ONE FOR MY BABY, ONE MORE FOR THE ROAD: LEGISLATION AND COUNSELING TO PREVENT PRENATAL EXPOSURE TO ALCOHOL

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INTRODUCTION

Medical authorities have become increasingly aware that a woman who drinks alcoholic beverages during pregnancy exposes not only herself but also her fetus to alcohol. Unfortunately, women who are the heaviest abusers of alcohol frequently do not alter their alcohol consumption during pregnancy.[1] A recent study estimates that 3.3% of all pregnant women consume two or more drinks per day.[2] Although two drinks may seem like a relatively small number of drinks to have in one day, the effects of prenatal alcohol exposure are clearly observable after weekly consumption of alcohol equivalent to four to six drinks.[3]

The most severe expression of in utero alcohol damage to the fetus is Fetal Alcohol Syndrome ("FAS"). Characteristics of FAS include abnormal facial features, for example, flat mid-face, thin upper lip, small eye openings, and behavioral problems like attention deficiency, hyperactivity, motor dysfunction, mental retardation, and learning and social skill deficiencies. While most physical characteristics abate as the child ages, many behavioral problems persist into adulthood.[4]

Although FAS is clearly preventable, FAS is becoming an increasing problem. The rate of reported cases of FAS identified among newborns in the United States increased approximately six-fold during a period of thirteen years.[5] Another source listed the national rate of FAS diagnosed in newborns as high as two per

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[1] *See* Jennifer Thomas, *Fetal Alcohol Syndrome: Does Withdrawal Play a Role?*, ALCOHOL HEALTH AND RES. WORLD, Dec. 22, 1998, at 47.

[2] *See* E.L. ABEL, FETAL ALCOHOL SYNDROME (Oradell, NJ 1990).

[3] *See* Kara Gabriel, *The Hormonal Effects of Alcohol Use on the Mother and the Fetus*, ALCOHOL HEALTH AND RES. WORLD, June 22, 1998. One drink is defined as one twelve-ounce can of beer or wine cooler, one five-ounce glass of wine, or one and a half ounces of distilled spirits.

[4] *See* Thomas, *supra* note 1, at 47.

[5] *See Update: Trends in Fetal Alcohol Syndrome - United States, 1979-1993*, MORBIDITY AND MORTALITY WKLY REP., Apr. 7, 1995, at 249. The six-fold increase was measured between 1979-1992. FAS was reported at a rate of 6.7 per 10,000 newborns in 1993. The rate in 1979 was 1.0 per 10,000 newborns. The *Update* was quick to note that this increase, although possibly a true reflection in the number of infants with FAS, may also reflect an increase in the awareness and diagnosis of primary-care clinicians of FAS in newborns.

1,000 births.[6] As many as 50,000 babies per year suffer from fetal alcohol effects ("FAE").[7] Clearly, the unborn are in need of protection from what may justifiably be called fetal abuse.[8]

This Note addresses the hurdles faced by legislators attempting to solve the problem of preventing alcohol abuse by pregnant women. Part I explains the historical treatment of fetal rights in the United States. Part II uses references to abortion cases to describe the conflict between women's rights and state's rights. Part III provides an overview of case law addressing substance abuse by mothers during pregnancy. Part IV highlights the possible constitutional challenges to laws that impose criminal sanctions on pregnant women who consume alcohol during pregnancy. Finally, in Part V, I conclude that pregnant women who refuse to undergo counseling to deal with their alcohol problem should be held criminally liable if their child is born with alcohol-related birth defects.

I. HISTORICAL TREATMENT OF FETAL RIGHTS

Fetal rights have been recognized in the field of property law since the late Nineteenth century. It is now generally accepted that a fetus in existence at the time of a testator's death that is subsequently born alive is entitled to inherit property equally with its living siblings.[9] This expression of the common law, however, did not recognize the *fetus* as having independent legal rights, but rather focused on its *potential* to receive property. Nevertheless, a fetus is recognized as a legal person under modern inheritance law.[10]

In contrast, the legal recognition of fetal rights in tort law is a more recent concept. *Dietrich v. Inhabitants of Northampton*[11] held

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6 Robert Whereatt, *Drastic Steps Aim to Fight Alcohol Use in Pregnancy*, THE STAR-TRIBUNE, Feb. 6, 1998, at 1B. FAS is diagnosed in twelve out of every 1,000 live births in Minnesota, where FAS is the number one cause of mental retardation and developmental disabilities in newborns.

7 *The Alcohol Warning Labels Act: Hearing on § 2407 Before the Subcommittee of Consumerism of the Senate Committee on Commerce, Science and Transportation*, 100th Cong., 2d Sess. 596 (1988) (statement of Dr. Enoch Gordis, National Institute on Alcohol Abuse and Alcoholism, Department of Health and Human Services). Symptoms of FAE include growth retardation before and after birth, reduced sucking reflex, tremulousness, and defects in physical and neurological development.

8 *See* Kristin Burgess, *Protective Custody: Will it Eradicate Fetal Abuse and Lead to the Perfect Womb?*, 35 HOUS. L. REV. 227 (1998) (defining fetal abuse as the result when pregnant women endanger the heath of their fetus through active conduct or by failing to behave in a certain manner).

9 *See* UNIF. PROBATE CODE § 2-108, 8 U.L.A. 66 (1983) (codifying the common law tradition of fetal inheritance rights).

10 *See id.*

11 52 Am.Rep. 242 (Mass. 1884). In *Dietrich*, a pregnant woman had a miscarriage after she fell while she was walking, presumably due to a defect in the highway. In the subse-

that an unborn child was part of the mother, and that the fetus had no independent legal identity while in the mother's womb. Yet, in 1946, the *Bonbrest v. Kotz*[12] court allowed a cause of action against third parties for prenatal injuries as long as the fetus was born alive. Some states have even extended the *Bonbrest* holding to include stillborn fetuses.[13]

Fetal rights under criminal law have followed a similar expansion. Traditionally, states have required that a fetus which sustains fatal injuries while in utero must be born alive and subsequently die from those injuries in order for the parents to bring an action in homicide.[14] The rationale for the "born alive" rule was based on then limited knowledge of the medical community regarding the viability of a fetus before birth.[15] However, this rule is slowly being eradicated with the advent of more sophisticated equipment and the scientific knowledge of doctors who recognize that fetuses are capable of living outside of the womb before birth. For example, many states, including California, have enacted statutes that do not require that the fetus be born alive.[16] Instead, the fetus must have been viable within the mother at the time of the fatal injury.[17] Although the idea of giving a fetus the status of a person within the sphere of criminal law is gaining acceptance, it has yet to achieve consensus.

As the above discussion reveals, "the traditional approach to recognizing fetal harm is giving way to one that recognizes inde-

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quent wrongful death action brought against the town by the child's administrator, the court held that "any damage to [the unborn fetus] which was not too remote to be recovered [. . .] was recoverable [only] by" the mother. *Id.* at 17.

