at $27,000 for a month; one has only room for ten women with a diagnosis of mental illness; and one that only has a detox center. *Id.* Shelby County is the most populous county in Tennessee. *Tennessee County Selection Map*, UNITED STATES CENSUS BUREAU (2010), http://quickfacts.census.gov/qfd/maps/tennessee_map.html (click on "Shelby") (showing the population of Shelby County at almost 1,000,000 per the 2010 census).

trict—among many others—do not have access to treatment facilities in close range.[98] Drug courts are not available in every county in Tennessee, and Davidson County (Nashville) is the only county with a residential drug court treatment program.[99] The same health and substance abuse professionals providing support and guidance in the passage of the Safe Harbor Act testified against the passage of the assault amendment in the hearings to House Bill 1295 and Senate Bill 1391.[100] These professionals cite concern that the criminalization of maternal substance abuse would actually deter women from seeking treatment for fear of prosecution.[101] Professionals also cited concern for women who may avoid prenatal care for fear of prosecution.[102] Representative Terri Weaver rebutted these concerns, calling drug abusing mothers "the worst of the worst . . . not those who would consider going to prenatal care [in the first place]."[103] Beyond the initial controversy of the amendment, the statute now presents broader constitutional issues.

## IV. CONSTITUTIONAL ANALYSIS OF TENN. CODE ANN. SECTION 39-13-107

There are a number of potential constitutional issues[104] that arise under the language of T.C.A. section 39-13-107. First, the

---

98. *Tenn. S. Judiciary Comm.*, *supra* note 83.

99. *Id.* (testimony of Nathan Ridley).

100. *Id.* (testimony of Kurt Hippell, Valerie Nageshiner, and Marynell Brian).

101. *Id.* Representatives from Children's Hospital Alliance, March of Dimes, the Department of Mental Health and Substance Abuse and the Tennessee Department of Health spoke at legislative hearings regarding concerns for access to prenatal care, determent from substance abuse treatment, and the lack of time given for the Safe Harbor Act to have a positive impact on treating mothers to impact NAS statistics. *See* Bryson, *supra* note 92.

102. *Tenn. S. Judiciary Comm.*, *supra* note 83 (testimony of Kurt Hippell, Valerie Nageshiner and Marynell Brian).

103. Gonzalez & DuBois, *supra* note 24 (quoting Rep. Terri Lynn Weaver).

104. For a discussion of constitutional issues in the early 1990s associated with a rise in criminal prosecutions of drug-addicted mothers, see Doretta Massardo McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 506 (1990) ("The fundamental right to bear a child will be denied to a class of women—drug addicts —based on their status as addicts and the effects that their addictive behav-

statute violates the eight and fourteenth amendments' prohibition on cruel and unusual punishment by creating a "status" crime punitive to only narcotic addicts. Second, the statute potentially violates the fourth amendment's protection against search and seizure by the use of public and private hospitals' blood testing for evidence of prenatal drug use. Third, the language of the statute is unconstitutionally vague in violation of substantive due process protections.

### *A. Eighth and Fourteenth Amendments: Cruel and Unusual Punishment*

In *Robinson v. California*, the Supreme Court held imprisonment for the status of narcotic addiction, an illness "contracted innocently or involuntarily," is cruel and unusual punishment in violation of the fourteenth amendment.[105] Police arrested Defendant Robinson for having needle marks on his arm under a California statute that made it illegal to have an addiction to narcotics.[106] The Supreme Court determined while a state may impose criminal sanctions for "unauthorized manufacture, prescription, sale, purchase, or possession of narcotics," a California court could not convict Robinson of the crime of drug addiction.[107] The appellate court erred in instructing a jury they could convict Robinson of a crime even if the jury disbelieved the evidence of Robinson's use of drugs within Los Angeles.[108] The Supreme Court focused on the nature of the statute because it created a "status" crime. The State of California did not require evidence of use or possession of

---

iors are likely to have on their children. The rights of privacy and reproductive freedom currently accorded all women may be further eroded. Such restrictions may, however, be found constitutional if courts accept the view that fetal rights outweigh women's rights in the context of a pregnant woman's behavior likely to cause fetal harm."). The development of constitutional law regarding the status of pregnant women has since developed to eradicate some of the early claims. *See* Jill E. Habig, Comment, *Defining the Protected Class: Who Qualifies for Protection Under the Pregnancy Discrimination Act?*, 117 YALE L.J. 1215 (2008).

