

PUNISHING PRENATAL ALCOHOL ABUSE: THE  
PROBLEMS INHERENT IN UTILIZING CIVIL COMMITMENT  
TO ADDRESS ADDICTION

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*New laws seek to protect unborn children from fetal alcohol syndrome by committing, or even imprisoning, women who consume alcohol during their pregnancy. These laws fall afoul of the Due Process and Equal Protection Clauses of the Constitution. Although civil commitment or imprisonment of expectant mothers who drink seems effective at first blush, it is likely that it would deter pregnant women from seeking appropriate medical treatment for fear of being incarcerated. Further, such laws cannot reverse the damage the mother has already done to her unborn child. Ultimately, the only way to protect the rights of expectant mothers and their unborn children is to follow a strategy of education and treatment aimed at stopping prenatal alcohol addiction before it starts.*

I. INTRODUCTION

Although American citizens are entitled to certain basic freedoms, new laws aimed at protecting unborn children from the effects of alcohol threaten to rob pregnant women of their fundamental rights.<sup>1</sup> The fetus, on the other hand, is increasingly protected as an independent legal entity, often with interests adverse to a pregnant woman's autonomy.<sup>2</sup> Over the past few decades, legislatures have advanced the idea of a fetal rights doctrine that would permit states to intervene in the maternal-fetal relationship to protect potential human life.<sup>3</sup> Provoked by the crack-cocaine epidemic of the 1980s, states originally focused on prosecuting women who abused illegal drugs during pregnancy for the subsequent harm to their unborn children.<sup>4</sup> Fetal protectionism has gone so far,

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1. Jean Reith Schroedel et al., *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89, 99 (2000).

2. *See id.*

3. *See* Michelle D. Mills, Comment, *Fetal Abuse Prosecutions: The Triumph of Reaction Over Reason*, 47 DEPAUL L. REV. 989, 992-93 (1998).

4. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1420-21 (1991).

however, that pregnant women are now being punished for legal behavior that may injure a fetus.<sup>5</sup>

In Wisconsin, law enforcement officials are directed to take a pregnant woman into custody whenever they believe her consumption of alcohol may affect the physical health of her unborn child.<sup>6</sup> The state can even decide to involuntarily commit the woman until her child is born.<sup>7</sup> While Wisconsin's regime seems to be an effective solution to prenatal alcohol exposure, the use of coercive legislative tactics is inherently flawed. Not only does a punitive approach assume that a pregnant woman and her fetus occupy adversarial roles, but it also fails to address alcohol addiction as the root of the problem.<sup>8</sup> Even more troubling is the notion that states can intrude into the lives of pregnant women when the conduct at issue is a legal activity. Accordingly, as medical technology improves and more behavior is deemed harmful to fetal development, there may be no logical end to the diminution of a pregnant woman's rights.<sup>9</sup>

This note focuses on prenatal alcohol abuse and utilizes Wisconsin's protective custody statute as a backdrop for discussing the dangers inherent in prohibiting otherwise legal behavior. Specifically, Part II provides an examination of the history of the fetal rights movement and legislation prohibiting prenatal substance abuse. Part III explores both the constitutional and practical obstacles to regulating maternal consumption of alcohol. Part IV recommends a more proactive approach to combating fetal alcohol syndrome that focuses on community education and voluntary treatment efforts. Finally, Part V concludes that punitive regulations do not effectively address prenatal alcohol abuse, and, as such, states should work to develop public health policies which do not function at the expense of a pregnant woman's autonomy.

## II. STATE INTERVENTION IN THE MATERNAL-FETAL RELATIONSHIP

While a fetus traditionally had no rights under the common law, in recent years, states have expanded their role in protecting potential human life.<sup>10</sup> Protections now range from fetal homicide statutes to prosecution of pregnant women for prenatal drug abuse.<sup>11</sup> Some states have gone so far as to enact legislation allowing government officials to take protective custody of pregnant women who abuse alcohol.<sup>12</sup> This type of

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5. See WIS. STAT. § 48.193 (2003).

6. *Id.*

7. See *id.*; *id.* § 48.213(3) (2003).

8. See Caroline S. Palmer, *The Risks of State Intervention in Preventing Prenatal Alcohol Abuse and the Viability of an Inclusive Approach: Arguments for Limiting Punitive and Coercive Prenatal Alcohol Abuse Legislation in Minnesota*, 10 HASTINGS WOMEN'S L.J. 287, 307 (1999).

9. See Schroedel et al., *supra* note 1, at 106.

10. See Mills, *supra* note 3, at 993.

11. *Id.* at 991-94.

12. See WIS. STAT. ANN. § 48.193 (West 2003).

fetal rights legislation raises a number of questions as to how far a state can intervene to protect fetal health before impermissibly infringing on the sovereignty of pregnant women.

### A. *History of the Fetal Rights Movement*

State intervention in the maternal-fetal relationship has increased dramatically over the past fifteen years.<sup>13</sup> Although the landmark case of *Roe v. Wade* held that a fetus is not legally distinguishable from the mother,<sup>14</sup> many jurisdictions have begun to recognize the fetus as a separate legal entity, not contingent upon live birth.<sup>15</sup> While the concept of fetal rights began with the protection of fetuses from harmful third party conduct, it has evolved to include the criminal prosecution of pregnant women for ingesting illegal drugs.<sup>16</sup>

#### 1. *The “Personhood” Debate*

The battle over fetal rights centers on the question of whether or not the unborn should be classified as “persons” under the law. As a constitutional matter, the Supreme Court concluded in *Roe v. Wade* that the word “person” in the Fourteenth Amendment does not include fetuses.<sup>17</sup> Consequently, the unborn are not entitled to constitutional protection.<sup>18</sup> The *Roe* Court did acknowledge, however, that a viable fetus may enjoy protection from nonconstitutional sources.<sup>19</sup> While they may not do so through the incorporation of the Fourteenth Amendment, states reserve the right to define and protect the rights of a fetus where there is an “important and legitimate interest” in protecting potential human life.<sup>20</sup>

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13. See Deanna Rae Reitman, Note, *The Collision Between the Rights of Women, the Rights of the Fetus, and the Rights of the State: A Critical Analysis of the Criminal Prosecution of Drug Addicted Pregnant Women*, 16 ST. JOHN'S J. LEGAL COMMENT. 267, 293–94 (2002) (noting the trend towards expanding the common law rights of the fetus in both civil and criminal litigation).

14. 410 U.S. 113, 162 (1973) (holding that while the State does have a legitimate interest in “protecting the potentiality of human life,” the law has never recognized the unborn as “persons in the whole sense”).

15. See Patricia A. Sexton, Note, *Imposing Criminal Sanctions on Pregnant Drug Users: Throwing the Baby Out with the Bath Water*, 32 WASHBURN L.J. 410, 414 (1993); see also Mills, *supra* note 3, at 993; Reitman, *supra* note 13, at 294.

16. Mills, *supra* note 3, at 992–94.

17. 410 U.S. at 158.

18. See Nova D. Janssen, Note, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 DRAKE L. REV. 741, 749 (2000); Palmer, *supra* note 8, at 304–05; Reitman, *supra* note 13, at 286–88.

19. 410 U.S. at 162 (stating that “unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolutions of property”).

20. *Id.* (qualifying a woman’s right to privacy in deciding whether or not to have an abortion by limiting such right to the compelling interests of the State in protecting potential human life); see also Reitman, *supra* note 13, at 290 (discussing cases that establish “precedent for the state’s interest in the protection [of fetuses]”).

In 1992, the Supreme Court reaffirmed *Roe*'s central holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>21</sup> but narrowed the scrutiny required to uphold a state abortion regulation.<sup>22</sup> In doing so, the Court held that states may further their compelling interest in prenatal life so long as they do not place an undue burden on a woman's right to terminate her pregnancy.<sup>23</sup> The Court went on to hold that a viable fetus is not a person and, therefore, is not entitled to protection under the Constitution.<sup>24</sup> As a result, it is up to individual states to determine whether or not their statutory definitions of "personhood" include viable fetuses.<sup>25</sup>

## 2. *Expanding the Common Law Rights of the Fetus*

Since *Roe*, states have expanded their interest in protecting potential human life in both the civil and criminal arenas.<sup>26</sup> For example, every jurisdiction now allows actions against third parties for causing injuries to a viable fetus later born alive.<sup>27</sup> Additionally, the majority of states consider a fetus that dies in utero a person under their wrongful death statutes.<sup>28</sup> Other jurisdictions have expanded their tort law to recognize a cause of action by a fetus against its mother for negligent conduct.<sup>29</sup> In the criminal context, some states have enacted fetal homicide laws.<sup>30</sup>

Fetal homicide statutes, in particular, have paved the way for more extensive criminal prohibitions against harming a fetus.<sup>31</sup> Historically, the common law adhered to the "born alive rule," which required a fetus to be born alive before criminal charges could be brought for any injuries suffered during gestation.<sup>32</sup> Under the born alive rule, the time of birth marked the point at which the law recognized a fetus as a "person."<sup>33</sup> As

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21. 505 U.S. 833, 878 (1992) (holding that the Court would "protect the central right recognized by *Roe v. Wade*"); see also Palmer, *supra* note 8, at 305.

22. *Casey*, 505 U.S. at 878 (using the undue burden test rather than the trimester framework established in *Roe v. Wade*).

23. *Id.* at 874-76.

24. *Id.* at 860-61.

25. See Reitman, *supra* note 13, at 291-92. See generally Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845, 1851 (2000).