12 65 F. Supp. 138 (D.D.C.1946) (holding that when direct tortious injury has been inflicted upon a viable fetus subsequently born alive, the child has a cognizable cause of action).

13 *See generally* Danos v. St. Pierre, 383 So.2d 1019 (La. Ct. App. 1980). *But see* Justus v. Atchison, 565 P.2d 122, 125 (Cal. 1977) (refusing to allow a wrongful death action based upon medical malpractice for a stillborn fetus, even after conceding that "25 [. . .] states now recognize a cause of action for the wrongful death of a fetus").

14 *See* MODEL PENAL CODE § 210.0(1) (1985) (defining a "human being" for homicide purposes as an individual who has been born and is alive). *See also* State v. Dickson, 275 N.E.2d 599 (Ohio 1971) (explaining the so-called "born alive" rule and its application).

15 *See* Lawrence J. Nelson & Nancy Milliken, *Compelled Medical Treatment of Pregnant Women*, 259 JAMA 1060, 1064 (1988) (discussing the relative uncertainty of a fetus' health while it is within the womb).

16 *See* CAL. PENAL CODE § 187(a) (West 1998).

17 As of 1998, eight states have expressly included within their statutes, or interpreted their statutes as providing, the killing of a viable fetus as homicide: California, Illinois, Massachussetts, Minnesota, New York, South Carolina, Utah, and Wisconsin. *See* CAL. PENAL CODE § 187(a) (West 1998); 720 ILL. COMP. STAT. ANN. § 5/9-1.2 (West 1993); MINN. STAT. ANN. § 609.2661 (West 1987); N.Y. PENAL LAW. § 125.00 (McKinney 1998); UTAH CODE ANN. § 76-5-201(1)(a) (1997); Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989); State v. Horne, 319 S.E.2d 703 (S.C. 1984); State v. Black, 526 N.W.2d 132 (Wis. 1994).

pendent status."[18] Although a fetus' rights are not equal to the rights afforded a born person under current state and federal laws, they are gaining greater recognition as exemplified by the emerging field of fetal rights.[19] Currently, pregnant women can be criminally prosecuted for conduct hazardous to their fetus.[20] These developments are a product of society's view that life, even *potential* life, should be protected under the law.

II. Conflict Between Women's Rights and State Interests

A woman's right to autonomous bodily control during her pregnancy has long been a source of intensive debate. The central concept in this debate is that all individuals are afforded the right to privacy under the United States Constitution.[21] The fundamental basis of the right to privacy is that each individual has the right to a certain "independence [when] making certain kinds of important decisions,"[22] particularly in matters regarding the course of his or her life.

The first case to decide that this general right to privacy existed was *Pacific Railway v. Botsford.*[23] In *Pacific Railway*, the Supreme Court held that a person has constitutional rights to the

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18 Burgess, *supra* note 8, at 245 (quoting Deidre Moira Condit, *Fetal Personhood: Political Identity Under Construction*, *in* Expecting Trouble 25, 34 (Patricia Boling ed., 1995) (discussing the commercial and political aspects of fetal technology)).

19 A growing number of academics advocate a drastic change in the legal position of pregnant women due to the modern concept of fetal rights. *See* Charles J. Dougherty, *The Right to Begin Life with Sound Body and Mind: Fetal Patients and Conflicts with Their Mothers*, 63 U. Det. L. Rev. 89 (1985) (stating that every human being has a right to be born with sound body and mind and that pregnant women who infringe on that right should be held liable for injury inflicted to the fetus at any time during development); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 Va. L. Rev. 405 (1983) (proposing that although a woman may abort a fetus, once she decides to continue the pregnancy, her constitutional rights are diminished); Barbara Shelly, *Comment, Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 Dick. L. Rev. 691 (1988) (proposing criminal punishment for women who make unwise decisions regarding the health of her fetus).

20 Although many states sought to prosecute women for conduct hazardous to fetuses, few have been successful. *See, e.g.*, People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991) (holding that under the state's drug delivery statutes, a woman could not be held criminally liable for the movement of cocaine through the umbilical cord to her baby after birth but before the cord was severed); State v. Gethers, 585 So.2d 1140 (Fla. 1991) (holding that a woman could not be held guilty of aggravated child abuse based on her activities during pregnancy).

21 Although the U.S. Constitution does not explicitly provide for such a right, it has been interpreted to imply a penumbra of individual privacy rights. *See* Roe v. Wade, 410 U.S. 113 (1973) (recognizing the right of personal privacy); Doe v. Bolton, 410 U.S. 179 (1973) (holding that a fundamental right to privacy exists); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a fundamental right of marital privacy).

22 Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

23 141 U.S. 250 (1891) (determining whether a plaintiff in a civil action for injury was required to submit to a surgical examination to discover the extent of the injury).

"possession and control of [their] own person, free from all restraint and interference of others."[24] Although the right to self-possession and control is not absolute, the Court ruled that any invasion of such nature must be supported by a "clear and unquestionable authority of law."[25]

The Court first recognized the right to privacy in making reproductive decisions in *Griswold v. Connecticut.*[26] In a seven-to-two decision, the Court struck down two Connecticut provisions: one provision imposed a monetary fine and jail sentence for anyone using contraceptive devices to prevent conception, and the other provision stated that any person who assists, abets, counsels, causes, hires, or commands another to use contraceptive devises was to be punished as if he were the principal offender.[27] In *Griswold,* an executive of the Planned Parenthood League of Connecticut and the Medical Director of the League were convicted under the Connecticut provision for providing information, instruction, and medical advice to married persons regarding means of preventing conception.[28] The Court concluded that the right to marital privacy in making contraceptive decisions was a tradition so rooted in our society "as to be ranked fundamental."[29] The Court continued that since the law "marks an abridgment of important fundamental liberties, [it] will not do to urge [. . .] that the statute is related rationally to the effectuation of a proper state purpose. A closer scrutiny and stronger justification than that are required."[30]

Where *Griswold* dealt with the right to privacy in making contraceptive decisions for married couples, *Eisenstadt v. Baird* [31] expanded the nature of the right to privacy in general, regardless of the activity sought to be regulated. *Eisenstadt* overturned a lower court's decision which convicted the defendant under a law banning the distribution of contraceptives. The most significant legal

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[24] *Id.* at 251.

[25] *Id.*

[26] 381 U.S. 479 (1965).

[27] *Id.*

[28] *Id.*

[29] *Id* at 487 (quoting Snyder v. Mass., 291 U.S. 97, 105 (1934)).