105. Robinson v. California, 370 U.S. 660, 667 (1962).

106. *Id.* at 661–63; *see* CAL. HEALTH & SAFETY CODE § 11721 (Deering 1953) (repealed 1972).

107. *Robinson*, 370 U.S. at 664–66.

108. *Id.*

an illegal substance within the state, but only proof of addiction.[109] The Supreme Court recognized, "[I]mprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."[110]

A criminal offense for maternal narcotic use may be distinguishable from the facts in *Robinson*, but the Court's reasoning in striking the California statute can be applied in Tennessee:

> [The California law] is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." . . . It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill . . . . [A] law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment . . . .[111]

The Court found the state had requisite power to punish a broad range of behavior associated with drug trafficking and drug use, but a crime based solely on the status of addiction was unconstitutional.[112] T.C.A. section 39-13-107 does not require proof of specific use or possession within the state by the mother in accordance with existing drug law as an element of the crime of neonatal assault.[113] Criminal charges for maternal drug use punish a wom-

---

109. *Id.* at 665–66; *see* Mohapatra, *supra* note 31.

110. *Robinson*, 370 U.S. at 667.

111. *Id.* at 666; *see also* Mohapatra, *supra* note 31, at 253–54 (discussing *Robinson* in the context of criminalizing maternal drug use).

112. *Robinson*, 370 U.S. at 664–65.

113. *See* TENN. CODE ANN. § 39-13-107(c) (2014). The elements of the offense on its face require the showing of addiction or harm to the child by illegal drug use as a separate offense from the elements of the crime of drug possession or distribution. *See generally* TENN. CODE ANN. § 39-17-418 (2014) (list-

an's status as a drug addict.[114] Tennessee must require proof of specific use for the assault statute to stand under *Robinson*'s "status crime" limitation.

*B. Fourth Amendment: Warrantless Searches*

The United States Supreme Court also found that requiring mandatory blood tests for the purpose of incriminating patients violates the Fourth Amendment.[115] In *Ferguson v. City of Charleston*, the Supreme Court held hospitals violate a patient's constitutional rights when they obtain evidence for the purpose of incriminating patients without informing the patient.[116] In *Ferguson*, ten petitioners were arrested after testing positive for cocaine when hospital employees turned over their urine samples to police.[117] The hospital had a policy of testing patients receiving prenatal treatment for current drug use.[118] The positive results of these tests were turned over to state authorities to prosecute mothers for child abuse whose newborns tested positive for drugs.[119] The Court

---

ing the elements for the criminal charge of possession of a controlled substance in Tennessee).

114. *See* Marcy Stovall, *Looking for a Solution: In Re* Valerie D *and State Intervention in Prenatal Drug Abuse*, 25 CONN. L. REV 1265, 1276–77 (1993) ("Though [a woman's] original decision to use drugs [is] presumably voluntary, the subsequent nature of the addiction limits her choice, even if she wishes to stop using drugs. Punishing prenatal drug use thus comes very close to penalizing a woman for her status as an addict, and the Supreme Court has forbidden punishment based on an individual's status as an addict.") (citation omitted).

115. Ferguson v. City of Charleston, 532 U.S. 67, 84–86 (2001).

116. *Id.* ("While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.").

117. *Id.* at 73.

118. *Id.* at 70.