26. See Janssen, *supra* note 18, at 749-50; Palmer, *supra* note 8, at 305-06; Sexton, *supra* note 15, at 414-15.

27. See Janssen, *supra* note 18, at 750; Mills, *supra* note 3, at 992.

28. Sexton, *supra* note 15, at 414-15.

29. Mills, *supra* note 3, at 993. See generally Grodin v. Grodin, 301 N.W.2d. 869, 870-71 (Mich. Ct. App. 1980).

30. See Smith, *supra* note 25, at 1846-69.

31. See Reitman, *supra* note 13, at 294.

32. Smith, *supra* note 25, at 1847; see also Janssen, *supra* note 18, at 751. The born alive rule originally developed in England and was tailored to the limitations of medical knowledge in the sixteenth century.

33. Smith, *supra* note 25, at 1847 (noting that under the common law, it was necessary that a fetus be born alive for courts to determine whether or not the "material acts" of the defendant caused injury to the fetus).

medical science began to recognize human life before viability,<sup>34</sup> some jurisdictions followed suit, rejecting the born alive rule in favor of alternative theories of criminal culpability.<sup>35</sup>

Varying and contradictory state approaches toward fetal homicide reflect a fundamental disagreement as to who should be protected under the law: the expectant mother or the fetus.<sup>36</sup> Currently, eighteen states still adhere to the born alive rule.<sup>37</sup> Of these, several allow prosecution for actions taken against a pregnant woman that result in miscarriage or injury to the fetus.<sup>38</sup> These states view the pregnant woman, not the fetus, as the victim of the crime, thereby avoiding the question of whether the fetus is a “person.”<sup>39</sup>

On the other side of the debate, twenty-four states punish actions against the fetus, as opposed to the pregnant mother.<sup>40</sup> Even among these states, there are differences of opinion as to what point in the pregnancy criminal culpability should attach.<sup>41</sup> Six states limit criminal feticide to viable fetuses.<sup>42</sup> Another six draw the line prior to viability at the point of quickening.<sup>43</sup> Seven more states use fertilization or conception as the threshold.<sup>44</sup> Three states criminalize actions against fetuses but do not specify when criminal liability attaches.<sup>45</sup> As many states consider the protection of fetuses an important state objective, more states have begun using criminal sanctions to protect the health of the fetus, independent from the interests of the mother.<sup>46</sup>

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34. Janssen, *supra* note 18, at 751. Physicians now recognize the presence of life long before the traditional point of “quickening,” when the mother first feels physical movement of the fetus in the womb.

35. *Id.*

36. Smith, *supra* note 25, at 1869–70.

37. *Id.* at 1848. These states espouse the born alive rule by either express statutory language excluding a fetus from the definition of “person” or “human being” or by judicial interpretation of such statutes. *Id.* at 1848–49. The classic case for discussion of the born alive rule is *Keeler v. Superior Court*, 470 P.2d 617, 622 (Cal. 1970), where the California Supreme Court determined that the legislature did not intend to include the act of feticide as part of the homicide offense under California law.

38. Smith, *supra* note 25, at 1865–69.

39. *Id.* at 1866–67.

40. *Id.* at 1851.

41. *Id.*

42. *Id.* at 1851–52. Three of the six states that impose criminal penalties for the killing of viable fetuses utilize homicide statutes (Indiana, Michigan, and Tennessee). *Id.* In the other three (Massachusetts, South Carolina, and Oklahoma), the courts, as opposed to the legislatures, have determined that viable fetuses are “persons” under the homicide laws. *Id.*

43. *Id.* at 1855–58 (listing Florida, Mississippi, Nevada, Rhode Island, Washington, and Georgia). Arkansas is unique in that its criminal code considers fetuses “persons” after twelve weeks of development. *Id.* at 1858–59. California’s homicide statutes, on the other hand, extend protection to the unborn after seven to eight weeks of fetal development. *Id.* at 1859–61.

44. *Id.* at 1861–64 (listing Missouri, Pennsylvania, Louisiana, North Dakota, Illinois, Minnesota, and Wisconsin).

45. *Id.* at 1864–65 (listing Arizona, South Dakota, and Utah).

46. See Janssen, *supra* note 18, at 755; Kellam T. Parks, Note, *Protecting the Fetus: The Criminalization of Prenatal Drug Use*, 5 WM. & MARY J. WOMEN & L. 245, 246 (1998).

### 3. *Criminalizing Prenatal Drug Use*

A number of jurisdictions have attempted to stretch the concept of fetal rights to include protection from the mother's harmful behavior.<sup>47</sup> Early prosecutions of pregnant mothers focused on the use of illegal drugs, particularly crack cocaine.<sup>48</sup> Many of these attempts failed, as prosecutors turned to child abuse and controlled substance statutes as the vehicle for the prosecution of pregnant mothers.<sup>49</sup> In 1997, however, the Supreme Court of South Carolina concluded that a viable fetus was a "person" under the state's Children's Code.<sup>50</sup> The United States Supreme Court denied certiorari on the issue,<sup>51</sup> thereby opening the door for other states to interpret their statutes similarly. In 2000, the Court did strike down mandatory drug testing for pregnant women,<sup>52</sup> indicating that it may construe fetal rights more narrowly in the future.

#### a. Early Caselaw

Criminal prosecution of women for prenatal drug abuse began in the late 1970s and early 1980s, at the same time the crack cocaine epidemic rose to the forefront of the political arena.<sup>53</sup> Crack changed the face of the typical drug addict, as women began to represent an increasingly larger percentage of drug users.<sup>54</sup> Accordingly, prosecutors began to focus on the children of drug dependent mothers and the effects of prenatal exposure to cocaine.<sup>55</sup>

The first prosecutions of pregnant women proceeded under child abuse and endangerment statutes.<sup>56</sup> In one of the earliest cases, *Reyes v. Superior Court*, a pregnant heroin addict was charged with felonious child endangerment in violation of the California Penal Code.<sup>57</sup> In particular, the defendant had been warned by a public health nurse that if she continued to use heroin the life of her baby would be endangered.<sup>58</sup> The defendant failed to heed this advice and delivered twin boys who were addicted to heroin and suffered withdrawal at the time of birth.<sup>59</sup> The appellate court declined to apply the child endangerment statute,

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47. Janssen, *supra* note 18, at 755.

48. See Parks, *supra* note 46, at 246–51.

49. *Id.*; see also Janssen, *supra* note 18, at 755; Mills, *supra* note 3, at 994–96; Sexton, *supra* note 15, at 412–14. Courts have been reluctant to find that legislatures intended such statutes to protect fetuses.

50. Whitner v. State, 492 S.E.2d 777, 780 (S.C. 1997); see also Nancy Kubasek, *The Case Against Prosecutions for Prenatal Drug Abuse*, 8 TEX. J. WOMEN & L. 167, 170–73 (1999).

51. Whitner v. State, 523 U.S. 1145 (1998).

52. Ferguson v. City of Charleston, 532 U.S. 67, 86 (2001).

53. See Sexton, *supra* note 15, at 411.

54. *Id.*

55. See Mills, *supra* note 3, at 999–1001.

56. *Id.* at 994–95.

57. 141 Cal. Rptr. 912, 912–13 (Cal. Ct. App. 1977).

58. *Id.*

59. *Id.*

holding that the legislature had not intended the word “child” to refer to a fetus.<sup>60</sup>

The state of California also charged Pamela Rae Stewart for failing to follow her physician’s instructions while pregnant.<sup>61</sup> When Stewart gave birth to a severely brain damaged child, who died within six weeks of birth, prosecutors charged Stewart under a California child support statute.<sup>62</sup> Just as in *Reyes*, the court dismissed the charge, finding that the statute was intended to assure financial support for children, not to regulate the behavior of pregnant women.<sup>63</sup>

When these early attempts to convict pregnant women proved unsuccessful, prosecutors turned to controlled substance statutes.<sup>64</sup> In 1989, Jennifer Johnson became the first woman convicted for giving birth to a drug exposed fetus when the court determined that Johnson knowingly delivered a controlled substance to a minor.<sup>65</sup> The Florida Supreme Court reversed the conviction, however, on the grounds that the drug delivery statute did not apply to the facts of Johnson’s case.<sup>66</sup> Ultimately, the prosecution of pregnant women under controlled substance statutes proved problematic, and courts have generally been reluctant to accept the transmission of illegal substances through the umbilical cord as sufficient evidence for “delivery.”<sup>67</sup>

#### b. *Whitner v. State* and the Viable Fetus as a “Person”

To date, South Carolina is the only state to interpret its statutes to hold that a viable fetus is a “person.”<sup>68</sup> Since the late 1980s, South Carolina has prosecuted the largest number of women for prenatal drug abuse.<sup>69</sup> In 1996, it also became the first state to uphold such a conviction based on a child endangerment statute.<sup>70</sup> In 1992, Cornelia Whitner pled

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60. *Id.* at 913–15 (holding that had the legislature intended the statute to apply to prenatal conduct, it would have done so expressly).

61. *People v. Stewart*, No. M508197 (S.D. Mun. Ct., Feb. 26, 1987); *see* *Reitman*, *supra* note 13, at 296.

62. *People v. Pamela Rae Stewart*, No. M508197 (S.D. Mun. Ct., Feb. 26, 1987).

63. *Id.*

64. *See* *Mills*, *supra* note 3, at 994–95; *see also* *Parks*, *supra* note 46, at 246–47.

65. *Johnson v. State*, 578 So. 2d 419, 419–20 (Fla. Dist. Ct. App. 1991), *rev’d*, 602 So. 2d 1288 (Fla. 1992). The court concluded that Johnson “delivered” cocaine to her unborn child through the umbilical cord during the time period after birth but before the severing of the umbilical cord. *Id.* at 420. Thus, the court avoided the question of whether the fetus qualified as a “person” under the Florida Penal Code. Johnson was sentenced to one year of “community control” and fourteen years probation. *See* *Reitman*, *supra* note 13, at 297.

66. *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992). The legislative history did not express an intent to use the word “delivery” in the context of a mother delivering drugs to her fetus by way of the umbilical cord. *Id.*

67. *See* *Parks*, *supra* note 46, at 249.