[30] *Id.* at 497. The state argued that discouraging extra-marital relations was a legitimate subject of state concern, and that the statute was rationally related to the subject. Furthermore, the state supported it's claim by proposing that preventing the use of birth-control devices by married persons helps to discourage extra marital affairs. Justice Goldberg responded to this contention in his concurrence by stating that "the rationality of the justification is dubious, particularly in the light of the admitted widespread availability of all persons [in] Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception." *Id.* at 498.

[31] 405 U.S. 438 (1972).

factor in *Eisenstadt* was that marriage was not a critical factor in deciding an individual's right to privacy.[32] *Eisenstadt* held that:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. 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.[33]

The *Eisenstadt* decision was a critical stepping point from the arguably narrow holding in *Griswold* to the unmistakably broad one in *Roe v. Wade*.[34]

Courts have also held that the right to privacy includes a right to bodily integrity: the right to protect one's autonomy from government interference. Medical decisions generally are protected, even when the decision ultimately harms the patient.[35] Pregnant women should, of course, be able to have the same right to personal autonomy as others. Yet, the issue is whether and to what extent legislative bodies are justified in punishing women whose actions are inconsistent with recommended prenatal care and harmful to their unborn child.

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[32] Baird had distributed contraceptive foam that was eventually received by an unmarried person. *Id.* at 438.

[33] *Id. at* 453.

[34] 410 U.S. 113 (1973). For a further discussion regarding this "stepping stone" notion, see Richard Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 1973, which argues that *Eisenstadt*, unlike the narrow *Griswold* ruling, was an essay in substantive due process and that *Eisenstadt* unmasked the fact that *Griswold* was based on the idea of sexual liberty rather than privacy.

[35] *See generally* Cruzan v. Director, Missouri Department of Health, 497 U.S. 2841 (1990) (indicating in dicta that competent persons have a constitutionally protected liberty interest in refusing unwanted medical treatment); Bee v. Greaves, 744 F.2d 1387 (10th Cir.1984), *cert. denied*, 469 U.S. 1214 (1985) (holding that a pretrial detainee retained a constitutional liberty interest in avoiding unwanted drug therapy, and that this interest could only be overcome in an emergency situation where no other less restrictive alternative exists); Osgood v. District of Columbia, 567 F.Supp. 1026 (D.D.C.1983) (holding that a Christian Scientist patient's right not to be given anti-psychotic drugs could be overcome only by a compelling state interest if there was no reasonable and less intrusive alternative); Public Health Trust v. Wons, 541 So.2d 96 (Fla. 1989) (denying a hospital's request for an order allowing administration of a life-saving blood transfusion based on religious reasons); In re Farrell, A.2d 404 (NJ 1987) (holding that a thirty seven year-old competent pregnant women with a terminal illness had a right to have her respirator removed, based on common law and constitutional principles which overrode state interests). *But see* Washington v. Harper, 494 U.S. 210 (1990) (holding that where convicted prisoners are involved, the standard of review is whether the regulation which allows anti-psychotic drugs to be administered is reasonably related to legitimate penalogical interests).

Roe v. Wade[36] presented the first opportunity for the Supreme Court to examine a woman's right to have an abortion. The Court concluded that the right to personal privacy included the right to have an abortion, but that the right was qualified and must be considered against the important state interests to regulate abortion.[37] *Roe* involved a pregnant unmarried woman who wished to have an abortion. She was unable to have a legal abortion in Texas because abortion was prohibited in Texas unless the life of the mother was threatened by the continuation of her pregnancy.[38] Roe challenged the Texas statute on the grounds that it invaded her personal privacy as protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution.[39]

The Court separated pregnancy into three trimesters and placed different levels of autonomous freedom within each of them.[40] Within the first trimester, a woman had complete discretion to decide whether or not to procure an abortion.[41] During the second trimester, the Court allowed the state to regulate abortion if the health of a mother was in danger.[42] In the third trimester, the Court determined that the state's interest in potential life became so compelling as to warrant intrusive regulation of the woman's right to have an abortion.[43] This trimester framework was later found rigid and unnecessary, and has been heavily criticized.[44]

Many hoped that *Roe* would be overruled by *Planned Parenthood v. Casey*[45] In *Casey*, abortion clinics and physicians challenged the constitutionality of five provisions of the Pennsylvania Abortion Control Act.[46] However, while upholding the principles enumer-

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36 410 U.S. 113 (1973).

37 The Court stated that the right to privacy "was broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 120. However, the Court went on to say that it was reluctant to support the notion that an individual has an "unlimited right to do with one's body as one pleases." *Id.* at 153.

38 *Id.* at 117-118 (stating that it is a crime "to procure an abortion, [. . .] except with respect to an 'abortion procured or attempted by medical advice for the purpose of saving the life of the mother'" (quoting TEX. PENAL CODE ART. 1191 (1996)).

39 *Id.* at 120.

40 *Id.* at 164-165.

41 *Id.*

42 *Id.*

43 *Id.* at 164-165.

44 *See* Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (upholding a state's right to regulate abortion even though the statute in question expressly stated that the legislature was concerned with promoting the state's interest in potential human life rather than in maternal health).

45 505 U.S. 833 (1992).

46 The Act requires that a woman who wants an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least twenty-four hours before the abortion is actually performed. For a minor to

ated in *Roe*, the Court held that the trimester system was no longer workable, and found that abortions may be regulated by a state as long as the regulations do not impose an "undue burden" on a woman who wishes to obtain an abortion.[47]

The aforementioned cases have developed the idea that the interests of the state in protecting potential life, although legitimate, must always be weighed against an individual's right to privacy. For a state to justify imposing regulations upon an individual's conduct, it must exhibit a "compelling state interest." In order to meet the "compelling state interest" standard, the state must bear three burdens.[48] First, the asserted state interest must be important and legitimate.[49] Second, the regulation must be substantially related to the goal as stated.[50] Finally, the regulation must be the least intrusive means to achieve that end.[51] This framework was established to prevent states from arbitrarily infringing upon protected liberty interests. In addition, the behavior to be regulated must be clearly linked to the harm that the state is trying to prevent, and the harm must be likely and great.[52]

Another possible approach that a state can take in asserting its control over fetuses or children is through its *parens patriae* power. The *parens patriae* power originates from the common law through which the state exercises paternalistic power over an individual who lacks the capacity to act in their own best interest.[53] In cases where a minor is physically or mentally abused, the state has an express obligation to exercise its *parens patriae* power over the minor and thus assume the role of the child's protector.[54] When a state attempts to control the behavior of a woman during her pregnancy, there is an undeniable struggle between the woman's inter-

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obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option. Another provision requires that, unless certain exemptions applied, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. In addition, the Act imposes reporting requirements on facilities that provide abortion services. The Act exempts compliance with these requirements in the event of a medical emergency. *See id.*

47 *Id.* at 874.

48 *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that "strict scrutiny [. . .] is essential.").

49 *Id.*

50 *Id.*

51 *Id.*

52 *See Note, Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994, 1005 (1988).