119. *Id.* at 70–71; see *supra* discussion Section II.B.2 for analysis of South Carolina's child abuse statute, distinguished from Tennessee's based on its inclusion of a viable fetus in the definition of a child. This definition of child allows the prosecution for child abuse for drug use in the third trimester rather than a separate crime against a fetus.

found the policy was designed specifically to provide admissible evidence in a criminal prosecution without a search warrant.[120]

In *Ferguson*, the Court recognized the importance of access to diagnostic and prenatal care without fear of warrantless searches for criminal prosecutions.[121] The Court's prohibition of warrantless searches is analogous to charges brought under T.C.A. section 39-13-107 based upon positive drug screens handed over to law enforcement while in the hospital to give birth. Urine or blood screens taken in the regular course of treatment in a hospital delivery turned over to police for purposes of prosecution are unconstitutional warrantless searches in violation of the Fourth Amendment.[122]

### *C. Void-for-Vagueness: Substantive Due Process*

A statute violates an individual's substantive due process rights if it fails to "provide a person of ordinary intelligence fair notice of what [activity] is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[123] The void-for-vagueness doctrine arises under substantive due process rights, predominately to reign in police discretion.[124]

In *Cochran v. Commonwealth*, the Kentucky Supreme Court found criminal child abuse statutes could not apply to maternal drug abuse because women would be subject to an indefinite

---

120. *Ferguson*, 532 U.S. at 86.

121. *Id.* at 84. ("Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of 'special needs.'").

122. *See id.* at 86; *see also* Sandi J. Toll, Note, *For My Doctor's Eyes Only*: Ferguson v. City of Charleston, 33 LOY. U. CHI. L.J. 267 (2001) (analyzing the implications of *Ferguson* in the context of fetal abuse protections). "[T]he *Ferguson* decision affirms that the special needs exception may only be applied when the government's interest in conducting the search is divorced from any law enforcement purpose." *Id.* at 319.

123. United States v. Williams, 553 U.S. 285, 304 (2008); *see also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[A]n enactment is void for vagueness if its prohibitions are not clearly defined.").

124. *See* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1500–01 (2007).

number of new crimes covering a broad range of behavior.[125] In *Cochran*, the defendant gave birth to a child who tested positive for cocaine, and police arrested her for wanton child endangerment.[126] The Kentucky Supreme Court determined the application of a criminal abuse statute to prenatal conduct:

> [This application] could have an unlimited scope and create an indefinite number of new "crimes" . . . a "slippery slope" whereby the law could be construed as covering the full range of a pregnant woman's behavior - a plainly unconstitutional result that would, among other things, render the statutes void for vagueness.[127]

The Court focused on the void-for-vagueness doctrine, finding the statute "transgress[ed] reasonably identifiable limits."[128]

T.C.A. section 39-13-107(c) is unconstitutionally vague in two ways: (1) the element of harm and (2) the requirement of "narcotic" use. The statute requires proof that a child is born "addicted to or harmed by" narcotic use.[129] The parameters for "addicted to" or "harmed by" are unconstitutionally vague because neither "harm" nor "addiction" are defined in the Tennessee Code. There are a variety of factors that may affect the health of a fetus, and it is impossible to isolate specific harm to a delivered infant due to prenatal use of a particular drug.[130] Under the current statute, the prosecution retains the discretion to determine when there is a level of "harm" or "addiction" sufficient to justify an arrest for assault.

In addition to the undefined terms, the language of T.C.A. section 39-13-107(c) includes specific reference to illegal use of

---

125. Cochran v. Commonwealth, 315 S.W.3d 325, 328 (Ky. 2010) (citing Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993).

126. *Id.* at 327.

127. *Id.* (citing *Welch*, 864 S.W.2d at 283).

128. *Welch*, 864 S.W.2d at 283.