68. *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1997).

69. *See* *Kubasek*, *supra* note 50, at 173; *see also* *Kirsten Scharnberg, Prosecutors Targeting Pregnant Drug Users; Some Fear Women Will Shun Treatment*, CHI. TRIB., Nov. 23, 2003, at C1. South Carolina has heard more than seventy cases of prenatal drug abuse since 1989. *Id.*

70. *See* *Kubasek*, *supra* note 50, at 170.

guilty and was convicted of criminal child neglect for ingesting cocaine late in her third trimester of pregnancy, causing her son to be born with cocaine metabolites in his system.<sup>71</sup> On appeal, Whitner argued that the circuit court lacked subject matter jurisdiction because the offense of criminal child neglect did not include an expectant mother's use of crack cocaine.<sup>72</sup> The Supreme Court of South Carolina disagreed, holding that a viable fetus qualified as a "person" under South Carolina's Children's Code.<sup>73</sup> In particular, the court looked to precedent recognizing viable fetuses as persons "holding certain legal rights and privileges,"<sup>74</sup> and concluded that "it would be absurd to recognize a fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse."<sup>75</sup>

Although other states have yet to directly utilize *Whitner's* logic, the United States Supreme Court declined to review the decision in 1997,<sup>76</sup> leaving open the possibility that other states could include a viable fetus in their definition of "personhood." Consequently, states may apply *Whitner's* broad reasoning to hold pregnant women liable for any behavior which may be considered harmful to a viable fetus.<sup>77</sup> Under such a regime, expectant mothers could be held criminally liable for otherwise legal activities, such as the consumption of alcohol.<sup>78</sup>

c. The View of the Supreme Court in *Ferguson v. City of Charleston*

While the Supreme Court declined certiorari in *Whitner*, it decided to hear a fetal abuse case, *Ferguson v. City of Charleston*, during its 2000 term.<sup>79</sup> In that case, the Court overruled a Fourth Circuit decision upholding a public hospital's state-mandated policy of drug testing preg-

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71. *Whitner*, 492 S.E.2d at 778–79. Whitner pled guilty, and the circuit court sentenced her to eight years in prison. Originally, Whitner did not appeal her conviction, but she later filed a petition for Post Conviction Relief based on the circuit court's lack of subject matter jurisdiction and a claim of ineffective assistance of counsel. *Id.* at 779.

72. *Id.*

73. *Id.* at 782–83.

74. *Id.* at 779. The court noted that it had previously allowed the application of South Carolina's wrongful death statute to a viable fetus that died after birth as a result of prenatal injuries. *Id.* at 779–80 (citing *Hall v. Murphy*, 113 S.E.2d 790, 793 (S.C. 1960)) (holding that a viable fetus does not have to be born alive to maintain a wrongful death cause of action). Additionally, the court construed a viable fetus as a "person" under South Carolina's murder statute when it upheld a conviction for the voluntary manslaughter. *Id.* at 780 (citing *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984)).

75. *Id.* at 780.

76. *Whitner v. South Carolina*, 523 U.S. 1145 (1998).

77. *Whitner*, 492 S.E.2d at 788 (Moore, J., dissenting).

78. *Id.* at 788. There have been criminal prosecutions for exposing fetuses to alcohol, with at least one currently on the docket for a woman whose baby was born with a blood alcohol level of twice the legal limit in New York. See generally *State v. Deborah J.Z.*, 596 N.W.2d 490, 491–92 (Wis. Ct. App. 1999); Alison Gendar, *Boy Born Drunk, Mom Busted*, DAILY NEWS (New York), Oct. 4, 2003, at 2.

79. 532 U.S. 67 (2001).



nant women seeking prenatal care.<sup>80</sup> While the Court acknowledged that the overall goal of the hospital's program was to provide substance abuse treatment, it pointed out that the "immediate objective [of the drug tests] was to generate evidence for law enforcement purposes."<sup>81</sup> As such, the hospital's act of reporting positive results to law enforcement officers constituted an unreasonable search in contravention of the pregnant plaintiffs' constitutional rights.<sup>82</sup>

The Court's decision to strike down mandatory drug testing for pregnant women in *Ferguson* indicates that the Court may look unfavorably upon the prosecution of pregnant women for prenatal substance abuse in future cases.<sup>83</sup> The Court has not responded, however, to several states which have enacted and enforced legislation designed to punish prenatal drug and alcohol abuse.<sup>84</sup> In the absence of a definitive statement from the Supreme Court, the extent to which a state can intervene in a woman's pregnancy is still up for debate.<sup>85</sup>

### B. Prohibiting Prenatal Alcohol Abuse

Although the majority of fetal rights legislation has focused on prenatal drug abuse,<sup>86</sup> a wide spectrum of other behaviors can negatively affect fetal health.<sup>87</sup> Even legal activities such as smoking cigarettes, taking over-the-counter medications, and exercising may impact the well-being of a fetus.<sup>88</sup> The consumption of alcohol is one such activity which has a profound effect on fetal health.<sup>89</sup> In fact, maternal alcohol consumption is considered even more dangerous than prenatal drug abuse because it is

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80. *Id.* at 70, 76–78.

81. *Id.* at 82–83 (emphasis omitted). Since the state hospital's employees are effectively government actors, the urine tests performed by the hospital constituted "searches" within the meaning of the Fourth Amendment. *Id.* at 76–77.

82. *Id.* at 84–85.

83. See generally *Ferguson*, 532 U.S. at 84–86.

84. See S.D. CODIFIED LAWS § 34-20A-70 (Michie Supp. 2003); WIS. STAT. Ann. § 48.193 (West 2003).

85. See Scharnberg, *supra* note 69, at 1.

86. See generally *supra* text accompanying Part II.A.3.

87. See Mills, *supra* note 3, at 1001–05 (describing the effect of prenatal exposure to legal substances, such as alcohol, cigarettes, and over-the-counter medicines); see also U.S. DEP'T HHS, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, 10TH SPECIAL REP. TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH (2000), available at <http://www.niaaa.nih.gov/publications/10report/intro.pdf> [hereinafter SPECIAL REP.].

88. See Claire E. Dineen, *Fetal Alcohol Syndrome: The Legal and Social Responses to its Impact on Native Americans*, 70 N.D. L. REV. 1, 40 (1994) ("Virtually every action of a pregnant woman has some effect on the fetus."); Heather Flynn Bell, Comment, *In Utero Endangerment and Public Health: Prosecution v. Treatment*, 36 TULSA L.J. 649, 673 (2001).

89. CDC, *Fetal Alcohol Syndrome*, Fetal Alcohol Information at [www.cdc.gov/ncdbbb/fas](http://www.cdc.gov/ncdbbb/fas) (last visited Jan. 28, 2004) [hereinafter CDC, Fetal Alcohol Information]; SPECIAL REP., *supra* note 87, at 283; see also Palmer, *supra* note 8, at 297–98.

more prevalent in society<sup>90</sup> and the leading cause of nonhereditary mental retardation.<sup>91</sup>

Several states, including South Dakota and Wisconsin, have passed criminal legislation directed at pregnant women who consume alcoholic beverages.<sup>92</sup> Wisconsin's civil commitment laws, in particular, have sparked a great deal of controversy. These laws allow the state to take an expectant mother into custody if a public officer finds that she exhibits a "habitual lack of self-control in the use of alcohol beverages."<sup>93</sup> Wisconsin's statutory scheme is a far more draconian approach to protecting fetal rights than previous legislation targeting the use of illegal substances.<sup>94</sup>

### 1. *Fetal Alcohol Syndrome*

Prenatal exposure to alcohol can cause a range of disorders, varying in severity from fetal death to fetal alcohol syndrome (FAS) and related developmental and behavioral problems.<sup>95</sup> In fact, the use of alcohol during pregnancy is one of the leading causes of birth defects and mental retardation.<sup>96</sup> While this link was suspected for some time, FAS was not formally recognized until 1973.<sup>97</sup>

Although experts are now aware of the wide spectrum of fetal alcohol effects, FAS and related disorders remain underdiagnosed, as there is no specific test to determine the presence of fetal alcohol exposure.<sup>98</sup> In response, states, including Wisconsin, have turned to protective custody statutes in an attempt to prevent FAS.<sup>99</sup> Nevertheless, this approach to deterring harmful maternal behavior threatens to cross constitutional boundaries.

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90. Dineen, *supra* note 88, at 11–13.

91. SPECIAL REP., *supra* note 87, at 283.

92. S.D. CODIFIED LAWS § 34-20A-70 (Michie 1999); WIS. STAT. ANN. § 48.193 (West 1998).

93. WIS. STAT. ANN. § 48.193(1)(c)–(d) (West 2003). An adult expectant mother can be held in custody upon judicial order or under "[c]ircumstances in which a law enforcement officer believes on reasonable grounds that . . . there is a substantial risk that the physical health of the unborn child . . . will be seriously affected or endangered due to the adult expectant mother's habitual lack of self-control in the use of alcohol beverages . . . unless the adult expectant mother is taken into custody." *Id.* § 28.193(d)(2).

94. See Jean Reith Schroedel & Pamela Fiber, *Punitive Versus Public Health Oriented Responses to Drug Use by Pregnant Women*, 1 YALE J. HEALTH POL'Y, L. & ETHICS 217, 221 (2001).

95. CDC, Fetal Alcohol Information, *supra* note 89.

96. *Id.*; see also CDC, National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect, *Defining the National Agenda for Fetal Alcohol Syndrome and Other Prenatal Alcohol-Related Effects*, 51(RR14); 9-12 (Sep. 20, 2002), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5114a2.htm> [hereinafter CDC, *National Agenda*].

97. Palmer, *supra* note 8, at 295–96. In 1981, the Surgeon General publicly recommended that pregnant women and women considering pregnancy avoid consumption of alcohol. *Id.* Since that time, Congress has established a national task force to address the problem and foster the development of prevention programs. See CDC, *National Agenda*, *supra* note 96.