53 *See generally* Prince v. Massachusetts, 321 U.S. 158 (1943) (recognizing the ability of the state through it's *parens patriae* power to limit parental freedom and authority in matters concerning a child's welfare).

54 *See* In re Phillip B., 92 Cal.App.3d 796, 801 (1979) (stating that the "state has a right, indeed, a duty, to protect children").

est in maintaining bodily integrity and the state's interest in protecting the potential life and the welfare of the fetus who lacks the ability to protect itself.

III. Case Law Surrounding Fetal Rights and Maternal Actions During Pregnancy

As evidenced in Part I of this Note, the rights of fetuses have been continuously expanding. Most importantly, laws defining fetal rights have changed considerably in the last twenty years. The following is a brief overview of the case law and statutes from various states concerning the issue of fetal rights.

One approach in dealing with the fetal rights issue has been to expand the existing law designed to protect already-born children from parental neglect or abuse to include unborn fetuses. According to such an approach, chemically dependent mothers who give birth to afflicted babies would be prosecuted as if they had abused an already born child. Fetal rights advocates have argued that existing child abuse statutes may be sufficiently extended to address the problem of maternal misconduct toward fetuses.[55] Currently, there is no statue that specifically deals with fetal abuse and neglect. Since enacting new legislation can be a lengthy an arduous process, expanding the existing child abuse statute can provide an immediate protection to unborn children.

An early application of a standard child abuse statute was in the 1977 case of *Reyes v. Superior Court*.[56] In *Reyes*, a public health nurse advised Margaret Reyes, a pregnant heroin addict, to get prenatal care and to stop ingesting harmful drugs.[57] Despite the nurse's warnings, Reyes failed to seek prenatal care and continued to take heroin.[58] Reyes eventually gave birth to twin sons who were born addicted to heroin and suffered from withdrawal.[59] Reyes was subsequently charged with two felony counts of endangering the welfare of a child under § 273a(1) of the California Penal Code.[60]

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[55] *See* John Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 Duq. L. Rev. 1, 26 (arguing that the statutes should be expanded because their only express limitation is at the upper end of the age range and that nothing in their nature precludes a construction including the unborn).

[56] 75 Cal.App.3d 214 (1977).

[57] *Id.* at 216.

[58] *Id.*

[59] *Id.*

[60] *Id.* At the time of the prosecution, the California statute read:

> Any person who, under circumstances or conditions likely to produce great bodily harm or death [. . .] having the care or custody of any child, [. . .] willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county

The *Reyes* court considered both the precedent and the conventions of statutory interpretation in deciding that the California legislature did not intend the unborn to be protected by the child abuse statute. The court first listed a number of California and United States Supreme Court decisions that held that a fetus was not a "human being,"[61] a "person,"[62] a "minor child,"[63] or a "dependent child."[64] The court went on to interpret the language of § 273a(1), which states that an offender must be a person "having the care or custody of [a] child," as presupposing the existence of an already born child "susceptible to care or custody."[65] Furthermore, the court compared the punishments for violations of § 273a(1) to that of § 275, and reasoned that the California legislature could not have intended to include fetus in § 273a(1).[66] Violation of § 275, which proscribed illegal abortions, is punishable by one to five years of imprisonment, while violating § 273a(1) is punishable by one to ten years of imprisonment.[67] The court compared the two provisions, and reasoned that the California legislature could not have intended that illegal abortions be punished less severely than injuring a fetus.[68] Finally the court concluded that, when the legislature intends to include a fetus within the protection of law, it must do so explicitly.[69] Conversely, when the legislature does not mention fetuses specifically, the law "impliedly but plainly" excludes the unborn.[70]

One of the first cases addressing prenatal rights in New York was *In re Male R.*,[71] decided in 1979. *In re Male R.* involved a mother who ingested large quantities of alcohol and cocaine during her pregnancy. As a result, her child was born addicted to both alcohol and cocaine. The court addressed the fetal rights issue by relying on a statute that allowed the state to assume control over the

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jail not exceeding 1 year, or in the state prison for not less than 1 year nor more than 10 years.

Id. (citing CAL. PENAL CODE § 273a(1)).

61 *Id.* at 217 (citing People v. Carlson, 37 Cal.App.3d 349(1974) and Keeler v. Superior Court, 470 P.2d 617, 624 (Cal. 1970)).

62 *Id.* (citing Roe v. Wade, 410 U.S. 113, 158 (1973)).

63 *Id.* (citing People v. Yates, 298 P. 961, 962 (Cal.Super. 1931)).

64 *Id.* (citing Burns v. Alcala, 420 U.S. 575, 580-581 (1975)).

65 *Id.* at 217-218.

66 *Id.*

67 *Id.*

68 *Id.*

69 In the past, California courts had held that criminal child support and murder statutes did not protect fetuses. Subsequently, the legislature amended the laws to include fetuses explicitly. *Id.* at 218-219.

70 *Id.* at 219.

71 422 N.Y.S. 819 (1979).

newborn on the basis that it was neglected.[72] The court allowed the state to assume control by focusing on the fact that the child was suffering from chemical addiction at birth due to the mother's neglect of the baby's welfare, and the possibility that the child would be abused afterwards.[73] Unfortunately, the court did not extend the meaning of the statute to include mother's neglect of a *fetus'* welfare.

However, in 1985, a New York court went a step further and found that a mother had neglected her baby based solely on her prenatal intake of alcohol and cocaine.[74] The court stated:

> Proof that a person repeatedly misuses a drug or drugs and alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor [. . .] shall be prima facie evidence the child of or who is the legal responsibility of such a person is a neglected child.[75]

Also in 1985, a similar drama was unfolding in California. In *California v. Stewart*[76] a pregnant women who failed to follow her doctor's prenatal care instructions was charged with willfully omitting medical care for her child. The defendant, Pamela Rae Stewart, was a woman at the thirty-third week of her pregnancy and suffering from placenta previa.[77] She was told by her doctors to stay off her feet, maintain bed rest, abstain from sexual intercourse, take medication, report any bleeding immediately, and to come to the hospital immediately if any bleeding should start.[78] Twelve days after this consultation, Stewart came to the hospital bleeding, and told the staff that she had been bleeding for twelve hours following sexual intercourse with her husband.[79] An emergency cesarean section was performed and the baby was resusci-

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[72] N.Y. FAM. CT. ACT art. X, § 1012(f) (McKinney 1983) (stating "'neglected child' means a child less than eighteen years of age [. . .] (i) whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent [. . .] to exercise a minimum degree of care").

[73] *See In Re Male R.*, 422 N.Y.S. at 825.

[74] *See* In re Danielle Smith, 492 N.Y.S.2d 331 (1985).