129. TENN. CODE ANN. § 39-13-107(c) (2014).

130. *See* Hudak, *supra* note 14, at e542 (Table 2); *see also* Okie, *supra* note 20 ("[F]actors like poor parenting, poverty and stresses like exposure to violence were far more likely to damage a child's intellectual and emotional development . . . .").

only "narcotic" drugs. The definition of a "narcotic" is cross-referenced to the definition of narcotic as used in other criminal drug-related statutes.[131] Narcotic drugs as defined in Tennessee include: opiums, salts, poppy, coca leaves and their derivatives.[132] By defining narcotic, the statutory language does not include the abuse of prescribed drugs, but is limited to only "illegal drug use."[133] Prescription drug abuse is one of the larger causes of NAS.[134] It is impossible to distinguish the cause of NAS symptoms between drug classifications and illegal or legal drug abuse.[135] Additionally, several women have been arrested under

---

131. TENN. CODE ANN. § 39-17-402(17) (2012).

132. *Id.*

133. *See id.* The statutory language limits the behavior of the mother to "illegal drug use" leading to harm or addiction to a "narcotic drug." TENN. CODE ANN. § 39-13-107(c). There was failed legislation in both the Tennessee State House and Senate in early 2015 to specifically include methamphetamine in the statutory language. *See* S.B. 586, 109th Gen. Assemb., 1st Reg. Sess. (Tenn. 2015); H.B. 1340, 109th Gen. Assemb., 1st Reg. Sess. (Tenn. 2015) (allowing prosecution for assault if "harm is a result of [a mother's] illegal use of a narcotic drug or methamphetamine, taken while pregnant."). In addition, an equal protection argument has been made in the past that application of maternal drug abuse statutes to certain classes of drugs violates the equal protection clause of the fourteenth amendment based on protected racial classes. *See* U.S. CONST. amend. XIV, § 1; 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 (2009); *see also* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991). Roberts analyzes the development of the early prosecutions of maternal fetus abuse, comparing the prosecution of mothers of "crack babies" and encouraging abortions in African American women with forced sterilization of black women. See *id.* at 1450–56 for an early discussion of the implications of the equal protection clause in light of maternal fetal abuse prosecutions.

134. Hudak et al., *supra* note 14, at e541.

135. Hudak et al., *supra* note 14, at e542 ("Pregnant women who abuse methamphetamine are at increased risk of pre-term birth, placental abruption, fetal distress, and intrauterine growth restrictions at rates similar to those for pregnant women who use cocaine. . . . [O]nly 4% of infants exposed to methamphetamine were treated for drug withdrawal, but it was not possible to exclude concomitant abuse of other drugs as contributory in all cases."); *see also id.* at e542 (Table 2).

the statute for using methamphetamine during their pregnancy.[136] The vague application of the law as written violates due process as provided in the Fourteenth Amendment.

## V. ADOPTING A DIFFERENT APPROACH: HEALTH IMPACT OF CRIMINAL PROSECUTION OF MATERNAL DRUG USE

The appropriate viewpoint to approach maternal drug abuse is to take a public health perspective. The 2009 National Survey on Drug Use and Health reports on the usage of illicit drugs, heavy alcohol use, and tobacco use during pregnancy.[137] Binge or heavy drinking in the first trimester is reported by 11.9% of pregnant women; recent tobacco use by 15.3%.[138] Studies show illicit drug use is no more harmful to a fetus than either tobacco or alcohol use during pregnancy.[139] There has not been a change in the rate of maternal drug use nationally since the rise of child abuse statutes punishing women for drug use during pregnancy, indicating these statutes are ineffective.[140] However, fear of criminal retribution discourages women from seeking prenatal care, undermining both the health of the mother and the health of the fetus.[141]

Criminalizing drug use during pregnancy is more likely to prevent women from seeking proper prenatal care or seek treat-

136. Hudak, *supra* note 14, at e541 ("[C]hronic use of narcotic prescriptions . . . among pregnant women cared for at a single clinic increased fivefold from 1998 to 2008, and 5.6% of infants delivered to these women manifested signs of neonatal withdrawal."); *see Using Meth*, *supra* note 4; Goldensohn & Levy, *supra* note 4.

