

When CRACK is the Only Choice: *The Effect of a Negative Right of Privacy on Drug-Addicted Women*

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CRACK

“Prevent Child Abuse . . . \$200 cash for drug addicts who participate in long-term birth control.”¹ This is one of the catchy slogans used in advertisements by Children Requiring A Caring Kommunity (CRACK), a California-based organization whose stated goal is “to offer effective preventive measures to reduce the tragedy of numerous drug affected pregnancies.”² The unorthodox solutions CRACK proposes for drug-addicted adults of childbearing age have drawn emotional responses from all sides. Essentially, the program offers drug-addicted women and men two hundred dollars cash if they agree to participate in sterilization or long-term birth control.³ For women, aside from sterilization via tubal ligation, long-term birth control options include Norplant, Depo-Provera and IUDs; for men, sterilization via vasectomy is the only option.⁴

From its inception in 1997 through early February 2000, CRACK has had 153 participants, all of whom have been women. Of these women, approximately 39% are white, 43% are African-American and 14% are Hispanic. The remaining 3% of participants identified themselves as Native American or bi-racial. The majority are from California, with a few hailing from other states such as Florida, Minnesota, Illinois and New Hampshire.⁵

Clients are recruited mainly through billboards and flyers, which are posted and distributed primarily in poor urban neighborhoods.⁶ When

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1. *Morning Edition* (National Public Radio broadcast, Aug. 27, 1999) (transcript available on LEXIS NEXIS).
2. Children Requiring a Caring Kommunity, *Objectives* (visited Feb. 10, 2000) <<http://www.cracksterilization.com/objectives>>.
3. See Children Requiring a Caring Kommunity, *Prevention* (visited Feb. 10, 2000) <<http://www.cracksterilization.com/prevention>>.
4. See *id.*
5. See Children Requiring a Caring Kommunity, *Statistics* (visited Feb. 10, 2000) <<http://www.cracksterilization.com/stats/stats.html>>.
6. See Greg Barrett, *Mother Cracking Down on Drug-Addicted Newborns*, TULSA WORLD, Sept. 21, 1999, at 5.

asked about the placement of these billboards, the program's founder, Barbara Harris, responded: "Would Macy's put a billboard up in a ghetto? . . . Of course not. You have to advertise where your clients are."⁷ The organization itself does not perform any medical procedures, nor does it provide family planning counseling.⁸ Due to the socioeconomic status of the participants, nearly all of them are able to obtain birth control or be sterilized elsewhere without charge.⁹

CRACK is funded entirely through private donations made by groups and individuals, many of whom commend Harris for offering a solution for both drug addicts and the children who would have been born to them already addicted to drugs.¹⁰ As a foster parent to four children of the same drug-addicted mother, Harris responds to her critics by saying, "[u]nless you're willing to take these babies into your home for 18 years, your opinion means nothing to me."¹¹

The program inevitably raises the question of what would induce a woman to exchange her childbearing capabilities, even temporarily, for a mere two hundred dollars? The answer to this question is not that the money affords women the opportunity to purchase birth control or a tubal ligation, because such costs are generally borne by the state.¹² As this article will discuss, the answer likely lies in a combination of judicial opinions and legislative decisions that have provided low-income women with an incentive to participate due to a lack of other options.

In Supreme Court decisions over the past twenty years, the right of privacy with respect to childbearing decisions has been limited to such an extent that, essentially, only those women with enough money to purchase the services that fall within the scope of this right are now awarded its full protection.¹³ By defining the right of privacy in distinctly negative terms, it has effectively been denied to women with low incomes who rely on the government for medical care and financial support.¹⁴ This conceptualization of privacy as a negative right has been coupled with widespread attempts by prosecutors across the country to criminalize women's behavior during pregnancy.¹⁵ With these efforts, the ability to make choices

7. *Id.*

8. *See* Children Requiring a Caring Kommunity, *Prevention*, *supra* note 3.