[75] *Id.* at 334. *Contra* In Re Fletcher, 533 N.Y.S.2d 241 (1988) (where the court retreated from the standard put forward by *In re Danielle Smith*, focusing more upon the connection between the activity and the resultant harm to the fetus. The court held that a prima facie case shall not be developed solely because the mother had ingested enough of a substance to possibly effect the fetus).

[76] No. M508197, slip. op. (San Diego Mun. Ct. Cal. Feb. 26, 1987).

[77] Placenta previa is a serious medical condition occurring in one in every 200 pregnancies.

[78] California v. Stewart, No. M508197, slip. op., at 3-4.

[79] *Id.* at 4.

tated,[80] but the baby suffered apparent prenatal brain damage, and died six weeks later.[81]

Stewart was charged with willfully omitting to furnish necessary medical attendance or other care for her child in violation of § 270 of the California Penal Code.[82] The trial court dismissed the charges, and concluded that § 270 was a child support statute that was intended to penalize parents who fail to provide the necessary support to their offspring. Furthermore, the court held that § 270 was not meant for criminal prosecution purposes.[83]

In *Collins v. State*,[84] Texas prosecuted Debra Ann Collins for reckless injury to a child.[85] The state prosecuted Collins for ingesting cocaine while pregnant which caused injury to her subsequently born child.[86] The prosecution argued that the injury sustained by the fetus was "pain from cocaine withdrawal" after birth.[87] *Collins*, a case of first impression for Texas,[88] turned on whether Collins' fetus was a "child" within the meaning of the Texas penal code.[89]

While the appellate court noted that the state's attempt to bring Collins' conduct within the scope of existing criminal law was "creative," it held that the state's attempt was not constitutionally permissible.[90] In rendering its decision, the court pointed out that "the Penal Code does not proscribe any conduct with respect to a fetus, and the Legislature, by its definitions of 'child,' 'person,' and 'individual,' has specifically limited the application of penal laws to conduct committed against a human being who has been born and is alive."[91] Therefore, the court concluded that applying the existing law to the defendant's conduct would render that law "impermissibly vague."[92]

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80 *Id.*

81 *Id.*

82 *See* CAL. PENAL CODE § 270 (1972).

83 *See Comment, Of Woman's First Disobedience: Forsaking Duty of Care to Her Fetus - Is This a Mother's Crime?*, 53 BROOK. L. REV. 807, 808 n.7 (1987).

84 890 S.W.2d 893 (Tex. App. 1994).

85 *See id.* at 895.

86 *See id.* at 895-896 (referring to the "undisputed fact" that Collins's baby was placed in a state of addiction).

87 *Id.* at 895.

88 *See id.* (noting that many other states had already addressed the issue).

89 *Id.* at 897-98.

90 *Id.* at 898 (concluding that the state had ignored the fact that the appellant's conduct was not a crime when committed).

91 *Id.* at 897-898.

92 *Id.* at 898.

Perhaps the most important decision in the area of fetal rights was handed down in South Carolina in 1996 in *Whitner v. State*.[93] In *Whitner*, Cornelia Whitner pleaded guilty to criminal child neglect for "causing her baby to be born with cocaine metabolites in its system by reason of ingestion of crack cocaine during the third trimester of her pregnancy."[94] The South Carolina Supreme Court refused to grant post conviction relief, stating that the word "person" as used in the criminal child neglect statute *did* include a viable fetus.[95] This was the first case of its kind where conviction of prenatal fetal abuse was affirmed on appeal. The difference between this case and previous failed attempts to prosecute women for using drugs and alcohol during their pregnancy rests on the South Carolina court's particular reliance on the term "viable fetus." As these cases demonstrate, successful prosecutions for prenatal fetal abuse under existing child abuse statutes, although not impossible, are unlikely.

The most recent prosecutorial approach against pregnant women who use drugs is to use statutes that criminalize delivery of drugs to minors. In 1989, Jennifer Johnson was charged with a felony drug charge[96] when she gave birth to a baby addicted to cocaine. Johnson was subsequently convicted of delivering drugs to a minor through the umbilical cord.[97] The infant was Johnson's third cocaine-addicted baby.[98] Johnson received a sentence of fourteen years probation and one year in a rehabilitation program.[99] The court found that a child is a "person" after birth but not before the umbilical cord is severed for purposes of the rele-

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[93] 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998). Cornelia Whitner pled guilty to criminal child neglect in South Carolina Circuit Court and was convicted. Whitner subsequently filed a petition for post conviction relief. Her petition was granted on the grounds that the circuit court lacked subject matter jurisdiction to accept her guilty plea and that Whitner was provided with an ineffective assistance of counsel. The South Carolina Supreme Court reversed the grant of the post conviction relief petition. *See id.* at 786.

[94] *Id.*

[95] *See id.* at 779. The South Carolina criminal child neglect statute states:

> Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide [. . .] the proper care and attention for such child or helpless person, so that the life, health, or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

S.C. CODE ANN. § 20-7-50 (Law Co-op 1976).

[96] *See* Rorie Sherman, *Keeping Babies Free from Drugs*, NAT'L L.J., Oct. 16, 1989, at 1. In addition, Johnson was required to report any pregnancy to law enforcement authorities.

[97] *See* Jean Davidson, *Newborn Drug Exposure Conviction a 'Drastic' First*, L.A. TIMES, July 31, 1989, at 1.

[98] *See id.*

[99] *See* Sherman, *supra* note 96, at 1.

vant statute.[100] The court also found it important that Johnson *chose* to use the cocaine, to become pregnant, and to allow those pregnancies to come to term.[101] The Florida Supreme Court, however, overturned the conviction three years later, ruling unanimously that when the State Legislature made "delivery" of illegal drugs a crime, it did not contemplate a prosecution of this sort.[102]

Furthermore, it has been stated by the United States Supreme Court that "[i]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."[103] Even if it would not be completely absurd to apply the "delivery" theory to deliveries through the umbilical cord, the United States Supreme Court has held that where a statute is vague as to whom it applies, the statute should be construed narrowly and strictly with any ambiguity resolved in favor of the defendant.[104] A narrow and strict construction of the phrase "delivery" seemingly does not include delivery through the umbilical cord. Therefore, it seems that little success can result by using this approach.

The most recent case in this debate has been *Ferguson v. City of Charleston.*[105] In *Ferguson,* the Supreme Court has issued *certiorari* to decide whether a public hospital in South Carolina conducted unconstitutional searches when it tested pregnant women's urine for drugs for the purpose of reporting illegal drug use to the police.[106] Crystal M. Ferguson tested positive for cocaine during a prenatal visit. She agreed to attend a drug abuse counseling program, but unfortunately tested positive again when she gave birth.[107] She was arrested three days later.[108]

The federal appeals court ruled that while testing the woman's urine was a search, it was not unconstitutional because it was justified by "a special need beyond normal law enforcement goals."[109]

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100 *See* Davidson, *supra* note 97, at 1.