98. Palmer, *supra* note 8, at 296.

99. See WIS. STAT. ANN. § 48.193 (West 2003).

## a. Epidemiology

Prenatal exposure to alcohol can result in permanent physical and mental damage due to the effects of alcohol on a developing brain.<sup>100</sup> In as little as fifteen minutes after consumption by the pregnant mother, water-soluble alcohol passes through the placenta membrane, causing the fetus's blood alcohol content to equal that of the mother.<sup>101</sup> The fetus, unlike the mother, is not able to quickly metabolize the alcohol and eliminate it from its system.<sup>102</sup> Instead, the toxin lingers within the placenta, disrupting the formation of the fetus by impairing fetal oxygen supply and disrupting protein synthesis and hormone production.<sup>103</sup>

The severity of the resulting harm depends on the susceptibility of the individual mother and fetus, environmental factors, and the gestational timing of alcohol exposure.<sup>104</sup> Studies have shown that “the strongest relationship between alcohol exposure and birth defects [is] the two-to-eight week period after conception.”<sup>105</sup> Significantly, many women do not even realize they are pregnant during this initial stage when the fetus is most vulnerable to the toxic effects of alcohol exposure.<sup>106</sup> As a result, statutory schemes that seek to prevent FAS by identifying pregnant women who are currently abusing alcohol only prevent further damage to the fetus;<sup>107</sup> these schemes cannot reverse the damage that has already been done.

## b. Effects

Prenatal alcohol use can cause many birth defects, with FAS being the most severe.<sup>108</sup> Children with FAS are characterized as having a set of recognizable birth defects, including abnormal facial features, growth deficiencies, and central nervous systems problems.<sup>109</sup> FAS, however, only accounts for the most extreme cases.<sup>110</sup> A significant proportion of children are diagnosed with alcohol-related neurodevelopmental disor-

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100. CDC, Fetal Alcohol Information, *supra* note 89; SPECIAL REP., *supra* note 87, at 283.

101. Steven R. Hawks, *Fetal Alcohol Syndrome: Implications for Health Education*, 24 J. HEALTH EDUC. 22, 23 (1993).

102. Dineen, *supra* note 88, at 18–19.

103. *Id.* at 19.

104. *Id.* at 19–21.

105. *Id.* at 20–21 (citation omitted).

106. *Id.* at 21; *see also* CDC, Fetal Alcohol Information, *supra* note 89.

107. CDC, Fetal Alcohol Information, *supra* note 89.

108. *Id.*; *see also* SPECIAL REP., *supra* note 87, at 283.

109. CDC, Fetal Alcohol Information, *supra* note 89; Dineen, *supra* note 88, at 4–6. FAS children are often recognizable by their facial abnormalities, such as small eye openings, a flat mid-face, and a thin upper lip. FAS children are often born premature and are smaller than their peers throughout their childhood, though “the characteristic emaciated appearance disappears in adolescence.” Other features of FAS include low-birth weight and mental retardation. *Id.* at 4–6.

110. SPECIAL REP., *supra* note 87, at 283.

der (ARND), which lacks some of the tell-tale features of FAS but shares many of its ill effects on the developing brain.<sup>111</sup>

The most devastating effect of fetal alcohol exposure is the damage caused to the central nervous system, resulting in varying degrees of mental retardation.<sup>112</sup> In particular, FAS and ARND children frequently have difficulty with learning, coordination, mathematical skills, memory, attention, and judgment.<sup>113</sup> These children may also suffer from secondary conditions, such as psychiatric problems, criminal behavior, substance abuse, and unemployment.<sup>114</sup> Although these secondary conditions tend to manifest with age,<sup>115</sup> early diagnosis and access to appropriate education may reduce some of the mental and behavioral problems.<sup>116</sup> Overall, FAS problems are life-long, making fetal alcohol exposure just as dangerous as prenatal drug use.<sup>117</sup>

### c. Prevalence in Society

Reported rates of FAS vary depending on the population surveyed and the criteria measured.<sup>118</sup> For FAS alone, CDC studies show 0.2 to 1.5 per 1000 live births are affected with the most severe symptoms.<sup>119</sup> Moreover, ARND and other prenatal alcohol-related conditions are estimated to occur three times as often as FAS.<sup>120</sup> Since 1995, the overall rates of alcohol use during pregnancy have reportedly declined.<sup>121</sup> From 1991 to 1999, however, the rates of habitual and binge drinking during pregnancy and by nonpregnant women of childbearing age did not decline.<sup>122</sup> FAS has not diminished as a national health concern since heavy alcohol use before pregnancy is “highly predictive of continued use.”<sup>123</sup> Accordingly, nonpregnant women of childbearing age, especially those with patterns of habitual or binge drinking, should be warned of the adverse effects of prenatal alcohol use.<sup>124</sup>

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111. *Id.* Children with ARND may exhibit mental impairments that are even more serious than those found in children with FAS. *Id.*; see also CDC, Fetal Alcohol Information, *supra* note 89 (“Those with ARBD may have problems with the heart, kidneys, bones, and/or hearing.”).

112. *Id.*

113. *Id.* FAS children may also exhibit hyperactive behavior and problems with daily living. *Id.*

114. *Id.*; see also Palmer, *supra* note 8, at 298. Children displaying these secondary conditions often have an incomplete education, legal troubles, and an “overall dependence on others in order to meet daily needs.” *Id.*

115. *Id.*

116. Dineen, *supra* note 88, at 7–8.

117. Palmer, *supra* note 8, at 297–98.

118. CDC, Fetal Alcohol Information, *supra* note 89.

119. *Id.*

120. *Id.*

121. CDC, *Alcohol Use Among Women of Childbearing Age—United States, 1991–1999*, 51(13); 273-6 (Apr. 5, 2002), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5113a2.htm>.

122. *Id.* Binge drinking is classified as having five or more drinks on any one occasion, while frequent drinking equals seven or more drinks per week or more than five drinks on any one occasion. *Id.*

123. *Id.*

124. *Id.*

## 2. *Addressing Fetal Alcohol Syndrome: Wisconsin's Civil Commitment Approach*

In response to the growing national concern over FAS, a number of federal, state, and local initiatives now focus on preventing and treating maternal consumption of alcohol.<sup>125</sup> Wisconsin is one state that has taken an aggressive approach toward regulating the conduct of a pregnant woman for the benefit of her fetus.<sup>126</sup> After the Wisconsin Supreme Court reversed several cases holding pregnant women liable for harming their fetuses through drug and alcohol use,<sup>127</sup> the Wisconsin legislature responded by revising its Children's Code to create a new category of "unborn child" abuse.<sup>128</sup> Wisconsin law places "unborn children" under the jurisdiction of juvenile courts.<sup>129</sup> Accordingly, the state is authorized to take custody of an expectant mother who uses drugs or alcohol during pregnancy and order involuntary inpatient care.<sup>130</sup>

### a. Historical Background

Several controversial cases involving prenatal drug and alcohol abuse led to the enactment of Wisconsin's current protective custody legislation.<sup>131</sup> In 1997, Wisconsin attempted to regulate prenatal conduct by taking an unborn fetus into custody under the existing Children's Code.<sup>132</sup> In *Kruzicki*, the Waukesha County Department of Health and Human Services filed a motion to take Angela M.W.'s unborn fetus into protective custody after her obstetrician reported to the county that she was ingesting cocaine.<sup>133</sup> Before the juvenile court could execute its protective custody motion, Angela checked herself into an inpatient treatment facility.<sup>134</sup> In view of this, the court ordered that Angela be retained at the treatment center and threatened to detain her at a local hospital if she tried to leave.<sup>135</sup>

Angela subsequently challenged the juvenile court's application of the CHIPS (child alleged to be in need of protection of services) statute to her case, arguing that it did not apply to a viable fetus.<sup>136</sup> While the

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125. CDC, *National Agenda*, *supra* note 96 (outlining the creation of the National Task Force on FAS and resulting state and local collaborations).

126. See Kubasek, *supra* note 50, at 174-75.

127. State *ex rel.* Angela M.W. v. Kruzicki, 561 N.W.2d 729, 740 (Wis. 1997); State v. Deborah J.Z., 596 N.W.2d 490, 496 (Wis. Ct. App. 1999).

128. WIS. STAT. ANN. §§ 48.01(1)(2), 48.02(1) (West 2003); see also Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1047 (1999).

129. WIS. STAT. ANN. § 48.01(1)(2); see also Judy Pasternak, *Wisconsin OKs Civil Detention for Fetal Abuse*, L.A. TIMES, May 2, 1998, at A1.

130. WIS. STAT. ANN. §§ 48.193, 48.347(6).

131. See Palmer, *supra* note 8, at 336.

132. *Kruzicki*, 561 N.W.2d at 732.

133. *Id.* at 732.