9. *See id.*

10. *See* Children Requiring a Caring Kommunity, *Donations* (visited Feb. 10, 2000) <<http://www.cracksterilization.com/donations>>; Children Requiring a Caring Kommunity, *Quotes* (visited Feb. 10, 2000) <<http://www.cracksterilization.com/quotes>>.

11. Andy Goldberg, *Paying Addicts Not to Have Kids Sparks Storm in U.S.*, *DEUTSCHE PRESSE-AGENTUR*, Sept. 26, 1999.

12. *See* Children Requiring a Caring Kommunity, *Prevention*, *supra* note 3.

13. *See infra* notes 26-43 and accompanying text.

14. *See infra* note 37 and accompanying text.

15. *See infra* notes 45-63 and accompanying text.

regarding childbearing has become increasingly burdened, creating a situation in which women are compelled to choose between their own futures and those of their potential children. Furthermore, the failure of state legislatures to provide adequate drug treatment programs for pregnant women and women with young children has eliminated even more options for those who cannot afford to enroll in private drug treatment programs.¹⁶ Thus, while the CRACK program may appear on the surface to be voluntary, its participants are essentially coerced by the government's attitude and behavior towards the privacy and reproductive rights of indigent women.

THE RIGHT OF PRIVACY

While the U.S. Constitution recognizes no right of privacy *per se*, over the years the Supreme Court has read such a right into the Constitution, finding it to be necessary to the exercise of various other rights the Constitution does explicitly recognize.¹⁷ In his dissent in *Olmstead v. United States*, Justice Brandeis asserted that, in their creation of the Constitution, the Founding Fathers "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations . . . [and] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."¹⁸

The right of privacy was first applied to the marriage relationship in *Griswold v. Connecticut*, in which the Court invalidated a Connecticut law forbidding the use of contraceptives by *any* person.¹⁹ In its analysis of the right of privacy, the Court held that as with other rights, the right of privacy among married people is not specifically enumerated in the Constitution, yet it is one of "those peripheral rights [without which] the specific rights would be less secure."²⁰ The Court further held "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and that "[v]arious guarantees create zones of privacy."²¹ Although the Court's ruling in *Griswold* applied only to those in a marital relationship,

16. See *infra* notes 64-70 and accompanying text.

17. See *e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350-51 (1967); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

18. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

19. 381 U.S. 479, 480, 486 (1965) (emphasis added).

20. *Id.* at 482-83 (citing the right of people to associate freely, the right of parents to choose how to educate their child, and the right to study any specific subject or language as examples of rights not enumerated in the Constitution but construed as protected by it).

21. *Id.* at 484 (citation omitted) (citing the First, Third, Fourth, Fifth and Ninth Amendments as creating a "zone of privacy").

later rulings expanded the right of privacy to unmarried individuals as well.²²

The role of the right of privacy in decisions regarding whether to have children was again evoked in the landmark decision *Roe v. Wade*.²³ In *Roe*, the Court held that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."²⁴ Thus, the right to obtain an abortion free from government interference, at least during the first trimester, was established by the Court's ruling.²⁵

It is clear from the succession of opinions discussed previously that the Court placed a high premium on the right of privacy as it pertained to decisions of childbearing and contraception. Yet, in subsequent decisions, including *Maher v. Roe*²⁶ and *Beal v. Doe*,²⁷ the Court proceeded to limit the exercise of that right in such a way that only those who could afford to purchase reproductive health services without the aid of the government would continue to be protected by it. In deciding *Maher* and *Beal*, the Court effectively eliminated the option of affordable clinical abortions for many indigent women.²⁸ By holding that states in receipt of federal Medicaid funds under Title XIX of the Social Security Act²⁹ had no obligation to fund elective abortion procedures, the Court opened the door for states to find legal ways to limit the exercise of the right the

22. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); see also *Carey v. Population Svcs. Int'l*, 431 U.S. 678, 687 (1977) ("*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.")

23. 410 U.S. 113 (1973).

24. *Id.* at 153. Essentially, the *Roe* Court held that, barring the presence of a compelling state interest, a woman should be free to decide without interference by the State whether to terminate a pregnancy. See *id.* at 163.