101 *See id.*

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

103 Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

104 *See generally* Liparota v. United States, 471 U.S. 419 (1985); Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973); Arroyo v. United States, 359 U.S. 419 (1959); United States v. Wiltberger, 18 U.S. 76 (1820).

105 186 F.3d 469 (S.C. 1999), *cert. granted* 68 U.S.L.W. 3391 (2000).

106 *Id.*

107 *See* Linda Greenhouse, *Program of Drug-Testing Pregnant Women Draws a Review by the Supreme Court,* N.Y. TIMES, at A12 (Feb. 29, 2000) (also stating that although thirty women were arrested under the program up until the end of the program in the mid-1990's, charges against all but two women were dropped when they entered a treatment program).

108 *See id.*

109 *See* Ferguson v. City of Charleston, 184 F.3d 469, 472 (Tex. 1999). In a two-to-one decision, the court affirmed a jury's verdict in favor of the hospital. The city maintains that this "special need" consisted of "the clinical necessity for the drug screens, the health

This case presents the Supreme Court with an important issue: the extent to which a state may intervene to protect fetal health, and the circumstances under which pregnant women may be held criminally responsible for behavior that endangers their fetuses.

Of course, South Carolina has been able to rely on the State Supreme Court's interpretation of the state child endangerment law as applying not only to children, but to viable fetuses as well.[110] However, no other state has been willing to make such an expansive extension of the state child endangerment laws. In response, many states have enacted legislation to specifically deal with the issue of fetal rights rather than applying existing statutes that do not seem to address fetal rights issues specifically. Unfortunately, many of the proposed bills have been rejected on constitutional grounds.[111] It is becoming clear that the best hope for a successful prosecutorial attempt would be to pass a statute that passes constitutional muster and criminalize alcohol consumption during pregnancy.

IV. CONSTITUTIONAL CHALLENGES AGAINST LEGISLATION THAT CRIMINALIZES ALCOHOL CONSUMPTION DURING PREGNANCY

A statute that criminalizes alcohol consumption during pregnancy may be challenged on two distinct constitutional grounds. First, the statute is open to the challenge that it violates individuals' right to privacy. Second, the statue can arguably be held to violate the principle of equal protection.[112] This Section confronts both of these constitutional issues and concludes that legislation that criminalizes alcohol consumption during pregnancy survives both of these challenges.

As discussed earlier in Section III, when a state enacts a provision that infringes upon a fundamental privacy right, it must meet three burdens. First, the state must assert an important and legitimate interest that it seeks to satisfy by enacting the legislation. Second, the regulation must be substantially related and tailored to

problems associated with maternal cocaine use and the astronomical costs of caring for infants suffering the effects of cocaine use by their mothers." *See also* Greenhouse, *supra* note 107, at A12.

110 *See Johnson*, 602 So.2d at 2061.

111 *See* ACLU Women's Rights Project, State Legislation Pertaining to Drug Abuse During Pregnancy (Memorandum, Nov. 1989) (containing a summary of defeated legislation).

112 *See* U.S. CONST. amend. XIV, sec. 1 (relevant part reading "[n]o State shall make any law which shall [. . .] deny to any person within its jurisdiction the equal protection of the laws").

the stated goal. Finally, the regulation must be the least intrusive means possible to achieve that end.

There is little argument against the idea that society, and therefore the state itself, has a legitimate and compelling interest in ensuring that children are born healthy. This goal has strong moral and ethical underpinnings. Furthermore, there are strong economic considerations on the side of state intervention in situations involving the health of newborns.[113] Therefore, the state meets the "compelling interest" prong of the test.

The most controversial of the three-prong test in the context of fetal rights is the second prong. The second prong of the test requires that the legislation must be substantially related and tailored to the asserted state interest. In the context of fetal rights, a state bears the burden of showing that imposing criminal sanctions upon pregnant women will reduce the likelihood that fetuses will be exposed to alcohol.

The four goals of criminal sanctions are retribution, deterrence, incapacitation, and rehabilitation. The kind of activity a community chooses to punish and the extent of the punishment is a good indication of that community's values and how strongly they hold those values.[114] Where a state criminalizes the act of drinking alcohol during pregnancy, the goal of retribution will most certainly be met since society views such acts as morally reprehensible.[115] However, criminal sanctions alone will not achieve the goal of deterrence. Currently, women who are chemically dependent on drugs are not deterred by the enforcement of drug laws. It is, then, unrealistic to think that laws punishing alcohol consumption during pregnancy will be effective.[116] Punishing pregnant women who consume alcohol also does not serve the goal of incapacitation. The purpose of incapacitation is to protect society from further harm. In cases where mothers are punished for consuming alcohol during pregnancy, the mother has already irrepara-

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113 *See* Gloria Shaver, *Prosecute the Mothers of Addiction*, 30 CAL. LAW. 69, 72 (Nov. 1989) (stating that the cost to the state for drug addicted babies ranges from $6,000 to $250,000 per infant depending upon the severity of the addiction). Although these figures were based upon babies addicted to crack cocaine, it is clear that children born addicted to any substance will require more medical attention and intervention during its lifetime. *Id.*

114 *See* JEAN HAMPTON, *The Retributive Idea, in* FORGIVENESS AND MERCY 130 (1988).

115 *See* Michelle Wilkins, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1433-1434 (stating that "[t]he woman who harmed her child suffers, and the social balance that her wrongful act upset is restored").

116 *See* A. Morgan Cloud, *Cocaine, Demand and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725, 750 (proposing that an addict will continue to use certain substances no matter how great the threat of criminal sanctions).

bly harmed the child. The most that can be said about incapacitation in this context is that she will perhaps think twice before having another child. The goal of rehabilitation may be served if the mother is given counseling alternatives subsequent to prosecution.

The last burden that the state must meet is to show that the proposed legislation is the least burdensome way of achieving the asserted state interest, i.e. ensuring the health and safety of the fetus. Although the very least burdensome way of ensuring the health and safety of the fetus is optional counseling and nothing more, current statistics show that optional counseling is an ineffective means of achieving the goal.[117] Unfortunately, the only way to protect a fetus from alcohol exposure is to prohibit alcohol consumption during pregnancy. There is no viable alternative.

Aside from criminally sanctioning pregnant women who drink alcohol, *Casey* clearly held that a state has a legitimate interest in protecting a fetus from the outset of pregnancy.[118] Drugs and alcohol received in utero by a fetus significantly damage the fetus.[119] Therefore, the state has a compelling interest in protecting the fetus from alcohol exposure from the outset of pregnancy, not only after viability. The difficulty comes from recognizing that any law that sanctions alcohol consumption at *any point* during pregnancy must survive the constitutional challenge of the right to privacy.[120]

Another constitutional attack upon laws that sanction alcohol consumption at any point during pregnancy may come from advocates who argue that such laws violate women's rights to Equal Protection as guaranteed by the United States Constitution. The Supreme Court held that under the Equal Protection Clause of the Fourteenth Amendment,[121] the state may not discriminate against an individual on the basis of his or her gender.[122] However, it has also been articulated that a state may promulgate gender classifications within statutes if the classification is substantially related to the asserted governmental objective.[123] It is clear that a statute that

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117 *See* Whereatt, *supra* note 6, at 1B.