137. *See* Hudak, *supra* note 14, at e540.

138. Hudak, *supra* note 14, at e540.

139. Mohapatra, *supra* note 31, at 244 (noting women are not prosecuted for alcohol or tobacco use during pregnancy and "an illicit drug-abusing mother . . . is easily vilified by the public and prosecutors as giving birth to a 'crack baby,' or more recently a 'meth baby.'"); Hudak, *supra* note 14, at e542 (showing signs of neonatal abstinence syndrome resulting from alcohol use).

140. Mohapatra, *supra* note 31, at 244 (citation omitted). It is too soon since the passage of this statute in Tennessee to determine its effects on in utero drug use.

141. *See Legal Interventions During Pregnancy*, Report of American Medical Association Board of Trustees, 264 JAMA 2663, 2670 (1990).

ment.[142] The possibility of punishment for maternal drug use discourages women from seeking drug treatment options.[143] After criminal prosecutions of maternal drug use began in South Carolina, there was an 80% reduction in admissions of pregnant women in drug treatment programs.[144] Women who do not seek appropriate prenatal care have higher rates of infant mortality.[145] By lessening the focus on criminal prosecutions, women in Tennessee would have more incentive to seek treatment and less fear for retribution despite seeking treatment options

Drug rehabilitation facilities are also rarely accessible to many Tennessee women.[146] Senator Mike Bell voted against the amendment to T.C.A. section 39-13-107 because he believed there were not sufficient clinics accessible to pregnant women to make treatment a viable option for his constituents in Bradley, McMinn, Meigs, Monroe and Polk Counties.[147] Health organizations noted the need for funding for clinics when the Safe Harbor Act passed in 2013 to remedy this accessibility.[148]

A public health approach increasing funding for drug treatment facilities who accept pregnant women, as well as resource centers for prenatal care, would encourage both drug treatment options and prenatal care. Creating a statutory environment where women are encouraged to seek treatment promotes the health of the mother and the child both during the pregnancy and

142. *Id.* ("Pregnant women will be likely to avoid seeking prenatal or other medical care for fear that their physician's knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.").

143. Fitzpatrick, *supra* note 37, at 566–68 (citing Martha A. Jessup et al., *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. DRUG ISSUES 285 (2003)). Fitzpatrick discusses the fear of loss of custody, arrest, or prosecution prevented women from seeking treatment options, and rather to flee from care. *Id.*

144. Mohapatra, *supra* note 31, at 254.

145. *See id.* at 568.

146. *See* Gonzalez & DuBois, *supra* note 24.

147. *See Tenn. S. Judiciary Comm.*, S. 1391, 108th Gen. Assemb., 2d Reg. Sess. (Tenn. 2014) (statement of Senator Mike Bell), http://wapp.capitol.tn.gov/apps/videocalendars/VideoCalendarOrders.aspx?CalendarID=1336&GA=108.

148. *See The 108th General Assembly,* AMERICAN ACAD. OF PEDIATRICS, TENN. CHAPTER, http://www.tnaap.org/Legislative/legislative.htm (last visited Oct. 27, 2015).

afterward.[149] The Safe Harbor Act provided protection from arrest or removal proceedings where that treatment is successful.[150]

The Tennessee General Assembly should allow the assault amendment to sunset to protect the constitutional rights of pregnant women in Tennessee. The vague language of T.C.A. section 39-13-107(c) and its potential application as a "status" crime render it constitutionally void.[151] The amendment creates a status crime, requiring no proof or parameter for evidence of specific drug use.[152] By adopting a public health approach, the Tennessee General Assembly can both address the grave problems of NAS and avoid violating individual rights. To protect individual rights and lessen the impact of NAS on Tennessee children, the Tennessee General Assembly should expand the availability of treatment to pregnant women.