25. See *id.* at 163-65 (reserving for a woman and her doctor the right to make a decision regarding abortion during the first trimester, but allowing the State to regulate the abortion procedure during the second trimester, and to regulate or proscribe it in the third and final trimester); see also *Planned Parenthood v. Danforth*, 428 U.S. 52, 69, 74 (1976) (denying absolute authority to a woman's husband or the parents of a minor to interfere with her right to choose abortion during the first trimester).

26. 432 U.S. 464 (1977).

27. 432 U.S. 438 (1977).

28. See *Maher*, 432 U.S. at 474 (upholding a regulation of the Connecticut Welfare Department limiting state Medicaid benefits to include only those abortions deemed to be medically necessary by a patient's physician); see also *Beal*, 432 U.S. at 444-45 (holding that Title XIX of the Social Security Act did not require states to fund nontherapeutic abortions in order to be eligible to participate in the Medicaid program, as it was "hardly inconsistent with the objectives of the Act for a State to refuse to fund unnecessary though perhaps desirable medical services").

29. 42 U.S.C. § 1396 (1999).

Court had previously protected in *Roe*.³⁰ In *Maher*, the Court justified its action by asserting that “[t]he Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman’s path to an abortion.”³¹ Furthermore, while “[t]he State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, . . . it has imposed no restriction on access to abortions that was not already there.”³² Instead, it is the woman’s indigency that may make obtaining an abortion impossible, yet the indigency “is neither created nor in any way affected by the Connecticut regulation.”³³ The obvious effect of these rulings, however, was captured by Justice Brennan in his dissent in *Maher*, in which he wrote:

As a practical matter, many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to have abortions if the State had also provided funds for that procedure, or indeed, if the State had provided funds for neither procedure. This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure.³⁴

The Court went a step further with its decision in *Harris v. McRae* when, relying on its reasoning in *Maher*, it upheld the right of states to refuse to fund even medically necessary abortions for Medicaid recipients.³⁵ This issue arose in light of the Hyde Amendment, which, in its strictest form, provided for federal reimbursement under the Medicaid program only for abortions performed “where the life of the mother would be endangered if the fetus were carried to term.”³⁶ The Court relied on the proposition that a woman who is unable to afford “the full range of constitutionally protected freedom of choice” is burdened by indigency, not by governmental restrictions, and held that “the Hyde Amendment leaves an indigent woman with at least the same range of choice in decid-

30. See, e.g., *Maher*, 432 U.S. at 473-74 (“*Roe* did not declare an unqualified ‘constitutional right to an abortion[.]’ . . . Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.”).

31. *Id.* at 474.

32. *Id.*

33. *Id.*

34. *Id.* at 483 (Brennan, J., dissenting).

35. *Harris v. McRae*, 448 U.S. 297, 324-26 (1980).

36. See Pub. L. No. 94-439, § 290, 90 Stat. 1418 (1976); *Harris*, 448 U.S. at 302-03. Named after its original congressional sponsor, Representative Henry Hyde, the Hyde Amendment was first introduced in 1976 as an amendment to the annual appropriations bill for the Department of Health, Education and Welfare. See *id.*

ing whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all."³⁷

Options for indigent women seeking abortions were further limited by the Court's holding in *Webster v. Reproductive Health Services*.³⁸ In *Webster*, the Court upheld a Missouri statute which "prohibit[ed] the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life" and proscribed the use of public funds for abortion counseling except in instances where the mother's life would be at stake.³⁹ In reaching its decision, the Court again held that these prohibitions did not place any obstacles in the path of a woman obtaining an abortion that would not have been there had the state never entered the business of running public hospitals in the first place. This holding essentially ignored the warning of the Court of Appeals, which stated that "[t]o prevent access to a public facility does more than demonstrate a political choice in favor of childbirth; it clearly narrows and in some cases forecloses the availability of abortion to women."⁴⁰