134. *Id.*

135. *Id.*

136. *Id.* at 733.

court of appeals concluded that a viable fetus is a “person” within the statute’s definition of “child,”<sup>137</sup> the Wisconsin Supreme Court overruled this interpretation, finding that the “legislature intended ‘child’ to mean one born alive.”<sup>138</sup> Moreover, the court determined that the issue of detaining a pregnant woman for “acts harming her fetus is a policy issue best addressed initially by [the] legislature.”<sup>139</sup> Lawmakers responded to the court’s call for guidance in 1998, by enacting section 48.193 of the Children’s Code.<sup>140</sup>

In *State v. Deborah J.Z.*,<sup>141</sup> Wisconsin courts once again addressed the issue of whether an unborn child qualifies as a “human being.”<sup>142</sup> After she began to experience labor pains, Deborah Zimmerman’s mother brought her daughter from a local bar to the hospital with a blood alcohol concentration of 0.30%.<sup>143</sup> Nurses at the hospital described Deborah as belligerent and uncooperative, even though she consented to a cesarean section and gave birth to a baby girl.<sup>144</sup> At birth, the baby exhibited the classic physical features of FAS and had a blood alcohol level of 0.199%.<sup>145</sup> Shortly thereafter, the state charged Deborah with attempted first-degree intentional homicide and first-degree reckless injury.<sup>146</sup> Although the circuit court believed Deborah could be charged because the baby was born alive within hours of her reckless conduct,<sup>147</sup> the court of appeals disagreed.<sup>148</sup> As in *Kruzicki*, the court deferred to the legislature to make a determination as to what extent the state may intervene to protect the health of a viable fetus.<sup>149</sup>

#### b. Taking an Adult Expectant Mother into Custody

In 1998, the Wisconsin legislature revised the existing CHIPS statute to include prenatal substance abuse as “unborn child” abuse.<sup>150</sup> Juvenile courts were given jurisdiction over unborn children “from the time of fertilization to the time of birth.”<sup>151</sup> As such, law enforcement officers and the courts have the authority to take an adult expectant mother of an unborn child into custody upon a showing that, due to the adult expect-

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137. *Id.*

138. *Id.* at 740.

139. *Id.* at 739.

140. WIS. STAT. ANN. § 48.193 (West 2003).

141. 596 N.W.2d 490 (Wis. Ct. App. 1999).

142. *Id.* at 491–92.

143. *Id.* at 491.

144. *Id.*

145. *Id.* at 492.

146. *Id.*

147. *State v. Zimmerman*, No. 96-CF-525, 1996 WL 858598, at \*1, \*3 (Wis. Cir. Sept. 18, 1996).

148. *Deborah J.Z.*, 596 N.W.2d at 496 (holding that “an unborn child is not a ‘human being’ because it is not one who has been born alive as required” in the statutes at issue).

149. *Id.* at 494–95.

150. WIS. STAT. ANN. § 48.02(1)(am) (West 2003).

151. *Id.* § 48.02(1)(19).

tant mother's habitual lack of self-control in the use of alcohol beverages or controlled substances, "there is a substantial risk that the physical health of the unborn child . . . will be seriously affected or endangered."<sup>152</sup> Once in custody, an expectant mother may either be released to a relative or friend after counseling or detained if found to be mentally ill, drug dependent, developmentally disabled, or intoxicated.<sup>153</sup> If an expectant mother is not released, the state conducts a hearing within forty-eight hours to determine whether protective custody should be continued.<sup>154</sup>

Upon finding the unborn child of the expectant mother to be in need of services, a judge can order involuntary, inpatient alcohol treatment as the least restrictive treatment available.<sup>155</sup> Although public and private treatment facilities are mandated to give first priority to pregnant women who suffer from alcoholism or drug dependency,<sup>156</sup> there is no guarantee that treatment programs will be available for these women.<sup>157</sup> Furthermore, since the state may intervene on behalf of an unborn child beginning at the time of fertilization, a pregnant woman can be taken into custody before she even knows that she is pregnant.<sup>158</sup> The state may also appoint guardians ad litem "for any unborn child alleged or found to be in need of protection or services."<sup>159</sup> Since the guardian ad litem is required to act in the best interests of the unborn child,<sup>160</sup> a pregnant woman seeking an abortion would be met with opposition by the guardian, raising constitutional right to privacy concerns.<sup>161</sup> These are just a few of the problems that arise under Wisconsin's mandate that pregnant women be forced into protective custody when their conduct risks physical harm to an unborn child.

### III. PROBLEMS INHERENT IN CODIFYING PRENATAL ALCOHOL ABUSE

Any regulation that punishes or restricts a pregnant woman's behavior in order to protect an unborn fetus essentially subordinates the civil liberties of the woman to the rights of her fetus.<sup>162</sup> This maternal-fetal conflict is especially severe when states attempt to regulate prenatal behavior that is otherwise legal, such as alcohol consumption.<sup>163</sup> Civil

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152. *Id.* § 48.193.

153. *Id.*

154. *Id.*

155. *Id.* § 48.347(6).

156. *Id.* § 51.46.

157. See Pasternak, *supra* note 129.

158. See Paltrow, *supra* note 128, at 1047.

159. WIS. STAT. ANN. § 48.235(1)(f).

160. WIS. STAT. ANN. § 48.253(3).

161. Paltrow, *supra* note 128, at 1048.

162. See Mills, *supra* note 3, at 1020; Schroedel et al., *supra* note 1, at 104-05.

163. See Alison M. Leonard, *Fetal Personhood, Legal Substance Abuse, and Maternal Prosecutions: Child Protection or "Gestational Gestapo"?*, 32 NEW ENG. L. REV. 615, 647-48 (1998). See generally Palmer, *supra* note 8, at 332-33.

commitment schemes which regulate prenatal alcohol consumption, such as Wisconsin's protective custody statute, pose a number of constitutional and practical problems.<sup>164</sup>

First, prenatal alcohol abuse protections may violate both the Due Process and Equal Protection Clauses of the Constitution. Even if these protections pass constitutional scrutiny, they may still be rendered unworkable by the range of practical problems they face.<sup>165</sup> A purely punitive approach to preventing FAS, which forces pregnant women into involuntary treatment, does not address the addiction at hand but, instead, may deter women from seeking proper prenatal care.<sup>166</sup> In addition, proscribing otherwise legal behavior is the first step toward regulating any maternal conduct that may adversely effect the health of a fetus.<sup>167</sup> Further, statutes that simply react to the problem of prenatal alcohol abuse by taking already pregnant women into custody are unlikely to prevent FAS since the fetus has most likely already suffered irreversible damage.<sup>168</sup>

### A. *Constitutional Issues*

In addition to the policy concern that a woman's citizenship status is trumped by her fetus,<sup>169</sup> fetal protection laws that criminally or civilly confine a pregnant woman on account of her maternal behavior raise significant constitutional problems.<sup>170</sup> While civil commitment does not necessarily rise to the same level of severity as criminal prosecution, any type of civil confinement is a significant enough deprivation of liberty that the Constitution requires due process.<sup>171</sup> Consequently, civil commitment of pregnant women for using alcohol may run afoul of their substantive and procedural due process rights.<sup>172</sup> Furthermore, regulations directed solely at substance abusing pregnant women, as opposed to men or women in general, may also violate the Equal Protection Clause.<sup>173</sup>

#### 1. *Due Process*

While a state may argue that certain fetal abuse protections are necessary and justified in order to promote its compelling interest in potential human life,<sup>174</sup> a pregnant woman has constitutional rights that

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164. See *infra* Part III.A–B.

165. See *infra* Part III.B.

166. See Mills, *supra* note 3, at 1038–39; Paltrow, *supra* note 128, at 1044.

167. See *infra* Part III.B.4.

168. Dineen, *supra* note 88, at 19–21.

169. See Paltrow, *supra* note 128, at 1044.

170. Leonard, *supra* note 164, at 644–50; Mills, *supra* note 3, at 1020.

171. Carol Gosain, *Protective Custody for Fetuses: A Solution to the Problem of Drug Use?*, 5. GEO. MASON L. REV. 799, 825 (1997) (citing *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

172. *Id.*

173. Mills, *supra* note 3, at 1028.

174. *Roe v. Wade*, 410 U.S. 113, 154 (1973).



cannot be so easily abrogated.<sup>175</sup> A civil commitment scheme akin to Wisconsin's implicates the Fourteenth Amendment's guarantee of due process.<sup>176</sup> First, regulations which punish a pregnant woman for behavior that affects her fetus may violate her substantive due process right to privacy.<sup>177</sup> Second, these punitive regulations may also pose procedural due process concerns, as pregnant women must be given fair notice that their conduct is proscribed and significant deprivations of liberty may result.<sup>178</sup>

a. Substantive Due Process

Punitive regulations which subject pregnant women to involuntary civil commitment violate the substantive rights of privacy and bodily integrity afforded by the Due Process Clause.<sup>179</sup> Historically, substantive due process has "limited government's . . . power to regulate various aspects of economic and non-economic life."<sup>180</sup> The Supreme Court has since recognized that this concept implies a fundamental right to privacy that extends to reproductive decisions.<sup>181</sup> The Court first pronounced this right in *Griswold v. Connecticut*,<sup>182</sup> where it struck down a state law prohibiting the use of drugs or devices of contraception.<sup>183</sup> The *Griswold* Court discussed a "penumbra" of privacy rights that encompasses all reproductive decisions.<sup>184</sup> Further, in *Eisenstadt v. Baird*,<sup>185</sup> the Court held that the right to privacy applies to both married and unmarried persons.<sup>186</sup> These opinions laid the groundwork for the landmark decision of *Roe v. Wade*,<sup>187</sup> which significantly strengthened the concept of a woman's fundamental right to reproductive freedom.<sup>188</sup>

The Court in *Roe* held that the right to privacy protects a woman's right to have an abortion.<sup>189</sup> In so holding, the Court made clear that the word "person" in the Fourteenth Amendment does not include the un-

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175. See Mills, *supra* note 3, at 1020; see also James Denison, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. CAL. L. REV. 1103, 1135 (1991).

176. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

177. See Mills, *supra* note 3, at 1021–22.

178. See Gosain, *supra* note 171, at 826; Leonard, *supra* note 163, at 648–49; see also Denison, *supra* note 175, at 1124.

179. See Mills, *supra* note 3, at 1021–28; Schroedel et. al, *supra* note 1, at 108–10.

180. Schroedel et. al, *supra* note 1, at 108.

181. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

182. 381 U.S. at 483–86.

183. *Id.*

184. *Id.* at 485.

185. 405 U.S. 438 (1972).

186. *Id.* at 453.

187. 410 U.S. 113 (1973).