118 *See Casey*, 505 U.S. at 846.

119 *See* Gabriel, *supra*, note 3, at 4.

120 *See Webster*, 492 U.S. at 519 (stating "[w]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability by prohibiting it before viability").

121 *See Reyes*, 75 Cal.App.3d at 217.

122 *See* Craig v. Boren, 429 U.S. 190 (1976) (holding some gender classifications should receive heightened scrutiny).

123 *See* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (stating that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference

prohibits women from using alcohol during pregnancy is a classification based upon physical condition unique to women, and thus is not an impermissible gender classification. In *Geduldig v. Aiello*,[124] the Supreme Court allowed the exclusion of pregnancy-related disabilities from insurance coverage, holding that this was not a classification based merely on gender, but a permissible classification based upon physical condition. Furthermore, in *Michael M. v. Superior Court*,[125] Justice Rehnquist noted that "this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."[126]

Another variant on the equal protection argument is the civil liberties defense. The argument is that the enforcement of drug abuse laws unfairly singles out poor, nonwhite women while allowing white, middle-class women who abuse substances to avoid prosecution. One study showed that approximately 70% of all pregnant women prosecuted for drug-related fetal abuse laws were African American.[127] Furthermore, even though pregnant white women were slightly more likely to test positive for drug use, African American women were ten times more likely to have those results reported to law enforcement officials.[128]

Those who claim an Equal Protection challenge to statute that criminalize alcohol consumption during pregnancy face two obstacles. One obstacle is that constitutional protections apply only against government actions,[129] and the physicians that decide whom to test for alcohol consumption under the statute may include private physicians. When the Supreme Court considered a claim that constitutional rights were implicated where physicians used statutory guidelines to determine the kind of medical facilities where Medicaid patients can be treated,[130] the Court held that the

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having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

124 417 U.S. 484 (1974).

125 450 U.S. 464 (1981). This case involved a facially discriminatory California statute which subjected a male person of any age to criminal sanctions for engaging in sexual relations with a female under the age of eighteen, but imposed no sanctions on a female for having sexual relations with a male under the age of eighteen. The Court upheld the statute, accepting the state's contention that it was justified to pass such a statute to prevent illegitimate teenage pregnancies.

126 *Id.* at 468.

127 *See* Ira J. Chasnoff, et al., *The Prevalence of Illicit Drug or Alcohol Use During Pregnancies and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1997).

128 *Id.*

129 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1688 (2d ed. 1988).

130 *See* Blum v. Yaretsky, 457 U.S. 991 (1982).

actions of the physicians were not state actions. The Court reasoned that "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be made by the state."[131]

Another obstacle is the requirement of showing intent to discriminate either by the legislature enacting the statute[132] or by those who enforce the statute.[133] So far, no evidence demonstrates that existing fetal rights statutes were enacted or are enforced with racially discriminatory intent. A successful challenge on the basis of racial discrimination to statutes that criminalize alcohol consumption during pregnancy also requires that the physicians be considered state actors in addition to some evidence of intentional discrimination.

Thus, it is possible to make into law a statute that prohibits alcohol consumption during pregnancy that violates neither a woman's constitutional right to privacy, nor her right to equal protection. However, legislating harsh criminal sanctions may not be the most effective means to protect fetuses from alcohol abuse. The next Section proposes that a more appropriate response is to couple moderate criminal sanctions with education about the harmful effects of alcohol.

V. A More Appropriate Response

Criminal sanctions alone have their shortcomings as evidenced above. However, they should remain in place. Criminal sanctions serve one important goal of punishment by deterring future mothers and presently pregnant women from drinking alcohol during pregnancy. However, criminal sanctions alone serve *only* the goal of deterrence. In order to better serve the other goals of punishment, criminal sanctions should be supplemented with other programs.

First, counseling should be made available to pregnant women who are dependent upon alcohol. Currently, treatment via counseling is woefully inadequate, "available for less than 10% of the 300,000 pregnant women who abuse illegal drugs."[134] With so little

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131 *Id.* at 1004.

132 *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977).

133 *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

134 Matheo Falco, The Making of a Drug-Free America: Programs that Work 29 (1992).

help available, women are faced with a decision between incurring criminal liability or having an abortion to evade it.

Second, any criminal sanction imposed against pregnant women should not include jail time for the mother. Instead, mothers who fail to seek counseling can perform mandatory community services. Generally speaking, imposing prison sentences upon pregnant women is far outweighed by the possible benefits of counseling and community service:

> The irony is that anyone who knows anything about maternal care in prisons would never send a pregnant woman there to protect the fetus. Even though pregnant women need to have a diet high in proteins, vitamins and nutrients, fourteen out of twenty-six prisons in one survey made no special provisions for providing pregnant inmates with special diets or supplementary vitamins. Only a few prisons have medical care available for female prisoners twenty-four hours a day and some do not even have contingency plans for medical needs during the night.[135]

New research indicates that there are "equivalencies" of punishment between community-based sentences and prison sentences, and that, at some level of intensity, community-based programs have roughly the same punitive "bite" as prison sentences.[136] For example, inmates in a Minnesota correctional facility viewed one year in prison as equivalent in severity to three years of intensive probation supervision, and they viewed one year in jail as equivalent to one year of intensive supervision.[137]

Of course, "[n]o legal action can deter if it is not perceived as punitive by those who are subject to it, and whether or not those sanctions deter depends in part on the extent to which they are perceived to be severe."[138] Most people would assume that remaining within the community is preferable to imprisonment, but recent evidence suggests that offenders may not share this view.[139]

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135 Stacey L. Best, *Fetal Equality?: The Equality State's Response to the Challenge of Protecting Unborn Children*, 32 LAND & WATER L. REV. 193, 214-215 (1997) (quoting Schroeder & Peretz, *A Gender Analysis of Policy Formation: The Case of Fetal Abuse*, 19 J. HEALTH POL. POL'Y & L. 335, 343 (1994)).

136 *See* John Petersilia & Elizabeth Piper Deschenes, *Perceptions of Punishment: Inmates and Staff Rank the Severity of Prison Versus Intermediate Sanctions*, THE PRISON J., Vol. 74, No. 3, Sept. 1994, at 306-328.