The Court reaffirmed its position in *Rust v. Sullivan*,⁴¹ which involved prohibitions on the use of Title X funds.⁴² Here, the Court held that the denial of such funds to family planning clinics that advocate abortion as a means of family planning could not be construed as a violation of the constitutionally protected right to choose whether to terminate a pregnancy.⁴³

Thus, while the right of privacy with regard to childbearing decisions remains intact for those with access to private health care, it has been severely undercut for women dependent on the government for medical aid. To make matters worse, an additional set of burdens has been placed

37. *Harris*, 448 U.S. at 316-17. In adhering to the idea that it is under no constitutional obligation to provide medical services, the government thus finds itself free to withhold at will the services it has chosen to provide. Essentially, by defining *action* only as requirements or penalties the government imposes, rather than including in its definition decisions to withhold public funding or the use of public hospitals, the government is able to skirt the issue of unconstitutionality, despite the fact that either policy has the same effect. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2297-2309 (1990).

38. 492 U.S. 490 (1989).

39. See *Webster*, 492 U.S. at 499, 501.

40. See *id.* at 509 (citing *Reproductive Health Services v. Webster*, 851 F.2d 1071, 1081 (8th Cir. 1988)).

41. 500 U.S. 173 (1991).

42. Title X of the Public Health Service Act, 42 U.S.C. § 300 (1999), provides federal funding for family planning services, so long as "[n]one of the funds appropriated . . . [are] used in programs where abortion is a method of family planning." *Rust*, 500 U.S. at 178 (citation omitted).

43. See *Rust*, 500 U.S. at 201. In reaching its decision, the Court again relied on the proposition that the Constitution imposes on the government no affirmative obligation to "commit any resources to facilitating abortions," so long as it does not place any obstacles in the way of a woman choosing to obtain one. *Id.* (citing *Webster*, 492 U.S. at 511).

upon these women by criminal prosecutors hoping to make a dent in the increase in number of children born addicted to drugs.⁴⁴

CRIMINALIZATION OF PREGNANCY

In a series of state court cases across the country, prosecutors have attempted to find "creative" responses to the rise in drug use and the corresponding increase in the number of babies born affected by or addicted to drugs during the 1980s.⁴⁵ The most well-known of these cases is *Johnson v. State*, in which Jennifer Johnson was tried and convicted of delivery of a controlled substance to minors.⁴⁶ In its argument, the State relied on a Florida statute that made it a crime for an adult over eighteen years of age to "deliver" a controlled substance to a person under eighteen.⁴⁷ Under this law, Johnson was accused of delivering cocaine to her children through the umbilical cord in the sixty to ninety seconds after birth and before the cord was cut.⁴⁸ While the decision of the lower court was eventually reversed by Florida's highest court,⁴⁹ Johnson's prosecution was followed by a wave of others, all attempting to punish women for their behavior during pregnancy.⁵⁰

A popular tactic of many prosecutors has been to charge women with child abuse in the hope that courts will be willing to expand the definition of a "person" to include a fetus. In nearly all of the states where this has been attempted, however, courts have declined to make the required jump, relying mainly on the intent of the legislature in creating child protection laws.⁵¹ An exception to this general rule is South Caro-

44. See *infra* notes 45-63 and accompanying text.

45. For a discussion of the increase in drug use and the corresponding effect on babies born during this period, see Wendy Chavkin et al., *Reframing the Debate: Toward Effective Treatment for Inner City Drug-Abusing Mothers*, 70 BULL. OF N.Y. ACAD. OF MED. 50, 50 (1993) (observing a three or four times increase in the use of illicit drugs among parturient women in the late 1980s as compared to earlier in the decade); Drew Humphries et al., *Mothers and Children, Drugs and Crack: Reactions to Maternal Drug Dependency*, in THE CRIMINALIZATION OF A WOMAN'S BODY 81, 84 (Clarice Feinman ed., 1992) (citation omitted) (noting an increase in maternal drug use in New York City from eight percent in 1980 to thirty percent in 1988); DREW HUMPHRIES, CRACK MOTHERS 48 (1999) (citing studies estimating the birth of 375,000 drug-exposed babies and the delivery of 100,000 crack/cocaine babies in 1989).