The Tennessee General Assembly should abandon the assault amendment and focus on expanding the Safe Harbor Act. Prioritizing pregnant women in drug rehabilitation facilities is the first step in a public health approach to addressing NAS. In 2013, Tennessee was a leading state in addressing drug abuse from a health perspective through the passage of the Safe Harbor Act, which guaranteed pregnant women's priority in treatment facilities.[153] Treatment is a long-term solution, and women should be incentivized with treatment rather than punished or forced into treatment. Women-specific substance abuse centers may be necessary to ensure proper prenatal care is available and to specifically

---

149. *See* Tony Gonzalez, *Drug Czar Slams Criminalizing Moms as Haslam Mulls Veto*, THE TENNESSEAN (April 28, 2014, 6:45 PM) (statement of Michael Botticelli, Director of the White House Office of National Drug Control Policy), http://www.tennessean.com/story/news/politics/2014/04/28/drug-czar-slams-criminalizing-moms-haslam-mulls-veto/8435967/ ("What's important is that we create environments where we're really diminishing the stigma and the barriers, particularly for pregnant women, who often have a lot of shame and guilt about their substance abuse disorders. . . . We know that it's usually a much more effective treatment and less costly to our taxpayers if we make sure that we're treating folks.").

150. *See* TENN. CODE ANN. § 33-10-104(f) (2013).

151. *See* discussion *supra* Section IV.A; *see also* Cochran v. Commonwealth, 315 S.W.3d 325, 328 (Ky. 2010) ("[A]pplication of the criminal abuse statutes to prenatal conduct would render the statutes void for vagueness . . . .").

152. *See* Robinson v. California, 370 U.S. 660, 763 (1962).

153. TENN. CODE ANN. § 33-10-104(f).

monitor the dangers of detoxing from a drug addiction while pregnant.[154] A different approach to addressing NAS involves taking a public health perspective and using mental health professionals to establish standards for state provision of funding necessary to better access to treatment options.[155] By returning to the provisions of the Safe Harbor Act, the state would guarantee priority of access to drug treatment programs for pregnant women.

## VI. CONCLUSION

The startling rates of NAS in Tennessee dictate a state interest in providing a remedy to protect the interest of both the mother and the child. The Tennessee General Assembly first enacted the Safe Harbor Act and later amended the assault statute in order to provide a remedy.[156] These remedies both attempt to protect children afflicted with NAS while taking different approaches, but T.C.A. section 39-13-107(c) violates individual rights protected by the United States Constitution. Criminalizing maternal drug use without requiring specific proof of conduct renders this crime a "status" crime inflicting cruel and unusual punishment in violation of the Eighth Amendment. The statute is void-for-vagueness where "harm" is not defined by the Tennessee code and the statute includes only one category of illegal drug use.[157] The state interest in criminalizing maternal drug use does not outweigh the potential constitutional violations. Because a public health approach encompasses both the interests of the child and mother, Tennessee

---

154. Mohapatra, *supra* note 31, at 267–69. Mohapatra also addresses the difficulty for many women to seek residential treatment where those treatment options offer no childcare for women who may have existing children.

155. For an approach to maternal drug use utilizing a public health perspective, see *Cochran*, 315 S.W.3d at 329 ("[T]he General Assembly finds it is necessary to treat the problem of alcohol and drug use during pregnancy solely as a public health problem by seeking expanded access to prenatal care and to alcohol and substance abuse education and treatment programs." (quoting The Maternal Health Act of 1992, 1992 Ky. Acts, ch. 442 (H.B. 192))); *see generally* Mohapatra, *supra* note 31 (advocating for a public health approach to in utero drug use).

156. *See supra* Sections III.B-C.

157. TENN. CODE ANN. § 39-13-107(c) (2014); *see Cochran*, 315 S.W.3d at 328.

should retain the Safe Harbor Act and provide funding to facilities providing treatment for pregnant drug addicts.