188. See Mills, *supra* note 3, at 1022–24.

189. 410 U.S. at 153.

born.<sup>190</sup> While the right to privacy extends to decisions regarding contraception and abortion, it is not absolute.<sup>191</sup> Rather, it must be weighed against the state's competing interests in protecting the health of the woman and her fetus.<sup>192</sup> The Court noted that there may be circumstances where the state's interest is sufficiently compelling to outweigh a woman's constitutional right to an abortion.<sup>193</sup> The Court did not specify, however, what sort of state interest would outweigh a woman's right to terminate her pregnancy.<sup>194</sup> Instead, the Court focused on the notion of viability.<sup>195</sup>

The Court clarified its position in *Planned Parenthood v. Casey*, where it eliminated a strict notion of viability and, alternatively, applied an undue burden standard of review on state actions.<sup>196</sup> A state regulation may not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."<sup>197</sup> Those regulations which do place an undue burden on a woman seeking an abortion do not serve legitimate ends and are held unconstitutional.<sup>198</sup> Conversely, it is also impermissible to place an undue burden on a woman's decision whether or not to carry her fetus to term.<sup>199</sup>

Civil commitment statutes that place alcohol-abusing pregnant women in involuntary treatment, such as Wisconsin's statute, unduly burden a woman's fundamental right to privacy. Although the Court has never explicitly ruled on the issue, it makes sense that if a woman's right to privacy encompasses decisions regarding procreation, such as contraception and abortion, it should also include decisions regarding health during pregnancy.<sup>200</sup> Accordingly, punishing maternal conduct may interfere with the right to privacy. Furthermore, it is illogical to allow a woman to terminate her fetus altogether but, at the same time, subject her to punitive sanctions for behavior that may harm the fetus, when she might choose not to carry the baby to term.<sup>201</sup>

Nevertheless, a state may intervene to protect its interest in potential human life as long as it does not unduly burden a woman's choice to

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190. *Id.* at 158.

191. *Id.* at 154–56, 162–63.

192. *Id.*

193. *Id.*

194. *Id.* at 154; *see* Reitman, *supra* note 13, at 291.

195. 410 U.S. at 162–64. Under *Roe's* trimester framework a woman could decide to obtain an abortion during the first three months of pregnancy free from state intervention. During the second three-month period the state was given the power to regulate, but not expressly limit, this right. The final trimester, however, was designated as the point of viability, and an abortion may only be obtained when vital to the life or health of the mother. *Id.*

196. 505 U.S. 833, 874 (1992) (rejecting *Roe's* trimester approach and applying, instead, the undue burden test).

197. *Id.* at 877.

198. *See id.*

199. *Id.* at 878; *see also* Mills, *supra* note 3, at 1027.

200. Mills, *supra* note 3, at 1022.

201. *See id.* at 1024.

procreate.<sup>202</sup> Perhaps more compelling is the argument that punitive regulations unduly burden a woman's choice by placing greater responsibility on a woman who chooses to carry her unborn child to term.<sup>203</sup> Essentially, a pregnant woman abusing alcohol must choose between seeking prenatal care and risking civil commitment or terminating her pregnancy.<sup>204</sup> This fear of punishment unduly burdens a woman's decision to keep her fetus.<sup>205</sup> While preventing FAS is certainly a substantial state interest, a state may not achieve this objective in a way that unconstitutionally burdens a woman's right to privacy.<sup>206</sup> Consequently, regulation of maternal conduct should focus on less intrusive means to accomplish the goal of fetal health.

Civil commitment statutes may also violate a woman's right to bodily integrity under the Due Process Clause.<sup>207</sup> In particular, this right allows an individual to be in control of his or her own person, free from unwarranted invasions by others.<sup>208</sup> The right to bodily integrity includes, for example, the right to refuse unwanted medical treatment, such as compelled surgery.<sup>209</sup> Nonetheless, the Supreme Court held that committing drug-dependent individuals for the purpose of treatment does not violate their constitutional rights.<sup>210</sup> Wisconsin's protective custody mandate may violate the right to bodily integrity, however, because it imposes involuntary treatment for an otherwise legal activity, as opposed to committing individuals for illegal behavior.<sup>211</sup>

Also interesting is the fact that Wisconsin's legislation allows the state to take an expectant mother into custody under its child welfare statute.<sup>212</sup> In doing so, the state uses its *parens patriae* power to subordinate the rights of an adult woman to those of an unborn child. This is especially controversial since an unborn fetus is not considered a "person" in the constitutional sense.<sup>213</sup> Hence, such a practice may function to undermine women's legal status in society by regulating their behavior based solely on their ability to reproduce.<sup>214</sup>

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202. See *Casey*, 505 U.S. at 877.

203. Kubasek, *supra* note 50, at 179; Mills, *supra* note 3, at 1026.

204. See Mills, *supra* note 3, at 1026–27.

205. *Id.* at 1027.

206. See Kubasek, *supra* note 50, at 179.

207. See Denison, *supra* note 175, at 1135; Schroedel et al., *supra* note 1, at 109.

208. Parks, *supra* note 46, at 256–57 (citing *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968)).

209. *Winston v. Lee*, 470 U.S. 753, 766–67 (1985) (holding that compelled surgery to remove a bullet from the defendant to be used in his own prosecution violates the right to bodily integrity).

210. David F. Chavkin, "For Their Own Good:" *Civil Commitment of Alcohol and Drug-Dependent Pregnant Women*, 37 S.D. L. REV. 224, 246 (1992) (discussing *Robinson v. California*, 370 U.S. 660 (1962)).

211. See Schroedel et al., *supra* note 1, at 109–10 ("Both common law and statutory law have long upheld the right of a person to refuse to allow others to invade his or her bodily integrity.").

212. WIS. STAT. ANN. § 48.193 (West 2003).

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

214. See Paltrow, *supra* note 128, at 1048; Schroedel et al., *supra* note 1, at 108–10.

b. Procedural Due Process

Civil commitment statutes prohibiting prenatal alcohol abuse also pose procedural due process problems, as they regulate an otherwise legal activity.<sup>215</sup> In order to avoid a vagueness challenge, the Constitution requires criminal statutes to provide “a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”<sup>216</sup> Accordingly, legislation which restricts a pregnant woman’s consumption of alcohol must give fair notice of the prohibited activity to any woman who might fall within the statute.<sup>217</sup> While this requirement traditionally applies to criminal sanctions, it is also a concern in civil commitment actions where individuals are similarly deprived of their freedom.<sup>218</sup> Statutes that punish pregnant women for drinking alcohol fail to afford defendants fair notice because ordinary persons will usually not consider the consumption of alcohol an activity giving rise to punitive sanctions.<sup>219</sup>

Although the consumption of alcohol is generally not an illegal activity, a state may decide to prohibit such conduct under certain circumstances.<sup>220</sup> For instance, states are free to punish drunk driving or public intoxication.<sup>221</sup> In the case of drunk driving, for example, driving and consuming alcohol are both legal activities, but they become illegal when combined under specific circumstances.<sup>222</sup> A statute criminalizing drunk driving is not unconstitutionally vague.<sup>223</sup> A drunk driver, while intoxicated, is still generally aware of the fact that he or she is operating a motor vehicle and such conduct is prohibited under the law.<sup>224</sup>

Prenatal consumption of alcohol, on the other hand, presents a different situation because a woman might not always know that she is pregnant. Thus, a statute prohibiting prenatal use of alcohol can only withstand a due process challenge if it requires that the woman know she is pregnant.<sup>225</sup> Otherwise, the state has no way to ensure the civil defendant had proper notice that her conduct could result in involuntary custody.<sup>226</sup> Wisconsin’s civil commitment statute attempts to avoid this problem by limiting a judicial custody mandate to expectant mothers who

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215. See Leonard, *supra* note 163, at 647 (“Tackling the problem of fetal alcoholism through legislation however presents several inherent difficulties.”); see also Denison, *supra* note 175, at 1124–25 (noting that a unique problem to fetal abuse legislation lies in determining at what time during the pregnancy liability attaches).

216. See *United States v. Harriss*, 347 U.S. 612, 617 (1954) (describing the constitutional requirement of definiteness).

217. See Leonard, *supra* note 163, at 647–48.

218. See Gosain, *supra* note 171, at 826.

219. See Denison, *supra* note 175, at 1124.

220. *Id.* at 1124–25.

221. *Id.*

222. See *id.*

223. *Id.*

224. See generally *id.*

225. See Gosain, *supra* note 171, at 826 (explaining how notice may become a problem if a state chooses to confine women for legal activities).

226. *Id.*

refuse treatment or fail to make a good faith effort to participate in services offered.<sup>227</sup> In doing so, it is apparent that the state assumes these women are aware that they are pregnant.<sup>228</sup> The problem with this approach is that even a small amount of alcohol consumed just after conception can have harmful effects on a fetus.<sup>229</sup> Therefore, waiting until an expectant mother refuses treatment before taking her into custody does not prevent FAS; it merely reacts to damage that has already been done.

## 2. *Equal Protection*

Civil commitment statutes codifying prenatal alcohol consumption may also violate the Fourteenth Amendment's guarantee of equal protection.<sup>230</sup> A state may not enact legislation that regulates conduct in such a way that discriminates against a certain class of individuals, either on its face or as applied.<sup>231</sup> On its face, fetal abuse legislation raises the issue of gender discrimination because civil commitment statutes apply only to pregnant women and not to men, who are also capable of inflicting harm on a fetus.<sup>232</sup> Furthermore, these statutes may also be discriminatory as applied by disproportionately impacting minorities and women of lower socioeconomic status.<sup>233</sup>

### a. Gender Discrimination

Legislation that utilizes gender as a classification must survive intermediate scrutiny to be constitutional.<sup>234</sup> As stated in *Craig v. Boren*,<sup>235</sup> statutes aimed solely at one gender must "serve important governmental objectives and must be substantially related to the achievement of those objectives."<sup>236</sup> Even though fetal abuse protections are not gender-neutral, proponents argue these protections may still pass constitutional muster since they single out women not because of their sex but because of their ability to procreate.<sup>237</sup> In *Geduldig v. Aiello*,<sup>238</sup> the Supreme Court held that classifications based on biological factors, including

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227. WIS. STAT. ANN. § 48.193(1)(c) (West 2003). This requirement does not appear to apply to circumstances in which a law enforcement officer may take the expectant mother into custody. *Id.* § 48.193(1)(d).