46. See *Johnson*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), *quashed*, 602 So. 2d 1288 (Fla. 1992).

47. See FLA. STAT. ch. 893.13(1)(c) (1989).

48. 578 So. 2d at 422 (Sharp, J., dissenting).

49. See *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992).

50. See, e.g., *Reinesto v. State*, 894 P.2d 733, 734-35 (Ariz. Ct. App. 1995); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998); *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 736 (Wis. 1997); *State v. Deborah J.Z.*, 596 N.W.2d 490, 496 (Wis. Ct. App. 1999).

51. See, e.g., *Reinesto v. State*, 894 P.2d 733, 734-35 (Ariz. Ct. App. 1995) (holding that the "legislature did not intend that a fetus would be regarded as a 'child' under the statute" and refusing to allow the state to prosecute petitioner for prenatal conduct that caused harm to the child once it was born); *State v. Gethers*, 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991) ("[T]he Legislature never intended for the general drug delivery statute to authorize prosecutions of those mothers who take illegal drugs close enough in time to childbirth that a doctor could testify that a tiny

lina, which, in *Whitner v. State*, asserted that "South Carolina has long recognized that viable fetuses are persons holding certain legal rights and privileges."⁵² Ignoring the fact that this long history of recognition was concentrated in cases of tort law and criminal cases involving the actions of a third party against the fetus,⁵³ the court relied on this construction of the law in order to hold Cornelia Whitner guilty of criminal child neglect for "causing her baby to be born with cocaine metabolites in its system by reason of [her] ingestion of crack cocaine during the third trimester of her pregnancy."⁵⁴ In rendering its opinion, the court claimed to be concerned with child welfare. In reality, however, the court failed to recognize the fact that its overextension of the South Carolina child protection laws to fetuses would be likely to deter pregnant women from seeking any prenatal care at all, thereby leaving their future children potentially worse off than they had been under the original interpretation.⁵⁵

Finally, a handful of courts have attempted to remedy the situation by prohibiting women from becoming pregnant as a condition of probation. This approach was adopted by a California Superior Court judge in *People v. Pointer*.⁵⁶ The defendant in *Pointer* was convicted of child endangerment for placing her children on a strict macrobiotic diet.⁵⁷ As a

amount passed from mother to child in the few seconds before the umbilical cord was cut."); *State v. Hardy*, 188 Mich. App. 305, 310 (Ct. App. 1991) ("We are not persuaded that a pregnant woman's use of cocaine, which might result in the postpartum transfer of cocaine metabolites through the umbilical cord to her infant, is the type of conduct that the Legislature intended to be prosecuted under the *delivery-of-cocaine* statute . . ."); *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 736 (Wis. 1997) ("[T]he legislature intended a 'child' to mean a human being born alive."); *State v. Deborah J.Z.*, 596 N.W.2d 490, 496 (Wis. Ct. App. 1999) (recognizing that "an unborn child is not a 'human being' because it is not one who has been born alive").

52. 492 S.E.2d at 779.

53. *See id.* at 779-80.

54. *Id.* at 778-79.

55. *See* Brief for Amici Curiae at 2, *Whitner v. South Carolina*, 492 S.E.2d 777 (visited Oct. 21, 1999) <http://www.lindesmith.org/about_tlc/whitner2.html> "The *Whitner* decision also has produced real and devastating consequences for pregnant women, many of whom are now avoiding prenatal care and drug and alcohol treatment for fear that confiding their health problems to their physicians or counselors could lead to their arrest and imprisonment." *Id.* Even more ironically, as the dissent in *Whitner* points out,

If the statute applies only when a fetus is 'viable,' a pregnant woman can use cocaine for the first twenty-four weeks of her pregnancy, the most dangerous period for the fetus, and can be immune from prosecution under the statute so long as she quits drug use before the fetus becomes viable. Further, a pregnant woman now faces up to ten years in prison for ingesting drugs during pregnancy but can have an illegal abortion and receive only a two-year sentence for killing her viable fetus.