137 *See id.*

138 J. Gibbs, *Crime, Punishment, and Deterrence*, 15 SW. SOC. SCI. Q. 48, P. 527 (1968).

139 *See* Joan Petersilia, *When Probation Becomes More Dreaded Than Prison*, FED. PROBATION 54(1), pp. 23-27 (1990). The article discusses Oregon's intensive supervision probation ("ISP") program, which gave nonviolent offenders the choice of either serving out a prison term or returning to the community to participate in ISP, which incorporated drug testing, mandatory employment, and frequent home visits by the probation officer. One-third of the offenders chose prison instead, feeling that going to work everyday, being drug tested,

Drinking while pregnant has not commanded much public attention. Furthermore, it is an area where a broad sector of the population can be considered potential offenders. This provides an interesting contrast to other areas of crime control where potential offenders constitute a relatively small segment of the population. Therefore, whether pregnant women will be deterred from consuming alcohol by the threat of community service programs is a question of first instance.

Third, criminal sanctions alone present the issue of causation. The main thrust of the causation argument is that it would be hard to identify those women who did drink while pregnant if there are no observable signs of exposure in the infant. Therefore, a woman should be prosecuted only if her infant exhibits symptoms that are identifiable in the medical profession as indicative of alcohol abuse during pregnancy. This will be an issue of fact to be determined at a hearing, where the court should require medical testimony to prosecute.

Fourth, criminal sanctions should consist of mandatory participation in a clinic program that educates pregnant women about the harmful effects of alcohol and other substance on their babies. Furthermore, mandatory participation in clinic programs should be followed by random visits by health professionals to ensure the child's welfare. The educational aspect of this type of a plan will make the mother more knowledgeable about the effects of alcohol, and the mother will be better equipped to take a good care of herself during her subsequent pregnancies.

Funding for such programs should not be hard to muster since costs involved in pregnancies with complications are far greater than the cost of any educational program.[140] A short-term raise in taxes for the beginning of such programs might be necessary, or state governments could solicit aid from private donors. Moreover, the overall costs of community service are far lower than incarceration. The average cost of incarcerating one person is $1,492 per month, whereas the Office of Probation estimates that the average cost of supervising those doing community service is only $115 per month.[141]

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and having their home privacy invaded were more punishing than serving out a sentence in prison.

[140] *See* Shaver, *supra* note 113, stating that the cost to the state for drug addicted babies ranges from $6,000 to $250,000 per infant depending upon the severity of the addiction.

[141] These figures were provided by the Administrative Office of the U.S. Courts and reported by Loren Buddress, Chief Probation Officer of the Northern District, in Office Memorandum No. 91-32 (Sept. 6, 1991).

One last benefit of community service should be highlighted. Instead of a jail sentence that sends an individual away and isolates her from the community, community service puts the individual in the community and exposes her. The shame of having to face others may effectively deter other women from engaging in such behavior.[142]

Community service programs, however, pose two problems. First, criminal offenders as a group are unreliable. By definition, they have failed to conform to social conventions. Second, community service programs tend to be loosely administered. Community service agencies usually depend heavily on volunteers and are staffed by people who may have no special interest in performing a supervisory function.[143]

Therefore, it is necessary that community service programs be administered by individuals directly accountable to the courts. The challenges noted above can be met by compacting the duration of community service into a short time period and relying on intensive supervision by a full-time staff whose only job is to monitor work performance of program participants and report their findings to the sentencing court.

An example of a statute that might serve all of these goals could read as follows:

> Any woman who willfully, intentionally, and knowingly uses alcohol during her pregnancy in an amount that is later determined to have adversely affected her child while in utero, shall be subject to mandatory community service, the duration determined by the presiding judge, and shall be placed on probation. Exceptions shall be made for women who sought counseling during their pregnancy to address their alcohol problem.

This plan addresses all four goals of punishment. It will deter women from drinking in that women will not want to serve community service and be placed on probation. It serves the retributive aspect of punishment in that these women will be giving back to the community, thus restoring the balance that they disturbed when they engaged in socially irresponsible and morally reprehensible acts. It is rehabilitative in that it ensures treatment for those who need it. Lastly, the goal of incapacitation may not be served,

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142 *See* Developments in Law, *The Legality of Innovative Alternative Sanctions for Nonviolent Crimes*, 111 HARV. L. REV. 1944, 1949 (1998) (noting that such "shaming" may have such a deterrent effect).

143 *See* Malcolm M. Feeley, *Report on Client Specific Planning: A Project of the National Center on Institutions and Alternatives* (1983) (noting that these two factors pose a substantial challenge for those who design community service sentences).

but the rehabilitation of the mother may prevent alcohol related complications during future pregnancies.

CONCLUSION

Although there is no sure way to prevent pregnant women from consuming alcohol during pregnancy, society must make strides to decrease the risk that fetuses will be exposed to alcohol. A low level of criminal sanctions coupled with education will best serve society's goal of protecting the helpless from the actions of their mother. The technological limitations of medicine once dictated the treatment of a pregnant woman and her child as a single medical entity. Advances in medicine and greater awareness of the effects of maternal conduct on fetal health, however, have led to the recognition of the fetus as an individual patient with needs separate and distinct from those of its mother. This has necessarily led to a conflict between pregnant mothers on one hand, and doctors and the legislature on the other. Pregnant women assert their right to autonomy, and doctors and the legislature feel compelled to intervene in the medical and lifestyle choices of pregnant women on behalf of the fetus. This conflict is especially intense when the hazardous effects of maternal conduct are known to the average person, when the behavior is thought to be controllable, and when the common expectation is that a woman should do whatever is necessary to keep her fetus healthy.

As illustrated by this Note, the illegal use of drugs during pregnancy, which results in known detrimental consequences to mother and fetus, is becoming an acceptable basis for state regulation of pregnant women's conduct. A unique problem in regulating their consumption of alcohol during pregnancy is that alcohol is a *legal* substance that causes known detrimental consequences to the fetus equal to that of exposing the fetus to *illegal* substances. This Note takes the position that at one point, a person who willfully injures another must assume legal responsibility for her conduct, regardless of its legality. This conclusion is justified by the very real social costs of caring for children who were exposed to alcohol before birth, many of whom will never become fully functioning adults.

The legislature can end this depressing trend. Instead of drafting civil and criminal laws that penalize women for consuming alcohol while pregnant, the legislature should find ways to educate women about the effects of drug and alcohol abuse before they become pregnant. The proper solution is not to punish women

when the fetus is already injured, but to expand alcohol rehabilitation services, and find solutions for women who, through problems other than accessibility, do not seek or stay in treatment.

Unfortunately, there is no guaranteed way to prevent pregnant women from consuming alcohol during pregnancy. Therefore, society must make strides to decrease the risk of fetal exposure to alcohol. A low level of criminal sanctions coupled with education will best serve society's goal of protecting the helpless from the actions of their mother who is the only person that can ensure the health of the fetus. In this way, the state can advance fetal health in a way that promotes everybody's rights.