228. *See id.*

229. Dineen, *supra* note 88, at 19–21.

230. *See* Mills, *supra* note 3, at 1028–30.

231. *Id.* at 1028.

232. *Id.*; *see also* Gosain, *supra* note 171, at 832–34; Kubasek, *supra* note 50, at 176.

233. *See* Gosain, *supra* note 171, at 834; Kubasek, *supra* note 50, at 177; Mills, *supra* note 3, at 1030–32.

234. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

235. *Id.*

236. *Id.* at 197.

237. Parks, *supra* note 46, at 253.

238. 417 U.S. 484 (1974).

pregnancy, do not discriminate on the basis of sex.<sup>239</sup> Instead, a pregnancy-based classification merely creates the categories of “pregnant women and non-pregnant persons.”<sup>240</sup> Consequently, legislation based on the ability to give birth need only be rationally related to a legitimate state purpose.<sup>241</sup>

While preventing FAS is a legitimate state objective, civil commitment provisions like Wisconsin’s statute do not merely regulate behavior based on the biological ability to procreate.<sup>242</sup> These statutes only punish women, not men, for harming a fetus.<sup>243</sup> Studies show, however, that the biological father’s behavior before and even during pregnancy, such as heavy consumption of alcohol before conception, may also have a negative impact on fetal health.<sup>244</sup> As a result, prenatal alcohol abuse statutes do not merely create categories of “pregnant women and non-pregnant persons.”<sup>245</sup> On the contrary, there is a risk of punishment “from which men are protected and women are not,” thus, constituting gender discrimination.<sup>246</sup>

Furthermore, *Geduldig*’s rational basis approach to pregnancy-based classifications may no longer be controlling after the Supreme Court’s decision in *UAW v. Johnson Controls*.<sup>247</sup> Specifically, the Court struck down a workplace regulation which forbade fertile women from performing jobs which could expose them to substances harmful to a fetus.<sup>248</sup> The Court held that since both women and men could cause fetal harm by working at the plant, the regulation, which focused only on the potential offspring of female workers, impermissibly discriminated against women on the basis of their sex.<sup>249</sup> Similar to the regulation in *Johnson Controls*, Wisconsin’s civil commitment provision also “classifies on the basis of gender and childbearing capacity, rather than fertility alone,”<sup>250</sup> as it fails to address a man’s use of alcohol or controlled substances which may seriously endanger the physical health of a fetus.<sup>251</sup>

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239. *Id.* at 496–97, 496 n.20 (“[N]ot . . . every legislative classification concerning pregnancy is a sex-based classification.”).

240. *Id.* at 496 n.20.

241. Mills, *supra* note 3, at 1028.

242. *Id.* at 1029.

243. *Id.*

244. *Id.* at 1005 (describing how the father’s lifestyle may also affect the health of the fetus before conception and during pregnancy). Toxic substances, such as alcohol, “absorbed by the exposed male may contaminate the seminal fluid and cross the placental barrier through intercourse.” *Id.* (citation omitted).

245. *Geduldig*, 417 U.S. at 497 n.20.

246. *Id.* at 496–97.

247. 499 U.S. 187, 197–99 (1991).

248. *Id.* at 190–91.

249. *Id.* at 197–99 (holding that the regulation violated Title VII of the Civil Rights Act of 1964). “The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender.” *Id.* at 197.

250. *Id.* at 198.

251. See WIS. STAT. ANN. § 48.193 (West 2003).

Assuming, arguendo, that prenatal alcohol abuse statutes do rise to the level of gender discrimination, they must still pass muster under intermediate scrutiny in order to survive.<sup>252</sup> Although preventing FAS is an important state objective, courts may nevertheless conclude that civil commitment is not substantially related to achieving that goal.<sup>253</sup> While a perfect fit between the state's regulation and its substantial interest are not necessary, an underinclusive statute which concentrates entirely on maternal conduct and ignores similarly devastating male behavior may not survive intermediate scrutiny.<sup>254</sup>

#### b. Race Discrimination

Race discrimination is also important to consider when analyzing the constitutionality of fetal abuse legislation, as the majority of state intervention on the behalf of fetuses is directed at minority women of low socioeconomic standing.<sup>255</sup> Commentators argue that this unequal impact is a result of legislation that "unfairly target[s] minority women as fetal abusers."<sup>256</sup> For instance, state intervention is more likely where the substance at issue is cocaine, which is more likely to be used by minority women.<sup>257</sup> In addition, studies have shown that while minority women are not more likely to use drugs than other groups, they are more likely to be tested for substance abuse during pregnancy.<sup>258</sup> In fact, one study found that prenatal substance abuse by African American women is almost ten times as likely to be reported to government authorities than similar abuse by white women.<sup>259</sup> This discrepancy may be a result of the fact that public hospitals, which often cater to individuals of low-socioeconomic status, are more likely to test and report prenatal substance abuse than private facilities.<sup>260</sup>

Civil commitment provisions may also run afoul of equal protection if they have a disproportionate effect on low-income or minority women.<sup>261</sup> In order to violate the Equal Protection Clause, a state regulation must have both a discriminatory impact and motive.<sup>262</sup> Unlike gen-

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252. Mills, *supra* note 3, at 1030.

253. *Id.*

254. *Id.*

255. Roberts, *supra* note 4, at 1432. See generally Christine M. Bulger, *In the Best Interests of the Child? Race and Class Discrimination in Prenatal Drug Use Prosecutions*, 19 B.C. THIRD WORLD L.J. 709 (1999).

256. Mills, *supra* note 3, at 1031; see also Paltrow, *supra* note 128, at 1023–29.

257. Ira J. Chasnoff et al., *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204–05 (1990) (finding that in Pinellas, Florida, 7.5% of African American women tested positive for cocaine as opposed to 1.8% of white women).

258. *Id.* at 1204.

259. *Id.*

260. See Mills, *supra* note 3, at 1031–32.

261. See *id.* at 1032–33; see also Gosain, *supra* note 171, at 833–35; Kubasek, *supra* note 50, at 177.

262. Mayor of Washington v. Davis, 426 U.S. 229, 239–40 (1976).

der discrimination, race discrimination is subject to a heightened strict scrutiny review, requiring states to use the least restrictive means available to further a compelling government interest.<sup>263</sup> Accordingly, even though Wisconsin's civil commitment statute is facially neutral, the state cannot administer the law in a discriminatory fashion.<sup>264</sup> While there is inadequate information at this point to observe whether state intervention to address maternal alcohol consumption presents the same problems as illegal drug use, Wisconsin should take care to ensure its testing, reporting, and intervention are not directed at impoverished, minority women.<sup>265</sup>

### B. Practical Issues

In addition to the constitutional problems facing prenatal alcohol abuse statutes, there are also a number of practical issues that make such an approach imprudent. First, punitive measures may deter substance abusing women from seeking prenatal care.<sup>266</sup> Second, a civil commitment approach to preventing FAS fails to address a pregnant woman's alcohol addiction until the most pervasive damage to the fetus has already occurred.<sup>267</sup> Third, civil commitment has a drastic impact on the families of women taken into custody.<sup>268</sup> Finally, prohibiting prenatal alcohol consumption may be the first step toward regulating all behavior that adversely affects a fetus.<sup>269</sup>

#### 1. Detering Prenatal Care

While civil commitment provisions may encourage women to stop using alcohol during pregnancy, these provisions may also deter pregnant women from seeking necessary prenatal care for fear of being placed in state custody.<sup>270</sup> Proponents of a punitive approach to preventing FAS argue that Wisconsin's method will prevent women from using alcohol during pregnancy,<sup>271</sup> but studies have shown that pregnant substance abusers are unlikely to be deterred by additional punishments.<sup>272</sup> Impos-

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263. See Mills, *supra* note 3, at 1032–33. See generally Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

264. Gosain, *supra* note 171, at 835–36.

265. See *id.*

266. American Medical Association, *Report of the Board of Trustees on Legal Interventions During Pregnancy: Court Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 J. AM. MED. ASS'N 2663, 2669 (1990) [hereinafter, AMA, *Legal Interventions During Pregnancy*].

267. See *supra* notes 105–06 and accompanying text.

268. See Parks, *supra* note 46, at 266 (citing the argument that criminalization of prenatal drug use will have a destructive effect on the families of individual women who are prosecuted).

269. See *id.* at 267.

270. See AMA, *Legal Interventions During Pregnancy*, *supra* note 266, at 2669.

271. Palmer, *supra* note 8, at 320.

272. See Mills, *supra* note 3, at 1038.



ing punishment for maternal alcohol abuse will only discourage these women from accepting responsibility for their actions, supplying their health care providers with accurate information, and obtaining the prenatal care vital to the health of their fetus.<sup>273</sup> Thus, civil commitment statutes may increase the risks to both women and fetuses, ultimately, falling short of the goal of protecting fetal health.<sup>274</sup>

## 2. *Addressing the Addiction*

Civil commitment statutes are also problematic because of their reactive nature. For example, Wisconsin's child protection statute allows the state to take an expectant mother into custody only after she has displayed a "habitual lack of self-control in the use of alcohol beverages [or] controlled substances."<sup>275</sup> By this time, however, the most severe toxic effects of alcohol exposure on the fetus have likely occurred.<sup>276</sup> In fact, a tremendous amount of damage to the fetus may be done before the woman even realizes that she is pregnant.<sup>277</sup> As a result, Wisconsin's civil commitment approach only attempts to stop further damage after the harmful behavior has risen to the level of a "habitual lack of self-control," rather than trying to prevent the behavior in the first place.<sup>278</sup> Such a program does not effectively address the underlying problem of alcoholism.