492 S.E.2d at 788 (Moore, J., dissenting). *See also* *Chenault v. Huie*, 989 S.W.2d 474, 478 (Tex. Ct. App. 1999) (recognizing the possibility that when faced with the prospect of civil liability for the use of drugs during pregnancy, "some pregnant women may never reveal critical facts about their conduct to their physicians, resulting in less than adequate prenatal care").

56. 199 Cal. Rptr. 357 (1984).

57. *See id.* at 359. According to appellant's physician, a macrobiotic diet consists of "a diet that is pretty much exclusively grains, beans and vegetables, meaning pretty much excluding fruits,

result of the diet, one child "was seriously underdeveloped" and the other "suffered severe growth retardation and permanent neurological damage."⁵⁸ After being found guilty by a jury and sentenced to five years of probation, the defendant was, among other things, instructed to "have no custody of any children, including her own, without prior court approval," and was restricted from "conceiv[ing] during the probationary period."⁵⁹ Holding that the desired result of the trial court could be achieved in a less burdensome way, the appellate court rejected this requirement as "subversive of appellant's fundamental right to procreate" and, accordingly, struck it down.⁶⁰

This precedent, however, did not prevent a later California court from attempting to place the same restriction on a woman's right of privacy in making childbearing decisions. In *People v. Zaring*, the court sentenced the appellant, who had previously been found guilty of possession of heroin, to probation, ordering her "not to get pregnant during the term of [her] probation which is a term of five years."⁶¹ The judge then admonished the appellant, stating "[i]f you get pregnant, I'm going to send you to prison in large part because I want to protect the un-born child."⁶²

While this probation condition was overturned by the appellate court,⁶³ it is likely that the damaging influence of its conditions, like that of other trial court convictions of pregnant and drug-addicted women discussed herein, had already been done. Average citizens are unlikely to follow legal decisions through the maze of appeals that the decisions must travel. Rather, citizens are likely to hear conversations and news stories discussing women being arrested for delivering drugs to or abusing their unborn children, and as a result, are then likely to avoid seeking out prenatal care or drug treatment. Not surprisingly, for those who remain willing to participate in drug treatment programs, the options are rather limited.

DRUG TREATMENT PROGRAMS

It is well documented that the demand for drug treatment programs surpasses its availability for pregnant women, women with young children, and Medicaid patients, all categories into which CRACK participants and women who have been prosecuted during pregnancy are likely to fall. Ac-

deemphasizing salads, deemphasizing or eliminating milk products of all form, yogurt, milk, cheese, cottage cheese and, also, no fish, meat, poultry or eggs." *Id.* at 359 n.2.

58. *Id.* at 360.

59. *Id.*

60. *Id.* at 365.

61. 10 Cal. Rptr. 2d 263, 267 (1992).

62. *Id.*

63. *See Zaring*, 10 Cal. Rptr. 2d at 270.

According to a 1990 survey, "[t]he general shortage of treatment slots is aggravated by the unwillingness of many drug programs to include pregnant women."⁶⁴ Fifty-four percent of treatment programs surveyed "categorically excluded the pregnant," sixty-seven percent rejected pregnant women using Medicaid, and a mere thirteen percent were willing to accept "pregnant Medicaid patients addicted to crack."⁶⁵ Aside from problems of finding slots in residential treatment programs, women with young children also face problems securing outpatient treatment due to the lack of childcare facilities in the majority of these programs.⁶⁶ In fact, some of the women prosecuted for using drugs while pregnant expressed desire to obtain treatment during the course of their prosecutions, but were turned away.⁶⁷ In *Elaine W. v. Joint Diseases North General Hospital, Inc.*, the plaintiff even went so far as to sue the defendant hospital for its failure to admit pregnant women to its drug detoxification program.⁶⁸

For those women who are able to gain access to treatment, the programs in which they participate are almost always based on a male-oriented model of recovery, which tends to fall short of meeting the needs of women in treatment. Frequently, these programs "use[] confrontation and punishment to induce behavior change."⁶⁹ Yet "[f]emale addicts often don't respond to this treatment approach due to a lack of self-esteem and may even find it hostile or threatening, increasing the likelihood that they will not complete their treatment."⁷⁰ Thus, there is

64. Marsha Rosenbaum, *Women and Drugs: Twenty Five Years of Research and Policy* (visited Jan. 28, 2000) <<http://www.drugtext.org/ihra/paris/proceedings/rosenbau.htm>>.