While focusing on punitive measures may help to reduce the effects of FAS on fetuses, the long-term success of this approach is limited.<sup>279</sup> The children born to mothers taken into civil commitment will most likely display some of the effects of FAS.<sup>280</sup> Accordingly, these children will continue to need state support ranging from first-year postpartum services to long-term assistance as they "enter the public school systems and become integrated into local communities."<sup>281</sup> A recent study in Oregon concluded that the costs incurred to provide such services to children born with conditions such as FAS "will quickly surpass the costs of providing treatment before the children are damaged."<sup>282</sup> Conse-

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273. AMA, *Legal Interventions During Pregnancy*, *supra* note 266, at 2669. A number of major public health organizations, including the American Nurses Association, the American Public Health Association, the American Society of Addiction Medicine and the National Association of Public Child Welfare Administrators, have denounced a punitive approach to prenatal substance use. See Mills, *supra* note 3, at 998 n.71.

274. See Gosain, *supra* note 171, at 839.

275. WIS. STAT. ANN. § 48.193 (West 2003).

276. See Palmer, *supra* note 8, at 296; see also *supra* text accompanying note 98.

277. *Id.*

278. WIS. STAT. ANN. § 48.193 (West 2003).

279. See Bell, *supra* note 88, at 667-68.

280. See *supra* Part II.B.1.a.

281. Kathryn T. Jones, *Prenatal Substance Abuse: Oregon's Progressive Approach to Treatment and Child Protection Can Support Children, Women, and Families*, 35 WILLAMETTE L. REV. 797, 802 (1999).

282. *Id.* (citation omitted).

quently, programs which focus on treating alcohol dependence as an illness rather than condemning it as a punishable behavior achieve better, longer-lasting results.<sup>283</sup>

### 3. *Intrusion into the Family*

Civil commitment should be used as a last resort because of its destructive impact on the families of women taken into custody.<sup>284</sup> In practice, Wisconsin's civil commitment statute could force a pregnant woman into custody to protect the health of her fetus, while at the same time preventing her from caring and providing for her other children.<sup>285</sup> Although a mother's alcoholism imposes a considerable impediment to familial stability, taking the mother away from her family entirely may place further economic and emotional strain on her children.<sup>286</sup> In order to promote a healthy, permanent family environment, states should focus on treatment programs which allow substance abusing women to retain custody of their children while they work to overcome their addiction.<sup>287</sup>

### 4. *Slippery Slope: Where to Draw the Line?*

Wisconsin's civil commitment statute also raises the question of how far a state can intervene in the maternal-fetal relationship.<sup>288</sup> If Wisconsin can civilly commit a pregnant woman for consuming alcohol, it is conceivable that states could similarly impose liability for other legal activities that may result in harm to a fetus, including smoking cigarettes, maintaining an unhealthy diet, ignoring physician's instructions, or participating in dangerous sports.<sup>289</sup> For example, a woman in Utah was recently charged with criminal homicide when one of her twins was stillborn after she allegedly refused to undergo a caesarean section that may have saved the unborn child's life.<sup>290</sup> Prosecutors claim the woman's refusal to heed her physician's medical advice and her alleged drug use during pregnancy will factor into the murder case.<sup>291</sup> This case is another example of the growing trend toward protecting the health of a fetus at the expense of the mother. On the whole, allowing states to punish

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283. *Id.* at 799–800.

284. See Parks, *supra* note 46, at 266 (discussing the destructive effect of imprisonment on the families of individual women who are prosecuted for prenatal drug abuse).

285. See WIS. STAT. ANN. § 48.193 (West 2003).

286. See Jones, *supra* note 281, at 809–11.

287. See *id.*

288. See Bell, *supra* note 88, at 668 (discussing the slippery slope of fetal rights).

289. See Palmer, *supra* note 8, at 332. *But cf.* Parks, *supra* note 46, at 267–68 (arguing that the issue is that drug use is illegal and these other behaviors are not, thus, there is no slippery slope problem).

290. *Mom Won't Be Charged for Alleged Drug Use*, CHI. TRIB., Mar. 17, 2004, at C17.

291. *Id.* Interestingly, the twin's father told investigators he smoked marijuana laced with cocaine in the presence of the twin's pregnant mother three weeks prior to their birth, but prosecutors have yet to bring charges against him for his harmful conduct to the stillborn child. *Id.*

pregnant women for legal behavior that is harmful to a fetus sets a dangerous precedent that could lead to the abrogation of women's self-sovereignty.<sup>292</sup>

#### IV. RECOMMENDATIONS

While a punitive approach to preventing prenatal alcohol abuse may reduce some of the effects of FAS, its benefits are outweighed by a myriad of constitutional and practical problems.<sup>293</sup> Accordingly, states should embrace fetal protection policies which aim to eliminate the long-term problem of alcohol addiction by focusing on education and treatment. Although FAS is a prevalent problem with devastating effects, it is not unpreventable.<sup>294</sup> Simply put, abstinence from alcohol during pregnancy eliminates any risk of alcohol-related birth defects.<sup>295</sup> As such, the key to preventing FAS is early intervention to provide community education, to identify the women who are likely to engage in harmful prenatal behavior, and to provide voluntary substance abuse treatment that promotes a healthy family environment.<sup>296</sup>

##### A. Education

A successful approach to FAS should be built on raising public awareness about the dangers of maternal alcohol consumption. Specifically, comprehensive community education on FAS needs to begin at an early age.<sup>297</sup> This goal can be achieved by implementing prenatal substance abuse education as a mandatory part of public and private schools' curriculum.<sup>298</sup> High-school sex education courses, in particular, should highlight the deleterious effects of alcohol use during pregnancy and provide a more intensive focus on birth control. Other statewide initiatives could include awareness campaigns to distribute preventative literature which targets both teenage and adult males and females.<sup>299</sup> For example, Wisconsin's Department of Health and Family Services requires county clerks to distribute FAS pamphlets to marriage license applicants.<sup>300</sup> This is just one of many steps that can be taken to inform young women and men of the risks of substance abuse during pregnancy.

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292. See Schroedel et al., *supra* note 1, at 99.

293. See *supra* Part III.

294. See *supra* notes 95–124 and accompanying text.

295. CDC, Fetal Alcohol Information, *supra* note 89.

296. See generally Jones, *supra* note 281.

297. Palmer, *supra* note 8, at 344 (discussing the necessity of an inclusive model to prenatal substance abuse which focuses on early education).

298. See *id.*

299. *Id.*

300. WIS. STAT. ANN. § 46.03(34) (West 2003).

In addition, health care providers should pay special attention to educating pregnant women about the effects of alcohol consumption.<sup>301</sup> In some states, physicians are required to perform a risk assessment during the first trimester of pregnancy to identify and deter substance abuse.<sup>302</sup> States should seek to balance this approach with precautions to avoid deterring women from seeking prenatal care.<sup>303</sup> Finally, the liquor industry should also be obligated to play a role in preventing FAS. More prominent warning labels could help inform the public of the dangers of maternal alcohol abuse.<sup>304</sup> Similarly, states could require liquor retailers to post FAS warnings in their establishments.<sup>305</sup>

### B. Treatment

In order to effectively combat FAS, legislative efforts to educate the public must be coupled with voluntary treatment programs which encourage women to seek support on their own.<sup>306</sup> The most effective programs focus on helping women address the underlying problem of alcohol addiction.<sup>307</sup> By concentrating on addicted women's individual needs, these programs promote the total abstinence from alcohol necessary during pregnancy to truly prevent FAS. Moreover, these programs not only help women overcome addiction but also provide them with the skills necessary to avoid relapses and minimize the impact of substance abuse on their families.<sup>308</sup>

While treatment programs must be available to both pregnant and nonpregnant women alike, a special effort should be made to give priority to pregnant women seeking treatment. States should also ensure that voluntary programs are both geographically and economically accessible to a wide range of women.<sup>309</sup> In addition, public funding should be supplied to programs which provide housing for both women and their children during treatment. This way pregnant women can receive prenatal care and addiction treatment at the same time their children are engaged in child development services.<sup>310</sup> As a result, families remain intact while parents learn how to better support their children.

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301. Jones, *supra* note 281, at 807–08.

302. *Id.* (discussing Oregon's alternative approach to mandatory reporting).

303. *Id.* at 808.

304. Leonard, *supra* note 163, at 658–59.

305. Jones, *supra* note 281, at 807 (noting Oregon's statutory policy regarding alcohol retailers).

306. *See id.* at 809.

307. *Id.*

308. *Id.*

309. *See Palmer, supra* note 8, at 341.

310. *See Jones, supra* note 281, at 809–10. These multidisciplinary programs provide a variety of treatment services, including individual and group therapy, living skills classes, academic programs, nutrition education, and parenting classes. *Id.*

## V. CONCLUSION

A punitive approach to combating prenatal alcohol abuse runs the risk of violating the constitutional guarantees of due process and equal protection afforded to all citizens.<sup>311</sup> Punitive regulations also fail to treat long-term addiction problems and may deter the women who need the most help from seeking prenatal care.<sup>312</sup> Furthermore, allowing states to civilly commit pregnant women for otherwise legal behavior sets a dangerous precedent. Ultimately, legislatures should foster programs which recognize the unitary interests of a woman and her fetus and seek to protect this unique biological relationship. Only in this way can the law protect future generations from the effects of alcohol while preserving a woman's basic right to autonomy.

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311. *See supra* Part III.A.

312. *See supra* Part III.B.