65. *Id.* These findings are supported by studies in other geographic areas as well. In Michigan, for example, "only nine of the thirteen residential treatment programs available to women will 'consider' pregnant women." Humphries et al., *Mothers and Children*, *supra* note 45, at 93 (citing Mollie McNulty, *Pregnancy Police: The Health Policy and Legal Implications Punishing Pregnant Women for Harm to their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277 (1988)); *see also* Loren Siegel, *The Pregnancy Police Fight the War on Drugs*, in *CRACK IN AMERICA* 249, 252 (Craig Reinerman & Harry G. Levine eds. 1997) ("Drug treatment for poor, pregnant women is even scarcer than is prenatal care. . . . Northwestern University Hospital is the only Chicago area hospital that admits pregnant women for residential drug treatment, and it has only two beds reserved for them.").

66. *See* Rosenbaum, *supra* note 64; *see also* Chavkin et al., *supra* note 45, at 62-63.

67. *See, e.g.*, Humphries et al., *Mothers and Children*, *supra* note 45, at 93 (citing Katha Pollit, *Fetal Rights: A New Assault on Feminism*, THE NATION, Mar. 16, 1990, at 409) ("Jennifer Johnson had sought admission to a drug abuse clinic but was turned away, presumably because she was pregnant.").

68. 613 N.E. 2d 523 (N.Y. 1993).

69. Denise Paone & Julie Alperen, *Reframing the Debate: Effective Treatment for Crack Using Women* (visited Oct. 21, 1999) <http://www.ihra.org.uk/paris/proceedings/paone.htm>; *see also* Jean Wellisch et al., *Treatment Strategies for Drug-Abusing Women Offenders*, in *DRUG TREATMENT AND CRIMINAL JUSTICE* 5, 12 (James A. Inciardi ed., 1993) (noting, in a review of state prison programs, that the "use of traditional treatment for drug abuse based on the medical model did not appear to promote positive change in women inmates").

70. Jean Wellisch et al., *supra* note 69, at 12.

not only little incentive for women to seek out drug treatment programs, but also little hope of success even if adequate treatment is found.

CONCLUSION

Considering the lack of viable alternatives, it should come as no surprise that many indigent women are opting to eliminate even the possibility of becoming pregnant when presented with the impetus provided by CRACK. While the Supreme Court has clearly carved out a zone of privacy around decisions relating to family planning and childbearing into which the government may not intrude, the Court has failed to recognize that by ignoring external influences on this right, such as indigency, it has done little to extend protection to women without private resources. The Court may not deem this to be its responsibility, but it should realize that its failure to provide women with a full range of childbearing choices leaves them with few practical options.

The added pressure of the possibility of being criminally prosecuted for drug use during pregnancy and the inability to find available and effective drug treatment programs clearly creates further incentives for indigent women to participate in CRACK. While the creation of such incentives is neither illegal nor unconstitutional, it is also not in keeping with the principles which *Roe v. Wade* and its progeny intended to impart. While, technically, the government has not prevented women from obtaining abortions, securing prenatal care, or attending drug treatment, by failing to address that indigency is an impediment to receiving such services, the government has made it highly unlikely that poor women will pursue these options. Viewed in this light, it is difficult to maintain that the women who have participated in CRACK have made an illogical choice when faced with the option of having children they are physically, emotionally or financially unable to care for, or taking \$200 to participate in long-term or permanent birth control. This, however, is a choice no woman should be forced to make when viable alternatives could easily be placed within her reach.